IN THE CIRCUIT COURT PRINCE GEORGE'S COUNTY, MARYLAND

MICHAEL H. AHAN and PROTOLEX, LLC Plaintiffs	:	
v.	:	**CAL 02-09937**
GEORGE GRAMMAS and GARDNER, CARTON & DOUGLAS Defendants	:	

OPINION AND ORDER OF THE COURT

Before the Court are Defendants' George Grammas and Gardner, Carton & Douglas (hereinafter referred to as "GCD") Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and/or to Revise the Verdict. The trial of this case commenced on July 19, 2004. At the close of Plaintiff Michael H. Ahan's case, all Defendants made Motions for Judgment pursuant to Maryland Rule 2-519. The Court denied each of these motions. At the close of the Defendants' case, all Defendants' renewed their Motions for Judgment. The Court reserved ruling on these Motions at that time.

On August 5, 2004, the jury returned a verdict in favor of Plaintiff against the Defendants on the counts of Legal Malpractice ($1,700,000), Breach of Fiduciary Duty ($8,000,000), Breach of Fiduciary Duty (Third Party Liability)($2,500,000) and Tortious Interference with Economic Relationship ($5,000,000), for a total compensatory award of

$17,200,000. On August 17, 2004, Defendants George Grammas and GCD, filed the postjudgment motions considered here. Plaintiff Michael Ahan filed an Opposition to those motions. A Hearing on these motions was held on September 2, 2004.

This Court by its Order following this Opinion for the reasons stated below will grant the Defendants' Motion for Judgment Notwithstanding the Verdict on all Counts.

STATEMENT OF THE CASE

Plaintiff Michael Ahan and Nader Modanlo formed two companies, Final Analysis Inc., ("FAI"), and Final Analysis Communications Services, Inc. ("FACS"), to build and operate a constellation of satellites that would be used for data transmission and messaging services. FAI was incorporated in 1992. FACS was incorporated in 1993. Ahan and Modanlo were the only shareholders of FAI, each owning fifty percent of the company's stock. Initially, FAI owned all of the issued shares of FACS. Ahan and Modanlo were the only directors of FAI. Each therefore had "negative control" over FAI, meaning that either could block decisions affecting the company at the board of director's level. FAI and FACS were unsuccessful in implementing their plans to build and operate a constellation of satellites for wireless telecommunications purposes. They launched only three satellites, each of which failed to operate as designed.

In 1996, FAI retained GCD. The initial representation was limited to international trade and technology transfer issues. On December 8, 1997, GCD provided FAI with an amended engagement letter, which confirmed an agreement to expand the scope of its representation. In May 1998, another letter was sent which expanded the scope of GCD's role to that of general counsel to FAI and FACS. In addition to GCD, FAI and FACS

employed a number of other law firms to represent them. In connection with a planned high-yield bond offering, they retained Chadbourne & Parke. For FCC issues, they hired Kelly, Drye & Warren. Later, FAI and FACS retained Reed Smith for bankruptcy advice.

By late 1998, significant disagreements had arisen between Ahan and Modanlo, which disrupted their shared management of the companies. In essence, they disagreed on which of them would be in control. During this time, Ahan and Modanlo, along with a third member of the FACS Board – Vincent Cook, began discussing restructuring FAI and FACS in a way that would resolve their differences. On April 19, 1999, Ahan, Modanlo and Cook signed a non-binding Memorandum of Understanding ("MOA"), which expressed the intent of the parties to establish two independently, operated businesses, which would separately and independently pursue FAI and FACS business. Ahan would be responsible for the FAI business, which he would control and operate through a new engineering company. Modanlo would be responsible for the FACS business. GCD would provide legal advice and assistance in the restructuring process by drafting a set of bylaws and assisting in formation of Ahan LLC, the new Engineering Company.

Despite these efforts, the operational issues that separated Ahan and Modanlo prior to entering into the MOA persisted. In June 1999, Ahan retained David Baker as his personal counsel to advise him on all dealings concerning the implementation of the MOA. In September 1999, the continued discord and resulting deadlock brought the companies to near ruin. An interim mechanism to break the deadlock was agreed to by Ahan and Modanlo in October 1999. Pursuant to the "Shareholders Agreement," Ahan and Modanlo would give proxies to the FACS Board of Directors (which had been expanded to five members) so that the Board could vote on issues when there was a deadlock between Ahan and Modanlo on

matters submitted to the FAI shareholders for decision. In addition, Ahan and Modanlo released and waived their rights to assert claims against each other, FAI, FACS, and the companies' agents with respect to past, present or future claims related to restructuring.

Shortly after entering into the Shareholders Agreement, the parties abandoned their efforts to come up with a single set of bylaws. Both Ahan, through David Baker, and Modanlo, through Grammas and GCD, prepared separate sets of bylaws to be presented to the FACS Board. On November 14, 1999, the FACS Board considered both sets of bylaws. Ultimately, the Board voted 3-2 to adopt Modanlo's bylaws. During this same meeting, Raymond Schettino, a FACS Board member, nominated Ahan to serve as Vice President and Secretary of FAI and FACS. Ahan declined to accept the nomination. GCD attorney George Grammas was thereafter nominated and elected to the position of corporate secretary for both FAI and FACS. Later in the day, Ahan resigned his position on the Board of Directors for FAI and as Chief Executive Officer of FACS. Modanlo did not accept his resignation at this time. Ahan therefore remained in his positions with FAI and FACS.

Ahan LLC thereafter began negotiating an Engineering Contract with FAI. The Engineering Contract was signed on February 21, 2000. Ahan again submitted his resignation as Chief Executive Officer, employee, and any other officer position that he held or claimed to have held at FAI and FACS. Despite Ahan again tendering his resignation, it appears that he continued in his positions at both FAI and FACS.

Problems quickly developed between Ahan LLC and FAI regarding the implementation and interpretation of the Engineering Contract. In July 2000, David Baker, on behalf of Ahan, described in a letter to Rod Glover, another attorney associated with GCD, Ahan's desire to have FAI dissolved through bankruptcy. On August 15, 2000,

pursuant to the provisions in the bylaws adopted by the Board in November 1999, a series of meetings were called by Modanlo, which resulted in Ahan being replaced as a director of FACS. As a result, by August 2000, the dispute became the subject of an American Arbitration Association ("AAA") proceeding. During this same time, litigation also ensued in Montgomery County Circuit Court. That Court ordered that the governance and structure of FACS be maintained as it was on August 14, 2000, with Modanlo serving as President. On October 17, 2000, all claims by all parties were dismissed.

The deadlock continued until April 2001, when FACS shareholders elected a new slate of directors. Raymond Schettino, who was not re-elected, filed suit against Modanlo, FAI and FACS in Montgomery County Circuit Court. Ahan asserted claims against the same parties as Dr. Schettino. On September 4, 2001, three creditors of FAI filed a petition for involuntary bankruptcy in the United States Bankruptcy Court. A trustee was appointed and the assets of FAI were put up for auction. Ultimately FACS, which held the FCC license for operation of the constellation that the companies sought to build, forfeited that license because it failed to meet the required milestones set forth in the license. In April 2002, Ahan filed the instant lawsuit against GCD and George Grammas.

DISCUSSION

Applicable Law

A. Judgment Notwithstanding the Verdict

This Court's consideration of Defendants' Motion for Judgment Notwithstanding the Verdict is governed by Maryland Rule 2-532. The motion should be granted pursuant to the Rule when the evidence presented at trial does not support the verdict of the jury. *See* PAUL

V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY at 448 (3d ed. 2003). Thus, the motion tests the legal sufficiency of the evidence. *See Impala Platinum, Ltd. v. Impala Sales (U.S.A.), Inc.,* 283 Md. 296, 389 A.2d 887 (1978).

The standard for granting a Motion for Judgment N.O.V. is the same as the standard for granting a Rule 2-519 Motion for Judgment. *See, e.g. Miller v. Michalek,* 13 Md. App. 16, 281 A.2d 117 (1971). The Motion for Judgment N.O.V. must be denied if there exists "legally competent evidence, however slight, from which the jury could have found as they did…." *Houston v. Safeway Stores, Inc.*, 109 Md. App. 177, 183, 674 A.2d 87, 89 (1996)(quoting Huppman v. Tighe, 100 Md. App. 655, 663, 642 A.2d 309 (1994)).

B. New Trial

The Motion for New Trial is governed by Maryland Rule 2-533 and is granted in the discretion of the trial judge to prevent a miscarriage of justice. PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY at 452-53 (3d ed. 2003); *see also Cam's Broadloom Rugs, Inc. v. Buck*, 87 Md. App. 561, 590 A.2d 1060 (1991).

C. Revision of Judgment

Pursuant to Maryland Rule 2-535(a), a court may exercise revisory power over a jury verdict. This power, however, is "no greater than the power it had to grant a judgment notwithstanding the verdict or new trial under Rules 2-532 and 2-533." PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY at 460 (3d ed. 2003).

D. Remittitur

Remittitur is not a creature of statute, but instead is a common law power of a trial court to reduce a verdict that it determines is too large. Technically, when a court grants a remittitur as to compensatory damages, it orders a new trial unless the plaintiff will agree to accept a lesser sum fixed by the court, instead of the jury verdict. *Owens-Corning v. Waltka,* 125 Md. App. 313, 337, 725 A.2d 579, 590-91 (1999). A remittitur may be ordered if a court determines that the verdict awarded by the jury "is 'grossly excessive,' or 'shocks the conscience of the court,' or is 'inordinate' or 'outrageously excessive,' or even simply 'excessive.'" *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969 (1988)(quoting *Conklin v. Schillinger*, 255 Md. 50, 69, 257 A.2d 187 (1969).

Standing

Defendants argue that the Plaintiff lacks standing to assert the following claims: Count I (Legal Malpractice), Count II (Legal Malpractice – Third Party Beneficiary), Count V (Breach of Fiduciary Duty – as Attorney and as Corporate Officer), and Count VI (Breach of Fiduciary Duty – Third Party Beneficiary). The Defendants contend that these claims are derivative claims based on an alleged decrease in the value of the Plaintiff's FAI stock. As such, these claims must be brought by the corporation and not by the plaintiff as an individual shareholder. This Court agrees with Defendants and will therefore by this Court's Order following this Opinion grant the Defendants Motion for Judgment Notwithstanding the Verdict on Counts I, II, V, and VI because Plaintiff lacks standing to assert the claims set forth therein.

The Court of Appeals holding in *Waller v. Waller,* 187 Md. 185, 49 A.2d 449 (1946) controls this Court's decision in the case at bar. In *Waller*, the plaintiff claimed that several

officers and directors were conspiring to obtain control of the company, destroy the value of his stock, and generally ruin the plaintiff financially. In that case, the Court of Appeals held that "an action at law to recover damages for an injury to a corporation can be brought only in the name of the corporation itself acting through its directors, and not by an individual stockholder though the injury may incidentally result in diminishing or destroying the value of the stock." *Waller v. Waller*, 187 Md. 185, 189, 49 A.2d 449, 452 (1946).

