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OF THE
STATE OF DELAWARE

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Re: *Xperex Corp., et al. v. Viasystems Technologies Corp., LLC*
Civil Action No. 20582-NC

Dear Counsel:

This letter concerns the three pending motions in this matter: (1) plaintiff/counter-defendants' motion for summary judgment; (2) defendant/counterclaimant's motion for summary judgment; and (3) plaintiff/counter-defendants' motion to strike.

At the outset, let me note that the briefing in this case, regrettably, was less than helpful. Both sides engaged in significant overreaching, failed to clarify or focus on the key factual issues, and argued implausible or inconsistent points of law. Reading the briefs was like watching ships pass in the night. The Court is unable to expend judicial resources by doing all of the litigants' work for them and, unfortunately, a trial that might have been avoided is now in the cards.

Background. Viasystems was a contract manufacturer for Imagicast. In early 2002, Imagicast owed $408,446.48 to Viasystems. On this amount, Viasystems was an unsecured creditor. Although Viasystems argues that Xperex is the successor of Imagicast, it is undisputed that the legal entity that was Imagicast is now defunct. Xperex was a secured creditor of Imagicast, foreclosed on Imagicast's assets in June of 2002, and held a foreclosure sale on July 1, 2002

(at which Xperex was the successful, and only, bidder for Imagicast's assets). Normally the story would end here as an unsecured creditor has little, if any, recourse when a company goes under. In these circumstances, however, Viasystems suggests it was fraudulently denied its opportunity to collect the $408,000 owed by Imagicast.

The directors of Xperex were also directors of Imagicast (some holding management positions in both companies).[1] One of the common directors, Lon Chow, is a principal in a group referred to in the briefs as the "Apex entities." The Apex entities were shareholders of Imagicast and they are now shareholders of Xperex (providing Xperex its start-up capital). Xperex, with a loan provided by the Apex entities, purchased Imagicast's secured debt from Bank One, N.A., and used its position as a secured creditor of Imagicast (assigned by Bank One) to foreclose on Imagicast's assets.[2] Viasystems argues the circumstances of Imagicast's demise and Xperex's emergence amount to a fraud and allow Viasystems to recover its $408,000 (from Xperex, the Apex entities, and the common Imagicast/Xperex directors) that would otherwise be non-collectible.[3]

The Summary Judgment Motions. Viasystems Technologies Corporation, LLC ("Viasystems") has made eight counterclaims. Many of the counterclaims are convoluted and/or redundant. Counter-defendants have moved for summary judgment as to all eight of Viasystems' counterclaims. Viasystems has moved for summary judgment as to two of its counterclaims: Count III (fraudulent conveyance) and Count IV (breach of fiduciary duty). The Court would normally address each count in turn, but since the litigants failed to present their arguments in such a fashion, I return the favor.

The success of several of Viasystems' counterclaims seems to rest on the argument that Xperex is the "successor" to Imagicast's liabilities. Although the parties disagree as to what law applies to determine whether Xperex is the successor to Imagicast, I do not think this is a difficult question. Xperex is a Delaware corporation. Whether or not a Delaware corporation is liable for the conduct of another corporation is a question of Delaware law.

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[1] These common officers and directors are plaintiffs/counter-defendants in this action along with Xperex and a group of investors common to both Xperex and Imagicast, the so-called "Apex entities."

[2] The Apex entities also assigned their previously-held secured interests in Imagicast to Xperex.

[3] Viasystems itself is bringing this action on behalf of a defunct entity, Viasystems San Jose.

Counter-defendants contend that the elements necessary to create a *de facto* merger under Delaware law are the following: (1) one corporation transfers all of its assets to another corporation; (2) payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation; and (3) in exchange for their stock in that corporation, the transferee agreeing to assume all the debts and liabilities of the transferor.[4] Here, there is no dispute that (1) Bank One stood in between Imagicast and Xperex, *i.e.*, there was no transfer directly from Imagicast to Xperex, (2) Xperex did not issue stock to Imagicast's shareholders, and (3) Xperex did not agree to assume Imagicast's liabilities. I do not believe, however, that these facts are dispositive.

Drug, Inc. v. Hunt, in my opinion, did not set forth the only circumstances in which a Delaware corporation will be considered the successor of another corporate entity. Delaware law holds a recognized concern for transactions that seek to shelter assets from creditors.[5] Moreover, this Court is one of equity and will not allow sham transactions to achieve mischief. I have concerns regarding the manner in which Xperex came to acquire Imagicast's assets and the inquiry necessary to allay these concerns turns on the intent of the individual counter-defendants—an issue I cannot resolve at this stage of the proceedings.

Viasystems' fiduciary duty claim (Count III) will not be dismissed. Under Delaware law a director of an insolvent corporation owes fiduciary duties to the corporation's creditors.[6] It is also Delaware law, however, that:

> [F]iduciary obligation does not require self-sacrifice. More particularly, it does not necessarily impress its special limitation on legal powers held by one otherwise under a fiduciary duty, when such collateral legal powers do not derive from the circumstances or conditions giving rise to the fiduciary obligation in the first instance. Thus one who may be both a creditor and a fiduciary (*e.g.,* a director or controlling shareholder) does not by reason of that status

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[4] *Drug, Inc. v. Hunt*, 168 A. 87, 96 (Del. 1933).

[5] *See, e.g., Fidanque v. American Maracaibo Co.,* 92 A.2d 311, 316 (Del. Ch. 1952).

