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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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AMPA LTD., SHLOMO FOGEL,
YEHOSHUA WOLF, WOLF ICHILOV
& TRUST COMPANY, LTD., PINE LEVEL
COMPANY, INC., HAUNTON LTD., DC III LLC,
Individually and Derivatively on behalf of DC
MANAGERS LLC and DC II LLC, Individually and
Derivatively on behalf of DC INVESTORS LLC.,

Index No. 111896/01

Decision & Order

Plaintiffs,

-against-

KENTFIELD CAPITAL, LLC, JOSEPH
YERUSHALMI, MARTIN GANS and
YERUSHALMI & ASSOCIATES, LLP,

Defendants,

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KENTFIELD CAPITAL, LLC and BRICLA
REALTY CO., INC.,

Counterclaimants,

-against-

AMPA LTD., SHLOMO FOGEL,
YEHOSHUA WOLF, WOLF ICHILOV
& TRUST COMPANY, LTD., PINE LEVEL
COMPANY, INC., HAUNTON LTD., DC III LLC,
DC II LLC, ASHER FOGEL, LAWRENCE
SCHNEIDER, HENRY SCHNEIDER, ADAM
GREENE, NAFTALI CEDER, DOVERTOWER
CAPITAL LLC and DC MANGERS LLC,

Counterclaim Defendants

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HON. RICHARD B. LOWE, III:

The above caption matter was tried by this Court, without a jury, beginning on October

[* 2]

21, 2002 and ending May 6 , 2003. The following are findings of fact and conclusions of law pursuant to CPLR 4213.

I. Background

Plaintiff AMPA is Israel's largest manufacturer and distributor of refrigerators, and operates numerous other businesses. As of August 16, 1998, the majority of its shares were owned by the Israeli based Grodecki family. On that date the Grodeckis sold the controlling interest in AMPA to a group that had been put together by plaintiff Shlomo Fogel, his brother Asher, their attorney Yehoshua Wolf and several others. (They and their corporate vehicles are called herein the "promoters"). The named plaintiffs are all promoters, with the exception of AMPA, which has a stand-alone claim for tortious interference.

The transaction at issue was one whereby the promoters arranged a partial leveraged buyout, in which the bulk of the purchase price was borrowed from Bank Hapoalim in Israel and the balance was raised from nine investors. The largest of these investors is defendant and counterclaimant Kentfield Capital LLC ("Kentfield"), a Delaware company. The majority of Kentfield is owned by entitites controlled by two other defendants, Joseph Yerushalmi, a New York/Israeli tax and corporate attorney, and Martin Gans, a businessman who is a partner of Yerushalmi's in many other investments.

The investors invested in DC Investors LLC ("DCI"), a Delaware company that is managed by another Delaware company called DC Managers LLC ("DCM"). DCM's agreement creates a three person board of directors who must vote unanimously on all matters. The members of the DCM board are defendant Gans, plaintiff Shlomo Fogel and another promoter.

[* 3]

Immediately below DCI in the corporate structure is a Dutch company called Burn Holdings BV ("Burn"), which in turn owns the Israeli company Papos Holding, Ltd. ("Papos"). Papos borrowed approximately $30 million from Bank Hapoalim and used these funds, along with approximately $7 million raised from the investors in DCI, to purchase 70% of Grodecki Holdings Ltd, which at that time owned approximately 57% of AMPA's equity and controlled approximately 73.5% of its voting power. Thus DCI indirectly acquired approximately 40% of AMPA's equity and approximately 51% of its vote.

A central issue in this case is the question of the Promoters compensation for their efforts in putting together the Ampa transaction. There is a contractual promise that they will receive equity in DCI, the Delaware company formed for the acquisition. Under the agreement, the promoters receipt of equity will occur only after all the investors have been paid back their entire investments (approximately $7 million), together with interest and any tax liability arising from the transaction. The contract defines the repayment to the investors as the "hurdle event".

If the "hurdle event" occurs before August 2003, the amount of stock the promoters will receive (the "promote") will be sufficient to control DCI. After that date, the amount of equity received decreases, so that if the hurdle event is delayed until after August 2003, the promoters' ability to control DCI and the other relevant holding companies will be eliminated, to the benefit of Kentfield. Plaintiffs allege that Kentfield's owners, Yerulshami and Gans, have improperly blocked the "hurdle event" in order to seize control of DCI and its subsidiaries and thereby prevent the promoters from acquiring control.

The allegations surround the actions of Gans and Yerulshami which allegedly blocked the use of available bank loans to finance the hurdle event, on the pretext that only operating profits

[* 4]

from AMPA's various businesses can be used to repay the investors to achieve the hurdle event.

In addition to several other claims, Plaintiffs seek damages against Yerulshami, individually, for legal malpractice alleging, as tax lawyer for the transaction, he failed to prevent tax problems which were later found to be inherent in the Ampa transaction.

Defendants counterclaims allege that the entire transaction resulted from fraud in the inducement by the Promoters, who allegedly failed to disclose material terms of the bank loan used to acquire Ampa. Defendants also allege breach of contract and corporate waste by the promoters.

II. Hurdle Events Issues:

A. Improper Veto of the Hurdle Event by Gans

The Ampa transaction was one whereby it was contemplated that the promoters would eventually control DCI and the investors would get back their money and no longer be at risk. This "hurdle event" was projected to take place quickly. Yerulshami testified that he was told it would happen about one year after closing the Ampa transaction. Plaintiffs allege that Gans breached his fiduciary duty by vetoing the necessary financing which would allow for the "hurdle event" to occur.

If the hurdle event is not achieved by August 2003, Kentfield contends it will have control of both the equity and the management of DCI because the agreements giving the promoters two seats on the DCM board terminate at that time and because it will hold a majority of the equity. For this reason, control of the equity in August 2003 is significant. If the hurdle event is not achieved, Kentfield's share of the equity will be 54%. If the hurdle event is achieved by then, the promoters have control as they will have 46% of the equity; with

Kentfield's being reduced from 54% to 32%. Plaintiffs allege that in both November 1999 and October 2000 Gans improperly failed to approve financing which would allow the hurdle event to occur.

