

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JACK KENT COOKE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 11134
)	
SAM OOLIE, et al.,)	
)	
Defendants,)	
)	
and)	
)	
THE NOSTALGIA NETWORK,)	
INC.)	
)	
Nominal Defendant.)	

MEMORANDUM OPINION

Date Submitted: April 3, 2000
Date Decided: May 24, 2000

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CHANDLER, Chancellor

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This case involves a dispute between two directors of The Nostalgia Network, Inc. (“TNN” or the “Company”), Sam Oolie and Morton Salkind, and TNN’s shareholders. The shareholder plaintiffs, contending that Oolie and Salkind breached their duty of care and loyalty, essentially challenge four transactions: (1) TNN’s issue of warrants to its directors as compensation; (2) Oolie’s and Salkind’s personal loans to TNN; (3) Oolie’s and Salkind’s vote to pursue one particular acquisition proposal for TNN over other proposals the board was considering at its December 6, 1989 meeting; and (4) Oolie’s and Salkind’s sale of their personal stock to Gold ‘N M Communications, Inc. (“Gold”) in a privately negotiated sale.

In my June 23, 1997 Opinion,* I concluded that TNN properly issued the warrants, Salkind and Oolie properly loaned TNN funds, and Salkind and Oolie properly sold their personally held stock to Gold without usurping a corporate opportunity. I granted summary judgment for the defendants on all derivative claims and almost all of the class claims. I preserved, however, one last class claim. I granted shareholder plaintiffs further discovery on the sole issue of whether the two director defendants, Oolie and Salkind, breached their fiduciary duty of loyalty by electing to pursue a particular acquisition proposal that allegedly best protected their personal

¹ Cooke v. Oolie, Del. Ch., C.A. No. 11134, (slip. op.) Chandler, V.C. (June 23, 1997).

interests as TNN creditors, rather than pursue other proposals that allegedly offered superior value to TNN's shareholders. Defendants have moved for summary judgment on this last class claim. Plaintiffs, however, have interpreted the sole remaining class claim completely differently than the defendants. The plaintiffs now present to the Court three new claims---one new class claim and two new derivative claims. This awkward posture, in which the plaintiffs' and defendants' arguments have passed each other like two ships in the night, is unfortunate. Nevertheless, I will address the parties' arguments, mindful that I must consider each fact in the light most favorable to the non-moving party.

I. FACTUAL BACKGROUND²

In the late 1980s and the early 1990s, defendant TNN operated under extreme financial distress. The board, which consisted of both director defendants, Sam Oolie and Morton Salkind, and two other directors, David Wargo and John A. Janas, approved a number of transactions in the late 1980s in an attempt to steer TNN through its troubled time.³

² The plaintiffs' theory of the case relies on a somewhat different set of facts than the theory on which the defendants have focused. As such, the background facts I will set out are more lengthy than usually necessary for a second summary judgment Opinion because I must address the wide range of facts upon which the parties rely.

³ As a result of the company's financial condition, the TNN directors granted themselves warrants as compensation for their service as directors, rather than commit company funds to pay director's fees. I have already adjudicated, and dismissed in my June 23, 1997 Opinion, all claims challenging the warrants awarded to directors Wargo, Salkind,

On December 14, 1988, the TNN board determined that the Company required \$2.55 million to finance operations and repay short-term debt. Accordingly, director defendants Oolie and Salkind agreed to make an operating loan and a refinancing loan to the Company (the “December Loans”). Directors Wargo and Janas negotiated the December Loans on behalf of TNN. Oolie and Salkind agreed to a one-year operating loan of \$1.2 million in the form of a convertible note⁴ at 16 percent with interest payable upon maturity or conversion. If TNN repaid the loan or converted the notes within six months, the annual interest rate dropped to 12 percent. As part of the operating loan agreement, Oolie and Salkind also received 30,000 warrants with an exercise price of \$1.25 for each \$100,000 committed. The refinancing loan agreement contained exactly the same terms as the operating loan agreement except that Oolie and Salkind would receive 30,000 warrants for each \$100,000 *actually loaned*, as opposed to each \$100,000 *committed*. The board unanimously approved these loan transactions.

