IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

SB BELKIN, LLC. *

Plaintiff/Counter-Defendant *

v. * **Civil No. 266748-V**
(Hon. Durke G. Thompson)

HTPA HOLDING COMPANY, LLC, *et al.*, *

Defendants/Counter-Plaintiffs *

OPINION

This matter is before this court for trial and final judgment. The issues to be decided in the instant matter were presaged by a prior summary judgment of the Circuit Court, an appeal to the Court of Special Appeals and, in accordance with an unreported decision, a remand of the lawsuit back to the Circuit Court for trial on the merits. *SB Belkin, LLC. v. HTPA Holding Company, LLC., et al.* (Md. Court of Special Appeals, No. 989, September Term, 2006, September 11, 2007). The Court of Special Appeals vacated the Circuit Court's grant of summary judgment and remanded for a full trial after determining that the language of the disputed agreement between the parties was ambiguous as a matter of law.

The History of the Case.

The Court of Special Appeals (Sharer, J.) laid out an accurate factual history of the dispute between the parties and this Court elects to adopt, in pertinent part, the statement of facts of the Court of Special Appeals except as supplemented later in this opinion.

Acquisition of the Franchises

In August 2003, a group of investors – the parties to this litigation – began negotiations with Turner Broadcasting System, Inc. to acquire ownership of two professional sports franchises – the Atlanta Hawks of the National Basketball Association ("NBA") and the Atlanta Thrashers of the National Hockey League ("NHL"). The parties negotiated for the operating rights to the Phillips Arena, where both teams play their home games. To facilitate this acquisition, the investors formed HTPA[4], a holding company. HTPA is owned 40% by LPF, 30% by SSG and 30% by Belkin. Through its Atlanta Spirit, LLC subsidiary, HTPA became the owner of 93% of the Hawks, Thrashers, and arena rights in March, 2004.

The honeymoon between the owning parties was short lived, and in the summer of 2005, a major dispute erupted concerning a trade for a player from the NBA's Phoenix Suns. Hawks management proposed a trade for Joe Johnson, a player who then enjoyed a five year, $70 million guaranteed contract, with the Phoenix Suns. The majority of the ownership agreed to the trade, but Belkin disapproved and, pursuant to his authority as NBA Governor of the Hawks, refused to authorize the deal.[5]

The remaining owners, LPF and SSG, scheduled a board meeting to exercise their contractual right to remove Belkin as Governor. Belkin responded by obtaining an injunction in Massachusetts state court barring his removal. Shortly after the injunction was granted, NBA Commissioner David Stern filed an affidavit approving Belkin's removal as Governor and the injunction was lifted.[6]

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[4] HTPA is an acronym for *H*awks, *T*hrashers, *P*hillips Arena

[5] Under the NBA Agreement and Understanding, each franchise designated a person as "governor" with the authority to authorize or conduct transactions on behalf of the franchise.

[6] The Massachusetts court was apparently influenced by the Stern affidavit, which provided in pertinent part:

> 2. While I believe that paragraph 5(d) can fairly be read as requiring nothing more than my prior approval of the proposed replacement Governor, in light of the Court's reading of that paragraph, and in the

Purchase and Sale Agreement

As it was clear to the parties that Belkin's continued ownership in HTPA was untenable, the parties negotiated a purchase and sale agreement under which LPF and SSG, through HTPA, would purchase Belkin's interest. Under the "HTPA Holding Company, LLC Purchase and Sale Agreement ("PSA"), an equitable valuation process was set forth that was intended to produce a fair and reasonable price payable to Belkin for his interest in HTPA.

By the terms of the PSA, up to three investment banking firms would be engaged to determine HTPA's fair market value ("FMV")[7] as of August 17, 2005, and Belkin would be paid an amount to be calculated by independent auditors prior to closing. PSA § 1.2(a)-(c). The PSA recognized the specialized knowledge required for such valuations and accordingly limited the potential list of appraisers to investment banking firms "knowledgeable and experienced in mergers and acquisitions of professional sports teams and related assets." PSA § 1.3.[8] The so-called "Eligible Bankers" were required to make a "neutral valuation" of HTPA's FMV, not favoring or advancing the interest of any party. *Id.*

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interest of assisting the Court in reaching an ultimate determination, I submit herewith my own views on whether the requirements for removal under paragraph 5.1(k) of the HTPA Holding Company LLC Agreement have been satisfied.

3. My conclusion is that, under paragraph 5.1(k) if the Governor knows or reasonably should know that he is acting contrary to the wishes of a majority of the Board of Managers, and he nevertheless proceeds to take an action in connection with a material matter that legally binds the team – such as consummating a player trade or preventing the consumation a player trade – the requirements for removal have been met.

4. The decision whether or not to trade for a player who is to be paid nearly $70 million over 5 years and who may well have a long-standing impact on the success or failure of the team, is, without doubt, a material matter as that term is used in paragraph 5.1(k).

[7] FMV is defined as "100% of the cash purchase price that would be received if HTPA and its subsidiaries sold all of their operations and assets on a going concern basis[.]" PSA § 1.2(b).

[8] The agreed upon institutions are listed in Exhibit A of the PSA and are as follow: Goldman Sachs & Co., Lehman Brothers, JP Morgan/Chase[*sic.*], Bear Stearns, UBS Warburg, Morgan Stanley, CIBC, Bank of America, Societe Generale/Cowen, and Citigroup.

The PSA provided that Belkin was responsible for selecting and engaging the First Eligible Banker from the approved list. PSA § 1.2(d). Upon receipt of the First Eligible Banker's appraisal of HTPA's FMV, the PSA allowed both parties five business days "to deliver written notice to the other that such party objects to the First Banker's FMV. " *Id.* The parties agreed that, should neither party object to the First Eligible Banker's determination of FMV, then the First Eligible Banker's determination would become HTPA's FMV.

In the event that either party objected to the first appraisal, the objecting party was required to engage a Second Eligible Banker to determine HTPA's FMV. PSA § 1.2(e). Any subsequent valuation by the Second Eligible Banker would be subject to an objection scheme similar to the one set forth for the First Eligible Banker, whereby, if no party objected, the second appraisal would set the FMV. *Id.* If however, an objection were made, and the difference between the two appraisals was less than ten percent of the lower value, then the appraisals would be averaged and that figure would serve as the final FMV. Otherwise, the First and Second Eligible Bankers would provide the NBA with a list of remaining Eligible Bankers who they believed to be "knowledgeable and experienced in mergers and acquisitions of professional sports teams and related assets[,]" and the NBA would randomly select one to perform a third appraisal. PSA § 1.2(f).

If the third appraisal fell between the first and second valuations, it would establish the FMV. *Id.* If it were higher than both the first and second valuation, the higher of the first two evaluations would become the final FMV. *Id.* The exact opposite would occur in the event that the third appraisal was lower than the prior valuations, with the lower of the first two valuations becoming the FMV. *Id.*

If conditions such as league approval[9] were met, closing would occur within 60 days of the determination of the purchase price. PSA § 2.1. If HTPA did not pay at closing, PSA section 6.1[10] entitled "Guarantee," permitted Belkin to either proceed against guarantees by LPF, SSG, and their owners, or buy out the majority by causing HTPA to purchase LPF's and SSG's interests in HTPA at a price based on their contributed capital.

First Appraisal and the Race to the Court House

Pursuant to the terms of the PSA, Belkin engaged the First Eligible Banker, Citigroup Private Bank ("Citigroup"), on September 1, 2005. At 11:11 a.m., on November 23, 2005, Citigroup e-mailed[11] a 70-page appraisal to representatives of Belkin, LP F and SSG, but not to HTPA. Within one minute of receiving the report, and four minutes before the email reached

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[9] Such consent was mandatory because league approval was required to transfer an ownership interest in a team. PSA § 5.2(f).