On November 18, 1999, the promoters told Yerulshami, Gans, and the other DCI investors that Bank Hapoalim would likely approve a loan allowing the hurdle event to occur. The testimony of Wolf, states that he had a conversation with Gans following a meeting of the investors. He told Gans that they wanted to go forward with a loan to achieve the hurdle event and Gans responded he would only agree if the promoters took less equity than the agreements provided. This testimony was unrebutted by Gans. It is this court's finding that the conversation did occur. However, Plaintiff has failed to establish that the November 1999 conversation was a veto by Gans of the hurdle event. There is no evidence that the conversation involved what amounted to a proposal by Plaintiff whereby the terms were properly put before Gans and thereafter rejected.

Plaintiffs allege that Gans again vetoed the hurdle event in November 2000. The Plaintiffs' Exhibit 357 is a resolution signed by disinterested DCI investors requesting an approval of the loan for the hurdle event. The letter is sufficient evidence that it was circulated among investors and was a proposal seeking approval of the loan. Gans testified and the documentary evidence shows that he refused to agree to the loan. While no formal meeting was held to put the terms of the loan to a vote, the Court finds credible the testimony that it was the practice of the board to meet and conduct business informally. Therefore, the Court rejects defendants' argument that no formal meeting was held to discuss the terms of the loan. After review of Exhibit 357, it is confounding and not credible that the defendants aver they were

[* 6]

unaware of the proposal. The Court finds that the Plaintiff has established that the terms of the loan were presented to Gans in November 2000 and that he subsequently vetoed the loan .

As director, Gans' decision to veto the loan is generally protected by the business judgment rule. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Therefore, the burden is on the plaintiff to establish bad faith or lack of due care by Gans. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). Should Plaintiffs meet their burden, the business judgment rule will not shield Gans from liability for his actions in vetoing the loan. Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964). Furthermore, the substantive protections of the business judgment rule can be claimed only by disinterested directors whose conduct otherwise meets the tests of the rule's procedural requirements. McMullin v. Beran, 765 A.2d 910, 923 (Del. 2000). In other words, Gans must be shown to be incapable, due to personal interest or domination and control, of objectively evaluating the financing to achieve the hurdle event. Brehm v. Eisner, 746 A.2d 244, 257 (Del. 2000).

Plaintiffs have met their burden by establishing that Gans was acting in bad faith when vetoing the loan. The Court has found that a conversation occurred between Wolf and Gans in October of 1999 whereby Gans stated he would approve the loan only if the promoters took less equity in the company. While the Court held that this was not evidence of a veto, it is compelling evidence that Gans was acting in bad faith and in self interest when failing to approve financing which would procure the hurdle event. Furthermore, Gans was interested as defined by Deleware law. Here, he stands to benefit financially by vetoing the hurdle event because

Kentfield obtains control of the equity of DCI if the hurdle event does not occur by August 26, 2003. His personal interest was therefore different from the other DCI members whose goal is return of their investments as quickly as possible, and the promoters whose goal is control. Accordingly, Gans' decision is not protected by the business judgment rule.

Because the Court has held that Gans' decision is not shielded by the business judgment rule, the burden shifts to defendants to establish that his decision was made after considering all material information reasonably available. Brehm v. Eisner, 746 A.2d 244 at 258. The judgment of directors must be an informed one. Moran v. Household Int'l, Inc., 490 A.2d 1054, 1075 (Del. Ch.), aff'd 500 A.2d 1346 (Del. 1985). Gans has come forward with no evidence that he made an informed decision when vetoing the hurdle event. The record is void of any evidence that he analyzed the loan, sought financial information from inside or outside accountants, or that he contacted bank officials to discuss their analysis of the financing. Gans acknowledged that there is no documentary evidence showing that he took any steps to determine whether the loan was in the best interest of the company.

Significantly, Gans has failed to rebut the testimony of bank officer, Debra Elinati that the loan would have helped to ease the tax problems plaguing the Ampa transaction. Her testimony was corroborated by Professor Chirelstein from Columbia University School of Law. Chirelstein testified that achieving the hurdle event was a necessary first step in solving these tax problems. His testimony was unrebutted by defendants.

The Court does not find credible Gans' argument that the promoters should have provided him with information about the loan. The Court has found that he was sufficiently apprised of the available financing from the bank. There is no evidence showing that the

[* 8]

plaintiffs hid from Gans the information or failed to turn it over upon demand. The record shows no request by Gans for more information about the financing. To the contrary, the record shows an uninformed, flat out denial by Gans to approve the loan.

The Court also rejects Gans' argument that the information memorandum, which details how the hurdle event is to be achieved, does not contemplate encumbering the assets of Ampa with the additional loan. The PPM (Pl. Ex. 1, p. 36), the only pre-closing document describing how the hurdle event will be achieved, states that, after closing, the promoters plan to borrow money to achieve the hurdle event.

Lastly, the Court rejects defendants' argument that the Promoters defrauded Bank Hapolin when seeking the financing. Defendants argue that Fogel lied to the bank about his belief that Papos could repay the increase in the loan. However, bank officer Elinati, an uninterested witness, testified that she reviewed all of the financials and pertinent data and reached the conclusion that the loan could be repaid. Lastly, Defendants also argue that the promoters led the bank to believe they were still investors, and had money at risk when seeking approval of the loan. The Court finds that the bank was aware that the promoters would not have money at risk when it approved the loan for the hurdle event. Elinati testified the bank knew in November 1999 when it approved the loan that the promoters had no money at risk and that "from the bank's viewpoint, for a period of a year we would have been financing 100 per cent of the transaction."