TNN exhausted the funds provided in the operating and refinancing loans by June 1989, forcing TNN to seek additional capital in order to meet

and Oolie, and the separate claims challenging warrants awarded to Janas. These board actions, therefore, need not be discussed in detail in this Opinion.

⁴ TNN could convert the notes into common stock at any time at the loan execution date’s closing bid price. Oolie and Salkind could convert the notes after six months.

its June payroll expenses and July payment on its satellite contract. TNN's vice president-finance reported at the board's June 26, 1989 meeting that the company required up to \$1.7 million in additional funds within the next 12 months. TNN's investment bank, Donaldson, Lufkin & Jenrette ("DLJ"), told the board that any transaction it could find and negotiate for TNN would not close for at least three months. The board, consequently, unanimously approved another one year loan from Oolie and Salkind (the "June Loans"). Oolie and Salkind agreed to lend TNN up to an additional \$1.7 million at 16 percent. TNN, moreover, agreed to pay Oolie and Salkind 90,000 warrants exercisable at \$2.00 per share for each \$100,000 committed.

Following the June Loans, the TNN board solicited proposals to purchase some or all of TNN's common stock. On July 14, 1989, Gold submitted an unsolicited proposal to purchase certain specifically designated shares. Rather than immediately accept Gold's original proposal, the board attempted to use the Gold proposal to generate other superior offers. The board appointed Salkind as its chief negotiator. Both Salkind and DLJ attempted to unearth other potential bidders for TNN, and continued to do so until the board met on December 6, 1989. According to a DLJ report, DLJ or Salkind contacted 59 companies regarding a potential transaction with TNN. Three of these companies submitted formal written proposals by the

time the directors met on December 6. The board also received two oral proposals at the meeting.

At the December 6 board meeting, the directors considered all five of the proposals that Salkind and DLJ had managed to generate. The five proposals included: (1) the USA proposal; (2) the AMC proposal; (3) the TCI proposal; (4) the Concept proposal; and (5) the Gold proposal. The sole remaining class claim in this litigation (following my June 23, 1997 Opinion) alleges that Oolie and Salkind convinced the board at this meeting to pursue the USA Network (“USA”) proposal because the USA deal best protected Oolie’s and Salkind’s interests as TNN creditors.

A. The USA Proposal

During the board’s December 6, 1989 meeting, USA’s president, via conference call, offered to acquire all of TNN’s outstanding stock, on a fully diluted basis, for an aggregate purchase price of \$30,000,000.⁵ On a fully diluted basis, TNN had 14,272,631 shares outstanding; therefore, the USA offer had a value to stockholders of about \$2.10 per share.

As a condition of its offer, however, USA demanded that TNN’s debt could not exceed \$1,050,000. As of October 31, 1989, TNN had \$4,893,059

⁵ USA submitted a written proposal in a December 14, 1989 draft letter of intent to the TNN board.

of debt. The USA proposal required \$2550,000 in TNN debt to be converted to stock, leaving TNN with \$2,343,059 in post conversion debt, well above the \$1,050,000 cap established as part of the USA proposal.

As of October 31, 1989, Oolie and Salkind had loaned TNN \$796,000 pursuant to the \$1,700,000 June loan agreement. As of the December 6, 1989 board meeting to consider the various proposals for TNN, it seemed reasonably clear that TNN would continue to borrow against the \$1,700,000 Oolie and Salkind committed as part of the June loan agreement and surpass the cap the USA proposal set. Indeed, as of December 31, 1989, Oolie and Salkind had loaned TNN \$1,514,000 of the \$1,700,000 they committed to TNN as part of the June loan agreement. This sum surpassed the USA proposal's debt cap by almost half a million dollars.