Judge Delaplaine, writing for a unanimous Court of Appeals of Maryland, reasoned that "the cause of action for injury to the property of a corporation or for impairment or destruction of its business is in the corporation, and such an injury, although it may diminish the value of the capital stock, is not primarily or necessarily a damage to the stockholder, and hence the stockholder's derivative right can be asserted only through the corporation." *Waller*, 187 Md. at 189, 49 A.2d at 452. Despite this holding, however, the Court of Appeals noted that a shareholder may individually be allowed to bring a direct action when the wrongful act is directed at the shareholder *personally*. *Waller*, 187 Md. at 192, 49 A.2d at 453. This is the distinction that Plaintiff points to in traversing the bar to his standing to pursue these claims in the instant case set up by *Waller*. *Waller,* 187 Md. at 192, 49 A.2d at 453. His argument is to no avail in this case for the reasons that follow.

A "derivative action" is a claim asserted by a shareholder plaintiff on behalf of the corporation to redress a wrong against the corporation. The action is derivative because it is brought for the benefit of the corporation, not for the shareholder plaintiff. *Kramer v. Western Pacific Industries, Inc.,* 546 A.2d 348, 351 (Del. 1988); *See also Lewis v. Spencer*, 1990 WL 72615 at 2 (Del. 1990)("[W]here a plaintiff shareholder claims that the value of his stock will deteriorate and that the value of his proportionate share of the stock will be

decreased as a result of alleged director mismanagement, his cause of action is derivative in nature."); *Litman v. Prudential-Bache Properties, Inc.,* 611 A.2d 12 (Del. Ch. 1992); *Seinfeld v. Bays*, 595 N.E.2d 69 (1992)(citing *Kramer v. Western Pacific Industries, Inc.,* 546 A.2d 348, 351 (Del. 1988)("Claims of devaluation of stock . . . are claims which accrue to the corporation rather than to individual stockholders.").

In contrast, a "direct action" is a claim asserted by a shareholder, individually, against a corporate fiduciary, such as a director, to redress an injury personal to the shareholder. "[D]amages recovered in a direct action are to remedy the shareholder plaintiff individually, they are payable to him, not the corporation." *Paskowitz v. Wohlstadter,* 151 Md. App. 1, 9, 822 A.2d 1272 (2003).

Maryland law is clear. "[T]he plaintiff [in a direct action] must allege either an injury which is 'separate and distinct from that suffered by other shareholders,' or a wrong involving a contractual right to vote or to assert majority control, which exists independently of any right of the corporation." *Paskowitz*, 151 Md. App. at 10, 822 A.2d at 1277 (quoting *Moran v. Household International, Inc.,* 490 A.2d 1059, 1070 (Del. Ch. 1985) *aff'd*, 500 A.2d 1346 (Del. 1985)(in turn quoting 12b *Fletcher's Cyclopedia Corps*, § 5921, p. 451 (Perm.Ed., Rev.Vol.(1984)). The Plaintiff Ahan asserts in the instant case that he has a direct claim because the actions taken by Grammas and GCD breached a fiduciary duty owed to him directly and personally.

Plaintiff in making that assertion relies on the following passage in *Waller*:

> "[U]nquestionably[,] a stockholder may bring suit in his own name to recover damages from an officer of a corporation for acts which are violations of a duty arising from contract or otherwise and owing directly from the officer to the injured stockholder, though such acts are also violations of duty owing to the corporation."

Waller, 187 Md. at 192, 49 A.2d at 453. This Court finds that reliance on this particular passage in *Waller,* without more, is misplaced.

The Court of Appeals, in *Waller,* provided concrete examples in which courts have allowed stockholders to bring a suit in their individual capacity against an officer or director of a corporation.[1] The Plaintiff in this case points out specific instances in which the actions taken by the Defendants were specifically targeted at him. He alleges that Grammas and GCD participated in a consistent course of conduct to oust Plaintiff from the companies and to effectively destroy his 50% ownership interest in FAI by: drafting and implementing bylaws that stripped Ahan's 50% control interest; secretly issuing FAI shares to Polyot to dilute Ahan's ownership of the companies; calling Board meetings for the express purpose of ousting him; and negligently or intentionally omitting a key restriction of proxy rights on any shares issued to Polyot.

This Court recognizes that the cases mentioned in *Waller* are not all encompassing and are merely examples of instances in which courts have allowed a shareholder to bring suit personally against a corporation. However, as examples, they serve to provide a threshold description of the type of relationship and the requisite conduct that trial courts, such as this one, should consider in determining whether there is a violation of a duty owed directly to a shareholder. Using those cases as benchmarks, *this Court concludes that, as a matter of law, the Plaintiff has no fiduciary relationship with Defendants, Grammas and*

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[1] *Vierling v. Baxter*, 293 Pa. 52, 141 A.2d 728 (1928) held that a stockholder could bring suit against the officers of the corporation for defrauding him of his patents, royalties and other property. *Cutting v. Bryan*, 9 Cir. 30 F.2d 754 (9th Cir. 1929) a corporate officer entered into a contract to convey to the corporation the title to certain property which had been taken in his own name, it was decided that individual stockholders could bring suit against him because he held the property in trust for the benefit of the stockholders. *Blakeslee v. Sottile*, 118 Misc. 513, 194 N.Y.S. 752 (1922), where the manager of an incorporated automobile sales agency, who held a considerable amount of the capital stock as trustee, impaired the business by persuading the automobile manufacturer to transfer the agency's contract to another company, it was held that the owner of the stock could bring suit against the manager for violating his fiduciary duty.

GCD arising from either contract or any other source ***independent*** *of the duty owed to all stockholders of FAI and FACS*. Since no **independent** relationship existed between Plaintiff Ahan and Defendants Grammas and GCD, there was no independent duty. Therefore, Plaintiff, as a matter of law, has no standing to assert a breach of such a duty.

This analysis is made even more compelling by the fact that Plaintiff Ahan claims as his damages resulting from Defendants Grammas and GCD's conduct the destruction of the business and what he would have reasonably expected to receive as profits, *i.e.*, an increase in the value of his stock. Maryland law is equally well-settled by *Waller* on this issue. "[A] stockholder cannot maintain an action at law against an officer or director of the corporation to recover damages for fraud, embezzlement, or other breach of trust which depreciated the capital stock or rendered it valueless." *Waller*, 187 Md. at 190, 49 A.2d at 452. This holding in *Waller* is "applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder." *Danielewicz v. Arnold*, 137 Md. App. 601, 617, 769 A.2d 274, 283 (2001).

In the instant case, there is no injury suffered by Plaintiff Ahan that was not suffered by other shareholders, namely the other 50% shareholder Modanlo. Both shareholders alike lost considerable amounts of money due to decisions made by corporate directors of FAI and FACS, which caused FACS to seek bankruptcy. "It is immaterial whether the directors are animated merely by greed or by hostility toward a particular stockholder, for the wrongdoing affects all the stockholders alike." *Danielewicz v. Arnold*, *supra* (citing *Seitz v. Michael,* 148 Minn. 80, 181 N.W. 102, 12 A.L.R. 1060, 1068 (1921)). Even "[w]here conspirators ruin a person financially by forcing into receivership a corporation in which he was a large stockholder, in order to eliminate him as an officer and to acquire control of the corporation,

the wrongs are suffered by the injured person in his capacity as a stockholder, and the action to recover for resulting injuries should be brought by the receiver." *Waller,* 187 Md. at 191, 49 A.2d at 453 (citing *Miller v. Preston*, 174 Md. 302, 313, 199 A. 471, 476 (1938)).

Legal Malpractice

Notwithstanding my holding to the contrary, assuming, *arguendo*, that the Plaintiff Michael Ahan had standing to bring this suit, this Court now considers the other issues presented by the parties. In a suit against an attorney for negligence, the plaintiff must prove that (1) there was an attorney-client relationship, which gives rise to a duty owed to the plaintiff, (2) that the attorney breached that duty, and (3) the attorney's breach was the proximate cause of the client's injury. PAUL MARK SANDLER & JAMES K. ARCHIBALD, PLEADING CAUSES OF ACTION IN MARYLAND § 3.19, *Comment* at 186 (3rd ed. 2004). *See also Fishow v. Simpson*, 55 Md. App. 312, 462 A.2d 540 (1983); *Maryland Casualty Co. v. Price,* 231 F. 397 (4th Cir. 1916); *Wong v. Aragona*, 815 F. Supp. 889 (D. Md. 1993), *aff'd*, 61 F.3d 902 (4th Cir 1995); *Berringer v. Steele*, 133 Md. App. 442, 758 A.2d 574 (2000); *Flaherty v. Weinberg,* 303 Md. 116, 492 A.2d 618, 53 USLW 2613, 61 A.L.R. 4th 443 (1985); *Wren v. Wasserman*, 1995 WL 848529 (D. Md.).

A. Attorney-client relationship

Before a legal-malpractice claim against an attorney can go forward, it is necessary to establish that an attorney-client relationship existed between the purported client and the attorney. Black's Law Dictionary 230 (7th ed. 1999) defines a client to be "a person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist, and

defend him in legal proceedings…. [A client also] include[s] one who disclose[s] confidential matters to [an] attorney while seeking professional aid, whether attorney was employed or not." This Court recognizes that the formation of an attorney-client relationship is not limited to the rigorous formalities of an express agreement or a payment arrangement. In fact, an attorney-client relationship "can, and often must, be implied from the facts and circumstances of the given case." *Attorney Grievance Comm'n of Maryland v. Shaw*, 354 Md. 636, 650-651, 732 A.2d 876, 883 (1999). In addition, "[t]he relationship may arise by implication from a client's ***reasonable*** expectation of legal representation and the attorney's failure to dispel those expectations." *Attorney Grievance Comm'n of Maryland v. Brooke*, 374 Md. 155, 175, 821 A.2d 414, 425 (2003)(emphasis added).

The case at bar presents an issue that Maryland's appellate courts have never squarely faced – whether an attorney who serves as corporate counsel to a closely-held corporation with two equal 50% stockholders, absent an independent contract or other source of the relationship, automatically also creates an independent attorney-client relationship with each of the corporation's equal shareholders. Of course, an attorney-client relationship may arise given the beliefs of the purported client if that belief is ***reasonable***. *Bobbit v. Victorian House, Inc.,* 545 F. Supp. 1124, 1126 (Ill. 1982). While the determination of whether such a belief is reasonable is usually a factual inquiry based on the evidence presented in a particular case. *See Attorney Grievance Comm'n v. Brooke, supra*, *Attorney Grievance Comm'n v. Shaw*, *supra*. There are cases when it is not. The instant case is clearly one of them.

The Plaintiff testified at trial that he believed that there was an attorney client relationship impliedly formed between himself and the Defendants Grammas and GCD. The

issue before this Trial Court is whether that belief was reasonable. Based on the evidence presented in this case, this Court holds that, as a matter of law, it was not.