Frankly, the Court finds it curious that Defendants are arguing that in an attempt to secure this loan, the Promoters defrauded and lied to the bank. Yet, to this date the bank which is willing to provide millions of dollars in financing, at no time takes the position that it was

[* 9]

defrauded. Indeed, they have given testimony on behalf of the Plaintiffs. To this Court, it borders on incredulity that they would be supportive of Plaintiffs' position if, indeed, they were lied to and misled.

B. Aiding and Abetting Claim against Yerulshami and Kentfield

Plaintiffs claim that Yerulshami and Kentfield aided and abetted the breach of fiduciary duty by Gans in connection with the hurdle event. Aiding and abetting liability arises where (1) there is a breach of fiduciary duty, (2) the defendant "knowingly induced or participated in the breach, and (3) plaintiff suffers damages. S&K Sales Co. v. Nike, Inc., 816 F.2d 843, 847-48 (2d Cir. 1987).

In support of their claim, Plaintiffs proffer Gans' testimony that he relied on Yerulshami when making decisions. This testimony, in conjunction with the other actions being taken by Gans and Yerulshami at the same time (discussed *infra* in this decision), evidences to this Court that Yerulshami was instrumental in procuring Gans' actions. Those other actions, discussed infra, include his participation in creating an Acting Board of Managers to supercede the authority of the DCM. They also include Yerulshami's causing a letter to be sent to Bank Hapolim which resulted in a freezing of AMPA's assets. Yerulshami specifically stated on the record, when being questioned about this letter, that he wanted to prevent the hurdle event.

C. Damages

The court has "broad discretion to tailor the relief to suit the situation as it exists on the date the relief is granted." Needham v.Cruver, 1993 WL 179336 at 5 (Del. Ch. May 12, 1993). This Court finds that the appropriate remedy is an order requiring Gans , Yerulshami, and Kentfield to pay the other DCI investors the amount necessary to trigger the hurdle event. This

[* 10]

remedy shall put all the parties in the positions in which they should have been had Gans not improperly exercised his vetoes.

Based on the foregoing, it is ordered that Gans, Yerulshami, and Kentfield are jointly and severally liable to the DCI members, other than Kentfield and Bricla Realty, for their capital contributions of $3,100,000.00 plus 10% interest from August 26, 1998 to the date of the veto, October 2000. Payment of this amount shall achieve the hurdle event as defined in the DCI agreement.

III. Acting Board of Managers Issues

A. Illegal Creation of the Acting Board of Managers

At about the same time that the proposed hurdle event was vetoed, the evidence shows that Yerulshami unsuccessfully made a demand upon the Buffer Sub Committee (a committee established by amendment to the DCM agreement), to eliminate one of the promoters by amending the DCM agreement. (Plaintiff's exhibit 118). Yerulshami also asked the subcommittee to rewrite the powers of the DCM board so that the remaining promoter would have no voting power with regard to any interest of the investors (Pl. Ex. 155 p.3).

When the BSC failed to act, Yerulshami and Gans improperly created the ABOM to seize control of DCI. Yerulshami and Gans scheduled a meeting of the DCI investors on November 8, 1999 seeking to have a resolution passed which would create the ABOM. The meeting was scheduled in a surreptitious manner whereby Gans scheduled the meeting at a time when it was known by him that Fogel would be in London, the meeting was scheduled on short notice, and the notice makes no mention of the proposal to create the ABOM.

Yerulshami and Gans drafted a resolution creating the ABOM comprised of the two of

[* 11]

them and an investor named Shulman (Pl. Ex. 160). The resolution allows any two of them to act and instructs the ABOM to temporarily assume all the responsibilities and powers that were designated to the Board of Managers of DCI in its LLC agreement.

The Court finds that the statement in the ABOM resolution that it was approved by a vast majority of the investors is false because the resolution as written was never raised at the November 8 meeting of investors. Instead Yerulsami and Gans spoke only of an oversight body to work in conjunction with DCM (Green 1936:14-25).

The ABOM violates the DCM and DCI agreements and its existence is without any legal authority. The DCM agreement has a unanimity requirement and its amendment procedures mandate approval of the promoters. The testimony shows that Yerulshami and Gans were very aware of these provisions as they were the result of a hard fought compromise between Yerulshami and the Promoters. Paragraph 7.4 (a) of the DCI Agreement requires a court finding of fraud or willful misconduct before the DCM board of managers could be replaced. All allegations made by Defendants in support of their actions creating the ABOM are not compelling. If, as defendants argue, exigent circumstances existed, such as inappropriate conduct by the Promoters, which required action to be taken, the appropriate remedy under the DCI agreement was to obtain a court ruling finding misconduct by the plaintiffs. Accordingly, the creation of the ABOM is in violation of these terms of the DCM agreement.

B. <u>Remedy for the Illegal Creation of the Acting Board of Managers</u>

1. *Permanent Injunction*

A permanent injunction is warranted, if the plaintiffs show (1) the violation of a right presently occurring, or threatened and imminent; (2) that there is no adequate remedy at law; (3)

that serious and irreparable injury will result if the injunction is not granted; and (4) that the equities are balanced in the plaintiffs favor. Kane v. Walsh, 66 N.E.2d 53 (1946).

The Court finds that the creation of the ABOM to try to direct the actions of DCM, Papos and the other companies in the corporate chain is in violation of the parties rights under the agreements. The Court finds that irreparable harm exists as money damages are not sufficient to compensate the harm that shall occur if the ABOM is allowed to act, and enjoining its actions is the only appropriate remedy. The equities clearly lie in plaintiffs' favor as their rights under the management agreements are being violated.

This Court finds in favor of the Plaintiffs and a permanent injunction against defendants Yerulshami, Gans, and Kentfield from using the ABOM of DCI in any manner is hereby issued. It is hereby ordered that Yerulshami, Gans, and Kentfield shall be precluded from having the ABOM instruct any of the corporations in the corporate chain, their officers, directors or employees, and any companies that do business with those companies to take any actions. It is further ordered that all defendants forthwith notify Bank Hapoalim in New York that the freeze on bank accounts should be lifted, and the Bank is free to honor transfer instructions signed by any two of the three members of the board of directors of DCM.