B. The AMC Proposal

American Movie Classics ("AMC") submitted a proposal to purchase the assets of TNN for an initial \$26,000,000 payment plus two future contingent payments of \$5,000,000 each likely due at the end of 1995 and 1997 respectively. As part of the proposal, AMC indicated that it would reduce the \$26,000,000 payment by the amount TNN's current liabilities exceeded its current assets. As of October 31, 1989, TNN's current liabilities exceeded current assets by \$4,032,859. As of December 31,

following the conversion of \$2,550,000 of convertible debt, current liabilities exceeded current assets by \$1,651,356. After reducing the \$26,000,000 payment by \$1,651,356, the initial AMC payment would equal about \$24,348,644. This payment represented \$1.71 per share on a fully diluted basis.⁶

AMC would pay TNN the first contingent \$5 million if TNN reached 30 million subscribers by December 31, 1995. At the time of the board meeting, TNN had between six and eight million subscribers. AMC would pay TNN the second contingent \$5 million if TNN reached 35 million subscribers within two years after TNN reached 30 million subscribers. The total present value of the two \$5 million payments, using a 12 percent discount rate and without discounting for the payments' contingent nature, was approximately \$5,500,000.⁷ The AMC asset purchase proposal, after adding the \$5,500,000 contingent back-end payments to the \$24,348,644 upfront payment, provided an aggregate present value to TNN shareholders of \$29,848,644, which is slightly less than \$2.10 per share on a fully diluted basis. The AMC proposal actually provides less value due to the contingent nature of the back-end payments.

⁶ \$24,348,644 ÷ 14,272,631 = \$1.705 per share.

⁷ DA 28 (Agenda and DLJ's presentation materials for Nostalgia Board of Directors Meeting dated December 6, 1989).

AMC structured its proposal as an asset purchase; therefore, AMC would not assume most of TNN's debt. To meet its obligations, TNN presumably would apply the \$29,848,644 in proceeds from the sale of TNN's assets to pay off its debt. If TNN used the proceeds from its asset sale to pay off its debt, then the AMC proposal would not be worth \$29,848,644. Instead, it would be worth \$29,848,644, minus \$2,902,878 of TNN debt, leaving \$26,945,766 available for TNN to distribute to its shareholders. On a fully diluted basis, after discharging TNN's debt, the AMC proposal offered shareholders about \$1.89 per share?

AMC's suggested asset purchase also resulted in adverse tax consequences for TNN, according to Wargo's and Salkind's depositions, which would further reduce the value of the AMC proposal to shareholders. A stock acquisition would not result in the same tax consequences as AMC's asset purchase proposal.⁹

C. The TCI Proposal

Tele-Communications, Inc. ("TCI") submitted a proposal to acquire all TNN shares for an up-front payment of \$2.05 per share on a fully diluted

⁸ $\$26,945,766 \div 14,272,631 = \1.887

⁹ DA 98 (Wargo Dep.); DA 68 (Salkind Dep.).

basis, and a contingent back-end payment. The back-end payment.. .

gave shareholders the right to receive “an additional cash payment in the first quarter of calendar year 1995 equal to (i) \$.50 [multiplied by] the Weighted Average Number of Billable Subscribers for the calendar year 1994, divided by (ii) the sum of the aggregate number of shares of common stock outstanding at the closing plus the aggregate number of shares of common stock underlying all convertible securities, warrants and options outstanding at the closing, the exercise or conversion price of which was equal to or less than \$2.05 per share (estimated at 14,252,000 shares).”

The TCI offer included terms specifically targeted at Oolie’s and Salkind’s loans to TNN. The offer included immediate payment of \$1 million of Oolie’s and Salkind’s non-convertible loans, and a restructuring of the balance of the non-convertible debt to reduce the interest rate to prime plus one percent. In December 1989, the prime rate was 10.5 percent; therefore, TCI proposed reducing the interest rate on Oolie’s and Salkind’s loans from 16 percent to 11.5 percent. The TCI offer also extended the maturity date of the loans to December 31, 1994.

According to defendants’ brief in support of its motion for summary judgment, it seems that at \$2.05 per share, TCI’s proposal anticipated paying TNN \$29,258,893 up-front. Actually, however, TCI would pay TNN less than \$29,258,893 as its up-front payment because TCI would not pay \$2.05

¹⁰ A 731 (TCI’s “Proposed Term Sheet to Acquire All Shares of Nostalgia Network, Inc.”)

for all shares. TCI would have paid the holders of convertible debt, options and warrants the difference between \$2.05 and the conversion or exercise price of the convertible debt, options, and warrants. DLJ valued the up-front portion of the AMC offer at approximately \$22,500,000.

