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March 11, 2004

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Re: *Charles Potter, Jr. and Latannia Fair v. Community Communications Corporation and Benjamin "Twin B" Brown*, C.A. No. 115-N

Dear Counsel:

This is an action by Charles Potter ("Potter") and Latannia Fair ("Fair") against Community Communications Corporation ("CCC") and its sole stockholder and director, Reverend Benjamin "Twin B" Brown ("Brown").[1] The Complaint seeks preliminary injunctive relief against CCC and Brown concerning the control of certain rights to

[1] Unless otherwise indicated, the facts in this letter opinion are drawn from Plaintiffs' Verified Amended Complaint filed December 29, 2003 (the "Complaint").

airtime on Comcast Cablevision ("Comcast") as well as permanent injunctive and declaratory relief regarding Plaintiffs' rights to control that airtime.

On December 22, 2003, the Court held a hearing on Plaintiffs' motion for a temporary restraining order at which Brown appeared *pro se*. The Court granted Plaintiffs' motion and entered a temporary restraining order on December 23, 2003.

On February 4, 2004, the Court heard argument on Plaintiffs' motion for a preliminary injunction. For the reasons set forth below, the Court will grant Plaintiffs' motion.

I. FACTS

This action arises out of two separate but related agreements concerning rights to airtime on Comcast's public access station.

The first agreement is a Channel Lease Agreement (the "Agreement") between CCC and Comcast for two blocks of airtime on Channel 28 on Sundays from 8:00 a.m. until 11:00 a.m. and 2:00 p.m. until 4:00 p.m. CCC ran religious and community-based programming during those time periods. CCC paid a fixed hourly rate to Comcast for each hour used and sold advertising to be broadcast during those hours.

CCC fell behind on payments due under the Agreement and sought financial assistance from members of the community. Potter and Fair entered into a contract with CCC in March of 2003 (the "Contract") pursuant to which Potter and Fair paid Comcast $3,769.00 in settlement of CCC's arrears. The Contract provided for monthly payments to Potter and Fair by CCC starting in May of 2003 with a final balloon payment on

December 15, 2003. As consideration for the loan, CCC agreed to cede programming and advertising control of the Sunday 2:00 p.m. - 4:00 p.m. block of airtime (the "Sunday Afternoon Block") to Potter and Fair for as long as CCC retained and renewed its contract with Comcast. The Contract also granted Potter and Fair a right of first refusal in the event that CCC ever chose to relinquish its programming rights to the 8:00-11:00 a.m. Sunday morning block. Potter and Fair began paying Comcast the charges for the Sunday Afternoon Block and leasing time during the Sunday Afternoon Block to third parties.

CCC defaulted on its payment obligations under the Contract with Potter and Fair. Plaintiffs filed suit in the Justice of the Peace Court to recover the debt. Plaintiffs obtained a judgment for less than the full amount owed on the debt and have appealed that ruling.

After trial in the Justice of the Peace Court, Brown and those working on his behalf began contacting individuals to whom Potter and Fair had subleased airtime and advising them that CCC and Brown were assuming control of the Sunday Afternoon Block as of January 1, 2004. On Sunday December 14, 2003, during the morning block, a CCC representative announced on the air that Potter and Fair no longer controlled the Sunday Afternoon Block and instructed all of those who subleased time from Potter and Fair to contact Brown to work out new arrangements. CCC signed at least one contract to sublet time to an entity that had previously subleased from Potter and Fair.

On December 15, 2003, Brown renewed the Agreement with Comcast in his own name rather than under CCC.[2] When asked at his deposition why he did that, Brown did not offer any explanation other than that he "saw fit to do it," and that, regardless of the name on the Comcast agreement, it was always his business relationship with Comcast.[3] The record developed on the motion for preliminary injunction demonstrated that Comcast generally requires those who wish to lease airtime from it to put their names on a waiting list until a time slot opens.[4] However, Comcast permitted Brown to renew the lease for the former CCC time under his own name without being put on the waiting list.

The evidence presented suggests that Brown did very little to observe corporate formalities as to CCC or to distinguish himself from CCC. Brown was unable to produce any written minutes of CCC board meetings or any CCC bylaws. CCC's office is located at Brown's apartment and its telephone number and post office box are registered in Brown's name. CCC's checks bear the names of both CCC and Brown. Brown uses his own money to pay CCC's bills.[5]

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2 At the December 22, 2003 hearing on the temporary restraining order, Brown represented that CCC would not renew the Agreement. Brown did not reveal that he already had entered into an agreement with Comcast in his own name. Based on Brown's actions, Potter and Fair filed an amended complaint.

3 Brown Dep. 75.

4 *See* Plaintiffs' Reply Brief ("PRB") at 5.

5 *See* Plaintiffs' Opening Brief on their Motion for a Preliminary Injunction ("POB") at 3-4 (citing Brown Dep.).

Potter and Fair presented credible evidence that when they entered into the Contract with CCC under which they obtained access to the air time, they had a reasonable expectation of renewal.[6] That is, Potter and Fair expected that CCC would renew its Agreement with Comcast. Although CCC had no obligation to renew, the evidence supports a preliminary finding that Potter and Fair had an expectation from the Contract that Brown would not take over CCC's right to the Sunday Afternoon Block and claim he had no duty to continue subleasing it to Potter and Fair.