[10] Section 6.1 provides:

> Each of [LPF], the SSG Group, Levenson, Peskowitz and Gearon Jr. (collectively, the "Guarantors"), hereby jointly and severally unconditionally and irrevocably guarantees, as a principal and not as a surety, to the Belkin Group and its successors and assigns the payment of the Purchase Price by HTPA on the Closing Date under Section 2.2(b) and shall indemnify the Belkin Group for any costs and expenses incurred by the Belkin Group in enforcing this Section 6.1. Each of the Guarantors agrees that no party shall be required to provide any Guarantor with any notice pursuant to this Section 6.1 and that no failure to give any such notice shall discharge or diminish the liability which any Guarantor would have had under this Section 6.1 if such notice had been given. If HTPA does not perform its obligation under this Agreement to purchase all of the interest of the Belkin Group in HTPA, the Belkin Group may cause HTPA to purchase all of the interests of [LPF] and the SSG Group in HTPA for a purchase price equal to the aggregate contributed capital of such parties, in which case, such purchase shall be the Belkin Group's sole and exclusive remedy hereunder.

[11] Pursuant the PSA § 7.1:

> Any notice, payment, demand, or communication required or permitted to be given by any provision of this Agreement shall be in writing and shall be deemed to have been delivered, given, and received for all purposes hereunder (i) when delivered if delivered personally to the party or to an officer of the party to whom the same is directed, (ii) three (3) Business Days after mailing, if mailed either by registered or certified mail, postage and charges prepaid, (iii) when sent, if sent by facsimile, if such facsimile is followed by a hard copy of the facsimile communication sent promptly thereafter by registered or certified mail, postage and charges prepaid, or (iv) when delivery is refused by the intended recipient, addressed as follows, or to such other address as such party may from time to time specify by notice to the other parties hereto[.]

LPF and SSG, Belkin objected to the first appraisal. A short time later, representatives from LPF and SSG directed counsel for HTPA to object to the Citigroup appraisal, and at 11:24 a.m., HTPA faxed its objection, naming Morgan Stanley as the Second Eligible Banker.

Approximately five hours after HTPA notified Belkin of its objection to the Citigroup appraisal, Belkin filed suit, in the Circuit Court for Montgomery County, [12] contending that he was entitled to choose the Second Eligible Banker because he was the first to object. Despite having asked the court to determine which party was entitled to engage the Second Eligible Banker, Belkin, contemporaneously with filing suit, notified HTPA that he intended to, and subsequently did, engage J.P. Morgan as the Second Eligible Banker.

On December 17, 2005, J.P. Morgan delivered its report, which was more than ten percent higher than Citigroup's, thus triggering a third appraisal. HTPA sent a letter to Belkin on December 22, 2005, which stated:

> We do not recognize the JP [*sic.*] Morgan Valuation as the appraisal of the Second Eligible Banker and this letter shall serve as our objection to what purports to be the Second Banker's FMV, as provided for in Sections 1.2(f) and 7.1 of the PSA

The record supports a conclusion that counsel for all parties reached an understanding that a Third Eligible Banker would not be retained until such time as the court settled the issue of who was entitled to engage the Second Eligible Banker ("the standstill agreement").

Circuit Court Proceedings

On January 4, 2006, Belkin filed an amended complaint seeking declarations: (i) that J.P. Morgan was validly and properly selected as the Second Eligible Banker; (ii) that by failing to jointly engage a third appraiser, HTPA had breached the PSA and waived its right to a third

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[12] Section 7.9(b)(i) of the PSA provides that "any suit, action or proceeding as to any controversy or dispute arising out of this Agreement will be brought solely in The Sixth Judicial Circuit Court for Montgomery County, Maryland[.]

appraisal; (iii) that the J.P. Morgan appraisal established the FMV of HTPA; (iv) that [the defendants] had 60 days from December 17, 2005, the date of the J.P. Morgan appraisal, to purchase Belkin's interests at the J.P. Morgan price; and (v) that if they failed to do so, Belkin would have the right under § 6.1 of the PSA to purchase LPF's and SSG's interests in HTPA for a purchase price equal to their aggregate contributed capital. Appellants filed an answer and an amended counterclaim for declaratory relief and damages on January 23, 2006.

At a hearing on February 24, 2006, this Court ruled that the PSA contained all essential terms and concluded, based on the four corners of the contract, "that there [was] no ambiguity present[.]" This court granted Belkin's "Motion for Partial Summary Judgment as to Count I [Declaratory Judgment] of the Amended Complaint[,]" finding that because Belkin had been the first to object, he was "the objecting party" under the PSA.

On April 19, 2006, following Belkin's "Motion for Entry of Final Judgment" and [defendants'] "Motion to Vacate and Revise," this Court (E. Johnson, J.) issued a memorandum opinion clarifying, but reaffirming, its decision to grant partial summary judgment in favor of Belkin. This court based its ruling on the fact that, as the "objecting party," Belkin "had the right to select J.P. Morgan as the Second Eligible Banker pursuant to the terms of the PSA."

Following this ruling, Belkin moved for summary judgment, on May 2, 2006, seeking rulings that: (1) his engagement of J.P. Morgan was valid; (2) HTPA had breached the PSA by refusing to jointly engage a Third Eligible Banker; (3) HTPA had further breached by failing to pay the J.P. Morgan price within 60 days, and (4) pursuant to PSA § 6.1, Belkin had the right to purchase LPF and SSG's interests for a price equal to their aggregate contributed capital.

On June 14, 2006, this Court (E. Johnson, J.) granted Belkin's motion for summary judgment and entered a final order from which a timely appeal was taken to the Court of Special Appeals.

The Opinion of the Court of Special Appeals

In its decision and judgment upon the appeal, the Court of Special Appeals disagreed that this Court could, as a matter of law, find there was no ambiguity present in the contract. Applying previously cited rules of contract construction, the Court of Special Appeals stated,

> We are of the view that § 2.1(e) is ambiguous. By its terms the provision does not provide for how the parties were to proceed if, as here, both parties noted a timely objection to the First Eligible Banker's appraisal. As § 2.1(e) is "reasonably or fairly susceptible of different interpretations," the Circuit Court erred in ruling that the PSA was not ambiguous.

(*HTPA Holding Company, et al. v. S.B. Belkin, LLC,* No 989, September Term, 2006, p. 14)

Whereupon, the Court of Special Appeals vacated the judgment of the Circuit Court and remanded for further proceedings consistent with their opinion. The parties differ slightly on the extent of the Court's ruling. The narrower view of the ruling is that the prior ruling of the Circuit Court is vacated, but, more broadly, it is clear that the appellate court also found the contract to be ambiguous requiring an examination of extrinsic evidence, including extrinsic parol evidence to try and determine the true intent of parties and if there was a meeting of the minds.

