IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL COMRIE, IAN CHEONG, EARLE COMRIE, KAY COMRIE, LEROY DOUGHERTY, CYNTHIA A. OTT, PETER OTT, STEPHANIE SEBASTIANO, SALLY SETO, AFSHIN SHAMS, and JULIE M. SHAMS,	)	
Plaintiffs,	)	
v.	)	C.A. No. 19254
ENTERASYS NETWORKS, INC., a Delaware corporation, GNTS (CANADA) INC., an Ontario corporation, and GLOBALNETWORK TECHNOLOGY SERVICES, INC., a Delaware corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: January 29, 2004
Decided: February 13, 2004

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William M. Lafferty, Esquire, Patricia Uhlenbrock, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Douglas H. Meal, Esquire, Emily C. Shanahan, Esquire, ROPES & GRAY, Boston, Massachusetts, Attorneys for the Defendants.

LAMB, Vice Chancellor.

I.

In an earlier opinion, the court held that the defendants had breached a stock purchase agreement by not providing an "equivalent substitute" for options granted in accordance with that agreement. The defendants were under a duty to provide such a substitute pursuant to certain performance obligations found in Exhibit 7.11 to that agreement, which provides for the substitute if an IPO of Global*Network* Technology Services, Inc. was not undertaken.

Exhibit 7.11 also provides for a similar grant of options to certain employees who are not signatories to the stock purchase agreement and were not, originally, plaintiffs in this action. A majority of those employees now seek to recover against the defendants' based on the findings in the earlier opinion. The court concludes that those employees, as donee beneficiaries, have standing to bring such a suit; however, certain of those employees are barred from bringing suit because of releases signed by them as part of a severance package.

II.

BIT Management, Inc. ("BIT") was an Ontario corporation engaged in the information technology consulting and software development industry. In 2000, Cabletron Systems, Inc. ("Cabletron"),[1] a Delaware corporation headquartered in

[1] Cabletron merged with its former wholly owned subsidiary, Enterasys Networks, Inc. on August 6, 2001. The surviving corporation, also called Enterasys Networks, Inc., along with Global*Network* Technology Services, Inc., both Delaware corporations, are the defendants in this action.

Rochester, New Hampshire, engaged in a restructuring, through which it created four subsidiaries: Aprisma Management Technologies, Inc., Enterasys Networks, Inc. ("Enterasys"), Riverstone Networks, Inc., and Global*Network* Technology Services, Inc. ("GNTS"). Under this restructuring, Cabletron planned to conduct an IPO for each operating subsidiary by the end of 2001, followed by a spin-off of the subsidiaries' remaining shares to Cabletron's existing stockholders.

GNTS, in preparation for its IPO, sought to purchase small service companies complementary to its existing business in order to diversify its revenue base. BIT was identified as a potential target and negotiations between GNTS and BIT ensued in early 2000. The resultant Stock Purchase Agreement (the "Agreement") among Cabletron, GNTS, GNTS (Canada, Inc.),[2] BIT, and the holders of all of the outstanding capital of the stock of BIT (the "BIT Stockholders") (collectively, the "Parties") was signed on August 23, 2000.

The Agreement provides for an exchange of BIT stock for a combination of cash and options to purchase stock in GNTS. Specifically, section 7.11 of the Agreement requires Cabltetron to cause GNTS to adopt an option plan pursuant to terms set forth in Exhibit 7.11 attached to the Agreement. Exhibit 7.11 requires Cabletron to cause GNTS to "allocate options for 466,605 shares of GNTS stock . . . to the employees of BIT."

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[2] GNTS (Canada, Inc.) was an acquisition vehicle formed to aid the stock purchase.

Of those shares, 55,814 were to be issued to each of the partners of BIT (the **"Partners"),**[3] with the balance of shares (up to 14,512 each) to be issued to 12 non-partner former employees of BIT[4] (the "Non-Partner Employees," together with the Partners, the "BIT Group").

To protect the BIT Group in the event the defendants decided not to go forward with the GNTS IPO, the Parties agreed upon a substitution provision, which is included in Exhibit 7.11. That provision states:

> In the event that [Cabletron] determines not to pursue its current intention to cause GNTS to undergo an initial public offering prior to December 3 1, 2001 or determines not to pursue its current intention to distribute the stock of GNTS to the shareholders of [Cabletron] (each a "Trigger Event"), within sixty (60) days of the Trigger Event, [Cabletron] shall either (i) *provide equivalent substitute or replacement awards on the same terms and conditions to the former employees of* ***[BIT];*** or (ii) pay $4,620,000 in the aggregate for all Options then held by the Partners and former employees of [BIT].[5]

Within a few days of the closing of the Agreement, GNTS issued to the BIT Group an aggregate of 466,605 GNTS stock options at an exercise price of $4.25.