The back-end payment is more difficult to value due to its highly contingent nature. Defendants' estimate the value of the potential back-end payment at about \$0.35 per share on a fully diluted basis." TCI's proposal, therefore, offered about \$2.40 per share on a fully diluted basis to TNN's shareholders, ignoring the lower payments to holders of convertible debt, options and warrants, and assuming TNN ultimately received the contingent back-end payments.

D. The Concept Proposal

Concept Communications, Inc. ("Concept") offered to purchase \$7,000,000 of convertible debt and enough warrants to purchase 40 percent of TNN's outstanding common stock following exercise of those warrants. According to the Concept proposal, it was Concept's intention that TNN use the convertible debt as working capital to (i) repay Oolie and Salkind all principal and interest owed to them under their loan agreements; (ii) to pay

¹¹ DA 28. According to the defendants' brief, the midpoint of the present value of the contingent back-end payments was approximately \$5,000,000. TNN had 14,272,631 shares outstanding on a fully diluted basis. Therefore, $\$5,000,000 \div 14,272,631 = \0.35 .

DLJ fees owed to it; and (iii) to pay Robert Fleming Inc. for services rendered in connection with the contemplated transactions. The Concept proposal estimated the outstanding principal balance on the Oolie and Salkind loans to be approximately \$1, 100,000 at the time Concept submitted its proposal.

E. The Gold Proposal

The Gold proposal the TNN board considered at its meeting on December 6, 1989 varied greatly from the unsolicited proposal Gold initially submitted to the TNN board on July 14. The Gold offer the board ultimately considered consisted of a \$5 million loan in exchange for convertible debt. This debt could be converted into stock at a ratio of \$2.58 per share. The proposal also contemplated a Gold representative occupying a seat on TNN's board. Gold subjected its loan proposal to a satisfactory review of TNN's financial condition, business and operations.¹²

Gold's original proposal to the board on July 14, 1989 anticipated a very different transaction than the one the board considered at its December 6, 1989 meeting. Originally Gold submitted an unsolicited proposal to purchase for cash certain specifically designated shares, including those

¹² DA 59-60 (Letter to Salkind dated December 4, 1989 re Gold's offer to advance TNN \$5 million in working capital).

which Futuresat Industries Inc., Jack Kent Cooke, and the TNN executive officers and directors beneficially owned.¹³ Gold would base the price per share on an aggregate purchase price of all TNN issued and outstanding shares, on a fully diluted basis, of \$30,000,000 less all debt outstanding on the date of the purchase that had not been converted to equity. The provision of this offer which reduced the value attributable to TNN by the amount of TNN's debt implicitly acknowledges Oolie's and Salkind's loans.

Gold subjected its original offer to the following four conditions: (1) the designated shareholders had to agree to sell their shares by the end of business on July 21, 1989; (2) 90.1 percent of TNN's shareholders had to tender their shares in a tender offer which Gold contemplated at that time; (3) a satisfactory review of TNN's financial condition, business, and operations; and (4) execution of definitive transaction agreements.¹⁴

The plaintiffs contend that Oolie and Salkind declined the July 14 offer because Gold conditioned that offer on its satisfactory review of this action. The facts do not bear this out. The plaintiffs had not commenced this action at the time Gold submitted its initial proposal.

¹³ DA 52-3 (Offer letter dated July 14, 1989 from Gold to purchase all TNN shares for \$30 million).

¹⁴ *Id.*

Rather than simply accept Gold's first proposal, the board decided to shop TNN to obtain the highest value possible. In fact, the board never formally rejected Gold's first proposal. According to the terms of the July 14 offer, it terminated automatically if the TNN board did not accept by July 21. After the TNN board decided to seek other acquisition proposals, Salkind obtained a series of extensions of the July 14 offer, the last of which was dated August 15, 1989.

On August 23, 1989, Gold terminated its July 14 offer and substituted a new offer. Gold limited its new offer to the purchase of stock which only TNN's executive officers and directors beneficially owned. Gold also increased the value it ascribed to TNN to \$32 million less all debt not converted to equity. The August 23 offer contained the same conditions as the July 14 offer, but added the condition that Gold complete a satisfactory review of litigation which had begun in New York State Supreme Court.