2. *Punitive Damages*

Plaintiffs seek punitive damages for Gans' improper veto of the hurdle event and for defendants' improper creation of the ABOM.

Punitive Damages may be awarded where the defendants' conduct demonstrates a "high degree of moral culpability which manifests a 'conscious disregard of the rights of others or conduct so reckless as to amount to such regard.'" Home Insurance Co. V. American Home

Products corp., 75 N.Y.2d 196, 203 at 203 (1990).

The Court in its discretion denies the request for punitive damages as a search of the record does not find conduct which reaches the standard necessary for such an award. This Court finds that Gans, Yerulshami, and Kentfield may have had some legitimate concerns about the Promoters conduct. However, the actions they took to resolve such conduct was clearly illegal and in violation of the various agreements they were allegedly seeking to enforce. Accordingly, while they are liable for this illegal conduct, the Court finds that they did not have the motivation which would warrant punitive damages for their conduct.

IV. Claim relating to the December 26, 1999 letter

A few weeks after creating the ABOM, Yerulsahmi had his Israeli lawyer, Dan Cohen write to its lender, Bank Hapolim, that the defendants controlled the companies. The letter claimed that Kenfield not only had the right to veto transactions at the Papos level, but at Ampa as well. This letter caused the bank to freeze the loan, as well as many other open projects with Ampa. Allegedly, this caused damage to Ampa in the amount of about $1.1 million. Ampa seeks damages from defendants Yerulshami, Gans and Kentfield jointly and severally.

The Court finds credible the testimony of Elinati, the bank officer in charge of the Ampa account at present, and Lanir, the bank officer in charge in 1999. Both testified that as a result of this letter the bank immediately froze its relationship with Ampa and Papos pending receipt of a legal opinion as to whether the promoters properly spoke for those companies. The court also finds that this freeze caused damages to Ampa.

The Court does not find compelling defendants argument that there is a duty of candor towards banks and that the letter only informs the bank of that which it has a right to know. The

[* 14]

Court finds the purpose of the letter was to kill the financing which would allow the promoters to achieve the hurdle event. This finding is based upon the credible testimony of the bank officer Elinati who made it clear that the bank saw no need for disclosure of the veto. Furthermore, Elinati testified that there was no discrepancy between the loan application and the veto right. The finding also rests on the testimony of Yerulshami who admitted "his purpose was to kill the refinancing for the hurdle event". This purpose was further evidenced in a statement made by Oded Edan to the Ampa board on February 16, 2000 (Pl. Ex. 182 p. 2872). Furthermore, the letter was intended to kill the financing necessary to procure the hurdle event because it was sent at approximately the same time that Yerulshami and Gans created the ABOM and vetoed the hurdle event.

Cohen, when sending the letter, was under the belief that it was necessary because Yerulshami told him the bank should be aware that Kentfield had been granted a veto on the Papos board (Cohen 3207:10-16). However, as the Court has found Yerulshami's intent was actually to kill the hurdle event financing.

Plaintiffs seek to hold defendants liable because their conduct is actionable under Israeli law. The court was provided with the legal opinions of two Israeli lawyers. The Defendant's witness, attorney Dan Cohen and Plaintiff's witness Professor Joseph Gross. Cohen who testified on whether his own conduct violates Israel law is found to be an interested witness and the Court does not find his testimony credible. The Court, however, finds the testimony of Professor Gross credible and based on his testimony, holds that Defendant's conduct is actionable under Israeli law.

B. <u>Damages Stemming from the Dan Cohen Letter</u>

The court finds that damages to Ampa resulted from the letter sent by Dan Cohen to Bank Hapolim. Defendants claim that there could be no damages from a freeze because, before Cohen wrote his letter, the bank had insisted on a general lien, called a floating charge, against Ampa's assets as a condition to approving new credit. However, testimony established that the Ampa board, approved a floating charge before the Cohen letter was sent. After the letter, the bank changed the terms, causing damages to Ampa

The Court finds Yerulshami, Gans, and Kentfield jointly and severally liable for damages incurred as a result of the December 26, 1999 letter. However, the Court does not have sufficient evidence to determine the amount of damages incurred. Despite, the testimony given in support as to the amount of damages, the Court has no documentary evidence before it in support. Accordingly, the issue of the amount of damages incurred is hereby sent to a referee to hear and determine.

V. The Malpractice Issues

A. Malpractice by Yerulshami and His Firm

A few months after the acquisition of AMPA was consummated, the promoters, learned that the corporate structure created enormous tax problems for the U.S. investors in the transation. In particular because of §951 of the Internal Revenue Code that deals with controlled foreign corporations and related I.R.S. principles, each repayment of the $30 million bank loans that was used to finance the 1998 acquisition is treated as if a dividend had been paid to the investors. The result is that the investors must report these payments to the bank as income, even though they do not receive any funds with which to cover the taxes that are due. The concept is called "phantom income."

[* 16]

Professor Chirelstein testified that a competent tax attorney would not have permitted the AMPA transaction to proceed without informing the participants of the disastrous tax consequences inherent in the structure. It was undisputed at trial that no such disclosure was made until months after the transaction closed. Had proper disclosure been made, the court finds that Shlomo Fogel would have entered into an alternative deal, involving an Israeli bank called FIBI, which would have funded the entire transaction without any need to involve any Americans.

Before the August 1998 closing, Yerulshami represented to the promoters that he was an experienced international tax attorney competent to handle the tax aspects of the transactions. The promoters contend that his offer was accepted. Yerulshami, on the other hand, testified that he was not hired as the promoters' lawyer and no retainer agreement was signed.