Findings of Fact

This Court makes the following findings of fact by a preponderance of the evidence:

The Negotiation

In early August, as a result of disagreements about the management of the basketball franchise, the ownership group of HTPA began to fall apart. The most immediate dispute arose over efforts to sign Joe Johnson, a particularly promising player who was eligible to become a

free agent. While the parties were in agreement that the acquisition of Johnson was a highly desirable step for the Atlanta Hawks, Belkin and the Atlanta/Washington group differed greatly on how it was to be done. Belkin wanted to wait until Johnson was a free agent and capable of negotiating with any team. This strategy ran the risk of costing more money as a result of entering a bidding war for Johnson's services. The alternative strategy proposed by the Atlanta/Washington owners was a "sign and trade" strategy where Johnson would be signed by his existing team, which in turn, would trade Johnson to the Hawks for draft choices. This alternative was expected to be cheaper in the short run, but would strip the franchise of critical draft choices in the future. Under the management scheme that had been adopted finally in March, 2005, Belkin served as the NBA governor for the franchise. The governorship was a league device designed to ensure that a franchise spoke with one voice where there were multiple owners as with the Atlanta Hawks. As it related to the Johnson acquisition, it meant that Belkin, as governor, had to agree to the method of acquisition. Because Belkin desired the "free agent market" approach, that might be expected to be the method of acquisition adopted by the team. However, under the ownership operating agreement, Belkin, as governor, was obligated to act in accordance with the majority ownership wishes. If he refused, he was subject to removal as governor.

Additional difficulties had previously been experienced on such matters as the distribution of complimentary tickets to the NBA All Star game. Belkin, even though he was the designated league governor, was forced to buy tickets to the game because the other owners used the complimentary tickets for themselves, and for others, even though the other individuals were not owners.[13]

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[13] Ironically, one of the individuals entertained with the team complimentary tickets was a member of the King and Spaulding Law Firm of Atlanta who later became counsel to the defendants in this lawsuit.

The Role of the Operating Agreement

With the impetus of the NBA, *supra,* page 3, counsel for the parties began an intensive negotiation on the PSA. Representing the Atlanta and Washington owners was Howard Baltz, Esq. of King and Spaulding while the Belkin interest was represented by Richard Floor, Esq. of Hale and Dorr. The attorneys used the format of the previously negotiated Amended and Restated Limited Liability Company Agreement of HTPA Holding Company, LLC (the "Operating Agreement") as a starting point for the negotiations to buy out the Belkin share. This was a logical step because the Operating Agreement contained language providing for a price mechanism in the event Belkin wanted to sell his interest in HTPA to the other owners. The Operating Agreement adopted alternating selection and objection rights to decide FMV. Under the Operating Agreement, LPF and SSG had the option of rejecting the appraised purchase price and, thereby, electing to put the teams and the arena up for sale utilizing a broad market solicitation to secure an appropriate price for the assets.

The Operating Agreement was designed to provide checks and balances to prevent manipulation of the price, and from the viewpoint of LPF and SSG, a "runaway appraisal." During the negotiation of the Operating Agreement and the PSA, a runaway appraisal was referred to as an "off the reservation" appraisal.

Use of the mechanism in the Operating Agreement to simply sell the teams was not an option because the NBA and David Stern made it clear that it desired the Belkin interest to be bought out. Consequently, the negotiators focused on the buyout mechanism to be included in the PSA. Both parties were concerned about the eventual price being different from the parties expectations, especially if it were a widely aberrant valuation.

The Actions of the Negotiators

Consequently, § 2.1(e) was drafted to enable either party to object to a valuation. The parties expected that the objection process would be exercised in good faith. It was anticipated that Belkin would object if the valuation was judged by him to be too low, and HTPA would object if the evaluation was too high. There was no discussion by Floor and Baltz about both parties objecting to the same valuation. In fact, there is no evidence that either party contemplated that a situation would arise where both parties would elect to object to the first valuation. While both parties understood that the "objecting party" would have the right to select the second appraiser, there was no contemplation by the negotiators that both parties would object and would, thereby, acquire the right to name the second appraiser as stated within the terms of the PSA. Nor was there any discussion of what was to occur if there was an objection by both parties. Nothing was negotiated about how the appraisal was to be communicated by the appraising banker, how a party could object, and whether being the first party to object created any legal standing under the contract. In fact, both during the negotiations and within the PSA itself, there is nothing to suggest that a race to object was contemplated by either party. The only timing provision discussed that relates to this aspect of the PSA was the inclusion of a five day period in which to make an objection.

Due to the pressure from the NBA, and for reasons that the parties each held, it was imperative that the PSA be completed. What would occur if the PSA was not promptly negotiated is unclear, but both parties were concerned and communicated the desire to wrap up an agreement within a matter of a few days, if not within hours. The negotiations got underway at 1:30 pm on August 16, 2005 and were completed at approximately 8 pm on August 17, 2005, a span of approximately 30 hours. The negotiators used a "term sheet" as the mechanism to

exchange ideas and positions. Initially, it contained much of the language used in the Operating Agreement. Under the initial term sheet, HTPA had the right to select the first appraiser. Baltz proposed that both parties should have the right to object to the first appraisal in order to meet Belkin's concern about the terms of the Operating Agreement. Baltz, being concerned about an attempt to manipulate the appraisal by Belkin, believed the reservation to HTPA of the right to object to the first appraisal was critical to HTPA. Ultimately, Belkin agreed to the right of HTPA to object, but insisted upon Belkin selecting the initial appraiser to which HTPA acceded.

The assumption by HTPA that it would have the right to select the second appraiser grows in importance when the provision is considered in light of what would happen if there was an objection to the second appraisal. Originally, the first and second appraisers would then select a third appraiser. This method of selecting the third eligible banker had the effect of magnifying the importance for both parties, if dissatisfied with the initial appraisals, of the input through a previously selected eligible banker as to who the third eligible banker would be. Ultimately, the method of the selection of the third appraiser was changed to a lottery among the remaining appraisers as selected by the NBA. While the parties thought hard on their right to have a voice in the appraiser selection, neither party contemplated both parties objecting to the first appraisal.

It is clear from the testimony of the key negotiators, and from the parties themselves, they were concerned with getting their price. After the signing of the PSA, it was toward this goal the parties then directed their efforts.

The Implementation of the Agreement

As soon as the agreement of the terms of the PSA had been reached, the parties began the process of the initial valuation. This was preceded by a discussion between the parties of who

should be the first appraiser. A vetting of the appraiser was necessary because the parties had extensive banking relationships. Ultimately, about a week after the PSA was signed, HTPA indicated that it would not object to Citigroup Private Bank performing the initial valuation provided that HTPA could select Morgan Stanley or Goldman Sachs as the second appraiser. The use of some of the bankers by some of the principals involved in the deal necessitated waivers dealing with past contact and possible conflicts. While there is little firm evidence on the point, the implication of the negotiations was that the first appraiser would be loyal to Belkin and the subsequent appraiser would be loyal to HTPA, even though it was negotiated and expected that any appraiser would be neutral and professional.

The Belkin interest selected Citigroup Private Bank as the initial appraiser on September 1, 2005. Citigroup began its work by having contact with the opposing groups. It is notable that Citigroup's charge for its valuation services was significantly below market for such work. Citigroup agreed to charge the Belkin interest $135,000 for the work while other appraisers would undertake the assignment for a payment of $1,500,000 to $2,000,000. The lead evaluator for Citigroup was Bradley Rangell who led a team of evaluators experienced in sport franchise valuation.

The first step to obtaining the valuation or appraisal was negotiating the Citigroup undertaking and entering upon a contract for its services. The appraisal contract contains language that the appraisal should reflect the highest possible price for the interests rather than the standard definition of what a willing buyer would pay to a willing seller for the interests provided that neither party was under duress to buy or sell. Thus, the value to be placed on the assets was similar to a value in connection with the sale of corporate assets to an outsider, not as in the case here, where one ownership interest was buying out the other ownership interest. This

had the effect of casting Citigroup Private Bank, and later, J. P. Morgan in the role of a broker trying to assess the highest possible market price as opposed to a FMV that was to be developed by the banker as a neutral.