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[3] The partners of BIT were Ian Cheong, Michael Comrie, Leroy Dougherty, Peter Ott, and Afshin Shams. The Partners, together with Earle Comrie, Kay Comrie, Cynthia A. Ott, Stephanie Sebastiano, Sally Seto, and Julie M. Shams are the plaintiffs in this action (the "plaintiffs").

[4] The non-partner former employees are Carrie Brody, Wayne W. Cuervo, Peter Forsythe, Glen Julien, Elizabeth Kapuscinski, Jennifer Knabenschuh, Ernie Lim, Paul Matheson, Darwin Palma, Bonnie Planchart, Ramesh Rathnam, and Donald Swora.

[5] Emphasis added.

A Trigger Event occurred on July 16, 2001,[6] thus implicating the substitution provision. On August 23, 2001, Cabletron decided to provide the BIT Group with substitute or replacement options.' Cabletron issued these options based on the theory that the substitute or replacement options must be valued at the same amount as the original GNTS options at the date of *replacement.**

The plaintiffs tiled suit claiming that the substitute or replacement options were to be valued as the same amount as the GNTS options at the date of *issuance.*[9] The court found, in a September 4, 2003 opinion (the "September 4 Opinion"), that the plaintiffs were correct in their reading of the Agreement, and by not issuing options valued as the same amount as the GNTS options at the date of issuance, Cabletron had breached the Agreement."

The court found damages in the amount of $2,190,620.[11] However, the plaintiffs only held 58.8% of the GNTS options, and were thus only entitled to an award of $1,309,991.[12] Because the Non-Partner Employees held the remainder of GNTS options,

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[6] ***Comrie v. Enterasys Networks, Inc.,*** *837* A.2d 1, 11 (Del. Ch. 2003). The Intervenors and the defendants agreed by stipulation, for purposes of this action, to be bound by the factual and legal findings and conclusions set forth in the opinion. Further, they allowed reliance by both sides on all exhibits, trial testimony, and designated deposition testimony admitted at the trial in the underlying litigation. Stipulation Regarding Claims of Intervenors (Nov. 7, 2003) ("Stipulation").

[7] Stipulation at ¶ D(2).

[8] ***Comrie,*** *837* A.2d at 14.

[9] ***Id.***

[10] ***Id.*** at 17.

[11] See *id.* at 2 1 (calculating damages).

[12] ***Id.***

the court reserved final judgment, stating, "[i]t is entirely plausible . . . that the BIT employees who were not plaintiffs in this action are third-party beneficiaries to the Agreement, and are equally entitled to an award based on a breach of that Agreement."[13]

Pursuant to the September 4 Opinion, an order dated October 7, 2003,[14] and Court of Chancery Rule 24,[15] ten of the Non-Partner Employees[16] included in the BIT Group (the "Intervenors") moved to intervene on October 21, 2003. A complaint in intervention was filed contemporaneously with the motion. The defendants' answer contains five affirmative defenses, two of which are addressed in the briefs. Specifically, the defendants contend that the Intervenors are not donee beneficiaries of the Agreement, and thus do not have standing to bring suit. Alternatively, the defendants argue that even if the Intervenors have standing, releases signed by certain of the Intervenors serve to bar their claims.

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[13] *Id.*

[14] This order provided that "any Potential Beneficiary who files a timely and proper motion to intervene will be permitted to intervene pursuant to Chancery Court Rule 24(b)." The implication of guaranteeing intervention is that the defendants would not waive any potential defenses, including a standing defense.

[15] Court of Chancery Rule 24(b) permits the court, in its discretion, to allow one to intervene in an action when a statute confers a conditional right to intervene, or when the applicant's claim and the main action have a question of law or fact in common. The application must be made according to the procedure set out in Court of Chancery Rule *24(c).*

[16] Brody and Planchart did not join in the motion to intervene.

III.

