ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MERCHANTS' NATIONAL PROPERTIES, INC.

Plaintiff,

v.

Civil Action No. 13139

ROBERT F. MEYERSON, RAYMOND D. MEYO, DAN R. WIPFF, ROBERT A. GOODMAN, DR. RAJ REDDY, NORTON W. ROSE and TELXON CORPORATION,

Defendants.

MEMORANDUM OPINION

Date Submitted: March 6, 1999
Date Decided: July 24, 2000

Joseph A. Rosenthal, Esquire, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; and Sidney B. Silverman, Esquire, of SILVERMAN, HARNES, HARNES, PRUSSIN & KELLER, New York, New York, Attorneys for Plaintiff

Steven J. Rothschild and Paul J. Lockwood, Esquires, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, Wilmington, Delaware; and GOODMAN WEISS MILLER, Cleveland, Ohio, Attorneys for Defendants Robert F. Meyerson, Dan R. Wipff, Robert A. Goodman, Dr. Raj Reddy and Norton W. Rose

Thomas P. Preston, Esquire, of REED, SMITH, SHAW & McCLAY, Wilmington, Delaware; Attorneys for Defendant Telxon Corporation

JACOBS, VICE CHANCELLOR

Pending are cross motions for summary judgment in this stockholders' derivative action brought against the board of directors of Telxon Corporation ("Telxon"). The Telxon Board is charged with having breached their duty of loyalty and care in approving a two-step acquisition of Teletransaction Corporation, Inc. ("Teletransaction") that occurred in 1992 and 1993. The defendants have moved for summary judgment dismissing those claims. In response, the plaintiff, Merchants National Properties, Inc., has filed a cross motion for summary judgment.

In its complaint the plaintiff originally challenged: (1) the level of compensation that the defendant directors had been receiving, and, (2) the Board's decision for Telxon to acquire a minority interest, and later 100%, of Teletransaction -- a company owned by defendant Robert Meyerson, Telxon's then-non-executive Board Chairman ("Meyerson").

In a bench ruling after oral argument, the Court granted summary judgment to defendants on the plaintiffs claim that challenged the directors' compensation, and reserved decision on the remaining fiduciary duty claims. This Opinion decides the summary judgment motions with respect to those remaining claims. As more fully set forth, I conclude that the defendants are entitled to summary judgment on the plaintiffs duty of loyalty claim and to partial summary judgment

on two of its four duty of care claims. The remaining two duty of care claims involve disputed material facts that can only be resolved after a trial.

I. BACKGROUND

A. The Parties

Telxon is a Delaware corporation that develops and markets portable hand-held computers for retailers and wholesalers in various industries. Telxon's shares have been publicly traded on the NASDAQ since 1983. Between 199 1 and 1993 (the time period relevant to this action), the Telxon Board of Directors (who are the named defendants), were Messrs. Raymond D. Meyo, Dan R. Wipff, Robert F. Meyerson, Raj Reddy, Norton W. Rose and Robert A. Goodman.

Meyerson was the CEO of Telxon from 1978 to 1985. During the late 1980s and early 1990s, he continued to serve as the non-executive Chairman of the Board, but otherwise limited his role at Telxon to providing part-time consulting services. When Meyerson stepped down as CEO in 198 1, Meyo succeeded him and continued as Telxon's CEO until he resigned in October, 1992.

B. The Accipiter Consulting Agreement

In 1989, Telxon was encountering operational problems under Meyo's

leadership. The Board pressured Meyo to improve results,[1] but soon recognized that Meyo needed assistance. The directors concluded that the best person to provide that assistance was Meyerson. To induce Meyerson to assist Meyo, Telxon entered into a consulting agreement with Accipiter Corporation ("Accipiter"), a Meyerson-owned company, in 1989. Under the 1989 Consulting Agreement, Accipiter agreed to perform the "technical and marketing services necessary for the planning and development of new products."[2] Accipiter would also render whatever assistance Telxon "reasonably requested" in connection with "new products and marketing strategies."[3] Accipiter's work product would become the property of Telxon, and Accipiter could not "render similar consulting services to any direct competitors of Telxon in the PTC market."[4] Accipiter (through Meyerson) would consult on a part-time basis, for which Accipiter would be paid $20,000 per month for the term of the Agreement, plus its reasonable out-of-pocket expenses.