Both parties had reason to be concerned with the role of Citigroup. First, Citigroup had the responsibility of the important, initial benchmark appraisal that could act as the floor, or the ceiling, or the actual price. Consequently, the evidence shows that both parties began a concerted effort at manipulation of the appraisal. Rangell, on behalf of Citigroup, invited information from both sides. To this end, Rangell and his team met with the management of HTPA. Aside from any personal animosities that might have previously existed, non-ownership management of the Atlanta Spirit gave information to Rangell, knowing full well that their future employer was HTPA. When the meeting was about to take place, Felix Riccio, executive vice-president of Belkin endeavored to attend. The meeting was held in Atlanta and before its conclusion, Riccio was asked to leave the meeting by Rangell and the HTPA representatives so as to permit more, private discussions. Riccio testified that he did not feel the data being supplied to Citigroup was accurate. Either to counter this circumstance or upon his own initiative, Riccio began to supply considerable data to Rangell's team. Ultimately, the HTPA interests emphasized data that showed, *inter alia*:

- HTPA had incurred large losses for the period it operated the teams and the arena:
- The loss of money had been chronic;
- The NBA Hawks were playing poorly and gate receipts were very low;
- The NHL Thrashers had been in a cycle of declining revenues and performed well below league average;
- Negative public image due to prior operation hurt sales;
- A prior Belkin offer to buy out the Atlanta interest for $10,000,000.

For its part, the Belkin interest, through Riccio met with the Citigroup representatives on September 7, 2005. At this meeting and later, Belkin through Riccio supplied Rangell with the following, *inter alia*:

- Information on the XM Radio agreement
- NHL Unified Report of Operations
- Turner ticket obligations
- Luxury tax and escrow obligations owed to the Hawks
- An email explaining tax benefits relating to the 2005-2006 budget
- HTPA annual meeting memo regarding financial inconsistencies
- Memo and email attachment about the team sports broadcasting
- Term Sheet for contract with Ticketmaster[14]
- Ampitheater operation information
- Deferred player compensation data
- A correction on the purchase price allocation information
- The NBA revenue assistance plan
- NBA financial report information
- A letter from Lyman Bullard in response to letter from Rangell
- Memo about the "Turner Notes" and attachments
- NBA private placement memo

Of significant dispute between the parties were several items. Some of the dispute was created by the terms of the contract that called for the appraisal or evaluation to generate a price as of August 17, 2005. The PSA sets forth only the date of August 17th as the valuation date

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[14] The franchises were in the midst of negotiating a deal for the sale and distribution of game tickets with Ticketmaster.

and does not have further language regarding events in progress on that date. For instance, the NBA was in the midst of negotiating a new collective bargaining agreement with the NBA Players Association (hereinafter, the "CBA"). The CBA was fully negotiated on August 17th, but had not been formally ratified. It was expected the CBA would benefit the NBA owners in certain key ways and benefit certain franchise owners over others. It was an open question as to whether and how much the already negotiated, but unsigned, CBA would change the franchise value of the Atlanta Hawks. Another transitional item was the operational budget. Clearly, this was a forward looking document, but was based on past empirical data. Inclusion of the budget with its projections of losses tended to depress the value, but the budget was a summary of projected events after August 17, 2005. The Belkin side directed in its engagement of Citigroup to end operational events on the 17th, but to consider non-operational events known, but not effective until after the 17th.

Secondly, under the original purchase, the new owners of HTPA were required to sign personal guarantees of payment to Time-Warner and to the NBA. These guarantees reaching into the millions of dollars were the subject of differing opinions among the parties and the appraisers over whether they would ever have to be honored and whether they should be included on the negative side of any balance sheet. While the guarantees existed, there had never been a demand for payment and, historically, the NBA had never called upon any owner to pay any guarantees. Recognition of the guarantees as obligations would depress the values and their exclusion would inflate the values. HTPA wanted the guarantees recognized as obligations and Belkin wanted them excluded.

A third issue of contention was whether the owners own purchase of the assets could be considered as a guide or indicia of value. The evidence is compelling that the owners through

HTPA, as purchaser, struck a very good deal when they purchased the properties from Turner Broadcasting. Little cash was necessary to close on the sale, but it was clear that the new owners expected losses to continue for several years before they could turn the deal positive. In the meanwhile, the franchises would continue to gain in value over time and well beyond the undervalue placed on the assets when bought. The use of the original purchase price in a valuation would have a tendency to reduce the price and its exclusion had the opposite effect. HTPA wanted to include the purchase price as a consideration and Belkin wanted to exclude it.

It is evident that both sides of the transaction in question were aware of the efforts of their opposing number to impact the ultimate valuation reached by Citigroup.

At the conclusion of one of the meetings in which Citigroup was acquiring information, Rangell was escorted to the airport by employees of HTPA. During the trip, Rangell commented to the effect that whatever the valuation of the franchises and other assets ended up being, it was of little moment because Citigroup was prepared to assist HTPA in obtaining the necessary financing to buy out Belkin. This comment was later discussed by Michael Gearon with his father J. Michael Gearon, Sr. Gearon, Sr. had been involved in the basketball business since the early 1960's. At the time of the trial, he owned a very small interest in the SSG entity, and thus, an even smaller interest in HTPA. He was portrayed by the defendants as an interested outsider to the transaction of purchase and the dispute with Belkin. It is apparent Gearon, Sr. was playing the role of senior advisor to the defendants.

Michael Gearon, Sr., as general manager of the Hawks' franchise, became aware of the efforts of Time-Warner to divest the assets after its purchase of Turner Broadcasting. Originally, there had been an effort to work out a deal between Time-Warner and David McDavid as a

potential purchaser.[15] When the McDavid deal was off the table, Gearon, Sr. alerted his son and his son's associates to the possibility of making a bid for the assets. Unable as a group to make the purchase, SSG, which included Gearon, Jr., joined with the other interested parties to buy the assets. During this process, Gearon, Sr. was either not involved or involved only to the extent that Gearon, Sr. made recommendations to NBA Commissioner David Stern on the form of the sales agreement. Gearon, Sr. worked as a liaison between the Atlanta and Washington groups.

When the parties to this proceeding had their falling out in the summer of 2005, Gearon, Sr. learned of developments from the defendants. He appropriately denied trying to sabotage Belkin's anticipated post-buyout effort to buy another team, but acknowledged that a high buyout price would be detrimental to Time-Warner, his former employer and owner of the assets in their emerging dispute with McDavid. See cf. No. 12, *supra.* Gearon, Sr. was dubious of the appraisers involved. While not expressly stating, he knew that Citigroup had been hired by Belkin as a part of the process. It appears from the evidence that Gearon, Sr. was upset with the attorney for the defendants, Ray Baltz, Esq. because he recognized the ambiguity existing in the contract. This recognition was passed on to his son in a number of emails sent from father to son relating to the transaction. He suggested that a prompt objection be made if the Citigroup appraisal was unsatisfactory. While he denies being concerned with being the first to object, the inference is to the contrary. As a part of the infamous ride to the airport with Rangell, Gearon, Sr. believed some of the numbers mentioned were very high and he was concerned with his son's ability to pay what would be owed to Belkin. He was alarmed that Rangell was treating the buyout of Belkin as something different than it was—a buyout. Instead, he felt Rangell was

[15] After the deal with McDavid collapsed, the basketball and hockey franchises and the arena were sold to the parties in this matter. It is this Court's understanding that McDavid brought suit against Time-Warner for failing to consummate the sale of the assets to him. At the time of the trial of this matter, McDavid had recovered significant damages upon a trial of the issues in his case.

treating the defendants as if they were trying to become owners and Rangell was brokering both the deal and the financing. On this point, the evidence is clear that Citigroup and Rangell expected to receive the bulk of the compensation for their work as a result of commissions earned when the buyout was financed. Rangell seemed skewed toward a high price according to Gearon, Sr.