Parties to an agreement may enforce the contractual terms of that agreement.[17] As a general rule, a nonparty to a contract has no legal right to enforce it.'* This general rule yields to the notion that intended third-party beneficiaries have an enforceable right under contracts conferring a benefit to them, even though they are not parties to those contracts." The general rule does apply, however, to prevent mere incidental beneficiaries from claiming enforceable rights under a contract.[20]

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[17] *See Triple C Railcar Serv. v. City of Wilmington, 630* A.2d 629,633 (Del. 1993) ("It is axiomatic that either party to an agreement may enforce its terms for breach thereof."); *Madison Realty Partners 7, LLC v. AG ISA, LLC,* 2001 WL 406268, at *4 (Del. Ch. Apr. 17, 2001) ("It is undisputed that Madison, as a signatory to the Partnership Agreement, has standing to sue for a breach of that Agreement.").

[18] *See Insituform of N. Am., Inc. v. Chandler, 534* A.2d 257,268 (Del. Ch. 1987) ("[T]he general rule [is] that strangers to a contract ordinarily acquire no rights under it . . ."); *Stuchen v. Duty Free Int 'l, Inc.,* 1996 WL 33 167249, at *9 (Del. Super. Apr. 22, 1996) ("The general rule in this state is that a stranger or nonparty to a contract has no legal right to enforce it."); see *also Guardian Constr. Co. v. Tetra Tech Richardson, Inc.,* 583 A.2d 1378, 1386 (Del. Super. 1990) ("Ordinarily, a stranger to a contract acquires no rights thereunder . . .").

[19] *See Insituform of* N. *Am., Inc.,* 534 A.2d at 268 (noting that the general rule applies "unless it is the intention of the promisee to confer a benefit upon such third party"); *Stuchen,* 1996 WL 33 167249, at *9 ("This principle holds sway unless the parties to the contract intended to confer a benefit upon an unrelated party, making them so-called third party beneficiaries."). *See generally* 13 Richard A Lord, A Treatise on the Law of Contracts by Samuel Williston § 37:1 (4th ed 2000) ("Williston on Contracts") (discussing the rights of intended third-party beneficiaries).

[20] *See Insituform of N. Am., Inc., 534* A.2d at 269 ("If, however, it was not the promisee's intention to confer direct benefits upon a third person, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then such third party beneficiary will be held to have no enforceable rights under the contract."); see *also* 9 Arthur Linton Corbin, Corbin on Contracts § 779C, at 36 (Interim ed. 1979) ("Corbin on Contracts") ("All others who may in some way be benefited by performance have no rights and are called incidental beneficiaries.").

In *Insituform of North America, Inc. v. Chandler,* this court set out a test for whether or not one is an intended beneficiary under a contract:

> In order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party-whether it be a creditor of the promisee or an object of his or her generosity-should be a material part of the contract's purpose.[21]

Former Vice Chancellor Jacobs, in *Madison Realty Partners 7, LLC v. AG ISA, LLC,* summarized the elements included in this test:

> To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.**

Thus for the Intervenors to have standing to bring suit based on the Agreement, they must show that the BIT Stockholders intended that the Non-Partner Employees benefit from the Agreement (i.e., receive the options),[23] that the benefit was intended as a gift from the

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[21] 534 A.2d at 270.

[22] 2001 WL 406268, at *5.

[23] There is conflicting precedent as to whether the requisite intent must be of the parties to the contract or of the promisee individually. *Compare Triple C Railcar Service, 630* A.2d at 633 ("Essential to a third party's right of enforceability is the *intention of the contractingparties* to view that party as either a donee or creditor beneficiary.") (emphasis added), and *Madison Realty Partners 7, LLC,* 2001 WL 406268, at *5 ("[T]he *contractingparties* must have intended that the third party beneficiary benefit from the contract) (emphasis added), with *Insitujiorm of N. Am., Inc., 534* A.2d at 268 ("It is universally recognized that where it is the *intention of thepromisee* to secure performance of the promised act for the benefit of another . . .") (emphasis added), and *Guardian Constr.* Co., 583 A.2d at 1386 ("[W]here it is the *intention of thepromisee* to secure performance of the promised act for the benefit of another . . .") (emphasis added).

BIT Stockholders to the Non-Partner **Employees,**[24] and that the conferral of that benefit is a material part of the Agreement's **purpose.**[25]

In applying Delaware law, the United States District Court for the District of Delaware addressed this conflict. The District Could held "that under Delaware law both parties must in some manner express an intent to benefit the third-party before third-party beneficiary status is found." *Am. Fin. Corp. v. Computer* ***Scies.*** *Corp., 558* F. Supp. **1182, 1185 (D.** Del. 1983).