Michael Ahan testified that his belief was based on the following: Defendants, Grammas and GCD, were engaged by FAI in which Ahan was a 50% shareholder; the Defendants undertook to incorporate Ahan's company, Ahan LLC and provided tax advice regarding the tax implications of the new company; Defendants obtained a power of attorney from Ahan to perform legal work on his behalf; the Defendants prepared a draft of an operating agreement; Defendants assisted Ahan and Modanlo in restructuring their respective ownership interest in the companies; and Defendants committed to represent the interest of FAI and FACS. The Plaintiff however specifically alleges in his Complaint that the actions taken by Grammas and GCD were taken by them because they were "***employed as corporate counsel to FAI and FACS***." (Emphasis added).

In addition, during the trial the Plaintiff testified on numerous occasions that there were various discussions of the roles that Mr. Grammas and GCD played as outside counsel. Specifically, he was aware according to his testimony and an e-mail written by the Plaintiff to Modanlo that "George [Grammas] ***does not represent you or I personally***; however, as the corporate attorney, he protects the company's interest and takes his direction from the company's officers in the order of hierarchy if there's a disagreement between us. That is my understanding." (Emphasis added). The Plaintiff knew that Mr. Grammas and the GCD were corporate counsel. The issue is whether it was still reasonable for Ahan to believe that Grammas and GCD also had a separate attorney-client relationship with him. Ahan's own testimony compels this Court to conclude, as a matter of law, that his belief was not reasonable.

All of the evidence presented at trial, exclusive of the Plaintiff's lay opinion testimony, supports this Court's holding that no reasonable jury could find that an attorney-client relationship between Ahan and the Defendants existed and that Ahan's belief that it did exist was unreasonable. The initial engagement letter by GCD identified the client as FAI. Later, two updated engagement letters prepared by George Grammas and GCD all reiterated that FAI was the client of GCD. Furthermore, although not dispositive, there was never any engagement letter or other written document identifying Ahan as a client of GCD nor did Ahan pay GCD for any legal services performed. Modanlo was present during conversations in which Ahan received advice as part of the purported personal attorney-client relationship. Ahan retained David Baker on June 25, 1999, and repeatedly referred to him as his personal counsel. Finally, Ahan confirmed his understanding of GCD's role as corporate counsel in a letter dated June 21, 1999, where he specifically acknowledges that Grammas was corporate counsel indicating that he "has done the best he could do without losing his position as the corporate attorney."

This Court therefore holds that Michael Ahan's lay opinion and Barry Cohen's expert opinion whether considered together or separately are insufficient, as a matter of law, to find an attorney-client relationship existed between Ahan and the Defendants. This Court also finds that, if Ahan believed that an attorney-client relationship existed, his belief was unreasonable based on the evidence presented in this case. Having, therefore, concluded that there is an insufficient evidentiary foundation upon which the jury in this case could find, as they did, that there existed an attorney-client relationship between Plaintiff, Michael Ahan, and the Defendants, Grammas and GCD, their verdict must be set aside and Judgment

Notwithstanding that Verdict entered for the Defendants and against the Plaintiff on Counts I and II.

B. Breach of Duty/Standard of Care

1. Expert Testimony

As a general rule in Maryland, a Plaintiff must provide expert testimony on the standard of care to establish legal malpractice except in those cases "where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts." *Central Cab Co. v. Clarke,* 259 Md. 542, 552, 270 A.2d 662, 667 (1970)(quoting *Butts v. Watts*, 290 S.W.2d 777, 779 (Ky. 1956); *See also Fishow v. Simpson*, 55 Md. App. 312, 462 A.2d 540 (1983). "[E]xpert testimony is necessary to establish the standard of care since only an attorney can competently testify to whether the defendant met the prevailing legal standard." 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.16 at 110 (5th ed. 2000). In this case, there was expert testimony by an attorney that the Defendants did not meet the prevailing legal standard. However, the legal standard and the degree of specialization within the profession necessary to qualify to testify about it are at issue in this case.

The Defendants argue that a Rule of Professional Responsibility can never be the basis of a legal malpractice action citing *Lazy Seven Coal Sales, Inc v. Stone & Hinds, PC,* 813 S.W.2d 400 (1991). While *Lazy Seven* is not controlling in this jurisdiction, this Court finds it persuasive. However, this Court also finds that its holding and certain dicta do not support the Defendants' position.

The Court in *Lazy Seven* held that the violation of the Rules of Professional Conduct were insufficient to be the basis of imposing civil liability on the Defendant in that case. However, the facts of *Lazy Seven* are easily distinguished from the facts of the present case. First, there were two experts who testified in *Lazy Seven*. One of the experts was an ethics professional but he was not "familiar with the practice of law in the area including Knoxville" nor was he asked "to distinguish between the standards by which lawyers are judged depending upon the nature of the proceeding." *Lazy Seven,* 813 S.W.2d at 406. The second expert, a general practitioner, was not familiar with corporate practice, had only a general familiarity with the Code of Professional Responsibility, was not able to "state accurately the difference between an Ethical Consideration and Disciplinary Rule; and he had never read [a] decision . . . regarding legal malpractice or an ethical opinion…." *Lazy Seven,* 813 S.W.2d at 406.

Conversely, in the present case, Mr. Cohen's testimony is as an expert in Professional Responsibility, he has practiced in this area for the last 20 years, he has a working familiarity with the standards governing attorney conduct for attorneys practicing in the District of Columbia, he is currently serving on Rules of Professional Conduct Review Committee for the District of Columbia and he has represented well over 50 lawyers and law firms on questions of professional responsibility in their respective practices.

Chief Justice Reid, writing for the Supreme Court of Tennessee, in *Lazy Seven* contemplated situations like the one in this case when he commented that:

> "Even though . . . the Code does not define standards for civil liability, ***the standards stated in the Code are not irrelevant in determining the standard of care in certain actions for malpractice.*** The Code may provide guidance in ascertaining lawyers' obligations to their clients under various circumstances, and ***conduct, which violates the Code may also constitute a***

> ***breach of the standard of care due a client***. However, in a civil action charging malpractice, the standard of care is the particular duty owed the client under the circumstances of the representation, which may or may not be the standard contemplated by the Code." (Emphasis added).

Lazy Seven, 813 S.W.2d at 405.

This Court agrees with the Defendants that Plaintiff's allegations are complex and go beyond the understanding of a layman. The testimony of an expert is therefore required to establish the standard of care for an attorney's alleged breach of fiduciary duty. This Court disagrees, however, with Defendants' contention that Plaintiff's expert was not qualified to assist the jury in understanding that standard and that the standard he articulated was a legally impermissible standard.

Barry Cohen was "qualified as an expert in professional responsibility" and gave his opinion in this area alone. The Defendants argue that because Mr. Cohen testified that he was "not a corporate lawyer" and his testimony was limited to the area of professional responsibility that, he could not "establish the applicable standard of care for a corporate lawyer; or testify that defendants fell short of that standard."

This Court finds that the fact that Mr. Cohen is not a corporate lawyer goes to the weight his opinion should be given by the jury not its admissibility. The nature of the plaintiff's claims is a breach of fiduciary duty both as a lawyer and a corporate officer. As to Grammas and GCD's duty as a lawyer that duty in this case is identical to the duty proscribed by the DC Rules of Professional Conduct. Mr. Cohen was therefore qualified to testify as an expert as to what standard of care was required of the defendants and whether the conduct of Grammas and GCD was consistent with that standard.

2. Breach of Fiduciary Duty as Attorney

Plaintiff Ahan contends that the Defendants breached their fiduciary duty to him as his attorneys. Specifically he argues that Grammas and GCD, as corporate counsel, had a duty ***not*** to take instruction from Modanlo, one 50% shareholder, even though that shareholder was at the top of the corporate hierarchy, if those instructions were not in the interest of Ahan, the other 50% shareholder. When George Grammas did so, Michael Ahan's expert opines that the Defendants breached their fiduciary duties of care, loyalty, disclosure and good faith to the Plaintiff. Ahan's expert opines that in such a situation, corporate counsel's duty is to remain neutral and merely serve as a referee. If that is impossible the Defendants would then be required to withdraw from representing the corporation.

The parties stipulated at the trial that District of Columbia law governs the consideration of Plaintiff's claim of a Breach of Fiduciary Duty as Attorney. The Scope of the District of Columbia's Rules of Professional Conduct expressly states "[n]othing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others…." D.C. Rules Scope [4].

There is ample persuasive authority that a plaintiff can use as the basis of a breach of fiduciary action, a violation of the Code of Professional Conduct. *See Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 679, 13 Fed.R.Serv.3d 883, (1989)("[W]hile not strictly providing a basis for a civil action, [the Rules] nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the DRs is conclusive evidence of a breach of the attorney's common law fiduciary [duty]."). In addition, in *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988), the Court affirmed

the trial judge's decision to allow an expert witness to use the D.C. Rules of Professional Conduct as a guide to the relevant standard of care in a malpractice action. To hold otherwise, as argued by the Defendants, would enable lawyers to use the Rules of Professional Responsibility to shield themselves from civil liability for actions otherwise encompassed in their duties to their clients simply by pointing to a Rule that covers the conduct at issue. This Court does not believe that the Judges who authored *Lazy Seven, supra; Noble v. Sears, Roebuck & Co.,* 33 Cal.App.3d 654, 109 Cal.Rptr. 269 (1973); *Bickel v. Mackie,* 447 F. Supp. 1376 (N.D. Iowa 1978); *Brody v. Ruby,* 267 N.W.2d 902 (Iowa 1978); *Hill v. Willmott,* 561 S.W.2d 331 (Ky.App.1978); *Drago v. Buonaguria,* 46 N.Y.2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821 (1978); *Bud Godfrey Pontiac, Inc. v. Roloff,* 291 Or. 318, 630 P.2d 840 (1981); *Martin v. Trevino,* 578 S.W.2d 763 (Tex.Civ.App.1978); *Ayyildiz v. Kidd,* 220 Va. 1080, 266 S.E.2d 108 (1980) holding expert opinion necessary and that the Rules of Professional Conduct are not a basis for civil liability intended for their holdings to be reconciled in this manner. For that reason and because common sense and strong public policy considerations dictates otherwise, this Court declines to so hold.

Fortunately for the Defendants, Grammas and GCD they do not need a favorable ruling on this issue to successfully defend against the Breach of Fiduciary Duty Count alleged against them. They prevail for other reasons. On June 25, 1999, Plaintiff Michael Ahan retained outside David Baker as his personal counsel. Ahan acknowledged in a letter, written by him to Modanlo on June 21, 1999, that the Defendants do not "represent you or I personally." Furthermore, on July 17, 1999, Defendant George Grammas clearly delineated the scope of GCD's representation as well as the implications for the equal 50% shareholders, Nader Modanlo and Michael Ahan. He explained:

> Gardner, Carton, & Douglas serves as outside General Counsel to the Companies with respect to all matters of the Companies, except FCC licensing issues and other matters where the Companies have engaged special counsel.
>
> * * *
>
> There are times when an organization's interests may be or become adverse to those of one or more of its constituents. In our view, the transition phase could become such a circumstance. Each of you [Ahan and Modanlo] has the opportunity to be represented by personal counsel during this phase, and we understand that each has engaged counsel.
>
> * * *
>
> We are pleased to continue as outside General Counsel to the Companies subject to your agreement to this letter. With this understanding, we will continue to represent the interests of the Companies, including preserving the operations of the Companies, the value of the Companies' assets and the value of the Companies for all shareholders, but we will not represent your individual interests as FAI shareholders or as officers and directors of the Companies when we believe your interests are adverse to the interest of the Companies.