Completion of the Citigroup Appraisal and the "Race to Object"

Under the PSA **§** 1.3**,** the first appraisal was to be completed within 30 days. Thereafter, any party wishing to object to the appraisal had five days to make the objection. The Citigroup appraisal was supposed to be completed by the end of September. However, no appraisal was forthcoming on a timely basis, nor was the appraisal completed by the end of October. This was not the direct fault of either the plaintiffs or defendants, although the back door communications, appraisal reports, supplemental information, and a threat to sue undoubtedly contributed to the delay. As mentioned *supra,* both parties lacked confidence that the Citigroup appraisal would be satisfactory and each began a process of supplying information believed to be relevant and, presumptively, better than the information gathered independently by Citigroup and the independent judgment about the information Citigroup was supposedly competent and qualified to fairly render.

Each party retained a consultant to assist in the appraisal process. There is nothing sinister about this fact. The retention of the consultant allowed each party to gather and supply information which was believed pertinent to the appraisal process. For this purpose, Belkin retained a former National Football League player, Randy Vataha and his company, Game Plan, LLC. For the defendant sellers, their consultant was Sal Galatioto, a former investment banker now running a sports brokerage company. The use of the consultants, entirely warranted in a

transaction of this dimension, became an obstruction to the envisioned methodology, which was already flawed. Both parties pressed Rangell through the consultants and directly with their view of what should be the proper elements of price to be considered. Rangell, not wanting to displease anyone, undoubtedly included the information in Citigroup's calculus.

The "Race" to Object

As the Citigroup appraisal neared completion, Rangell was in touch with both parties. The expectation was for the appraisal to be faxed to the parties. Under the terms of the PSA, the parties had a window of five business days to object to the appraisal and trigger the process for a second appraisal. PSA § 1.2.

Sensing that the appraisal from Citigroup was near, Raymond Baltz, Esq., November 22, 2005, called Lyman Bullard, Esq., outside counsel for Citigroup and inquired as to when the appraisal would be forthcoming, but did not reach Bullard and received no response. Later on the same day, Michael Gearon, Jr. called Rangell and asked for the same information and was told to expect the appraisal "tomorrow." Rangell asked for fax numbers, ostensibly for the transmission of the appraisal. Gearon told Rangell that he would be travelling and the appropriate fax number would depend on the time that the fax was to be sent. Gearon inquired whether the appraisal could be sent by email.

The next morning, November 23, 2005, Gearon called Rangell to inquire as to how the appraisal would be sent and was told it would be faxed. In a second call, Gearon provided the fax number for Baltz at his Atlanta law firm. Apparently, during these conversations, Gearon received information that led him to expect that the appraisal would be sent at approximately 10:00 a.m. because he sent an email to that effect to Baltz.

On the same morning, Rangell was in touch with Riccio by telephone. Aspects of the appraisal were discussed such as what were the appropriate data bases that had been used, the role of the collective bargaining agreement, the use of revenue multiples, the discounted cash flow for Phillips Arena, a valuation of a combined asset sale as opposed to a piecemeal sale of the constituent parts, and the review by a Citigroup committee. Rangell was openly appreciative of the input of the Belkin team and thanked Riccio for the information provided. While there is no direct evidence about the methodology and the timing of the appraisal transmission, apparently, Rangell advised Riccio that he intended to send the appraisal by email, not by fax, and that the appraisal would be sent "shortly."

Anticipating the receipt of the appraisal, and apparently having interpreted the PSA in a specific manner, Riccio stood by for the receipt of the appraisal via email and arranged for his secretary, Grace Gallagher, to stand by the office fax machine with a previously prepared objection to the appraisal. Riccio had previously emailed Rangell the Belkin permission to deliver the appraisal to HTPA by email. Undoubtedly, this confirmed to Riccio that the appraisal was going to be transmitted by email and not by fax. Almost immediately after the telephone call, the appraisal was transmitted by email and an objection to the appraisal was sent in accordance with the notice provisions of the PSA. This Court accepts the inference that the substance of the appraisal, but not necessarily the final amount, was known to Riccio and the Belkin side prior to the formal release of the appraisal by email. The Court also infers that the Belkin side had decided to object, and to be the first to object to the appraisal in advance of the formal release.

For its part, the HTPA side was still expecting a fax receipt of the appraisal until Baltz received a call from Bullard at 10:56 a.m. on November 23, 2005, informing him that the

appraisal would be sent "electronically later today."[16] At the time of the call, Baltz was heavily engaged in the closing of a transaction for another client involving a reported billions of dollars. It is clear at this point in time, despite Michael Gearon, Sr.'s concerns about the possible right of the Belkin side to object to the first appraisal that had been ordered by the Belkin side, the HTPA side fully believed that it possessed the right to object to the appraisal and they had five days in which to do so. However, being cautious and prudent, and with some degree of alarm upon the receipt of the objection from the Belkin side, HTPA also objected.

The Expert Testimony

The Defendants presented the testimony of Z. Christopher Mercer, the chief executive officer of Mercer Capital which specializes in business valuations and investment banking. Mr. Mercer was received by the court as an expert in the drafting of buy-sell agreements, having written extensively on business valuation theory and practice and had authored a book on buy-sell agreements entitled, <u>Ticking Time Bombs – Buy/Sell Agreements.</u>

The essence of the Mercer testimony was to opine that the characteristics of the PSA do not reflect a commercially reasonable arrangement. Included in his analysis in reaching his opinion were:

- An agreement where a party making the selection of the first appraiser would also have the right to select the second appraiser;
- If there was a race to object, the agreement would have to provide for a simultaneous transmission of the evaluation or appraisal;
- The use of Fedex, facsimile, or email do not provide for simultaneous delivery;
- It would be necessary to have all parties assembled at the same place and time;

[16] Apparently everyone involved used the term "electronically" to mean transmission by email. It is to be noted that facsimile transmissions occur electronically as well, but the end product is produced on paper instead of a computer screen.

- A statement within the PSA of a clear objection methodology.

Mercer also testified that he had never seen an agreement like the PSA with the process for objection. On cross-examination, Mercer stated that he had examined the PSA, the OA and had extensive experience in buy-sell agreements. He acknowledged that he did not consider the negotiating history of the PSA, the post agreement conduct of the parties, and the dialogue between the drafting counsel, Floor and Baltz. He also acknowledged that he was not experienced in the purchase or sale of sport franchises. Interestingly, Mercer further opined that the right to select the appraiser is less important than believed by the parties if the appraising banker was truly neutral in its evaluation, had no material business relationship, and was truly experienced. However, Mercer also opined it was not reasonable for the parties to try and influence the appraisal, but that it was almost always done. The sum total of the Mercer testimony is that the "race to object" is a contorted, unreliable and unreasonable interpretation of the contract that is not shown by the actions of the parties nor something routinely used in commercial transactions. Mercer was credible and persuasive in the limited area upon which he was called to opine.

Post Appraisal Conduct of the Parties

Following the receipt of the Citigroup appraisal and the submission of objection, Belkin proceeded to retain J. P. Morgan to provide the second appraisal. At $2,000,000, the retention of J.P. Morgan was at a significantly higher cost than the Citigroup appraisal. Belkin tasked J. P. Morgan in the same manner as it had tasked Citigroup in the creation of the appraisal. This method of tasking caused Morgan to consider certain post August 17, 2005 information. Specifically, Morgan included in consideration of its appraisal the Ticketmaster agreement impact even though the agreement had not been finalized. Morgan also considered the NHL XM

Radio deal finalized in September, 2005, fan attendance statistics for 2005, and projections about NHL revenue sharing in the forthcoming collective bargaining agreement which had been negotiated, but not ratified by the players' union as of August 17th. Additionally, J.P. Morgan was not instructed by Belkin to consider the personal guaranties of the owners to the lenders and the NBA.