The determination of whether an attorney-client relationship exists is inherently factual, and is governed by traditional principles of contract law. Gillberg v. Shea, 1996 WL 406682 at 4 (S.D.N.Y. 1996). " An attorney-client relationship may exist in the absence of a formal retainer agreement." Swalg Development Corp. V. Gaines, 274 A.D.2d 385, 386, 710 N.Y.S.2d 619, 620 (2nd Dept 2000).

The Court finds Yerulshami's statement that he was never retained, not credible. The evidence as presented shows that Yerulshami was hired by the promoters as tax attorney. He was hired and he worked with the law firm of Morrison and Forester ("MoFo"), which was retained to draft the basic agreements. The finding is based upon the credible testimony of Stuart Offer from MoFo who stated that he had a phone conversation whereby Yeruslshami made it clear to him that he had the expertise to handle the tax analysis of the transaction and that he would do so.

This finding is also based upon a "check list" put into evidence which was drafted by MoFo listing the open tax issues. This check list was drafted at Yerulshami's request so that his firm would have MoFo's thoughts about what tax work needed to be done. Yerulshami is the only lawyer to whom the document was sent. MoFo's time records show their attorneys spent almost no time on any tax work subsequent to sending the check list.

The Court finds that Yerulshami actually performed tax work. Yerulshami handled items on the checklist, which included making the "check the box" elections which resulted in the Israeli companies and Burn becoming "pass throughs" He also drafted the loan documents for Papos and Burn. Yerulshami also changed DCM and DCI from LLP's to LLC;s and had his firm draft a memo entitled "Risk Factors Relating to Israeli Taxation" that was sent to the other investors in DCI before closing.

Yerulshami alleges he had no time to change the corporate structure to avoid the phantom income tax problems because they existed before he ever invested in the venture. The closing occurred August 26th, 1998. According to his time records, Yerulshami personally spent 35 hours in August, beginning on August 4, 1998. Other members of his firm worked 99 hours beginning the same day. Furthermore, testimony of MoFo employee Stephanie Oana revealed that Yerulshami participated in numerous conferences, ether in person or phone. The credible testimony of Oana also was that Yerushalmi and the others at his firm were considered members of the working group arranging the transaction. Accordingly, this Court finds credible the evidence submitted in support of finding Yerushalmi was able to bring to the Promoters attention the phantom tax issues.

The failure of Yerulshami to report the problems constitute malpractice for which he is liable. The credible testimony of tax Professor Chrirelstein was that a competent tax professional would never have consented to the very deal structure used to acquire AMPA. He further testified that a competent tax professional would have disclosed the phantom tax issue. While the phantom income tax problem was inherent in the deal, it was incumbant upon Yerulshami, as tax attorney for the deal, to bring the problem to the attention of those involved. Accordingly, Yerulshami is liable for malpractice.

B. Breach of Fiduciary Duty by Gans for Not Helping to Solve the Phantom Income Tax Problem

The Court does not find enough evidence on the record to find that Gans breached his fiduciary duty for not helping to solve the phantom income tax problem. Plaintiffs contend that he should have allowed the hurdle event to occur followed by the dissolution of DCI and DCM, which would have been followed by sales by the American promoters, not by Gans or other Kentfield members.

Gans is not a tax attorney nor was he given the responsibility of solving the phantom income tax problem. The record also does not reflect that he knew of the phantom income tax problem and he still failed to take actions to remedy the problem.

C. Damages

This Court finds that Yerushalmi and Yerushalmi & Associates LLP jointly and severally are hereby liable to the promoters in the amount of $ 3,309 for malpractice. Furthermore, Yerushalmi and Yerushalmi & Associates LLP jointly and severally must pay DCI the sum of $14, 824 which is to be distributed to those DCI members who incurred phantom taxes.

[* 19]

nore, Yerushalmi and Yerushalmi & Associates shall be liable for the full amount of :1 taxes incurred in the future by the promoters or any of the DCI members.

It is further Ordered that the above relief is denied as sought against defendant Gans.

:famation Issues

The Promoters seek punitive damages based upon several alleged instances of defamatory ents made by Defendants to other DCI investors. The alleged defamatory statements were when:

- Gans chaired an ABOM meeting where investors were given a written presentation stating "The promoters have been signing checks at all levels by themselves or through cronies, while not providing complete reports of the bank accounts and financial transactions to the Investors or to Martin Gans."

- Defendants told the investors that "the promoters have assigned responsibilities of DCM to Dovertower, a company that is owned and controlled by promoters. This delegation was made without DCM's authorization and consent.

- The defendants' presentations accused promoters of self-dealing in the Ampa group of companies. Further, defendants accused plaintiffs of raising their salaries and improperly purchasing a piece of land in which Ampa was interested.

- Yerulshami and Gans claimed that the promoters are responsible for the tax structure which caused the phantom tax problem.

The Defendants argue that the communications are protected by the common interest rilege. The common interest qualified privilege applies where a communication is made ween persons with a common interest or duty. Liberman v. Gelslein, 590 N.Y.S.2d 857, 862 92). The privilege is broadly applied, and the parties to the privilege "need only have such a ation to each other as would support a reasonable ground for supposing an innocent motive for parting the information." Anas v. Brown, 702 N.Y.S.2d 732, 734 (2nd Dept. 2000). The privilege may only be refuted if actual spite or ill will is "the one and only cause for the publication." Liberman, 590 N.Y.S.2d at 439; Angs, 702 N.Y.S.2d at 763.

The Plaintiffs concede in their post-trial reply brief that the privilege is applicable because the communications were made to the members of DCI who have a common interest with Kentfield as owners of DCI. While the statements were most likely self serving to the defendants and in furtherance of an agenda to gain control of the equity at stake, plaintiffs, through their conclusory statements, have failed to meet their burden of establishing malice directed at the Promoters. Accordingly, damages based on the defamation claim are denied.