This letter was received, acknowledged and agreed to by Michael Ahan. This Court therefore holds that there is ***no*** evidence in the record of this case that an attorney-client relationship between Plaintiff Michael Ahan and Defendants George Grammas and GCD existed after July 17, 1999. Whether that relationship terminated in June or July 1999, there is also no evidence in the record that any actions taken by the Defendants after those dates caused injury to the Plaintiff. In fact, all of the actions which the Plaintiff asserts caused his injuries occurred after July 1999.

All of the evidence produced at trial in this case reveals only three distinct legal tasks that were performed by Defendants for Plaintiff Ahan prior to July 1999. The Defendants (1) provided advice concerning the Memorandum of Agreement; (2) provided tax and other

advice concerning the formation of the new entity, Ahan LLC, that plaintiff would own; and (3) formed Ahan LLC. The Plaintiff does not contend that the performance of any or all of these tasks failed to satisfy the standard of care. Furthermore, the rendering of these services is not alleged to have caused plaintiff to suffer any of the damages that are being claimed. Finally, nowhere in Plaintiff's expert Barry Cohen's testimony did he even suggest that any work performed by the Defendants prior to July 1999 failed to satisfy the applicable standard of care.

Instead, Mr. Cohen's testimony at trial centered on the letter dated July 17, 1999, from defendants to FAI, FACS, Ahan, and Modanlo. The letter sought the consent of the addressees to the law firm's continuing representation of FAI and FACS in light of the ongoing disputes between Ahan and Modanlo. Mr. Cohen testified that the letter was deficient to serve as notice in two respects. First, Mr. Cohen testified that it was his opinion that the letter did not constitute "informed consent" because the letter did not provide Mr. Ahan the "right to object to Gardner, Carton and Douglas doing work for the corporation." Second, he opined that because FAI was a small corporation, each stockholder having one seat on the Board of Directors and because the Board was deadlocked "a lawyer should not execute actions on behalf of such a corporation which have the necessary effect of favoring one shareholder over the other, even if they are presented as being in the name of the corporation." These are the only two actions which the Plaintiffs' expert, Mr. Cohen testified violated the applicable standard of care. Based solely on this expert opinion, Plaintiff asserts his claims of Legal Malpractice and Breach of Fiduciary Duty.

No evidence was presented that Mr. Ahan was advised formally of his right to object to GCD's continued of FAI and FACS as general counsel. Mr. Ahan is not an attorney.

However, Mr. Ahan is a sophisticated businessman. The level of notice for consent therefore is not required to be as explicit as it would be for someone with lesser or no experience. The last paragraph of GCD's letter, dated July 17, 1999, begins with the following sentence "[w]e are pleased to continue as outside General Counsel to the Companies ***subject to your agreement to this letter***." (Emphasis added). This is enough to give notice to Mr. Ahan that he did not have to sign or agree to the terms of GCD's continued representation of FAI and FACS outlined in the letter. This Court therefore holds that this does not constitute evidence upon which a jury could reasonably conclude, or even infer, that there was a breach of any fiduciary duty by Defendants to Plaintiff.

As to the second issue, Plaintiff's expert, Mr. Cohen, opines that because the Defendants were representing a corporation where there were two equal 50% shareholders, there is a special fiduciary duty owed similar to that owed by a lawyer to a partnership. He then states as an expert his opinion that any action taken by which corporate counsel favors one 50% stockholder over another violates that "special fiduciary duty" owed to each equal shareholder separately. This Court finds no basis in either the express language of the applicable D.C. Rules of Professional Conduct 1.13(a) or any Opinion or Comment interpreting that Rule which supports Plaintiff's experts' position. Nor do I believe that Mr. Cohen's opinion can be logically deduced from the express language of the Rule for the following reasons.

D.C. Rule of Professional Responsibility 1.13(a) Organization as a Client – provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Thus, the general rule itself does not express or even imply a "special duty" as suggested by the Plaintiff. Comment 4 to Rule 1.13 provides

that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful."

D.C. Ethics Opinion 216 (1991), which sets forth an example of representation of a closely held corporation in action against corporate shareholder. In that example, A and B were each 50% shareholders of C, a close corporation organized under Maryland law which did business in the District of Columbia. During an execution sale U became the owner of A's 50% interest in C. The question on inquiry is whether C's corporate lawyer, retained when C was controlled by A and B may continue to represent C in its action against U, now one of its 50% shareholders in U's action to dissolve C. Using this example as a basis, the opinion makes it clear that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." D.C. Ethics Opinion 216 (1991)(quoting EC 5-18 of the former Code of Professional Responsibility). *See also* D.C. Ethics Opinion 159 (1985); D.C. Ethics Opinion 186 (1987); *Egan v. McNamara*, 467 A.2d 733, 738 (D.C. 1983). "Throughout the representation, the lawyer must continue to recognize that the interests of the corporation must be paramount and that he must take care to remain neutral…." Notwithstanding this neutrality, "the corporation's lawyer may continue to take direction from [the President] until the dispute over control of the corporation is resolved by the courts or the parties. [Unless], the lawyer becomes convinced that [one shareholder's] decisions are clearly in violation of [the] fiduciary duties [owed] to the corporation…." *D.C. Ethics Opinion 216*.

In the instant case, Ahan and Modanlo were deadlocked. The business of the corporation could therefore not go forward without this deadlock being broken. In this

situation, Rule 1.13(a), Comment 4 to that Rule, and D.C. Ethics Opinion 216 all direct corporate counsel to do what is in the best interest of the corporation. This they did in proposing new bylaws to break the deadlock. Furthermore, the evidence presented revealed that all parties including the Plaintiff initially agreed to these steps.

Plaintiff's expert's opinion essentially was that, faced with deadlock at the Board of Directors level and because each 50% stockholder was exercising "negative control," the duty of corporate counsel was to not advise the client company on the methods to break the deadlock if such advice would harm or even compromise the interest of the other 50% equity owner, even if directed to do so by the 50% shareholder who had management authority and was at the top of the company hierarchy. In other words, corporate counsel's duty is to walk away from the company and let it die in the process if necessary.

This Court rejected that opinion as a matter of law when the jury was instructed as follows:

> An attorney representing the corporation has a fiduciary duty to the corporation, meaning he must always act toward the corporation with the highest degree of integrity, loyalty, candor, fidelity and good faith.

The jury obviously disregarded that Instruction and, in doing so, the law governing their deliberations. Judgment NOV must therefore be granted on Counts I, II and V.

3. Breach of Fiduciary Duty as Corporate Secretary

"The general rule . . . is that an officer or director of a corporation does not sustain a fiduciary relation to an individual stockholder with respect to his stock….." *Llewellyn v. Queen City Dairy, Inc.*, 187 Md. 49, 58-59, 48 A.2d 322, 327 (1946). Thus, "[w]here

directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders and any damages recovered are assets of the corporation, and the equities of the creditors and stockholders are sought and obtained through the medium of the corporate entity." *Waller,* 187 Md. at 190, 49 A.2d at 452.

Nevertheless, Plaintiff argues that corporate officers in this case Defendant George Grammas, a Corporate Secretary, owes fiduciary duties to both the corporation and to the individual stockholders. He cites *Toner v. Baltimore Envelope Co.,* 304 Md. 256, 498 A.2d 642 (1985) as his authority. Reliance on *Toner* in this case is misplaced because its holdings are inapposite.

Toner describes a closely held corporation and holds that majority stockholders owe a fiduciary duty to minority stockholders, in certain situations. *Toner,* 304 Md. at 268. The situations discussed in *Toner* are easily distinguished from the facts of the current case. Both Ahan and Modanlo are equal shareholders. Neither is therefore a "majority stockholder." Most importantly, Grammas is a non-shareholder director as opposed to a shareholder-director. *Toner* is therefore not controlling or even guiding in the instant case.

There are, of course, instances in which a director or corporate officer can breach a fiduciary duty owed directly to a shareholder. *Waller,* 187 Md. at 192, 49 A.2d at 453 ("a stockholder may bring suit . . . for acts which are violations of a duty arising from contract or otherwise and owing directly from the officer to the injured stockholder, though such acts are also violations of duty owing to corporation"). *See also Bayberry Assoc. v. Jones, et al.,* 783 S.W.2d 553, 560 (Tenn. 1990)(applying Maryland law, the court noted there are instances where a shareholder is clearly entitled to bring a direct action for a violation of personal rights, *e.g.*, the right to vote).

The only complaint by the Plaintiff about Defendant Grammas in his role as Corporate Secretary is that he failed to provide adequate notice that changes to the composition of the Board of Directors of FACS would be considered at a meeting held on August 15, 2000. There was no other evidence presented by the Plaintiff that related to Grammas's role as Corporate Secretary.

Under Maryland Code (1975, 1999 Repl. Vol.), Corporations and Associations Article, § 2-409(b)(2)(ii), a notice of the meeting "[n]eed not state the business to be transacted at or the purpose of any regular or special meeting of the board of directors" unless otherwise provided for in the bylaws of the corporation. There was no evidence presented in this case that the bylaws of FACS proscribed such notice. Therefore, as a matter of law, no duty was proven to be owed by Grammas as Corporate Secretary to Ahan as an individual shareholder or even to the Corporation in this case.

The Plaintiff, however, contends that the failure to provide this notice is not the only action taken by Grammas as Corporate Secretary, which breached a fiduciary duty to Ahan. Grammas noticed a meeting of the FACS Board for the purpose of removing Ahan from the FAI Board. Plaintiff alleges that, in doing so, he negligently or intentionally, failed to record the FACS Board's unanimous intent to condition any transfer of shares to Polyot without proxy rights. The Plaintiff contends that these actions led to the meeting on August 15, 2000, which was "designed to neutralize and/or eliminate Ahan's voting and control interests in the companies."

Again the Court of Appeals holding in *Waller* is controlling. 187 Md.185, 49 A.2d 449 (1946). A stockholder cannot maintain an action, which affects all stockholders alike, against an officer or director of the corporation "even when the wrongful acts were done

maliciously with intent to injure a particular stockholder." *Waller* 187 Md. at 190-91, 49 A.2d at 452. "It is immaterial whether the directors were animated merely by greed or by hostility toward a particular stockholder, for the wrongdoing affects all the stockholders alike." *Waller* 187 Md. at 191, 49 A.2d at 452.

The Court, therefore, concludes that there is no evidence that could support a jury finding that there was a breach of any fiduciary duty as Corporate Secretary; JNOV therefore will be granted as to Count V.