---

[1]As Meyo explained at his deposition, "I almost got fired. That was a hell of a year for me. I needed help finishing the products that we were developing. I needed some management help. . ." Meyo Dep. at 192.

[2]Aff. of Paul Lockwood, Tab 1, 1989 Consulting Agreement at § 1; Reddy Dep. at 68-69; Meyo Dep. at 102.

[3]*Id.* at § 5.

[4]*Id.* at §§ 10,13.

On March 6, 1992, the Board entered into a new three-year consulting agreement with Accipiter (the "1992 Accipiter Agreement"), under which Accipiter would provide "management consulting, corporate and financial analysis and marketing development services. . . as may reasonably be requested by Telxon."[5] Specifically, Accipiter would provide Telxon with "140 eight hour days per year of consulting services, the majority to be provided by Meyerson."[6] In return, Accipiter would receive $840,000 annually, plus $240,000 for general administrative and overhead costs, plus reimbursement for its travel and other out-of-pocket expenses.

C. Telxon's Initial 15% Investment in Teletransaction

In 199 1, Meyerson proposed that the Board consider having Telxon undertake the development of a product known as "pen based computers" ("PBCs"). Meyerson believed that PBCs were an emerging and potentially valuable technology. After considering Meyerson's proposal, the Board made a business decision that Telxon should not develop directly its own PBC product at

---

[5]Aff. of Paul Lockwood, Tab 4, 1992 Accipiter Agreement at § 1.

[6]Complaint, at 11.

that time.[7] Because Telxon had rejected his proposal, Meyerson (who at that point was consulting only part-time) was free to analyze and achieve the development potential for PBCs as his own personal project, which he did. As his vehicle for developing PBC products, Meyerson formed Tele-Pad, Inc., whose name was later changed to Teletransaction.'

Although it was disinclined to commit Telxon's financial and managerial resources to developing PBC products directly, the Telxon Board still wanted to retain the opportunity to benefit from this potential technology.[9] The solution, which the Board arrived at during its February 12, 1992 meeting, was for Telxon to purchase a minority (15%) interest in Teletransaction. Dr. Reddy advised the Board that an investment at the 15% level would give Telxon an equity stake in

---

'The reasons, as Dr. Reddy explained, was that: "[Y]ou have to look at it from the perspective where [Meyo] was, and namely, if you look at the annual report, the R&D budget of Telxon Corporation at that time was close to, maybe, five, six percent of the total revenues. High tech companies, most of them, spend between 10 and 15 percent of their revenues annually on R&D, and given that there was less money [Meyo] just didn't have the money to spend on it, and he was not willing to increase that budget because it was going to affect his profitability or the earnings per share, or whatever, which - you know, he and others were concerned about, so it's a question of today's profits versus tomorrow's growth." Reddy Dep. at 56-57; see Meyerson 10/10/96 Dep. at 101-105.

[8]Reddy Dep. at 60; Meyerson Dep. 1 O/l0/96 at 151.

[9]*See* e.g. Reddy Dep. at 52, 56; Meyo Dep. at 35-36; Aff. of Paul Lockwood, Tab 9, Ex. B to 2/12/92 Bd. Min.

this emerging field, yet at the same time avoid undue financial risk."

At that same Board meeting, a plan was presented for Telxon to invest in Teletransaction in incremental steps. First, Telxon would acquire a 15% interest in Teletransaction. Second, upon the successful completion of a PBC prototype, Telxon would acquire an additional 30% interest for $3 million, increasing its ownership interest to 45%. Third, after Teletransaction had PBC products that were ready for sale, Telxon would purchase an additional 35% stock interest for $3.5 million, bringing its total ownership interest in Teletransaction to 80%.[11] The Board approved that plan.