VII. Promoters' Right to a Management Fee

The promoters contend they proved the issue of a right to a management fee at trial and briefed this issue without objection by defendants that it was an unpleaded claim. Defendants claim that the issue was not pleaded or tried. The Plaintiffs request to amend the pleadings pursuant to 3025 (c).

Plaintiffs request is granted. An application to amend under 3025(c) lies within the discretion of the Court. Murray v. City of New York, 43 N.Y.2d 400, 401 N.Y.S.2d 773 (1977). Here, Defendants cannot allege demonstrable and real surprise or prejudice as to this claim. Furthermore, the proof at trial warrants the consideration of this claim by the Court. Accordingly, the Court shall address the issue in its decision.

The Promoters seek a 2 % management fee pursuant to Paragraph 7.8 of the DCI Agreement. Paragraph 7.12(c) of the DCM Agreement states that the fee "shall be applied as agreed by Members other than Kentfield Capital LLC holding at least 60% of the Company Interests." The five members of DCM are Kentfield (25%) and the four promoters (75%). The

[* 21]

fee has not been paid since Bank Hapoalim in November 1999 froze both DCM's and DCI's bank accounts.

When the issue was tried, Gans made the statement that the promoters had to pay professional and travel expenses from the 2% fee, leaving only the residual for them. Gans conceded on cross examination that no such provision is contained in the DCI and DCM agreements which both state that "the company shall pay all legal and accounting fees" and the next subparagraph in each contract which has the same language about "travel expenses."

The Court finds that paragraph 7.8 of the DCI agreement sets forth that the managers are entitled to the claimed 2% management fee for services rendered. This fee, under the agreements, is not to be reduced by any expenses. At the post trial oral argument, defense counsel conceded that the management fee is disclosed in the DCM agreement, however argued that at the time everyone thought there would be an upstream of dividends rather than borrowing of additional money. As the Court has already found, borrowing additional money to finance the venture was anticipated in the PPM.

Accordingly, Bank Hapoalim New York is directed to release funds to pay this fee, plus interest, upon presentment of transfer instructions signed by Fogel and Lawrence Schneider, authorized signatories on those accounts.

VIII. Counterclaim Issues

A. Fraudulent Inducement as a Matter of Fact

The first four counts of the Amended Counterclaim are based upon allegations of fraud. The Defendants allege numerous instances of fraudulent conduct by the Promoters.

1. *Alleged concealment of the terms of the bank loan*

The Defendants allege the Promoters lied about the terms of the bank loan taken to finance the Ampa transaction. Specifically, it is alleged the Promoters never revealed that Kentfield and the other DCI investors could not be repaid until after the bank loan was paid. Defendants also allege they did not know that the bank insisted on a provision that the promoters would constitute a majority of the directors of the board of Papos.

The Court finds that Defendants knew well before closing that the bank had priority and that its loan was senior to other debts. Two loans were taken by Papos to buy control of Grodetsky Assets; the company that controls Ampa. The first loan was from Bank Hapoalim for $30 million and the second was from Burn Holdings, the Dutch company that owned Papos, for about $5 million. On August 10th, 1998, a resolution was drafted which stated the Burn loan to Papos was subordinate to the loan Papos has taken from Bank Hapoalim. Gans executed the resolution pursuant to the direction of Yerulshami's firm. Yerulshami also testified that he knew before closing that the bank loan was "senior." Accordingly, the Court does not find that Defendants, prior to making their investment, were unaware of the terms of the bank loan.

Yerulshami also alleges he did not know that the bank insisted upon a provision that the promoters would constitute a majority of the directors of the Papos board. However, this same provision is in the DCM Agreement which Yerulshami helped draft and which was signed on behalf of Kentfield. This is compelling evidence that Yerulshami knew the bank would require the promoters to constitute the majority of the board of Papos.

Furthermore, "a fraud claim lacks merit where the other party had the means available to ascertain the truth, but elected to rely solely upon a representation." Carazza v. Thinkpath.Com, NYLJ, Jan. 10, 2002, p. 21. The court does not find credible that Yerulshami, a sophisticated international investor, was unaware of the terms of this bank loan. There is no credible evidence on the record of Promoter's alleged intent to hide these terms from Yerulshami. Yerulshami also had access to any information he wanted because he was a party of the working group that put together the DCI investment. Furthermore, the record is also void of credible evidence that the loan documents were changed immediately prior to closing.

Accordingly, the Court finds that the defendants were not fraudulently induced to invest based on an alleged concealment by the promoters of the terms of the bank loan.

2. *The Transaction Fee*

Defendants allege that before the closing the promoters did not disclose the request for a transaction fee from the sellers. Defendants argue that the promoters falsely represented that the sellers of Grodetsky assets promised an approximate $2 million transaction fee for putting together the deal, but that the promoters waived it. However, the promoters believed they were still entitled to the fee.

The promoters invested $1.6 million before the closing and believed they were entitled to a transaction fee of about $2 million. An invoice was sent to the Bank asking it to send the money to Burn Holdings for eventual payment to the promoters. The money had to be held there until unanimous approval to release the money by the DCM board of directors, including Gans, was obtained. An invoice for that exact amount of money was also sent to Yerulshami in New York. The Court finds that there was nothing surreptitious about the promoters' request for the money.

Yerulshami disputed the fee. The promoters and Yerulshami negotiated the settlement of this fee and this is evidenced by numerous drafts sent by Mark Leve, of Yerulshami's law firm to the Promoters. In the drafts, it was agreed that the promoters would receive $1,984,000, and they would still be considered investors in DCI for $1.6 million of which they would get back *after* other investors had been paid. This was a compromise by the promoters who believed they were entitled to both a fee and a return of their investment *when* the others got paid. The court does not find credible Yerulshami's testimony that he objected to Leve sending these drafts to the promoters and the Court finds he approved the sending of the drafts.