4. Third Party Beneficiary

The United Supreme Court, over a hundred years ago, held that in the absence of fraud or collusion a party not in privity with an attorney has no cause of action against the attorney for negligence. *National Savings Bank v. Ward*, 100 U.S. 195, 10 Otto 195, 25 L.Ed. 621 (1879). Furthermore, in a majority of jurisdictions, as a general rule, an attorney owes a duty of diligence and care only to his direct client/employer and only that client/employer can recover against him for a breach of that duty. *Clagett v. Dacy,* 47 Md. App. 23, 420 A.2d 1285 (1980). Since the Supreme Court ruling, Maryland has adhered to this strict privity rule in attorney malpractice cases. *See Wlodarek v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940); *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); *Clagett v. Dacy*, 47 Md App. 23, 420 A.2d 1285 (1980); *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998); *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985).

In 1972, the Maryland Court of Appeals announced a limited third-party beneficiary exception to Maryland's strict privity rule. *Prescott v. Coppage,* 266 Md. 562, 574, 296 A.2d 150, 156 (1972). However, this exception is only "to the extent of allowing a true third party

beneficiary to sue an attorney…." *Clagett,* 47 Md. App at 27, 420 A.2d at 1288. "[T]o establish a duty owed by the attorney to the non-client[,] the latter must allege and prove that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship." *Flaherty*, 303 Md. at 130-131, 492 A.2d at 625. "In this regard, the test for a third party to recover is whether or not the intent to benefit actually existed, not whether there could have been an intent to benefit the third party." *Flaherty,* 303 Md. at 131, 492 A.2d at 625.

The Plaintiff argues "whether . . . an attorney-client relationship was ever established . . . these claims are based on the duties that Defendants assumed by undertaking work actually intended to benefit [him] personally when he was not individually represented by Defendants." The Plaintiff alleges that the following services were intended to benefit him personally when performed by the Defendants for "the corporat[e] restructuring of FAI and FACS, the formation of Ahan LLC, and the structuring and drafting of the Engineering Contract." However, Plaintiff's proof fails to follow his proffer. There is no evidence, which is sufficient to prove that there was a specific intent for Ahan to be benefited by any of the work performed by the Defendant's as corporate counsel for FAI and FACS.

This Court finds the Court of Special Appeals' Opinion in *Goerlich v. Courtney Industries, Inc.,* 84 Md. App. 660, 581 A.2d 825 (1990) is instructive on this point. The plaintiff in *Goerlich* was a shareholder and employee of a corporation that hired an attorney to draft a shareholders' agreement, which also purportedly granted the plaintiff lifetime employment. After he was fired, the plaintiff sued the attorney hired by the corporation, arguing that the invalidity of a clause in the shareholders' agreement made it possible for the corporation to terminate him. *Goerlich*, 84 Md. App. at 663, 581 A.2d at 827. The Court, in

Goerlich, held that the third party beneficiary exception did not apply because there was no actual intent to benefit the plaintiff when hiring the attorney. Furthermore, even if "some incidental purpose [of drafting the agreement] may have been to provide for [the plaintiff's] employment [that] does not make the [plaintiff] an intended third-party beneficiary of the agreement." *Goerlich* 84 Md. App. at 664, 581 A.2d at 828. *See also Ferguson v. Cramer*, 349 Md. 760, 766, 709 A.2d 1279, 1282 (third-party beneficiary exception did not apply because the direct purpose and intent of the testator/client in executing a will was not necessarily to benefit the beneficiaries named in the will). In contrast to those cases, the Court in *Montgomery County v. Jaffe, Raitt, Heuer, & Weiss, PC*, 897 F. Supp. 233, 236 (D. Md. 1995), held that Montgomery County was a third-party beneficiary because the law firm was hired by its client for the specific purpose of providing an opinion letter to the County.

This Court finds no evidence in the record of this case upon which the jury could find, as they apparently did, that any of the services performed by the Defendant's were intended to benefit Ahan. In fact, the Plaintiff's Complaint and the evidence point to the contrary. The Plaintiff specifically states in his Amended Complaint that the services Grammas and GCD provided in connection with the companies' restructuring activities were "part of their duties as counsel to FAI and FACS." The July 17, 1999, letter from Grammas to Ahan and Modanlo specifically provides that "in relation to restructuring, we have considered and developed various alternative reorganization strategies and structures in the interests of the Companies, including considering all shareholders' rights and the tax consequences, in accordance with your mutual decisions and directions." In addition, an independent AAA arbitrator stated, "[i]t is evident that GCD's services were primarily designed to represent and benefit the Companies."

As articulated by the Court of Appeals in *Flaherty*, the third-party beneficiary exception has a rather narrow scope. That scope demonstrably and indisputably does not cover the actions of the Defendants in this case. *Flaherty,* 303 Md. at 131, 492 A.2d at 652. The third-party beneficiary exception, when "[p]roperly applied, will not [and should not] expose the attorney [including those in the instance case] to . . . litigation brought by those who might conceivably derive some indirect benefit from the contractual performance of the attorney and his client." *Flaherty,* 303 Md. at 131, 492 A.2d at 652.

There is no legally sufficient evidence to support a jury finding that the Plaintiff, in this case, was an intended third-party beneficiary of the services rendered by the Defendants in the instant case. Judgment NOV must therefore be granted as to Count II and Count VI of Plaintiff's Complaint.

C. Causation

Maryland Courts have never allowed a claim to go forward against an attorney where the record did not contain sufficient evidence to allow a reasonable juror to conclude that the harm complained about by the plaintiff was caused by the attorney's actions. *See, e.g., Stone v. Chicago Title Ins. Co.,* 330 Md. 329, 341, 624 A.2d 496, 501 (1993); *Taylor v. Feissner*, 103 Md. App. 356, 370, 653 A.2d 947, 954 (1995). Plaintiff is correct in stating that the law is well-settled that what is proximate cause of an injury ordinarily is a factual question for a jury to determine. *State v. Brandau*, 176 Md. 584, 589, 6 A.2d 233, 236 (1939). Courts may, however, declare as a matter of law "whether an act was the proximate cause of the injury." *State v. Brandau*, 176 Md. at 589, 6 A.2d at 236. Albeit they "are limited to those [cases] in which but one inference can be drawn from the facts." *Brandau*, 176 Md. at 589, 6 A.2d at

236; *See also Dennard v. Green, et al.,* 95 Md. App. 652, 662 A.2d 797 (1993); *Stone v. Chicago Title Ins. Co.,* 330 Md. 329, 624 A.2d 496 (1993); *Taylor v. Feissner,* 103 Md. App. 356, 376 A.2d 947 (1994).

In order to establish that proximate cause existed, "the plaintiff must show some reasonable connection between the defendant's alleged negligence and the injury suffered by the plaintiff." *Taylor*, 103 Md. App. at 366, 653 A.2d at 952. Accordingly, the Plaintiff must establish that the Defendants' alleged negligence was the cause in fact of the injury sustained.

The Plaintiff's damages theory rests on the notion that but for the Defendant's actions FACS would have been a success and would have generated over $550 million between 1999 and 2007. Therefore, the evidentiary record must be sufficient to support a finding that FACS would have been successful and generated profits for its investors, including Ahan. Otherwise, the jury's verdict cannot be sustained.

The Plaintiff argues that the jury only needed to consider two steps in the causation chain: *all* the Defendant's bad acts and the fact that FACS was ready to go forward with the bond offering as of August 14, 2000. The Defendants urge that the Plaintiff's burden is to prove something more. In particular, that (1) the adoption of corporate bylaws of FACS was with a purportedly illegal quorum provision; (2) which resulted in Modanlo using the quorum provision on August 15, 2000 to remove Ahan from the FACS Board and to elect Karl Olsoni as director to the FAI Board; (3) which resulted in litigation; (4) which caused Lehman Brothers not to proceed with a high-yield bond offering; (5) which resulted in FACS being unable to raise sufficient money to fund the development of its satellites; (6) which resulted in FACS' failure; and (7) which ultimately led to FAI's bankruptcy. Whether

Plaintiff's burden on the issue of causation is as simple as he styles it or as multifaceted as the Defendants argue, it amounts to the same thing. Both require inferences to be drawn from primary evidence produced that are neither rational nor unattenuated.

"The existence or absence of proximate cause rests upon principles of common sense in light of the surrounding facts and circumstances." *Taylor*, 103 Md. App. at 366, 653 A.2d at 952. This Court's common sense tells it that proximate cause does not exist in this case and that there is no evidence in the record to support the jury's verdict.

To allow the jury's verdict to stand even assuming that Plaintiff has standing to pursue his claims and that he has produced sufficient evidence to support each of his theories of liability, I would have to find that he has produced sufficient evidence for this jury to find: (1) FACS would have been successful where no other company had succeeded and a market developed for the satellite communications services that FACS was to provide; (2) contrary to the testimony of Karl Olsoni, Lehman Brothers was prepared to go forward with the high-yield bond offering despite the condition of the telecommunications industry and condition of the would-be competitors in the market in 2000; (3) even if there was high-yield bond financing, the company would have succeeded despite the deadlock between the two 50% shareholders (Ahan and Modanlo); (4) the high-yield bond offering did not proceed because of the litigation between the FACS board members; (5) the Defendants caused the litigation to transpire, which left Ahan with no alternative and therefore caused him to file suit; and (6) Defendants were responsible for the Board voting 3-2 to accept the bylaws presented by Modanlo, even though both Modanlo and Ahan submitted recommended bylaws to be voted upon at the meeting.

There is simply no evidence in the record of this case when considered in its entirety from which rational inferences could be drawn that these facts were true ***and*** causally related. The Jury's verdict must therefore be stricken and Judgment NOV entered.

Tortious Interference

In Maryland, in order to establish a claim of tortious interference the plaintiff must allege and prove "(1) [i]ntentional and willful acts; (2) calculated to cause damage to the plaintiff[] in [his] lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." *Willner v. Silverman*, 109 Md. 341, 71 A. 962, 964 (1909)(quoting *Walker v. Cronin,* 107 Mass. 562 (1880)).

The Defendants move for a new trial because they argue the Instruction read by the Court to the Jury on the claim of Tortious Interference confused the jury and thereby caused them to return an erroneous verdict. That instruction was the Pattern Instruction and was read by the Court to the Jury as follows:

> In order to recover for the tort interference with economic relationship, the plaintiff must prove by a preponderance of the evidence, as the question suggests: One, intentional and willful act on the defendant's part; two, calculated to cause damages and loss to the plaintiff in his or her lawful business or to his or her economic rights; three, done by the defendant[s] with the unlawful purpose of causing such damage and loss without justifiable cause or right; and four, actual damage and loss resulting to the plaintiff.

The Defendants argue three grounds in support of their motion: (1) there were many economic relationships presented during trial and the jury was not instructed precisely on which economic relationship served as the basis of the plaintiff's claim; (2) the instruction

omitted the element of malice, and (3) the instruction failed to inform the jury that the Defendants could not be held liable if the actions they undertook were as agents of FAI and/or FACS.