D. Meyo Resigns and Meyerson Again Becomes CEO

In March 1992, Telxon carried out the first step of its plan to invest in Teletransaction by purchasing 15% of Teletransaction for $1.7 million.[12] It appears that of that $1.7 million investment, Teletransaction distributed $1.2 million shortly thereafter to Meyerson and members of his family. Six months later, on October 14, 1992, Meyo suddenly resigned as CEO, an event that caused

---

[10]"There's a difference between jumping in head first or feet first into a swamp of -- and investing 50 or a hundred million dollars and then -- and, in other words, buying an insurance policy in case, think of this as an insurance policy. . ." Reddy Dep. at 85.

[11]*See* Goodman Dep. at 60-61; Reddy Dep. at 131-32; Rose at 64-65).

[12]Aff. of Paul Lockwood, Tab 9, Ex. B to 2/12/92 Bd. Min.

the Telxon Board to abandon its plan to acquire 80% of Teletransaction in incremental steps.[13] Instead, the Board concluded that the emergency caused by Meyo's resignation made it advisable for Telxon to acquire 100% of Teletransaction rather than 80% in three stages.[14] Telxon needed a CEO to fill the unexpected void created by Meyo's resignation. The Board believed that Meyerson was the best person for the job, and that the only way to induce Meyerson to come back "on board" full time would be a mutually agreeable arrangement that would make it attractive for Meyerson to devote his full time and attention to Telxon. To achieve that goal, it was decided that Telxon should acquire 100% of Meyerson's company, Teletransaction, and by that process, become the owner of Teletransaction's PBC product and business.

E. Telxon Acquires Teletransaction

On October 20, 1992, the Board authorized Telxon to acquire an additional 30% of Teletransaction for $3 million "as a down payment and a part of the process of negotiation for the acquisition of all, or substantially all of the stock of

---

[13]Rose Dep. at 90-91; Meyo Dep. at 10-l 1. The resignation followed a drop in Telxon's stock price following an announcement of a lower than expected quarterly earnings projection. This announcement occurred a day after Meyo assured analysts that no such announcement would be made. Aff. of Paul Lockwood, Tab 19, 10/8/92 Press Release; Aff. of Paul Lockwood, Tab 20, 10/9/92 Press Release; Meyerson 3/26/98 at 91-92.

[14]*See* Aff. of Paul Lockwood, Tab 19, 10/19-20/92 Bd. Min. at 1; Aff. of Paul Lockwood, Tab 12, 1 1/24/92 Bd. Min. at 4; Reddy Dep. at 134; Rose Dep. 76-77, 98-99.

[Teletransaction], and as part of the inducement to Mr. Meyerson to accept the role as full-time Chief Executive Officer of Telxon. . . ."[15] The parties dispute whether by this point Teletransaction had developed a working PBC prototype. Such a prototype (it will be recalled) had been made a precondition for Telxon to invest additional capital in Teletransaction above the 15% that the Board initially authorized.

In November 1992, during negotiations between Meyerson and Telxon over the terms of Meyerson's return to Telxon, Meyerson demanded an additional $5 million above the initially agreed price for Telxon's purchase of 80% of Teletransaction. Meyerson told the Board that the additional $5 million would compensate him for (i) his sale of the 20% residual equity in Teletransaction he had originally intended to retain, and (ii) his commitment to become full-time CEO of Telxon, rather than a part-time consultant.[16] After discussing Meyerson's proposal, the Board, without Meyerson present, approved that proposal subject to certain conditions.[17] The total consideration for the 100% purchase of

---

[15]Aff. of Paul Lockwood, Tab 11, 10/19-20/92 Bd. Min. at 6.

[16]Aff. of Paul Lockwood, Tab 12, 11/24/92 Bd. Min. at 4; Aff. of Paul Lockwood, Tab 24, ID 1251-55 at ID 1253.

[17]Aff. of Paul Lockwood, Tab 24, ID 1256-62 at ID 1260.

Teletransaction would be $17.3 million.[18] The Board approved the acquisition of Teletransaction, which was consummated in 1993.