Here, the defendants, as promisors, acknowledge that the intent element is satisfied as to them. Ans. Br. of Def s. Enterasys Networks, Inc. and **Global*Network*** Tech., Servs., Inc. to Intervenors' Claim for Relief, at 11 (Dec. **5, 2003) ("Ans.** Br."). Thus regardless of which analysis is used, the only issue for the court to decide is the intent of the promisees, here BIT and the BIT Stockholders.

[24] No allegations have been made that the BIT Stockholders had a preexisting obligation to the **Intervenors.** As such, the Intervenors must show that they are donee beneficiaries. *See Guardian Constr. Co., 583* **A.2d** at 1387 ("The only third parties who have legal rights are donees and creditors of the promisee.").

[25] The Restatement (Second) of Contracts eliminates the distinction between creditor and donee beneficiaries. Instead, it tests only for whether one is an intended beneficiary. Specifically, it states:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts § 302 (2004). Further, the introductory note to this chapter of the Restatement points to the "recognition of the power of promisor and promisee to create rights in a beneficiary by manifesting an intention to do so." While this test has not yet been adopted by the Delaware courts, the **ALI's** adoption of it is of note, and the standing of the Non-Partner Employee's under this test is even stronger.

The intent of the BIT Stockholders' to bestow rights on the Non-Partner Employees is plain from the face of the **Agreement.**[26] When a promised performance is rendered directly to the beneficiary, "it is presumed that the contract was for the beneficiary's **benefit.**"[27] Here, Exhibit 7.11 directs the defendants to grant options directly to the Non-Partner Employees. This differentiates the present facts from the facts considered in ***Insituform,*** where members of a board of directors argued that a stock-voting agreement, which none of the members had signed and which obligated the signatories to either abstain from voting their stock or to vote their stock in unanimity for existing members, created a right to "continued tenure" in the board members for the entire term of the stock-voting **agreement.**[28] Although the board members "surely were potentially **benefited** by performance of the **promises**"[29] contained in the stock-voting agreement, that benefit was incidental to that agreement. Here, the Agreement directs the defendants to issue performance directly to the Non-Partner Employees.

Further, even if one were to look beyond the face of the Agreement, an intent to benefit the Non-Partner Employees is clear. The Partners and Non-Partner Employees had set an expectation that "in the event of a sale or IPO [the Non-Partner Employees]

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[26] Since the BIT Stockholders owned all of the outstanding shares of the capital stock of BIT, the opinion addresses the intent of BIT and the BIT Stockholders simply as the intent of the BIT Stockholders.

[27] Williston on Contracts, § 37:7, at 55. See ***also id.*** § 37:8, at 70 ("In the typical case, where the promisor has undertaken to render performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested.").

[28] ***534*** A.2d at 268-70.

[29] ***Id.*** at 269.

would receive in the range of 10% to 15% of the value in cash and stock."[30] In deposition testimony designated by the defendants at trial, Mr. Comrie, the former managing partner of BIT, explained how this expectation was set:

> There was nothing particular that had occurred other than when we were hiring them, we had indicated to them that at some point down the road they may be able to share in the company. We had a profit sharing— an informal profit sharing plan and we had actually looked at ways in which we could make our employees, quote unquote, owners or part owners in the organization and we looked at employee-looked at devising some way that they could have some ownership in the company in the field that they were working in for themselves.[31]

Exhibit 7.11 is a manifestation of intent to fulfill this expectation. Contrary to the defendants' assertion, "[a]ny benefit that accrued to the BIT employees as a result of the performance of the Stock Purchase Agreement" was not simply the product of the defendants' efforts.[32] The Intervenors have shown intention to benefit the Non-Partner Employees, thus meeting the first prong of the *Insituform* test.

Moreover, the Intervenors have clearly shown the BIT Stockholders' intent as donative. In order to show *donative* intent, one must show that the promisee intended to make a gift of the promisor's performance to a third party.[33] The defendants claim that the options granted to the Non-Partner Employees were not the BIT Stockholders' to

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[30] DX 6.

[31] Comrie Dep. at 95-96.

[32] Ans. Br. at 15.