The first two arguments can be dealt with easily. First, this Court believes that the evidence and counsel for the Plaintiff made clear what economic relationship served as the basis for the Plaintiffs claim. The record shows that Plaintiff's counsel was explicit in explaining that the relationship that was to serve as the basis of the tortious interference claim related to the Engineering contract between Ahan LLC and FAI:

> "Tortious interference with economic relationship. Again, Mr. Grammas is setting up this relationship where FAI is supposed to be sending $50 million worth of work to Ahan LLC, and then tanks it. There's clear tortious interference. In the case of that, ladies and gentlemen, I'm suggesting that your damages should not exceed $50 million because that specific relationship didn't go to the value of FACS' shares but only [the] engineering agreement."

The Defendant's second claim is that the jury instruction omitted a crucial element of the offense – malice. Defendants incorrectly assert that the Court was required to instruct the jury that malice is a crucial element of the offense and that its verdict must be based on a finding of malice.

To support their position the Defendants rely on *Alexander &. Alexander, Inc. v. B. Dixon Evander & Assocs.*, 336 Md. 635, 652, 650 A.2d 260, 269 (1994) where the Court held that actual malice is required for tortious interference. The Defendants misconstrue the Court's holding. The actual holding in *Alexander* states, "for ***punitive damages*** to be recoverable under either form of the tort, the wrongful interference with contract or economic relations must be accompanied by 'actual malice,' *i.e.*, conduct by the defendant characterized by evil motive, intent to injure, ill will or fraud." *Alexander,* 366 Md. at 652,

650 A.2d at 269 (emphasis added). In *Alexander*, the Court provided that [the] malice required was established by the *Willner* line of cases – malice means "deliberate and improper violation of a known right, that is, absence of legal justification." *Alexander*, 366 Md. at 652 n.14, 50 A.2d at 269 (quoting *Damazo v. Wahby*, 259, Md. 627, 638, 270 A.2d 814, 819 (1970). The **MARYLAND CIVIL PATTERN JURY INSTRUCTIONS**, Comment 4 to MPJI-Cv 7:2 states that "[m]alice in the legal sense as distinguished from ill will is required." The Pattern Instruction clarifies the applicable definition of malice in the third element by stating that the action must be done "with the unlawful purpose of causing such damage and loss without justiable cause or right…." MPJI-Cv 7:2. This Pattern Instruction correctly restates the applicable case law. Punitive damages were dismissed on Defendant's Motion prior to trial. Therefore the instruction without mention of "legal" malice was properly given.

I now turn to the third argument propounded by the Defendants, which does have merit. It is undisputed that Defendants were acting as attorneys and therefore agents of FAI at all times operable in this case. Therefore they could not be held liable as tortious interferers.

The tort of intentional interference with contract can be traced back to the seminal case of *Lumley v. Gye*, [1853] 2 El. & Bl. 216, 118 Eng. Rep. 749, 22 L.J.Q.B. 463, which provides the simplest example of intentional interference with a contract.[2] Although decided many years ago, its application has not changed - "a claim of tortious interference with one's business relations can only arise out of the relationship between three parties, the two parties to the contract and the interferer." *Mates v. North American Vaccine, Inc.*, 53 F.Supp.2d

[2] In *Lumley*, the defendant persuaded an opera singer to breach her existing contract with the plaintiff's theater so that she would perform at his theater.

814, 827 (D. Md. 1999). As such, an agent acting on behalf of a principal or employee acting in the scope of employment cannot be liable for interfering as a third party, even if the agent is motivated by personal interests. *Bleich v. Florence Crittendon Servs. of Baltimore, Inc.,* 98 Md. App. 123, 147, 632 A.2d 463, 475 (1993); *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 402, 449 A.2d 1176, 1185 (1982)(corporation's agents not third parties); *Mates v. North American Vaccine, Inc.,* 53 F.Supp.2d 814, 827-28 (D. Md. 1999)(board members not liable for tortious interference with business relationship for removing former president from board of directors even if motivated by personal interests).

The Defendants, as corporate counsel to FAI and FACS are considered agents of the corporation in Maryland and elsewhere. "[T]he word 'attorney' assumes an agency relationship…." *Rappaport v. Vance*, 812 F.Supp. 609, 611 (D. Md. 1993)(quoting *Kay v. Ehrler*, 499 U.S. 432, 111 S.Ct. 1435, 1437 (1991)). Black's Law Dictionary, 117 7th ed. (1999) defines attorney in the general sense as "an agent or substitute, or one who is appointed and authorized to act in the place or stead of another." Furthermore, under Maryland common law, the attorney-client relationship is generally one of agency. *See Baker, Watts, & Co. v. Miles & Stockbridge, et al.*, 95 Md. App. 145, 620 A.2d 356 (1993); *Seney v. Seney*, 97 Md. App. 544, 631 A.2d 139 (1993); *Skeens v. Miller*, 331 Md. 331, 628 A.2d 185 (1993).

The Engineering Contract in question was between Ahan LLC and FAI. Defendants were agents FAI. Defendants were therefore legally the equivalent of parties to the contract. Since the Defendants were agents of FAI and thus parties to the contract, as a matter of law, they cannot be liable for tortious interference with their own contract. *Travelers Indem. Co. v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 90 (1992). *See also Wilmington Trust Co. v.*

Clark, 289 Md. 313, 424 A.2d 744 (1981); *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 449 A.2d 1176 (1982), *cert. denied*, 294 Md. 652 (1982); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 129, at 990 (5th ed. 1984)(the defendant's breach of his own contract with the plaintiff is of course not a basis for the tort. For this purpose the defendant's employees acting within the scope of their employment are identified with the defendant himself so that they may ordinarily advise the defendant to breach his own contract without themselves incurring liability in tort).

The Maryland Court of Appeals, in *K & K Management v. Lee*, 316 Md. 137, 170-171 n.14, 557 A.2d 965, 981 n.14 (1989), rejected "an analysis under which corporate officers, agents or employees, acting on behalf of a corporation within the scope of their authority, are viewed as actors . . . separate from their corporation . . . and thereby can maliciously interfere with business relations between their corporation . . . and the plaintiff…." The Court of Appeals in so holding stated "a suit for breach of contract is the appropriate remedy when one party to a contract alleges that another contracting party has interfered with his contractual rights." *Wilmington Trust,*. 289 Md. at 329-30, 424 A.2d at 755.

Maryland recognizes an agent acting outside the scope of their employment only in the following situations: (1) the agent engages in fraud[3]; (2) participates in a conspiracy[4]; (3) aids and abets unlawful conduct[5] or (4) acts without intent to further the interest of his principal.[6] The jury found that the Defendants did not engage in fraud. On July 2, 2004, this

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[3] *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046 (1992)

[4] *Harnish v. Herald-mail Co*., 264 Md. 326, 286 A.2d 146 (1972); *Marmot v. Maryland Lumber Co*., 807 F.2d 1180, 1185 (4th Cir. 1986)("conspiracy between corporation and its agents requires actions outside scope of employment").

[5] *Fraidin*, 93 Md. App. at 235, 611 A.2d at 1079 (aider and abettor liability possible where attorney aid "others" not principal).

[6] *Pope v. Board of School Comm'rs*, 106 Md. App. 578, 665 A.2d 713 (1995)

Court dismissed Counts X, XI, XII, and XIII,[7] which alleged conspiracy and aiding and abetting theories of liability. As a matter of law they cannot be basis for sustaining the theory that the Defendants were acting outside of the scope of employment. There was no evidence at trial that defendants were acting for their own purposes and not in the interest of FAI, even if their actions are assumed to have been impermissibly contrary to the Plaintiffs' interest. Finally, there was no evidence produced at trial that the Defendants were at any time acting for their own purposes and not in the interest of FAI, even if those actions were contrary to the interest of the Plaintiff. "The plaintiff carries the burden of proving that the attorney's self interest went beyond the scope of his employment as an advisor to his client." *Fraiden v. Weitzman,* 93 Md. App. 168, 235, 611 A.2d 1046, 1079 (1992). In this case he has not done so. Judgment NOV must be therefore be granted as to Count VII.

Damages

1. Damages Award

The Defendants' argue that the jury's award of $1.7 million on the legal malpractice claim, $8 million on the fiduciary duty claims and $2.5 million for the claim of breach of fiduciary duty to a third-party beneficiary cannot be aggregated because the damages theory underlying each claim was the same – diminution in value of the Plaintiffs shares of FAI stock. The Court of Appeals has stated:

> It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories…. The overlapping of damages is generally not permissible, and a

[7] Counts III and IV were dismissed on different theories of liability in the same order.

> person is not entitled to recover twice for the same elements of damage growing out of the same occurrence or event….

Montgomery Ward & Co., Inc. v. Cliser, 267 Md. 406, 425, 298 A.2d 16, 26-27 (1972) (quoting 25 C.J.S. Damages § 3). *See also Smallwood v. Bradford*, 352 Md. 8, 24, 720 A.2d 586, 594 (1998)("Duplicative or overlapping recoveries in a tort action are not permissible"); *Shapiro v. Chapman*, 70 Md. App. 307, 315, 520 A.2d 1330, 1334 (1987)(plaintiffs "would not have been permitted to recover twice for the same tort merely because the wrong gave rise to alternative theories of recovery").

The jury awarded the Plaintiff a total of $17.2 million in damages. This was broken down as follows:

1. Legal Malpractice ($1,700,000)
2. Breach of Fiduciary Duty ($8,000,000)
3. Breach of Fiduciary Duty (Third Party Liability)($2,500,000); and
4. Tortious Interference with Economic Relationship ($5,000,000)

The awards as to each count and cumulatively are considerably less than the amount claimed. It is also less both as to each count and cumulatively than acceptance of any theory expressed by counsel in opening statements and/or closing statements would suggest. Finally, this verdict does not logically follow from this Court's Jury Instructions on causation and damages. Nowhere in the record of this case is there any hint as to what evidence or theory of the claim or case the Jury directly, or even inferentially, based their calculation of damages as to each count and cumulatively. It is therefore impossible for this Court to determine whether the recoveries awarded by the Jury are duplicative or overlapping, except to the extent explained below. Nor, with the same caveat, for the same reason can this Court determine if they are separately or cumulatively excessive.

The awards as to Count I – Legal Malpractice and Count II (Legal Malpractice – Third Party Beneficiary) are clearly based on the same facts. The only difference is the necessary finding as to whether the Plaintiff was a direct client or a third party beneficiary. Similarly, the awards as to Count V (Breach of Fiduciary Duty as Attorney and Corporate Officer) and Count VI Breach of Fiduciary Duty – Third Party Beneficiary) should merge as a matter of law.