II. THE CLAIMS AND CONTENTIONS

The plaintiff contends that Telxon's two-step acquisition of Teletransaction constituted a breach of the defendants' duty of loyalty that is reviewable under the entire fairness standard, because Meyerson (the seller) dominated and controlled the Telxon Board (the buyer). The plaintiff also advances four separate claims that the board breached its fiduciary duty of care. Three of those claims arise out of the directors' initial decision to invest in 15% of Teletransaction. The fourth arises out of the Board's later decision to acquire the remaining 85%.

The duty of care claims that challenge Telxon's initial (15%) investment in Teletransaction are that: (1) the directors failed to have an outside financial investor evaluate the initial investment; (2) the directors either did not know, or did not care, that $1.3 million of Telxon's $1.7 million investment was funneled directly to Teletransaction's shareholders rather than being devoted to the development of PBCs; and (3) Telxon was caused to purchase an interest in a company whose product it already owned, because by virtue of the Accipiter

[18] *Id.*

Consulting Agreement Telxon already owned the property rights to the PBC work product, Teletransaction's sole asset. The fourth duty of care claim -- which challenges Telxon's acquisition of the remaining 85% of Teletransaction -- is that the directors should have known that Teletransaction had no asset of any value, because at that time it had no working PBC prototype.

The defendants dispute each of these claims. They contend that they did not breach any duty of loyalty because the directors who voted to approve the purchase of Teletransaction were disinterested and independent of Meyerson. The defendants further argue that they did not breach their duty of care, because (1) the Board was not legally required to retain an outside financial advisor to evaluate the initial 15% Teletransaction investment; (2) the Board made a legally proper business decision not to monitor how the $1.7 million invested in Teletransaction would be spent; and (3) Telxon had no property right to the PBC work product under the 1992 Accipiter Consulting Agreement. Finally, in response to the claim that the purchase of the remaining 85% of Teletransaction violated the directors' duty of care, the defendants argue that Teletransaction did have a PBC prototype at the time the Board approved that acquisition, for which this claim fails for want of a valid premise.

These contentions frame five issues. The first is whether Meyerson

controlled the Board at the time the defendants approved the initial 15% investment. The second is whether the Board was legally required to retain an outside financial investor to evaluate that initial investment. The third is whether the Board breached its duty of care by enabling Teletransaction to distribute $1.3 million of the initial $1.7 million Telxon investment to its stockholders. The fourth is whether the Accipiter Agreement gave Telxon property rights to the PBC work product at the time the Board decided to acquire 15% of Teletransaction. And the fifth is whether a working PBC prototype existed at the time the Board decided to acquire the remaining 85%.

These issues are addressed in the analysis that next follows.

III. ANALYSIS

Summary judgment will be granted where the Court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[19] In making those determinations, the Court will view any evidentiary disputes in the light most favorable to the nonmoving party, and will

---

[19]Ch. Ct. R. 56(c); *Mentor Graphics Corp. v. Quickturn Design Systems., Inc.,* Del. Ch., C.A. No. 16584, Mem. Op. at 7, Jacobs, V.C. (Oct. 9, 1998); see *also Gilbert v. El Paso Co.,* Del. Supr., 575 A.2d 1131, 1142 (1990); *Brown v. Ocean Drilling & Exploration* Co., Del. Supr., 403 A.2d 1114, 1115 (1979).

accept all undisputed factual assertions made by either party as true.[20] Summary judgment will be denied if "there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or inferences to be drawn therefrom."[21] The loyalty and due care claims are evaluated in light of these standards.

A. The Duty of Loyalty Claim

The plaintiffs duty of loyalty claim is that the Teletransaction acquisition was a self-dealing transaction that was unfair to Telxon because Meyerson, an interested party, dominated and controlled the remaining five Telxon directors who approved the Telxon acquisition. As a result, the plaintiff contends the Board was disabled from making an impartial disinterested business judgment. Specifically, the plaintiff claims that Meyerson, as CEO, controlled the five directors (i) by virtue of his ability to influence the amount of their compensation, and (ii) by virtue of those five directors having social and business relationships with Meyerson that would make it difficult for those directors to deal with Meyerson impartially.

---

[20]*Mentor Graphics,* at 7.