[33] Williston on Contracts § 37:8, at 73; see *also* Corbin on Contracts § 774, at 5-6 ("The third person is a donee beneficiary if the promisee who buys the promise expresses an intention and purpose to confer a benefit upon him as a gift in the shape of the promised performance.").

give-that the drafting of the option requirement into the Agreement did not cut into the consideration the BIT Stockholders would otherwise have been paid for their stock in BIT.[34] Findings in the September 4 Opinion, as the defendants' own brief points out, clearly prevent this argument. "GNTS had always represented to BIT that it was willing to pay at least 6 times and up to 7 times BIT's revenues, which resulted in a valuation between $8.8 million and $10.23 million, of which approximately $5.6 million was paid , in cash."[35] As the defendants acknowledge, the remainder of the consideration was to be paid in options.[36] The options granted pursuant to Exhibit 7.11 represent the remainder of consideration to be paid. Exhibit 7.11, then, grants 40.2% of the options, which represents approximately 19% of the total consideration (i.e., the negotiated performance), to the Non-Partner Employees. This requirement is in line with the "set expectations" of the BIT Stockholders and Non-Partner Employees described in Mr. Comrie's deposition.[37] This is clear evidence of donative intent.[38]

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[34] The defendants argue that the absence of a provision calling for a reversion to the Partners of that portion of options not exhausted by the grants to the Non-Partner Employees evidences lack of donative intent. While such a provision would evidence an intent, lack of such a provision does not suggest lack of such intent. Similarly, the Intervenors' argument that the lack of a "no third-party beneficiary" clause indicates an understanding that there were beneficiaries does not hold water.

[35] *Comrie, 837* A.2d at *38* n.91, *reprinted in* Ans. Br. at 13.

[36] Ans. Br. at 14.

[37] Comrie Dep. at 95-96. The defendants argue that there can be no donative intent because Mr. Comrie pressed for an all-cash deal during negotiations. See Comrie Dep. at 77-79. However, there is no evidence that should Mr. Comrie have succeeded in obtaining an all-cash deal, he would not have passed on a similar percentage of compensation to the Non-Partner Employees. The only definitive evidence presented is that the Non-Partner Employees received a percentage of the expected value of the deal.

Finally, the grant of options to the Non-Partner Employees is a material part of the purpose of the Agreement. Where the effect on a third party, "while a benefit to [that party] and intended, [is] merely a means through which the benefit that motivated the contract was sought to be achieved for the signatories," even if that third party is not merely incidental to the contract, that third party takes no rights under the contract.[39] Thus in order to gain rights under a contract, the beneficial effect to the third party must be material to the purpose of the contract.

The defendants assert that the granting of options to the Non-Partner Employees was merely instrumental to achieving the BIT Shareholder's purpose of maximizing shareholder value. The e-mail relied upon by the defendants to show maximization of value.as the sole purpose of the contract, however, does not lead to this conclusion. The defendants point to an e-mail sent by Mr. Shams to the BIT Partners in which Mr. Shams comments on a draft term sheet circulated among those partners.[40] In that e-mail, Mr. Shams states that he had "two intentions" when forming the company: being able to help run a company and financial reward. Based on this, the defendants assert that donating to

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[38] The defendants argue that because the non-partner BIT Stockholders did not receive options, the logical route of this conclusion, in the absence of an agreement among the BIT Stockholders to share the value of options, is that the non-partner BIT Stockholders intended to donate a disproportionate percentage of consideration to the Non-Partner Employees. How the BIT Stockholders intended to divide that portion of consideration provided to the Partners, but not the non-partner BIT Stockholders, is outside the scope of this analysis. The analysis only requires a showing of intent that the Intervenors made a gift of the promisors' performance. Exhibit 7.11 clearly shows this.

[39] *Insituform*, *534* A.2d at 270.

[40] DX 17.

the Non-Partner Employees a portion of the consideration would be at odds with the BIT Stockholders' purpose for entering into the Agreement. The conclusion simply does not flow from the premise. One cannot conclude the purpose of entering into the Agreement from a stated purpose of starting BIT in the first place. Further, in the e-mail, Mr. Shams implores the other Partners not to lose sight of the "effect that [the deal] would have on everyone involved, *including the* ***employees.***"[41]

The record shows, as discussed above, the purpose of the BIT Stockholders in entering into the contract included conferring a benefit to the employees. The option grant is material to that purpose and thus the third prong of the ***Insituform*** test is met.

The Intervenors, having met the test set out in ***Insituform,*** are donee beneficiaries of the' Agreement and thus have standing to bring suit to enforce their rights under Exhibit 7.11 of that Agreement.