II. STANDARD FOR A PRELIMINARY INJUNCTION

The standard for a preliminary injunction is well established. Plaintiffs must show: (1) a reasonable probability of success on the merits, (2) that the absence of a preliminary injunction would result in imminent and irreparable injury, and (3) that the injury plaintiffs would suffer in the absence of a preliminary injunction outweighs any injury that the defendants may suffer as a result of the preliminary injunction.[7] In the circumstances of this case in which a trial on the merits is scheduled for March 23, 2004, Plaintiffs have met their burden.

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[6] For example, Potter and Fair asked Brown to sign a resolution stating that if anything happened to him they would continue to have rights in the Sunday Afternoon Block and a right of first refusal for the Sunday morning block. POB at 7 (citing Potter Aff. ¶ 10; Fair Aff. ¶ 3; Davis Aff. ¶ 11 & Ex. 1).

[7] *See, e.g.*, *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

III. ANALYSIS

Plaintiffs need not establish that they will win at trial. They must show only that they have a reasonable probability of success on the merits. Plaintiffs' position with respect to their rights *vis a vis* CCC is supported by the executed Contract attached to the Complaint.

There is some room for argument as to the proper duration of the Contract. Brown contends that the Contract expired when CCC did not renew its Agreement with Comcast. Brown, however, did not walk away from his or CCC's relationship with Comcast. In fact, he is currently under agreement with Comcast for the same time blocks but in his own name rather than CCC's.

Plaintiffs argue that Brown breached the implied covenant of good faith and fair dealing by depriving Potter and Fair of the benefit of their contract with CCC while retaining the benefits flowing to CCC.[8] Plaintiffs' brief and supporting affidavits and documents also support at least a preliminary conclusion that this transaction was not the first instance in which Brown treated CCC as if he and the corporation were one and the same. While not having decided the issue, the Court concludes that Potter and Fair have shown that there is a reasonable probability that they will succeed on the merits of their claims. In particular, Plaintiffs have demonstrated a reasonable probability of success on the merits that: (1) Brown breached the implied covenant of good faith and fair dealing

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[8] POB at 12-13.

under his Contract with Potter and Fair by renewing with Comcast in his own name; and (2) the circumstances of this case justify disregarding CCC's independent legal existence from Brown for purposes of enforcing the Contract.[9]

Plaintiffs also have demonstrated that the absence of a preliminary injunction will result in imminent and irreparable harm. The parties' Contract acknowledges that control of the programming rights is a unique asset.[10] The Court has concluded preliminarily that Potter and Fair are entitled to control the Sunday Afternoon Block. In the absence of a preliminary injunction, Plaintiffs would suffer irreparable harm if the Sunday Afternoon Block each week were to be under Brown's control until the Court makes a final decision on the merits.[11] Furthermore, Plaintiffs have presented evidence that Brown undermined

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9 *See, e.g., Gadsden v. Home Preservation Co.*, 2004 WL 326756 (Del. Ch. Feb. 20, 2004). Because the Court finds a reasonable likelihood of success sufficient to justify the entry of a preliminary injunction, the Court declines to take up Plaintiff's claims for tortious interference and unjust enrichment at this time.

10 Contract para. 10 ("The parties recognize that access to the [Sunday Afternoon Block] is a unique asset, the unlawful loss of which would constitute irreparable injury warranting equitable as well as legal relief."). This Court "has repeatedly held that contractual stipulations as to irreparable harm alone suffice to establish that element for the purposes of issuing preliminary injunctive relief." *Cirrus Holding Co. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001).

11 *Plaza Sec. Co. v. O'Kelley*, 1985 Del. Ch. Lexis 404 (Mar. 5, 1985), *aff'd*, 496 A.2d 1031 (Del. 1985) ("Where a legal right granted by law appears to be clear, where interference with the legal right will necessarily occur in the absence of injunctive protection by the Court, and where it reasonably appears that money damages cannot adequately compensate for the interference with that legal right, the irreparable injury requirement is considered to be satisfied.").

their contractual relationships with third parties. It is difficult, if not impossible, to measure the loss of these intangible assets in money damages.[12]

Plaintiffs have demonstrated that the harm that they will suffer in the absence of a preliminary injunction outweighs the harm that CCC and Brown will suffer from being preliminarily enjoined. As noted above, the loss of the rightful control of the programming rights presents potentially weekly irreparable injury to Plaintiffs. In contrast, the harm to CCC and Brown, if any, is likely to be short lived in that the Court has scheduled a full trial on the merits of this action for March 23, 2004, less than two weeks from now.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' motion for a preliminary injunction will be granted. Potter and Fair shall continue to post a bond in the amount of $5,000 (unsecured) as a condition for entry of the preliminary injunction. The Court will enter an appropriate order.

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[12] "It is not necessary that the injury be beyond the possibility of repair by money compensation," but only that it "be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice." *State v. Delaware State Edu. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974). Furthermore, if equitable relief were deferred until after a final decision on the merits, that would not remedy Plaintiffs' loss of control of the airtime in the interim or its contractual relationships with third parties. *See Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998). Under the circumstances presented here, the legal remedy would not be entirely adequate.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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