[21]*Seagraves v. Urstadt Property Co., Inc.,* Del. Ch., C.A. No. 10307, Mem. Op. at 7, Jacobs, V.C. (April 1, 1996) (citations omitted).

The defendants argue that they are entitled to summary judgment on this claim because although concededly Meyerson was financially interested in the Teletransaction purchase, a majority of the remaining directors who approved that transaction were disinterested and independent of Meyerson. As next discussed, I agree, and conclude that summary judgment dismissing the duty of loyalty claim must be granted.

1. The Remaining Five Directors

Any "independence" analysis should begin by describing the five directors' positions at Telxon and their relationship with Meyerson.

Directors Meyo and Meyerson had a personal and a business relationship, having worked together for many years. It was Meyerson who proposed Meyo to succeed him as CEO. As earlier noted, Meyo served as Telxon's CEO from May 1995 to October 1992, when he resigned as CEO and as a director of Telxon. Thus, Meyo participated only in the February 1992 decision to acquire 15% of Teletransaction; when the Board decided to acquire the remaining 85%, Meyo had already departed.

Director Wipff was Telxon's Chief Financial Officer from December 199 1 through January 1995. Beginning in October 1992, Wipff also served as its President and Chief Operating Officer.

Director Goodman is the senior partner of Goodman Weiss Miller LLP, a Cleveland, Ohio law firm. Goodman's law firm provided law services to Telxon and, in the past, had also provided services both to Meyerson personally and to another company that Meyerson owned.

Director Reddy is the Dean of the School of Computer Science at Carnegie Mellon University. Dr. Reddy recently received a presidential appointment as co-chairman of the President's Information Technology Advisory Committee.

Director Rose is the President and Principal/Owner of Norton W. Rose & Co., a Cleveland, Ohio consulting firm.

2. Meyo and Wipff

The plaintiff argues that as Chairman of the Telxon Board and Telxon's highest paid executive, Meyerson was "in a position to exert considerable influence" over Meyo and Wipff. Moreover, plaintiff contends, Meyo and Meyerson had a close, personal relationship; indeed Meyerson had recommended Meyo to succeed him as CEO of Telxon.

This claim lacks merit, because the undisputed factual record shows that Meyo reported exclusively to the Board, not to Meyerson. Furthermore, Meyo was protected by a long-term employment agreement that the Board had

previously approved in April 199 1.[22] Also legally insufficient is the argument that Meyo was beholden to Meyerson because Meyerson had recommended Meyo for the CEO position seven years earlier.[23] Finally, Delaware courts have consistently rejected assertions that a personal friendship, without more, establishes a lack of independence.[24]

The plaintiff argues that Wipff was not independent, because his position at Telxon could have been terminated and also because his compensation could have been influenced by Meyerson. But, at the time the Board decided to acquire 15% of Teletransaction, Meyo, not Meyerson, was CEO of Telxon. Additionally, Meyo and Wipff s financial interests were aligned with the interests of the shareholders,

---

[22]Aff. of Paul Lockwood, Tab 17, 1992 Proxy Statement at *6-8; see In re Walt Disney Co. Derivative Litig.,* Del. Ch., 731 A.2d *342, 356* (1998) *aff'd, Brehm v. Eisner,* Del. Supr., 746 A.2d 244 (2000) (finding executive was independent because, among other things, his compensation was set by *the* board); *see also Goodwin v. Live Entertainment, Inc.,* Del. Ch., C.A. No. 15765, Mem. Op. at 49, Strine, V.C. (Jan. 22, 1999) *aff'd* Del. Supr., No. 72 1999, Veasey, C.J. (July 23, 1999) (officer/directors' long-term employment contracts are "evidence of economic security that undercuts mere rhetoric about their impending motives.")

[23]*See Aronson* v. *Lewis,* Del. Supr., 473 A.2d 805,816 (1984) ("it is not enough to charge that a director was nominated by or elected at the behest of' an interested person); *Andreae v. Andreae,* Del. Ch., C.A. No. 11905, Mem. Op. at 12-13, Hartnett, V.C. (Mar. 3, revised Mar. 5, 1992) (noting that Delaware courts have "consistently rejected" the argument that a director lacks independence from the person who nominated or appointed him as a director).