[6] *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787-88 (Del. Ch. 1992). To the extent that California law governs this count, it is of no practical concern because California looks to "corporate law developed in the state of Delaware," since "it is identical to California corporate law for all practical purposes." *Oakland Raiders v. NFL*, 93 Cal. App. 4th 572, 586 n.5 (Cal. Ct. App., 2001).

> alone have special limitations imposed upon the exercise of his or her creditor rights.[7]

In these circumstances, Imagicast's fiduciaries had the general right (as creditors) to foreclose on Imagicast's assets. To the extent that the counter- defendants exercised *bona fide* rights as secured creditors, Viasystems has no claim. To the extent that the counter-defendants exceeded or abused their rights as secured creditors, Viasystems may be able to recover for breaches of fiduciary duty. In this sense, Viasystems' fiduciary duty claim largely duplicates its fraudulent conveyance claim.

There are factual ambiguities, however, regarding whether counter-defendants' rights as creditors "derive[d] from the circumstances or conditions giving rise"[8] to their fiduciary obligations to Imagicast. In this context, I am primarily concerned with Imagicast's directors' involvement with Bank One's decision to notify Imagicast that it was in default and how Xperex came to purchase Bank One's secured interest in Imagicast. At this point there are insufficient facts in the record for the Court to conclude that the individual counter-defendants' rights as creditors were not circumscribed by their roles as fiduciaries of Imagicast.[9]

Viasystems claim for fraudulent conveyance (Count III) is complicated by the fact that the parties are arguing legal principles from three different jurisdictions without explaining why there is any difference between the laws of those jurisdictions. Without such an explanation, this sort of advocacy needlessly complicates the work of the Court. One thing that seems clear in all jurisdictions, however, is that counter-defendants cannot use the Uniform Commercial Code as a shield for fraudulent conduct.

While I am not certain that a fraud has occurred, I am convinced that when viewing the facts in the light most favorable to the non-moving party counter-defendants' conduct does not pass the smell test. Imagicast insiders were instrumental in orchestrating the manner in which Imagicast met its demise. Moreover, Imagicast insiders reaped the benefits of Imagicast's demise through their own association with the entity that picked at Imagicast's carcass, Xperex. It also appears that during this period, Viasystems was misled (by an

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[7] *Odyssey Partners L.P. v. Fleming Cos.*, 1996 Del. Ch. LEXIS 91, at *10-11 (Del. Ch. July 24, 1996).
[8] *Id.* at *10.
[9] My decision on this point has nothing to do with Cal. Corp. Code § 1001 or 8 *Del. C.* § 271, which, contrary to Viasystems' arguments, have no relevance in this case.

Imagicast/Xperex insider) about Imagicast's willingness to repay the money it owed. Defendants seek to insulate their conduct behind a public sale of Imagicast's assets, but what comfort is the Court to gather from a "public" sale that only Xperex (guided by Imagicast insiders) attended? The answer, at this stage of the litigation, is very little.

Although the core counterclaims cannot be dismissed at this stage of the proceedings, some are unsustainable as a matter of law.

Viasystems' attempt to defend its conversion counterclaim (Count VII) is infirm. Counter-defendants have brought forth evidence that Viasystems did not have title to the goods allegedly converted. Viasystems response is simply that [t]here are factual issues relating to Counter-defendants' right to possession . . . ."[10] Viasystems has not informed the Court as to what those facts might be and, as such, the conversion claim is dismissed.

Viasystems unjust enrichment counterclaim (Count V) is dismissed. Viasystems argues in its briefs that California law applies to all of its causes of action. While this is obviously erroneous, I do agree that California law applies to facts described under Count V (as does Xperex). Unfortunately, "there is no cause of action in California for unjust enrichment."[11] Given this principle of law, I am not even sure how this claim was made in good faith. Strangely, Viasystems does not even discuss this flaw in its briefs.

Viasystems' claim for intentional interference with prospective business advantage (Count VIII) is dismissed. The key word in this count is "prospective." Counter-defendants argue that there is no evidence in the record suggesting that Imagicast would have done business with Viasystems' predecessor after May of 2002 (because both companies were out of business by that time). Viasystems' brief on this issue contains not one record cite suggesting the existence of such evidence.[12] It is inappropriate for the Court to scour through the record on Viasystems' behalf.[13]

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[10] Viasystems Technologies Corp., LLC's Br. in Opp'n to Pl.'s Mot. for Summ. J. ("AB") at 45.

[11] *Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 793 (2003).

[12] AB at 45-46.

[13] I have not addressed Viasystems' fraud counterclaim (Count VI) directly because it appears largely duplicative of the fiduciary duty and fraudulent conveyance counterclaims. I also must point out an issue not raised by either party—punitive damages. Viasystems' amended counterclaim seeks punitive damages as relief for various causes of action. Without mincing words, Viasystems' attempt to seek punitive damages in this Court is frivolous.

The Motion to Strike. Plaintiffs' motion to strike certain declarations is denied. Given my disposition of this case, the concerns raised in the motion are largely moot because my decision has not turned on the contested declarations. Also, most of the grounds raised for striking the contested declarations go to the possible weight the Court would ascribe to those declarations at trial, not their inherent admissibility at this stage of the proceedings. To the extent that plaintiffs desire to press this argument before trial, however, they may do so in the form of a motion *in limine*.

Conclusion. A trial is necessary to determine disputed and/or undeveloped factual issues regarding defendants' role in Xperex's phoenix-like rise out of Imagicast's ashes. I ask the parties to submit a pretrial stipulation in accordance with Court of Chancery Rule 16 as soon as practicable. Once the pretrial stipulation is filed with the Court, a trial date will be set.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

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