The verdicts and their allocation in this case are even more anomalous because these recoveries, although based on the same facts, are for dramatically different amounts. Since these awards separately and cumulatively total less than the only range of damages supported by the evidence (Dr. Nantell's Testimony) and are allocated among the Counts in Plaintiff's Amended Complaint in a manner that cannot be deduced logically by this Court, this Court will grant a remittitur of the total verdict in the amounts awarded on Count I (Legal Malpractice - $1,700,000) and Count II Legal Malpractice – Third Party Beneficiary - $2,500,000), thereby reducing then total judgment to $13,000,000 if the Judgments NOV granted on other grounds are reversed.

The only evidence presented which quantified the alleged damages to Plaintiff was that of Dr. Nantell. He testified the amount of damages suffered by Mr. Ahan was somewhere between $76 million and $167 million. Timothy Nantell Tr. at 44(3) – 47(7). There appears to be no connection between this testimony and the Jury's verdict on each count separately and/or cumulatively. Nevertheless, this Trial Court is not at liberty to set aside this verdict in whole or in part on this ground. The Court of Appeals has held that a jury verdict may only be set aside if it is irreconcibly defective, that is, "[w]here the answer to one of the questions in a special verdict form would require a verdict in favor of the

plaintiff and an answer to another would require a verdict for the defendant." *Davis v. Goodman*, 117 Md. App. 378, 424, 700 A.2d 798, 820 (1997)(quoting *S&R, Inc., v. Nails,* 85 Md. App. 570, 590, 584 A.2d 722 (1991), *vacated on other grounds*, 334 Md. 398, 639 A.2d 660 (1994); *Adams v. Owens-Illinois, Inc.,* 119 Md. App. 395, 408, 705 A.2d 58, 65 (1998). All other verdicts including inconsistent verdicts are not subject to rejection. *Adams*, 119 Md. App. at 408, 705 A.2d at 65. The awards on the individual claims may be aggregated and in a way so they are not duplicative. A jury may apportion damages among liability theories as it sees fit. *See Bacon & Assoc., Inc. v. Rolly Tasker Sails (Thailand) Co. Ltd.,* 154 Md. App. 617, 627, 841 A.2d 53, 59 (2004)(quoting *Travel Comm., Inc. v. Pan Am World Airways, Inc.,* 91 Md. App. 123, 149, 603 A.2d 1301, 1314, *cert. denied,* 327 Md. 525, 610 A.2d 797 (1992)(courts may not interfere with a jury verdict, even one that is inconsistent); *Eagle-Pitcher Indus., Inc., v. Balbos,* 84 Md. App. 10, 578 A.2d 228, 240 (1990)(courts may not "interfere with the results of unknown jury interplay," including inconsistent verdicts)(quoting *Ford v.State*, 274 Md. 546, 553, 337 A.2d 81 (1975). Therefore as a matter of law, the Defendant's Motion for Judgment NOV and/or for a New Trial on the grounds that the verdict returned by the jury is irreconcilable and inconsistent with the evidence cannot be granted on this basis.

The Defendants have, however, raised other arguments with regard to the issue of damages, which this court finds have merit.

2. Measurement of Damages

In Maryland a plaintiff "may recover only those damages that are affirmatively proved with reasonable certainty, and said damages may not be based on speculation or

conjecture." *Roebuck v. Steuart,* 76 Md. App. 298, 314, 544 A.2d 808, 815 (1988). *See also John D. Copanos & Sons, Inc. v. McDade Rigging and Steel Erection Co., Inc., et al,* 43 Md. App. 204, 403 A.2d 402 (1979); *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n,* 830 F.2d 522 (4th Cir. 1987). This rule is easily applied in cases where the business is established and damages can be assessed by looking to the past performance of the business itself. However, the general rule is not so easily applied to situations, such as the one at bar, where the business has no history of profits which can aid in calculating lost profits claimed as a result of the tortious interruption of its operations.

The Court of Appeals suggested in *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 618, 112 A.2d 901, 904 (1955), that damage awards for lost profits caused by harm done to a new business could not easily be recovered because they are "merely speculative and incapable of being ascertained with the requisite degree of certainty" that is required. But it did not bar it directly as has been done in other states.

Indeed, appellate courts in other states have barred the recovery of damages for profits anticipated from a business, which has not started. *Re v. Gannett Co. Inc.,* 480 A.2d 662 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985); *Radlo of Georgia, Inc. v. Little*, 129 Ga. App. 530, 199 S.E.2d 835 (1973); *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955); *Cell, Inc., v. Ranson Investors*, 189 W.Va 13, 427 S.E.2d 447 (1992); *Scheduled Airlines Traffic Offices v. Objective, Inc.*, 180 F.3d 583 (4th Cir. 1999)(applying West Virginia law); *Kay Adver. Co. Inc., v. Olde London Transp. Co*., 216 Va. 273, 217 S.E.2d 876 (1975).

The Court of Appeals for Maryland has declined to lay down such a per se rule. It did, however, recognize in 1955 that no case in Maryland authorized or explained how a

party could recover lost profits when the business is not established and operating for a sufficient length of time. *Evergreen,* 206 Md. at 618-19, 112 A.2d at 904-05.

Instead, the Court of Appeals said the "real concern in considering lost profits as an element of damages is not whether the business is old or new, but rather whether anticipated profits can be shown with reasonable certainty so that the evidence rises above speculation or conjecture." *Copanos*, 43 Md. App. at 208, 403 A.2d at 405. This case-by-case analysis that appears to be mandated by the *Copanos* Court has also been embraced in other jurisdictions. *See Super Valu Stores, Inc. v. Peterson,* 506 So.2d 317 (Ala. 1987); *Chung v. Kaonohi Center Co.,* 62 Haw. 594, 618 P.2d 283 (1980); *In Re Merritt Logan, Inc*., 901 F.2d 349 (3rd Cir. 1990).

The plaintiff, in Maryland, must prove the lost profits with reasonable certainty. *Impala Platinum,* 283 Md. at 339, 389 A.2d 887. The issue of reasonable certainty may be established "with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and [industry averages]…." Restatement (Second) of Contracts § 352, comment b.

3. Expert Testimony

Maryland Rule 5-702 requires that expert testimony be supported by "a sufficient factual basis." The facts upon which an expert bases his opinions must permit reasonably accurate conclusions, as distinguished from mere conjecture or speculations. *E.g., Oken v. State,* 327 Md. 628, 659-660, 612 A.2d 258, 273 (1992). Expert testimony "has no probative force unless there is a sufficient basis upon which to support [the] conclusions" offered. *Nissan Motor Co. Ltd., v. Nave*, 129 Md. App. 90, 125, 740 A.2d 102, 121 (1999)(quoting

Beatty v. Trailmaster Prods., Inc., 330 Md. 726, 741, 625 A.2d 1005 (1993)(in turn quoting *Bohnert v. State*, 312 Md. 266, 275, 539 A.2d 657 (1988)).

The Plaintiff presented a damages expert - Dr. Timothy Nantell. His testimony and analysis constitute the predicate upon which nearly all the Plaintiff's damages evidence is based. Thus, the testimony and expert opinion of Dr. Nantell must meet the requirements set forth in Maryland Rule 5-702.

Dr. Nantell was properly and duly qualified as an expert in the valuation of securities, businesses, business opportunities and economic damages. He has more than 30 years of academic and professional experience in valuation of companies in various industries. Dr. Nantell has published numerous scholarly articles, books and computer software programs relating to the financial theories and techniques of corporate valuation. In addition, Dr. Nantell has previously been qualified as a testifying expert witness, in several cases, including cases where he opined on the issues of damages in commercial claims as well as the value of closely held corporations. There is no dispute as to whether or not Dr. Nantell is an expert and was qualified to testify. The dispute lies in whether or not Dr. Nantell's reliance on the valuation of FAI and FACS performed by Lehman Brothers and by Sturgill & Associates was a proper source of information considering the way they were utilized by him in reaching his opinion.

In order to answer this question, the Court must look to Maryland Rule 5-703 in conjunction with Rule 5-702. Maryland Rule 5-703(a) provides that in addition to the facts perceived or made known to the expert, he may also consider facts or data not admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field...." *See Hartless v. State,* 327 Md. 558, 578-579, 611 A.2d 581, 590-91 (1992)(An expert witness

may rely on reports or studies performed by a third party if the underlying material is shown to be of a type reasonably relied on by experts in field). When applied, it is the expert and the party proffering the expert that have the burden of demonstrating that the third party reports and studies were not only "made in a reliable manner, but that they are reliable sources of information for the purposes to which the expert puts them." *Madden v. Mercantile-Safe Deposit & Trust Co.,* 27 Md. App. 17, 44, 339 A.2d 340, 356 (1975).

a. Lehman Brothers Analysis prepared February 1999.

Dr. Nantell testified at length about how and why Lehman Brothers became involved with FACS and how it came to value the company's future business potential. FACS engaged Lehman Brothers to manage and underwrite a $150 million high yield bond offering. This was done in an effort to expedite the process of attracting the capital necessary to build and launch the FAISAT global satellite constellation. In preparing the analysis Lehman Brothers employed four primary methods of valuation: (1) discounted cash flow analysis,[8] (2) precedent stock sales,[9] (3) Internal Rate Return (IRR) analysis,[10] and (4) comparable company analysis.[11] With the exception of IRR analysis, which is not recognized, the Lehman Brothers valuation analysis was performed using valuation methods that are generally accepted techniques. *Kool, Mann, Coffee & Co. v. Coffey, et al.,* 300 F.3d 340, 362 (3rd Cir. 2002)("A number of courts have commented on the propriety of the discounted cash flow methodology for certain valuation situations, particularly where valuing

[8] Discounted cash flow method estimates cash flows into the future and discounts them back at an appropriate interest rate to allow for an estimate of intrinsic value
[9] precedent stock sales is the price willing buyers have paid the corporation for shares in the past
[10] Internal Rate of Return is the return a company could reasonably expect by investing in itself
[11] The comparable company analysis is based on what other companies in the industry have been performing. In this case, the comparable company analysis was primarily based on Orbcomm investor research reports. Orbcomm was one of at least two companies, which FACS viewed as competitors in the industry.

stock and other securities of a company"); *Steiner Corp. v. Benninghoff*, 5 F.Supp.2d 1117, 1129 (D. Nev. 1998)(discounted cash flow analysis is "the single best technique to estimate the value of an economic asset")(quoting *Cede & Co. v.. Technicolor, Inc.*, CivA. No. 7129, 1990 WL 161084 at 7 (Del. Ch. 1990)); *See also* Aswath Damarodan, Investment Valuation (John Wiley & Sons, Inc. 2002) at 11 (discounted cash flow (DCF) and comparative valuation are two of the three general approaches to valuation of any asset); *See generally* BRADFORD CORNELL, CORPORATE VALUATION (McGraw Hill, Inc. 1993); Jay W. Eisenhaffer & John L. Reed, *Valuation Litigation*, 22 Del J.Corp.L 37 (1997); Samuel C. Thompson, Jr., *A Lawyer's Guide to Modern Valuation Techniques in Mergers & Acquisitions*, 21 J.Corp.L. 457 (1996).

b. Sturgill & Associates Valuation Report prepared February 2000.