[24]*Odyssey Partners, L.P. v. Fleming Cos.,* Del. Ch., 735 A.2d 386, 409-10 (1999); *In re Grace Energy Corp. Shareholders Litig.,* Del. Ch., C.A. No. 12464, Mem. Op. at 10, Hartnett, V.C. (June *26,* 1992); *Green v. Phillips,* Del. Ch., C.A. No. 14436, Mem. Op. at 10-l 1, Jacobs, V.C. (June 19, 1996).

because each held significant amounts of Telxon stock. According to Telxon's 1992 proxy statement, Meyo owned 144,518 shares of Telxon stock, which would have been worth roughly $3.3 million as of February 11, 1992; and Wipff owned 32,747 shares, which would have been worth approximately $750,000.[25]

Thus, the record does not support the claim that Meyo and Wipff were dominated by Meyerson.

3. Reddy and Rose

The plaintiffs next challenge the independence of directors Reddy and Rose on the ground that they needed to stay in Meyerson's favor to continue receiving directors' fees and consulting fees of $25,000 and $30,000 (respectively). This argument is also insufficient.

Legally, it is insufficient because in *Grobow* v. *Perot*,[26] the Supreme Court held that the receipt of directors' fees, without more, does not constitute a disqualifying financial interest. Nor is the argument supported factually. Meyerson had no controlling equity interest, and accordingly had no power, to

---

[25]Aff. of Paul Lockwood, Tab 17, 1992 Proxy at 3.

[26]Del. Supr., 539 A.2d 180, 188 (1988). Indeed, in his recent *Walt Disney* opinion, Chancellor Chandler observed that for this Court to hold that a director is beholden to another by reason of her interest in receiving fees "expressly would be to overrule the Delaware Supreme *Court." In re Walt Disney Co. Derivative Litig.,* 731 A.2d at 360.

influence Messrs. Rose and Reddy's receipt of consulting fees, which were previously negotiated with Mr. Wipff and approved by the full Board.[27] Moreover, the plaintiff neither contends nor has shown that those fees were material in relation to the outside income of these two directors, both of whom had successful careers outside of Telxon.[28]

Because Wipff, Meyo, Reddy, and Rose were independent of and not dominated by Meyerson,[29] it follows that each step of the Teletransaction acquisition was approved by a majority of disinterested and independent directors. Thus, the plaintiffs duty of loyalty claim -- which rests on the proposition that Meyerson controlled the Telxon Board and its decision to approve the Teletransaction purchase -- is factually unsupported. Summary judgment in favor of defendants will therefore be granted on that claim.

---

[27]*See* Defendants' Op. Br. at 44; Aff. of Paul Lockwood, Tab 25 at ID 1874-75 (Reddy); Aff. of Paul Lockwood, Tab 25 at ID 857-58 (Rose); Aff. of Paul Lockwood, Tab 25 at ID 824-28 (Goodman).

[28]*Odyssey Partners,* 735 A.2d at 408 (finding that consulting agreement "meaningless as a financial issue" in the context of directors' other compensation). *See Walt Disney,* 731 A.2d at 360 (holding director who received consulting fees was independent because "[p]laintiffs have not alleged that the $50,000 in consulting fees was even material").

[29]That determination makes it unnecessary to address the issue of Goodman's independence.

B. The Duty of Care Claims

The plaintiff next claims that the Telxon directors breached their fiduciary duty of care, first by approving the initial 15% investment in Teletransaction, and later, by approving the acquisition of the remaining 85%. The analysis of this claim is segmented into two parts: the initial acquisition of the 15% interest in Teletransaction, and the later acquisition of the 85% balance. Teletransaction.

1. Telxon's Initial 15% Investment in Teletransaction

The plaintiff attacks the initial (15%)investment on three due care grounds: (1) the directors improperly failed to have an outside financial investor evaluate that investment, (2) the Board improperly allowed Teletransaction to distribute $1.3 million of the initial $1.7 million capital investment to its stockholders, and (3) the directors improperly caused Telxon to invest in a company whose only asset Telxon already owned.