IV.

Although the Intervenors have standing to enforce rights under the Agreement, the defendants allege several of the Intervenors signed, in conjunction with severance packages, releases preventing them from bringing claims they might otherwise have had.

In construing the releases, the court looks to the overall language of the releases to determine the parties' intent, which is controlling.[42] If the language of a release is clear,

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[41] Id. (emphasis added).

[42] *See Corporate Prop. Assoc. v. Hallwood Group,* 817 A.2d 777,779 (Del. 2003); *Adams v. Jankouskas, 452* A.2d 148,156 (Del. 1982).

the court will give effect to that language. If the language is ambiguous, "'it must be construed most strongly against the party who drafted it.'"[43]

A. Forsvthe and Lim

There is no evidence that either intervenors Forsythe or Lim signed any release. They are thus entitled to damages in accordance with the calculations used in the September 4 Opinion to determine the plaintiffs' rights. Damages are to be calculated, however, on the basis of the October terminations of Forsythe and Lim and the effects of those terminations on the vesting schedule.

B. Cuervo, Julien. Knabenschuh. Swora

Intervenors Cuervo, Julien, Knabenschuh, and Swora (the "Release Signatories") each signed identical releases. The pertinent language of the releases state:

> FOR AND IN CONSIDERATION OF the special payments and benefits to be provided to me in connection with my separation of employment, as set forth in a Memorandum dated April 11, 2002 from Enterasys Networks, Inc., I . . . hereby release and forever discharge Enterasys Networks, Inc. ("Enterasys") and its Affiliates . . . and Cabletron Systems, Inc. ("Cabletron") and its subsidiaries and other affiliates and all of the respective past and present officers, directors, shareholders, members, managers, employees, agents, general and limited partners, joint venturers and representatives of any of the foregoing, the successors and assigns of Enterasys and its Affiliates and Cabletron and its subsidiaries and other affiliates, and all others connected with any of them (all collectively, the "Released"), both individually and in their official capacities, jointly and severally from any and all actions, causes of action, contracts, covenants, whether express or implied, claims, demands for damages, including disability, life or other insurance claims, indemnity benefits, costs, interest, loss or injury of every nature and kind whatsoever and howsoever arising whether statutory or otherwise, which I may have had, may now have or

[43] *Corporate Property Assoc.,* 817 A.2d at 779 (quoting *Adams, 452* A.2d at 156).

may hereinafter have, *in any way relating to the hiring of, the employment by and the cessation of my employment by the Released parties.*[44]

The Release Signatories argue that because the releases initially refer to an April 11, 2002 memorandum, which provides terms for termination of employment, the language releasing claims relating to the "hiring of, and the employment by" should be construed narrowly. They base this argument on the premise that "Delaware law is clear that words of general application used in a release 'which generally follow a specific recital of the subject matter concerned are not to be given their broadest significance but will be restricted to the particular matter referenced to in the recital.'"[45]

The releases here are different from previous releases considered by Delaware courts. In *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage,* for example, the Delaware Supreme Court considered whether a general release of all claims, whether known or unknown, in a settlement agreement, following a preamble alluding to the action being settled, prevented a future claim for fraudulent inducement. The Supreme Court focused on whether a releasee should be held to "release a claim for fraud in the execution of the release itself," and decided it should not.[46] In *Adams v. Kankouskas,* the Delaware Supreme Court interpreted a general release narrowly. That court's opinion,

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[44] Emphasis added. The releases are in the Affidavit submitted to this court by Douglas H. Meal on December 5, 2003.

[45] *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage, 744* A.2d 457,460 (Del. 1999) (quoting *Adams, 452* A.2d at 156).

[46] *Id.* at 461.

however, was based on the fact that the general release followed a specific *release,* not a specific *recital.* The releases in this case contain no such bifurcation.