The Court finds that the Promoters were under pressure from Lawrence Schneider, who had put up the promoters initial capital of $1.6 million, to return the money, and in conjunction with this, eventually Yerulshami pressured the promoters to give up the fee entirely. This is evidenced in the final agreement dated May 17, 1999. The agreement states that the promoters waived their fee and their $1.6 million capital investment was converted into a loan and immediately repaid together with expenses of $384,000. Documentary evidence shows that Yerulshami was sent invoices for the promoters' $384,000 in expenses. Gans signed the agreement, individually, and Yerulshami signed it on behalf of Kentfield.

Yerulshami now claims that the promoters never intended that their money would be at risk. But the proof shows that the promoters believed they were entitled to a fee, which they could use to pay back Schneider, and that they would be investors at risk for $1.6 million.

The Court is not compelled by Defendants argument that the promoters falsely represented they were promised a transaction fee by the sellers, the Grodetskys. Defendants argue that this false representation led to the May, 1999 addendum allowing the promoters to take out their $1.6 million investment

In support of their allegation that the promoters were never promised a transaction fee, defendants proffer the testimony of Yerulshami who testified he had a conversation with Zelma Rubenstein from the Grodetsky family. He testified that Ms. Rubenstein stated that there was never a promised commission to the promoters. The Court does not find this testimony credible. This conversation only came to light at trial and Ms. Rubenstein was never called as a witness for deposition or at trial in support of this testimony.

Accordingly, the Court finds this issue of the transaction fee was resolved by the parties as evidenced in the May 1999 Addendum. Therefore the Court denies defendants' claims as they are merely a rehashing of that which has already been resolved by agreement.

Lastly, defendants' arguments about the transaction fee do not support a claim for fraudulent inducement because whatever the promoters may have told Yerulshami about the commission was after the August 1998 closing. The alleged representation could not have induced him to invest. A prerequisite to a fraud in the inducement claim is that the alleged representation induced the contract. Shea v. Hambros PLC, 244 A.D.2d 39,46, 673 N.Y.S.2d 369, 374 (1st Dept. 1998).

Accordingly, the Court denies the claims of fraudulent inducement based on the alleged failure to disclose the transaction fee.

B. Alleged Breach of Agreements

1. *Breach of the DCM Agreement*

Defendants allege that they were deprived of a meaningful voice on the DCM board because the promoter members of the board (Fogel and Schneider) prevented the board from meeting. The court finds no credible evidence on the record supporting this allegation.

Defendants have failed to come forward with any compelling evidence showing that the promoters frustrated any attempts to hold meetings of the DCM board. Further, the record shows that there were consensual informal meetings. This is logical since Gans is based in San Francisco, Fogel in Israel and Schneider in New York City. The DCM agreement specifically provides that meetings can be informal and held on the telephone. No evidence shows that Gans tried to hold a meeting, but could not. Further, at Gans' request, an in person meeting had been held on November 8, 1999.

Defendants have also failed to allege any damages resulting from the failure of meetings being held. Defendants have proffered no credible evidence of any issues the board should have considered, but did not.

2. ***Breach of the September 25, 1998 Amendment***

On September 25, 1998, about one month after the closing, the signatories to the DCM Agreement agreed that Kentfield's representatives on the Papos board would have the right to veto resolutions agreed to by the other Papos board members who are all promoters. Defendants argue that the promoters failed to formally implement the veto in the Articles of Association of Papos. Defendants assert that the promoters had the responsibility to implement the amendment, but surreptitiously failed to do so. The promoters assert that the onus was on Yerulshami because, the amendment states that the implementation necessitated a resolution by Burn Holdings, the Dutch company Yerulshami's law firm had located, with whom his firm had primary contact.

The record is not conclusive as to who had the burden to implement the amendment. However, the Court finds that Defendants have failed to prove damages resulting from the failed implementation.

Defendants allege as a result of the failed implementation, they were deprived of vetoing appointments on the Ampa board. Yerulshami's testimony was that Papos did not make such appointments to the Ampa board, but that they are made formally by Grodetsky Asssets who controls Ampa directly. Israeli legal expert Professor Joseph Gross testified to the same. Grodetsky Assets appointed the directors and Kentfield had no veto right at the Grodetsky Assets level. Kentfield thus has no right to veto appointments of Ampa directors. This finding is further supported by the fact that in March 1999, Grodetsky Assets appointed new Ampa directors who appeared at an Ampa board meeting on March 28, 1999 attended by Edan. If, at that time, Yerulshami believed the appointments in March were improper, he would have objected. An objection was never made until litigation of this matter began. Accordingly, the Court does not find this damages argument credible.

3. ***Breach of the April 1999 Addendum Creating an Executive Committee***

In April, the DCM Agreement was amended to provide for the creation of an Executive Committee to make all major operational decisions in the management of Papos Ltd., Grodecki Assets Ltd., Ampa Ltd., and all their subsidiaries and affiliates. Oded Edan was a member of the Executive Committee. Disputes in the Executive Committee were to be resolved by a Buffer Subcommittee consisting of Oded Edan for Kentfield and Zeevik Feldman for Promoters. A deadlock in the Buffer Subcommittee was to be referred to the DCM Board, and a deadlock in

[* 28]

the DCM Board was to be referred to a permanent decision maker to be appointed by the Buffer Subcommittee.

Defendants argue that the Executive Committee created by the April agreement never held formal meetings. They submit evidence that the efforts to implement the Buffer Subcommittee and Permanent Decision Maker also failed when Oded Edan and Zeevik Feldman deadlocked and Feldman would not agree on a permanent decision maker. Thus, defendants argue that Kentfield was effectively frozen out of major operational decisions regarding Ampa.

There is no credible evidence on the record showing that the promoters intentionally froze Kentfield out of major operational decisions regarding Ampa. The Court finds credible Fogel's testimony that Ampa was managed informally, that he kept Edan fully apprised of all major issues, and that Edan approved every significant transaction. During trial, Edan could not relate a single matter that was kept from him and which he did not approve.