In addition to Dr. Nantell's reliance on the Lehman Brothers analysis he also considered a Report prepared by Sturgill & Associates. James Sturgill, a Certified Public Accountant and Certified Valuation Analyst prepared the Report itself. Although Mr. Sturgill's Report relied heavily on the financial analysis performed by Lehman Brothers and also took into consideration prior $35 per share stock transactions, it appears that most of the quantitative techniques performed by Mr. Sturgill were done for the purpose of confirming the Lehman Brothers analysis. The Report provided an explanation of the business opportunities and markets FAI and FACS were pursuing and the competitive advantages that these companies had over others in the industry. However, the Report is clear that these explanations are the explanations provided by the management of FAI and FACS and are not independent explanations or opinions of Sturgill and Associates.

c. Dr. Nantell's Methodology.

Using as the basis of his analysis, the valuation reports from both Lehman Brothers and Sturgill & Associates, as well as the $35 per share stock transactions, Dr. Nantell applied the following methodology. First, he accepted the February 1999 Lehman Brothers valuation of FACS as $507 million. Next, because FAI owned 63% of the FACS shares he valued those shares at $318 million.[12] Sturgill & Associates valued the non-FACS assets held by FAI as $65 million, which was also accepted by Dr. Nantell. He then added the FACS assets and the non-FAI assets held by FAI together arriving at $318 million. Thus, Ahan's 50% share of the total value of FAI was approximately $190 million in mid-2000. This according to Lehman Brothers had an expected growth of three or four hundred million by 2004. Between the summer of 2000 and the summer of 2004, the telecommunications sector experienced a downturn and values of those companies in the industry fell by 60%. Dr. Nantell then reduced the three or four hundred million by 60% yielding $167 million. He then took the 60% drop and applied it to the initial $190 million belonging to Mr. Ahan in 2000 yielding $76 million. Based on these calculations, Dr. Nantell opined that Mr. Ahan's damages were somewhere between $76 million and $167 million.

This Court holds that the Lehman Brothers and Sturgill & Associates valuations, and the projections on which they are based are simply not "reliable sources of information for the purposes to which [Dr. Nantell] puts them" in July 2004. *Madden,* 27 Md. App. at 44, 339 A.2d at 356. Dr. Nantell admitted that Lehman Brothers' February 1999 projections were made at a time of great optimism for the telecommunications industry. Despite this admission, Nantell used the Lehman Brothers and Sturgill & Associates discounted cash flow

[12] This is 63% of $507 million.

valuations based on those projections as if they were reasonable as of the time of trial in July 2004, when all of the evidence produced at trial was to the contrary. Dr. Nantell failed to consider ex post data or evidence of events that occurred after the valuation date, in this case February 2000. He only applied this 60% discount factor "after he 'grew' the value of the plaintiff's stock from $190 million in mid-2000 to more than $400 million in mid-2004.

The Plaintiff's contend that Dr. Nantell's application of his 60% discount factor (consideration of the general telecommunications downturn) to FACS is enough to substantiate the claim that ex post data was considered. I am persuaded to the contrary by the holding and the reasoning in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.,* 289 US 689 (1933). In that case, Justice Cardozo held that events occurring after the date of valuation were indeed relevant to establishing value:

> The law will make the best appraisal that it can, summoning to its service whatever aids it can command. . . . [I]f years have gone by before the evidence is offered[,] [e]xperience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.

Sinclair, 289 U.S. at 698. *See also Carter Products, Inc. v. Colgate-Palmolive Co.,* 214 F.Supp. 383, 393 n.9 (D. Md. 1963)(holding that the court may employ the advantage of hindsight).

The Restatement (Second) of Torts and the Restatement (Second) of Contracts also support the use of ex post data. Specifically, "an event that indicates the conduct is less harmful than had been supposed prevents or diminishes damages for the consequences." Restatement (Second) of Torts § 910 cmt. b (1979). *See also Weishaar v. Conestrale*, 241 Md. 676, 685, 217 A.2d 525, 531 (1966)(following § 910). Both Restatements point to

situations similar to the facts presented in this case. The Restatement (Second) of Torts states:

> When the tortfeasor has prevented the beginning of a new business . . ., all factors relevant to the likelihood of the success or lack of success of the business. . .that are reasonably provable are to be considered, including general business conditions and the degree of success of similar enterprises.

§ 912 cmt. d. *See also* Restatement (Second) of Contracts § 352 cmt. b. Illus. 6 (proper to consider developments in the market after valuation date). Applying the 60% discount factor, to overly optimistic projections which, based on evidence in the record, are clearly dated and at a point when the industry paints a different portrait, does not satisfy the requirements or considerations that are required by law.

The Defendants also contend that Dr. Nantell's reliance on the purchases of FACS stock at $35 per share by the strategic partners – General Dynamics, Raytheon and L-3 – to support his valuation is misplaced. The $35 per share was submitted by the Plaintiff's expert as reflective of market price set by willing buyers and sellers to purchase/sell FACS stock. Dr. Nantell specifically stated that because the strategic partners, Ahan and Modanlo agreed to this price as the price that would satisfy the required financial contribution of Ahan LLC to be awarded the Engineering Contract, it was therefore reasonable.

The applicable Maryland case law provides otherwise. Fair market price, in Maryland, is the price at which property would change hands between an informed, willing buyer and an informed, willing seller when neither is under any compulsion to transact. *Hall v. Lovell Regency Homes Ltd P'ship*, 121 Md. App. 1, 17, 708 A.2d 344, 352 (1998). Dr. Nantell testified that the strategic partners were required to purchase stock in exchange for contracts with FACS. In particular, General Dynamics paid $5 million for shares in FACS in

consideration for being awarded a $15 million contract. Raytheon had to purchase $15 million of shares in FACS for a $40 million contract. L-3 had to purchase $5 million in shares in FACS for a $21 million contract. Ahan purchased stock for $35 a share in exchange for Ahan LLC, in which Ahan is the sole shareholder, receiving an engineering contract with FACS. It is clear from the evidence in this case that all of these buyers were being compelled to purchase the stock at $35 per share. There is no evidence that this compulsion was not present nor can a rational inference be drawn from that evidence that theses "strategic partners" were willing to buy this stock at $35 or that they valued it at that amount absent the contracts which were contingent on their stock purchase.

For all of these reasons, this Court holds that Dr. Nantell's opinion, as a matter of law cannot form the evidentiary foundation for the jury's verdict. In doing so this Court notes Sturgill & Associates own stated conditions in its Report, which should have limited Dr. Nantell's use of his report:

> (1) The estimates of cash flow if provided, and included herein, are solely for use in the valuation analysis and are not intended for use as forecasts or projections of future operations. We have not performed an examination or compilation of the accompanying cash flow data in accordance with standards prescribed by the American Institute of Certified Public Accountants, and accordingly, do not express an opinion or offer any other form of assurance on the accompanying cash flow data or their underlying assumptions. Furthermore, there will usually be differences between estimated and actual results because events and circumstances frequently do not occur as expected, and those differences may be material.
> ***(2)*** This report is ***valid only for the effective date specified herein.***
> (3) This valuation contemplates facts and conditions existing as of the valuation date. ***Events and conditions occurring after that date have not been considered*** . . .
> ***(4) This analysis should not be used as a basis to set a market price . . .***

This Report was improperly used as a basis for assessing damages or value of a company in July 2004, which was not intended or contemplated by James Sturgill at the time of preparation. As such, Nantell's reliance on the projections and resulting discounted cash flow valuations is contrary to Maryland law, and cannot support the jury's award of damages.

4. Actual Experience of the Industry

It is not disputed by the parties and it is clear from the record of this case that during mid-2000, every Big LEO or Little LEO company was experiencing significant difficulties, which resulted in ***all*** of those companies eventually, filing for bankruptcy. As a result, the initial investors in all of these companies lost all of their equity investment.

Thomas Tuttle provided unrebutted testimony on the causes of the Little LEO and Big LEO failures. "In the case of the Big LEOs and Little LEOs, the companies were simply wrong about their assessment of the market. The markets weren't there." Both the Big LEO systems and the Little LEO systems "were based on providing a service in an area that was not currently served by . . . terrestrial systems. So that meant that they were all intending to provide essentially global service [and]. . .had to put up a constellation of satellites that could see . . . and operate over the entire globe…." As a result, "there was a need for substantial up front: billions of dollars for the Big LEOs and hundreds of millions of dollars for the Little LEOs. Everything needed to be in place before you ever started making money…." Thus, these companies "needed to have immediate success because the requirements to repay the lenders were rigorous. . . . The companies had to succeed immediately when they become operational and earn lots of revenue."

Despite the apparent failure of all other companies in this industry, the Plaintiff did produce evidence that FACS would have succeeded. Evidence describing both the technological and costs-structure advantages FAI and FACS held over their competitors was presented to the Jury. In addition evidence showing that several of the Big LEO and Little LEO companies that struggled financially between 1999 and 2003 are currently operating successfully. Finally, in August 2000, Lehman Brothers was still willing to go forward with the bond offering despite the knowledge of the fate the competitors of FACS were facing.

The Plaintiff did not, however, present evidence that provided this jury with an evidentiary foundation upon which it could rationally determine what the profits of these companies would have been. In fact, Mark Cascia, FACS' chief engineer and Dr. Nantell both conceded that FACS never had a satellite telecommunications service to sell; never had a customer for such service; and never made a dollar from selling such services. In addition, it was undisputed that FACS never launched a satellite that operated as intended. There was no evidence presented to this jury upon which they could rationally find, or even infer, that without an operational satellite system, the technological advances and cost structures that FACS planned would ever be implemented.

Faced with this insufficiency of evidence and unable without a legally sufficient expert opinion to find a rational legal basis in the record of this case for the jury to award damages, this Court has no alternative but to hold that the Jury's Verdict was impermissibly based on speculation and conjecture. Defendants are therefore entitled to Judgment NOV on the issue of damages on each count for that reason.

For the reasons stated in this Opinion as to each Count of the Plaintiff's Complaint, it is this 19th day of November, 2004, by this Circuit Court for Prince George's County, Maryland,

ORDERED, that Defendants' Motion for Judgment Notwithstanding the Verdict is hereby **GRANTED;** and is further

ORDERED, that if the granting of the Defendants' Motion for Judgment Notwithstanding the Verdict is reversed by an appellate court on the issues of damages as to any or all counts, the Defendants are hereby granted a new trial on the issue of damages on that Count only; and it is further

ORDERED, that, if an appellate court reverses the granting of the Defendants' Motion for Judgment Notwithstanding the Verdict only on the issue of liability as to any or all counts, the Defendants' Motion for a New Trial is **DENIED;** and it is further

ORDERED, that, if the granting of the Defendants' Motion for Judgment Notwithstanding the Verdict is reversed in its entirety, the Defendants' Motion for Remittitur is hereby **GRANTED** to the extent that the compensatory damages awarded to the Plaintiff are remitted to $13,000,000.00 plus post judgment interest from the date of judgment.

/s/
Judge Steven I. Platt

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