Here, although stating that the releases are given in consideration of payments and benefits provided in the termination memorandum, the language of the releases specifically limits them to any action relating to the hiring of, employment by, and cessation of employment of the signatory. In seeking standing to assert their rights, the Intervenors linked their right to the options directly to their employee relationship with the defendants. Further, the options vested according to a schedule that depended on the Intervenors' continued employment with Cabletron, GNTS, or "any of their Affiliates." Under the clear, unambiguous language of the releases, the Release Signatories released their rights to bring a claim under Exhibit 7.11 .[47]

Further, the intention of the parties, which is controlling, is manifested by what each of the Release Signatories agreed to have removed from the releases. Each of the Release Signatories attempted to add handwritten language to his or her own release, stating "[e]xception to the above limited to Delaware litigation between sellers and

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[47] The reliance of the Release Signatories on *Fischer v. Fischer,* 1999 WL 1032768 (Del. Ch. Nov. 4 1999), is misplaced. *Fischer* looked at the parties' intent to determine whether a separation agreement between former spouses served to bar one former spouse's breach of fiduciary suit against the other former spouse. The court held that a release designed to cover the division of marital property could not foreclose a derivative suit by one spouse as shareholder against another spouse as director. The court determined "the parties never intended the release to discharge a claim arising outside the marriage relationship." Id. at *4. The claim in the current case is directly related to the subject matter of the release.

buyers of BIT Management Inc initiated on or about Nov. 13, 2001."[48] The Release Signatories all authorized the removal of this language at the request of BIT. This explicit removal further shows that the parties' intent was not to include the Delaware litigation.[49]

The Release Signatories, because they have signed the releases, are estopped from bringing suit against the defendants under Exhibit 7.11 of the Agreement.

C. Rathnam

Intervenor Rathnam's release is substantially similar to those of the Release Signatories. It states:

> IN CONSIDERATION of the payment to me of the amounts specified [in a separate letter] . . . I, **Ramesh Rathnam . . .** hereby release and forever discharge **Global Network Technology Services,** a subsidiary of **Cabletron Systems, Inc.** along with all parents, subsidiaries, affiliates and associated companies, and together with all respective officers, directors, employees, servants and agents and their successors and assigns

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[48] One of the releases contained the abbreviation "Inc.," and three did not. Swora's additional handwritten language did not contain the words "limited to."

[49] The Release Signatories seem to imply that their agreement to the removal of the additional language should not be valid because of estoppel, or alternatively because it was achieved as a result of duress. The Intervenor's Reply Brief, states that "Enterasys' own human resources consultant, Robert McCormack . . . expressly advised Cuervo, Julien, Knabenschuh, and Swora to include the handwritten language in the releases." Intervenors Reply Br. In Support of Their Claims for Relief 11-12 n.3 (Dec. 19, 2003) ("Reply Br."). Other than a statement being made, the brief does not set forth other elements of estoppel.

Further, the Release Signatories argue that, should they not have agreed to the removal of language, they would have only been entitled to the "paltry two weeks pay required by applicable Ontario law." Reply Br. at 13. They essentially argue that there is duress because, had they not signed, they would not be entitled to the additional severance offered on top of what the Ontario legislature deemed appropriate. This is not a valid argument for duress.

(hereinafter collectively referred to as the "Releasee") jointly and severally from any and all actions, causes of action, contracts, covenants, whether express or implied, claims, demands for damages, including disability, life or other insurance claims, indemnity benefits, costs, interest, loss or injury of every nature and kind whatsoever and howsoever arising whether statutory or otherwise, which I may heretofore have had, may now have, or may hereinafter have, *in any way relating to the hiring of, the employment by and the cessation of the employment of the Releasor by the Releasee.*[50]

Although there is no attempted insertion and subsequent removal of additional language, as there is in the cases of the Release Signatories, the clear language of this release, for the same reasons discussed above, prevents Rathnam from bringing a claim against the defendants under the Agreement.

D. Matheson. Palma, Kapuscinski

Although releases from intervenors Kapuscinski and Palma were submitted to the court, it is not clear from the record whether they signed those releases. Similarly, it is not clear whether intervenor Matheson, whose release mirrored that of Cuervo, Julien, Knabenschuh and Swora, agreed to accept the terms of the release without the proposed handwritten carve-out. Further factual development is required before the court can determine whether any of these intervenors released any claims they might otherwise have had.[51]

[50] Emphasis added. This release is also included in the Meal Affidavit.

[51] In a February 9, 2004, letter to the court, counsel to the defendants indicated that it has initiated steps toward developing this record.

V.

For the foregoing reason, judgment will be entered for intervenors Forsythe and Lim, and against the Release Signatories. The parties are instructed to present an order in conformity with the calculations used in the September 4 Opinion (while keeping in mind the terrnination dates of Forsythe and Lim and the resultant effect on the vesting schedule) within 30 days. The parties are further instructed to update this court within 30 days as to the status of the Matheson, Palma, and Kapuscinski claims.