Under the belief that HTPA was the entitled party, J. Michael Gearon, Jr. opened negotiations with another eligible banker, Morgan Stanley, for the purpose of developing the appraisal that HTPA believed it was entitled to obtain. The Morgan Stanley negotiations were finalized effectively on November 28, 2009, but not reduced to writing on that date. Mr. Belkin called the Morgan Stanley representative, Paul Taubman, during the period of the HTPA negotiation. Ultimately, Morgan Stanley, originally eager for the assignment, recognized the impending storm clouds of litigation gathering over the matter. Morgan Stanley took the position that it would work on and complete the assignment provided that a court ordered that HTPA was legally entitled to select the second appraiser. It is not clear from the evidence that the Morgan Stanley hesitancy was the result of the Belkin telephone call.

It was at this juncture that the parties had some discussions between attorneys regarding the selection of the second appraiser, the dispute as to which side was entitled to make the selection, and the rush to litigation. HTPA, through counsel, wrote a letter to Belkin and its proposed eligible banker who would serve as the second appraiser. This brought any possibility of contract implementation to a halt. Ultimately, this letter did not affect the outcome of the contract and the dispute. The parties reached a standstill agreement in anticipation of legal resolution of their differences. It was acknowledged by both sides that the universe of eligible investment bankers was a known group of bankers, but there was a lingering concern about the

choice of banker and the enforcement of the agreement via injunctive relief. After the instant litigation ensued with the filing of a complaint by Belkin on November 23, 2005, the parties agreed to a standstill in the process of selecting additional appraisers until the court considered the rights of the parties under the PSA. The parties have some disagreement about the "standstill" agreement. It is clear that, *inter alia,* the parties agreed that the litigation would be expedited by the parties and that a third appraiser would not be selected until the Court made essential rulings.

Third Party Post Contract Actions

Although the litigation of the validity of the contract has ensued, none of the actions necessary to the finalization of the PSA have occurred. While there is a valuation or appraisal that has been performed by Citigroup, the impasse over the selection of the second and third investment bank appraisers persists. Consequently, no entity has acted on the estimate of fair market value by Citigroup. Indeed, both parties have objected to the appraisal. There has been no action by the Atlanta Spirit auditors to determine the value of the Belkin interest in accordance with § 1.2 of the PSA. No request has been made to the NBA or the NHL for the approval of the Belkin buyout by HTPA nor has any Settlement and Release Agreement been executed and delivered as required by the PSA.

In addition to the third party actions, there has been no default by either party that would trigger the penalty provision of the PSA. The penalty provision applies to the payment of the purchase price after it was determined by the three appraisal process, the determination of value by the auditors, the league approvals and the receipt of the Settlement and Release Agreement. The penalty provision is inapplicable because none of these things have occurred due to the

positions taken by each of the parties regarding the selection of the second eligible banker for the determination of FMV.

Discussion and Conclusions of Law

It is clear to this Court that the parties to this dispute have elected different prisms with which to view their joint arrangement. The parties differ sharply upon the key elements of the asserted agreement represented by the PSA. Among their disagreements are:

1. The value of the sports franchises and related property interests and the proportionate value of Belkin's interest;
2. The method to be utilized in determining the identity of the appraisers to make the valuations;
3. The identity of the appraisers making the valuation;
4. The description of Fair Market Value to be used by the appraisers in making their valuations;
5. The information, history, and material that should be properly considered by the appraisers;
6. What should happen from this point forward.

The world of high finance includes the ownership of sports franchises. It is undisputed by the parties that the ownership requires significant resources and sharp business acumen in order to succeed. Sport franchises are no longer side shows in the portfolios of wealthy businessmen. Rather, they are more and more the central business for many of the owners. Because of the high capital cost for acquisition and continuation of the operation of sport franchises and related businesses, joint ownership of franchises has become more common. The ownership of a franchise is much more than fielding a team to compete with other similarly situated teams. Currently, franchise ownership requires sophisticated business management personnel, appropriate business and sport facilities, business plans, policies and strategies, sound

marketing and promotion, experienced and capable personnel for the management of the "sport" side of the business, and phalanxes of accountants, lawyers, consultants, tax experts and other professionals to whom owners may turn for advice. This is as it should be when dealing with a commodity of great value.[17]

Such assistance was not lacking in the dispute that is the subject of this suit. All of the participants have extensive business experience, some of which related to sport business. At the time of the initial purchase of the sport franchises and the negotiation of the ownership agreement, the parties relied on experienced attorneys who had served them well in the past. Negotiations on details of the ownership arrangement took months to complete and provided for an Operating Agreement that has served the business operation reasonably well. In sharp contrast, the PSA was an agreement that was reached in a matter of hours in which the attorneys laboring on behalf of the parties were being urged to complete their work to meet expectations generated primarily by the National Basketball League management. In the amazingly short period of approximately thirty hours, the attorneys developed a comprehensive document for the buyout of the Belkin interest. The work of the attorneys was followed and approved by the parties even though some issues were not clearly defined. Specifically, the parties, through counsel, *post* contract developed an understanding as to how to deal with conflicts of interest involving the eligible bankers who had a personal banking relationship with a party or parties.

It was only when the agreement was put into actual operation that its flaws became apparent. This flawed process coupled with the recognition by Belkin that it might be possible to manipulate the process created the problems which have vexed the parties and this Court. Specifically, Belkin bargained for and received the right to choose the first eligible banker. This

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[17] Van Riper, Tom; The Most Valuable Teams in Sports, Forbes Magazine, January 13, 2009

was obviously something that Belkin thought was important, and impliedly, if not explicitly, so did HTPA. It may well be that Belkin and HTPA felt they had the capacity to so influence the eligible banker so that the valuation would be to their each, individual liking. The right to select the eligible banker coupled with evidence that both sides tried to manipulate Citigroup emphasizes the importance of the eligible banker selection.

The next step was to position for the selection of the second eligible banker. If one side or the other could couple the selection of the second eligible banker together with further manipulation of valuation, then the deal would be successful for that side. Apparently recognizing the importance of selecting the second eligible banker, Belkin gained knowledge of the expected Citigroup valuation in advance. Belkin's actions immediately upon the release of the Citigroup valuation implicates advance knowledge, which, if there were to be a race to object to the valuation is a critical advantage. This advantage taken with the communication of the valuation before HTPA had notice would seal the deal for Belkin. Having selected and manipulated both the first and second eligible bankers, the objection by HTPA would be rendered almost meaningless. If a third eligible banker valued the assets less than it's predecessors, it would make little difference because, at the very least, the lower of the two earlier valuations would be used. Thus if Belkin could live with Citigroup's valuation and manipulate the eligible banker it chose for the second valuation, being forced out of ownership would result in a windfall gain when compared to the cash investment paid in just a few months earlier. This, of course, represents HTPA's theory of the case. While the evidence points with significant weight in that direction, it is unnecessary to have to reach that conclusion.