To support its claim that the Board wrongfully failed to hire an outside financial advisor to evaluate the initial investment, the plaintiff relies upon *Smith v. Van Gorkom,*[30] where corporate directors were faulted for not seeking outside financial advice when they approved a sale of their company for cash. But Van

[30]Del. Supr., 488 A.2d 858,876 ('1985).

Gorkom does not support the claim that the directors' duty of care required them to retain an outside financial advisor. To the contrary, the Van ***Gorkom*** Court stated that, "[W]e do not imply that an outside valuation study is essential to support an informed business judgment; nor do we state that fairness opinions. . , are required as a matter of law."[31]

The plaintiffs second due care claim is that the directors breached their duty of care by allowing Teletransaction, a start-up company, to distribute $1.3 million of Telxon's $1.7 million initial investment to Teletransaction shareholders, instead of requiring that those funds be used to develop PBCs. Plaintiffs counsel put it this way at oral argument:

> [T]here is a rule of venture capital financing. . . A venture capital lender or investor puts up money in a startup company, in a development company, it makes sure that the money stays in the company. . .Because you want the money to be used to develop a product; and two, you don't want to reward the developers until they have succeeded.[32]

Here, $700,000 of the initial Telxon investment was paid to Teletransaction shareholder Nancy Meyerson, and $600,000 was paid to Robert Meyerson. The plaintiff argues that allowing $1.3 million of the $1.7 million investment to be

---

"*Van Gorkom, 488* A.2d at 876.

[32]Oral Argument Transcript at 71.

paid out to the Teletransaction shareholders violated fundamental principles of venture capital investing, and, as a consequence, basic principles of due care.

The defendants respond that they are entitled to summary judgment on this claim. They argue that the Board's decision not to require that all of the money invested in a start-up company remains with the company, is a business judgment for the investing corporation's directors to make. The defendants claim that allowing the $1.3 million to be paid to Teletransaction's shareholders was a rational business decision on their part not to "micromanage" Teletransaction, based on the Board's view that so long as Teletransaction's managers performed as expected, they should be allowed to manage their company however they liked.[33]

On a motion for summary judgment, all inferences must be drawn in favor of the nonmoving party, here the plaintiff.[34] The proposition that a rational investor in a start-up company would want to ensure that the invested funds were actually being used to develop the product that would create value, has persuasive force. That is not to say that the Telxon Board did not have sound business

---

[33] Mr. Meyo explained, "we were going to see how Bob performed. . ," and if he performed as expected, Telxon would increase its investments in Teletransaction. Meyo Dep. at *70.*

[34] *Mentor Graphics,* at 7.

reasons for not monitoring the use of those invested funds. They may have, but on this record, those reasons have not been sufficiently developed to enable this claim to be disposed of as a summary judgment matter. This claim must therefore proceed to trial.

The third due care claim is that Telxon was improperly caused to purchase a company whose sole asset Telxon already owned. The plaintiff contends that Accipiter developed the pen based work product, and that Telxon owned the property rights to that product under the 1992 Accipiter Consulting Agreement. That Agreement (the plaintiff contends) provided that all product development and market research done for Telxon by Meyerson would be Telxon's work product, to which Telxon would have exclusive property rights. This claim rests upon paragraph 10 of that Agreement, which relevantly provides:

> Consultant acknowledges and agrees that any and all reports, studies, surveys, letters, documents, drawings, designs, sketches, models, prototypes, contrivances, processes, know-how and the like made or prepared by Consultant which related in any way to new products or marketing strategies (all of such items being referred to as "Work-Product") shall belong exclusively to Telxon. All Work-Product shall be deemed to be works made for hire, and to the extent that any Work-Product may not, by operation of law, be works made for hire, Consultant hereby assigns to Telxon forever the ownership of all right, title and interest in and to such Work-Product, including, without limitation, the right to obtain copyrights, patents

and trademarks with respect thereto.