Accordingly, the Court does not find that there was a breach of the addendum creating an Executive Committee.

4. Breach of the May 1999 Addendum

Defendants argue that the promoters breached the provision in the May 1999 addendum requiring them to use their best efforts to minimize the impact of phantom income on the DCI investors.

The Defendants have failed to come forward with credible evidence proving this failure to minimize the problem. While on the stand during trial, Gans failed to dispute that after this addendum was signed, no phantom income was generated.

Kentfield's other claim of breach of the May Addendum is that the promoters have not paid Kentfield $46,000 in phantom taxes generated in 1998. As for this alleged $46,000, promoters do not deny they may owe this amount. However, they argue they have not been provided with sufficient documentation of the debt. The Court finds this amount is payable only after submission of proper affidavits from Kentfield's members stating the amount of the tax they have paid.

5. Fraud in the Inducement based on allegation that the agreements were not performed

The defendants seek damages based on an alleged failure to perform under the three agreements, discussed supra, which were negotiated and signed in September 1998, April 1999 and May 1999. Because the court has found that plaintiffs did not breach any of these agreements, it need not reach the question of whether there was fraud in the inducement.

C. Breach of Fiduciary Duty and Corporate Waste

Defendants allege the promoters' self-dealing led to their claim of promoter's breach of their fiduciary duty and corporate waste. Specifically, defendants cite a transaction whereby Ampa leased Skoda cars from a company connected with Shlomi Fogel. Defendants also cite to an attempt by the promoters to obtain the Ha'argaz property for themselves, rather than for Ampa as contemplated. Defendants also cite to numerous payments to Dovertower and unidentified payments to lawyers and other professionals.

Corporate Waste is "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." White v. Panic, 783 A.2d 543, 554 (Del. 2001). A plaintiff's burden in proving corporate waste is severe because courts recognize that they are ill-fitted to attempt to judge the appropriate degrees of business risk. White, 783 A.2d at 554; Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993).

Defendants have failed to present evidence that the Skoda lease was unfair or an exchange beyond reason. The evidence shows the Skoda lease was approved by Ampa's board, including Edan, following a thorough presentation by an Ampa manager about why the lease was at a beneficial price to Ampa. There is no credible evidence that the lease was so unreasonable as to constitute corporate waste.

As for the allegation of self-dealing regarding the Ha'argaz property, there can be no damages because the deal never took place. The record shows that no promoter ever purchased the property, therefore, there can be no damages.

Defendants also proffer payments of $100,000 to Dovertower and unidentified payments to lawyers and other professionals. The Court finds that the payment to Dovertower was paid as permitted by ¶ 7.12(c) of the DCM Agreement and ¶ 7.8 of the DCI Agreement. The plaintiffs have come forward with evidence showing that Gans approved in writing the majority of the payments. Accordingly, the Court finds that they were not improper.

Defendants argue that the promoters were unwilling to issue properly prepared K-1's to the investors so the investors could calculate and pay their federal income by the October 15, 1999 last filing deadline. The court rejects this argument in support of defendants' claim because Yerulshami acknowledge that Kentfield received these forms and filed its taxes before Ocotber 15, 1999, the last date the IRS permits for filing tax returns without penalty.

Lastly, Defendants allege that the cash flow projections in the May 1998 offering memorandum indicated Ampa could be worth as much as $159 million, and that the company subsequently lost money. They allege that had they overseen the company, such a loss would not have occurred.

At trial, Yerulshami testified that he knew the numbers in the offering memorandum were not accurate and would be changed downward. Yerulshami cannot now argue that he relied on the numbers in the memo when he admitted he knew they were subject to change. Defendants failed to rebut Plaintiffs' economic expert who testified that the best proof of value is the price negotiated between the buyer and seller. The price set forth in the August 1998 purchase agreement reflects a value of approximately $62 million for Ampa. An expert appraisal introduced by Plaintiff's shows the value of Ampa increased to $112 million by December 1999. This is credible evidence that the promoters are not liable for corporate waste.

Accordingly, defendants claim of breach of fiduciary duty and corporate waste is denied.

D. Tortious Interference

Defendants assert that the two promoters (Fogel and Lawrence Schneider) tortiously interfered with the DCM and DCI contracts. Defendants allege that the DCM board did not meet and allege that the promoters made unauthorized payments. Here, nothing is alleged other than breaches of contract. There is no allegation supporting tortious interference with contract by the promoters. Accordingly, the cause of action is denied.

E. Bricla's Fraudulent Inducement Claim

In July 2000, about seven months after litigation began, Kentfield bought 90% of Bricla, which at the time owned a small interest in DCI. Bricla now brings a claim of fraudulent

[* 32]

inducement to invest based on the grounds that it believed the promoters' investment would remain at risk.

The Court has found the May 1999 Addendum to the DCI Agreement resolved this issue by treating the promoters' investment as a loan and returning it with interest. Bricla's claim is that it is not bound by the Addendum because it was not a signatory.

The Court finds that Bricla is bound by the Addendum. The Addendum was an amendment to the DCI Agreement which provided that it can be amended by vote of the DCM board of directors and more than 50 % of DCI's members. All the DCM directors and DCI memembers signed the Addendum, except for Bricla which owned only 5.7% at the time. Accordinly, the Court finds that Bricla is bound by the agreement.

F. Declaratory Judgment

Defendants seek declaratory judgment removing DCM as manager of DCI. This relief is sought based on grounds of misconduct by the promoters and allegations that, to date, DCM has been ineffective. As the Court has held *supra,* the record does not support these claims. Accordingly, the request for declaratory judgment is denied.

IX. CONCLUSION

This shall constitute the Order and Decision of the Court.

Settle Judgment.

ENTER:

J.S.C.

RICHARD B. LOWE III

[* 33]

Dated: August 11, 2003