The Appraisals or Valuations

Both parties presented extensive evidence, primarily by deposition, regarding the appraisals. As discussed, *supra,* the appraisals were to be independently conducted by qualified, eligible bankers to determine the fair market value as of August 17, 2005. If it were necessary to review the appraisals, there is considerable evidence that the Citigroup appraisal was flawed by the outside influence of both parties. If this were the only stumbling block to the resolution of the dispute between the parties, obviously this Court would order new appraisals. However, as will be seen, the parties impasse and lack of agreement on contract methodology and operation makes a review of the appraisals by this Court unnecessary. Additionally, as this Court advised the parties during the taking of testimony, it was not the role of the court to parse through the reasoning of the eligible bankers in making their appraisals. The parties thought they bargained and achieved a methodology of a self-correcting approach to valuation.

While the parties may differ on the appraisals, it is clear that both parties sought to influence the appraisal process by providing information directly and indirectly. However, the eligible bankers were selected because they were expected to be competent for the task and independent. In other words, the eligible bankers were believed by the parties to be able to resist the entreaties of both sides, interpret information given to them correctly without the bias of source, gather independent information, and to avoid conflicts of interest. Aside from the observation that the tasking of J.P. Morgan by Belkin was incorrect, the use or non-use of information, its accuracy, its importance to the calculus, and other factors considered by the bankers is of no moment to this Court. The terms of the PSA relating to the bankers is clear enough and the protections against an appraisal "going off the reservation" were in place. The appraisals are not the issue in this case.

The Race to Object and the Right to Object

The previous ruling of the Court of Special Appeals in this matter makes the idea of a race to object irrelevant. The Court of Special Appeals expressly determined that both parties had the right to make and did make timely objections to the first appraisal. *Belkin v. HTPA*, *supra*, p.14. While considerable trial time was expended on the "race" issue, there is virtually nothing in this extensive record to suggest that there was a "race" to object and that first in time makes a party first in right. In point of fact and evidence, it is overwhelming that the parties did not agree to have a race to object. It runs contrary to the express language in the agreement. Additionally, the "race," if there was to be one, was not a clearly defined event, is not evidenced anywhere in the agreement or in any of the dealings of the parties, was the subject of possible manipulation and collusion, and was not a commercially reasonable method or a commonly used technique in dispute resolution.

Upon remand, it is the mandate of the appellate court to this Court to determine what was the agreement, if any, as to how to proceed if both parties made timely objections. Ironically, both parties now assert the position that there was no race to object. While HTPA states there was never an intended "race to object," its actions at the time of the disclosure of the appraisal suggest it might have felt otherwise. On the other hand, Belkin complains that all argument about a "race to object" are misplaced and that the provision was designed to protect against a runaway appraisal. Not withstanding earlier observations about why the contract did not contain a "race to object" provision, the Belkin position is that it was first to object and what HTPA did thereafter is of no consequence. Belkin further reasons that the eligible bankers came from a list and, therefore, it makes little difference as to which second eligible banker was chosen. Belkin's actions belie their beliefs. At the time of the receipt of the first appraisal, Belkin treated the

matter of objecting as if it was a race to the exclusion of the rights of HTPA, and as was stated earlier, Belkin fought hard to bargain for the right to select the first eligible banker. It is illogical to suggest the first eligible banker is critical and the second eligible banker is non-consequential.

Was There An Agreement If Both Parties Objected?

It is to be laid to rest that both parties made a timely objection. The next question is to decide what, if any, agreement exists between the parties as to what should happen if both parties objected. In its decision, the Court of Special Appeals remanded this case because the intention of the parties was not expressly stated.

Because the PSA has been found to be ambiguous, this Court looks to extrinsic parol evidence to determine if there was a meeting of the minds. Under Delaware law, this Court must look to relevant extrinsic evidence that reveals the parties' intent at the time they entered into the contract. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1233 n.11 (Del. 1997); *Comrie v. Intersays Ntworks, Inc*. 837 A.2d 1, 13 (Del. Ch. 2003); *Cities Serv. Co. v. Garginier, Inc*., 344 A.2d 254, 258-259 (Del. Super. Ct.) appeal dismissed, 349 A.2d 744 (Del. 1975); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*., 769 F. Supp. 599, 616 (D. Del. 1991). However, the scope and nature of extrinsic parol evidence is not unlimited. Under Delaware law, only some types of parol evidence are permitted. Evidence of prior agreements and communications of the parties, business custom, trade usage or course of dealing, overt statements and acts of the parties, the business context, and prior dealings between the parties are examples of permitted extrinsic evidence. *Eagle Indus*., 702 A.2d at 1233; *Supermex Trading Co. v. Strategic Solutions Group*, Civ. A. No. 16183, 1998 WL 229530 at *3 (Del. Ch. May 1, 1998). Within the context of this dispute, business custom and trade usage play no significant role in discerning the intent of the parties because the prior course of dealings was

limited to the negotiation of the Operating Agreement and not regular, repetitive interactions over a significant period.

Nor is there any subjective interpretation of the PSA by either side that was shared with the other side, or should have been known, that would give rise to an implicit understanding. *Comrie*, 837 A.2d at 13; *United Rentals v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007); Klair v. Reese 531 A.2d 219, 223 (Del. 1987); Restatement (Second) of Contracts §201. There was no disclosed, shared intent orally expressed during the negotiations.

The principal authors of the PSA both testified that they never contemplated a situation where both parties objected. It is important to note that the question before this Court is not whether both parties had the right to object, but what should occur if both parties did object. The testimony at trial of Raymond Baltz, Esq. who represented HTPA in the PSA negotiation and Richard Floor, Esq. who represented Belkin could not have been clearer. Both lead negotiators stated that they did not contemplate that both parties would object. In its brief in argument to this Court, Plaintiff Belkin concedes this is the case. Belkin Post Trial Reply Brief, II. B., p. 4. Instead, both negotiators expected that if the appraisal were too high, HTPA, as buyer, would object, and Belkin, as seller, would object if the appraisal were too low. This Court considers the views of the negotiators, especially where their views are consistent with each other and are not illogical to be of great importance.

As determined by the Court of Special Appeals, there is no language in the agreement that touches upon such a situation. Further, there is no evidence that anyone else made such an agreement, either in writing or orally, expressly or implicitly. In fact, this Court finds that <u>no one</u> contemplated the legal entanglement that resulted when both sides objected. In other words,

there is no extrinsic evidence of an agreement of what should occur when both sides objected. Neither side has presented evidence of any mechanism for contract completion or resolution when both sides object. Instead, each side has taken pains to suggest that they have the legitimate right to the selection of the next eligible banker to make the next appraisal. As stated above, that is not the issue before this Court.

This Court is also not permitted to indulge in the interpretation of post-contract actions to discern what the parties intended by their contract.

Although it is the theory of the PSA that the list of eligible bankers would contain only neutral bankers, the practice of the parties shows the desire to corrupt the neutrality. The hiring of “consultants” by each party to “assist in the gathering of pertinent data” demonstrates a common methodology to influence the outcome of the appraisal process. This fact alone demonstrates the materiality and importance of the right to select any eligible banker during the process. This element coupled with the intense negotiation, centering in part, on which side would get to select the first eligible banker to begin the appraisal process, also demonstrates its importance. This Court is more than satisfied by a preponderance of the evidence that there was never a meeting of the minds as to what was to have happened if both sides timely objected to the initial appraisal. Additionally, this Court is also satisfied by a preponderance of the evidence that the decision to select the second eligible banker is a material term or condition. Finally, this Court declines to supply any term or condition of which there was no agreement, being satisfied that the understanding which is lacking is not mere trade terminology or usage.