In response, the defendants argue that the directors understood this provision to mean that Telxon and Accipiter would agree upon specific projects that Accipiter would develop for Telxon, thereby leaving Accipiter free to develop for itself any products distinct from portable teletransacting computers. That is, under the Consulting Agreement, Telxon would have property rights only to the product of any research done for Telxon, not to all of Accipiter's research work. The defendants further argue that Meyerson's consulting work for Telxon before Telxon's made its initial 15% investment in Teletransaction, was confined to Telxon's then-existing product line -- portable transaction computers -- which are distinct from "PBC's." In terms of the Accipiter Consulting Agreement, the defendants contend that the word "products" as used in Paragraph 1 0[35] of that Agreement, means any product that Telxon would negotiate for Accipiter to develop within Telxon's line of business. Because Telxon had not retained Accipiter to develop PBC's, defendants conclude that Telxon had no property rights to PBCs under the 1992 Accipiter Consulting Agreement.

The issue is whether Accipiter's development work on pen based computing

[35]Which relevantly provides that any Work-Product "made or prepared by Consultant which relate in any way to new products or marketing strategies. . . shall belong exclusively to Telxon."

was -- or was not -- done pursuant to the 1992 Accipiter Consulting Agreement. Resolution of that issue would require the Court to determine the meaning and scope of the term "products" as used in that Agreement. The plaintiff claims that that term means any product produced by Accipiter. If that is correct, then the pen based technology ("PBC's") would fall within that definition. The defendants contend that "products" means new products within Telxon's existing line of business. If that is the case, then pen-based computer products would fall outside of Telxon's line of business. Because both interpretations are plausible, the 1992 Accipiter Consulting Agreement is ambiguous with respect to the scope and meaning of the word "products." That ambiguity raises a question of material fact (i.e., the contracting parties' intent) that necessarily will require extrinsic evidence for its resolution. Therefore, as to this claim, the defendants' motion for summary judgment must be denied.

2. Telxon's Acquisition of The Balance of Teletransaction

Finally, the plaintiff claims that the directors' decision to acquire the balance (85%) of Teletransaction violated their duty of care, because the directors should have known that a material condition precedent -- that there be a working PBC prototype -- had not been fulfilled. The plaintiff urges that because that prototype -- the only asset that Teletransaction claimed to have -- did not exist,

Teletransaction had no value at the time the directors caused Telxon to acquire it. Therefore, (it is claimed) the decision to acquire the remaining 85% interest in Teletransaction violated the directors' fiduciary duty of care.

The defendants' response is that a working prototype did in fact exist. Indeed, defendants maintain, Teletransaction presented that product to the computer world at a Scan Tech show in October 1992. As support, the defendants offer the deposition testimony of four witnesses. Two of those witnesses, Dr. Yung Fu Chang and Mr. Thomas Gensel, who have first-hand knowledge and no interest in this case, testified that Telxon had a working prototype at that show.[36] Two other witnesses testified to the same effect.[37] Robert Becker states that the PBC prototype:

> [w]as fully functional [at Scan Tech] as I recall, because the nice part about it was you could actually check the boxes and write in characters, swipe cards, scan bar codes and actually went out over the radio to a printer to print stuff out, you could show the transactional pieces. It was a monumental advance at that show.

This evidence establishes that a prototype did exist.

The plaintiffs only evidentiary support for its contrary claim is the

---

[36]Chang Dep. at 83; Gensel Dep. at 29.

[37]Meyerson Dep. 10/10/96 at 211; Meyerson Dep. 3/26/98 at 65-66; Becker Dep. at 33, 78.

testimony of Portia Isaacson who believe that a prototype did not exist. Ms. Isaacson conceded in her deposition, however, that she has no first hand knowledge to support her belief:

> Q: Are you able to state as a fact that they -- that Teletransaction, then Telxon, did not have a working prototype in October of 1992?
>
> A: Oh, no. I can't state that as a fact.[38]

This evidence is insufficient to create a genuine fact dispute sufficient to withstand a motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted, in part and denied in part, and the plaintiffs cross motion for summary judgment is denied. Counsel shall submit a form of order that implements the rulings made in this Opinion.

---

[38] Isaacson Dep. at 235.