In this matter, Belkin has the burden of showing, by a preponderance of the evidence, the “obvious conclusion” that the parties reached a reasonable shared meeting of the minds that the

PSA required a race. *Comrie*, 837 A.2d at 13; *United Rentals*, 937 A.2d at 835. Belkin has failed to meet its burden of proof that there is an enforceable agreement and that this Court should impose terms of settlement on the payment for the assets as called for by the agreement. Under Delaware law, Belkin was required to prove specific conduct that is direct and clear as to leave no doubt of the intent of the parties.

Belkin relies, in part, on the post-contract actions and statements of the parties to attempt to demonstrate its view that it was permitted to select the second eligible banker and that HTPA was late in its objection to the first appraisal, and therefore had no right to make the selection. Belkin relies on Delaware precedent in this regard, citing *Artesian Water Co. v. Delaware Dep't of Highways and Transp*., 330 A.2d 441, 443 (Del. 1974). In *Artesian*, the dispute arose over the extent of the use of certain franchise rights that permitted the plaintiff to install water piping along a state road. When the State of Delaware realigned the right-of-way, the parties fell into a dispute over how much of the state's property was subject to use as a basis to determine cost of relocation of the water pipes. If the piping was covered by the franchise agreement, Artesian, as the franchise holder, would be liable for relocation. The trial court found that only 5% of the original area was in use and awarded relocation costs to Artesian in proportion to the amount of use. On appeal by the State of Delaware, the appellate court reversed citing the fact that Artesian continued to pay the whole franchise fee even after it no longer used the entire property. Relying on this post-contract conduct, the appellate court reasoned that Artesian considered itself the user of the entire property and not just 5%. The difficulty with Belkin's reliance on *Artesian* is that there is no post-contract statement or action that shows HTPA's intentions. Instead, Belkin points to comments by Michael Gearon, Sr., a non-party, regarding the need to race to object. This is hardly the kind of clear evidence of consistent post-contract conduct required to bind a

party under Delaware law. Other citations presented by the Plaintiff are not on point, or are not persuasive. See *Wilgus v. Salt Pond Investment Co. et. al*., 498 A.2d 151, 157 (Del. Ch. 1985); *Radio Corporation of America v. Philadelphia Storage Battery, Inc*., 6 A.2d 329, 340 (Del. Ch. 1939), "any interpretation of the contract may be gleaned from the actions of the parties before any dispute has arisen between the parties." Likewise, Belkin chooses to give the "five business day" window in PSA §1.2(d) a very narrow interpretation. Instead of considering the period a time for objection, Belkin suggests it is a deadline for the first appraisal to become final and operative unless there was an objection. There is nothing beside this bald assertion to support the Belkin position which this Court finds to be a contorted interpretation.

In order to unravel this resulting Gordian Knot, there is little that a court can do. Unlike Alexander the Great,[18] courts are not free to slash through the legal entanglement and impose a solution. To do so would undoubtedly prefer one party over the other. This is true notwithstanding the finding of Belkin's apparent "advantage" in the race to object and Belkin's employment of an appraiser under the wrong terms and conditions. Delaware law does permit the courts to imply missing terms, but only when they are necessary to honor the parties' reasonable expectations. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). Belkin views this contract construction technique in the negative and asserts this Court is not free to supply key language to the objection language, which would then operate to exclude HTPA's second and later in time objection. Simply put, such construction, or omission of construction of this contract is not warranted. Belkin desires this Court to not supply

[18] In 333 B.C.E., Alexander the Great led his fellow Macedonians and other fellow Greeks in the conquest of the Persian Empire. Upon entering Phrygia, a satrap of the Persian Empire, Alexander reputedly tried to unbind a complex knot on an ox cart. Seers claimed that whoever succeeded in the untangling the knot would go on to become king of Asia. Apparently in frustration at not being able to locate the loose ends of the knot in order to untie it, Alexander drew his sword and slashed the knot through, thereby solving the problem. This "Alexandrian solution" is now a metaphor for a dire result to an intractable problem.

a term and then argues that the lack of the term not supplied supports an interpretation by implication. There was no expectation of the parties to be bound by the Belkin view expressed in its brief, but found no where else in the evidence. Resort to supplying a term, or inferences drawn from not supplying it is not decisive, or even correct.

The Implied Covenant of Good Faith and Fair Dealings

Belkin asserts that HTPA has reneged on its promise to establish valuation and that its actions constitute a violation of contracting in good faith, or in dealing with your opposite contracting party fairly. To put it another way, a party, under Delaware law, may not act in such a fashion so as to defeat it own agreement. The specific act(s) complained of by Belkin is the failure of HTPA to honor the appraisal of J.P. Morgan, the selection of Belkin after Belkin was the first to object. In this, Belkin's premise is faulty. HTPA never agreed, under the circumstances within the facts of this case, that Belkin had the right to pick J.P. Morgan. Given the failure of a meeting of the minds on what to do with the contracting process if both parties objected, HTPA can hardly be faulted for objecting to the unilateral banker selection, especially when it believed it had the right to be making the selection itself. This Court need not examine whether either party acted in bad faith because of the failure of the meeting of the minds and the determination that a "race to object," did not exist, but it is clear from the evidence that Belkin had advance knowledge of Citigroup's appraisal and when it was to be made known to the parties.

What Now?

Given the failure of the parties to have a meeting of the minds if both objected to the first appraisal as they did, the contract becomes unenforceable by the courts. As mentioned above, this Court does not need to reach whether there was a duty of good faith and fair dealing so as to

give rise to a rescission of the contract because of any purported breach, or because of the "domination" of the appraisal process, or the invalidity of the appraisals. Consequently, this Court finds that the conditions precedent to the payment of purchase price have not been determined and the default provision of the PSA does not become operative.

It will be for the parties to determine what is in their best interests and not for the courts to do more. This Court views the parties to be operating under the terms of the Operating Agreement which provides a solution for the inability of the parties to work harmoniously together. Whether the Draconian solution of the Operating Agreement, under such circumstances, is invoked requires close consideration of whether to reopen negotiation for a buyout of the Belkin interest by HTPA. If such were to be the case, the parties would be well served if they were to reach an agreed buyout price on their own without relying on investment bankers to make such a vital decision for them. Much of what has become a stumbling block in this case would be avoided had this been the procedure originally adopted. This Court acknowledges that it would take hard bargaining to reach an accommodation, but surely it would be preferable to leaving the important decision of "how much" to third parties.

Declaration of the Rights of the Parties

In accordance with the foregoing findings of facts and conclusions of law, this Court declares the following rights of the parties:

1. The PSA is void and unenforceable for the want of material terms;

2. Belkin is an objecting party to the first appraisal pursuant to PSA § 1.2(e);

3. HTPA is an objecting party to the first appraisal pursuant to PSA § 1.2(e);

4. There is no agreed method for the selection of a second eligible banker when both parties timely object to the first appraisal, nor should this Court construe any terms to the PSA;

5. Neither party has breached the PSA;

6. Closing upon the buyout of the Belkin interest under the PSA by HTPA was rendered impossible when the appraisal procedure became unworkable;

7. Because Belkin resigned as NBA Governor as a result of the understanding that his interest would be purchased according to the terms of the PSA, Belkin is entitled to be restored as NBA Governor, pending the application of any NBA league rules to his standing as NBA Governor, or if there has been any violation of the Operating Agreement that creates a basis for his removal;

8. Neither party is entitled to recover any monetary damages and each shall bear their own costs in these proceedings;

9. The financial obligations of each party to Atlanta Spirit, LLC. remain the same as if the PSA had not been created and in accordance with the parties Operating Agreement;

Counsel for HTPA is directed to submit an order consistent with this Court's opinion within fifteen days of the date contained herein.

Dated:______________________

____
DURKE G. THOMPSON, JUDGE
Circuit Court for Montgomery
County, Maryland