On November 2, 1989, Gold revoked its August 23 offer and submitted a third proposal to the TNN board. The new offer mirrored the August 23 offer, except that it increased the value ascribed to TNN to \$35 million, less all outstanding debt not converted to equity. According to its terms, this third offer expired on November 20, 1989.

Gold, however, apparently lost its financing for this third acquisition proposal sometime after it submitted its November 2 offer and before the December 6 board meeting. Gold sent Salkind two separate letters, one dated December 4 and the other December 8, which both stated that Gold was “continuing to secure financing for the proposed acquisition of *The Nostalgia Network, Inc...*”¹⁵ Gold, consequently, contacted TNN on December 4 with an entirely different proposal. Gold’s fourth proposal to the TNN board envisioned lending TNN \$5 million in working capital through the purchase of convertible debt. The board considered this December 4 proposal at its December 6 board meeting.

F. The December 6 Board Meeting

At the board meeting, the directors considered all five proposals. Even though only the Gold *loan* proposal was before the board, the board considered the Gold *acquisition* proposal and rejected it for a number of reasons. First, technically, the Gold acquisition proposal had expired on November 20. Second, and more importantly, the board did not believe Gold had secured financing for its acquisition proposal. Gold’s eleventh hour \$5 million loan proposal, as opposed to its \$35 million acquisition proposal, bolstered the board’s belief that Gold had not yet secured the

¹⁵ DA 59 (Letter to Salkind dated December 4, 1989); DA 62 (Letter to Salkind dated

necessary financing for an acquisition of TNN.

The board rejected the TCI offer for three reasons. First, the TCI proposal posed tax complications for TNN.¹⁶ Second, board members thought DLJ overestimated TNN's future subscriber base, thereby potentially inflating the value of the back-end payment. Third, TCI would control the calculation of the data on which the deferred consideration would be based. The law firm of Davis, Polk & Wardwell prepared a memorandum for DLJ regarding a potential TCI acquisition of TNN. It provides:

TCI's proposed transaction essentially provides for a cash payment of \$2.05 plus the right to receive payments in the future based on the performance of the [TNN] business. As the accompanying tax memorandum indicates, this structure has the risk of being currently taxable with respect to both the consideration paid at the time of the acquisition and the future consideration, even though the value of the consideration to be paid in the future is not certain... Obviously, a TCI proposal with cash paid on the effective date of the merger would simplify matters because of the tax and liquidity problems inherent in the current TCI proposal. In addition, the current TCI proposal has the somewhat unsettling situation of deferring part of the consideration and that the payment of such consideration is based on the success of TCI's operation of and business plan for [TNN] after acquisition.¹⁷

December 8, 1989).

¹⁶ DA 20-1 (Davis, Polk & Wardwell's summary of TCI's offer for TNN dated December 4, 1989).

¹⁷ DA 20-1 (Davis, Polk & Wardwell's summary of TCI's offer for TNN dated December 4, 1989).

The board rejected the AMC offer because, on an after-tax basis, AMC had submitted an inferior proposal compared to others the board was considering at the time. The board also expressed concern that AMC, a competitor of TNN, was embarking on a fishing expedition cloaked in a legitimate acquisition proposal. The board also rejected the Concept offer to loan \$7 million to TNN for convertible debt and warrants for 40 percent of TNN's outstanding stock.

At the conclusion of the December 6 board meeting, all four directors and DLJ agreed that the USA proposal offered the most value to TNN. DLJ gave an opinion that the USA offer was superior to the other offers the board was considering. According to Wargo, Colin Knudsen, DLJ's representative advising the board, indicated that "the per share value from the USA Network appeared at that time to be the best offer available.. ." ¹⁸ The directors voted unanimously to pursue the USA deal.

G. USA Withdraws Its Offer

On December 14, 1989, USA sent TNN a draft letter of intent outlining the proposed acquisition. On January 4, 1990, TNN and USA entered into an indemnification agreement, under the terms of which TNN agreed to pay USA's expenses if TNN accepted a different deal, or if USA

¹⁸ A 172 (Oolie Dep.); A 424 (Wargo Dep.).

ended negotiations with TNN in good faith after performing its due diligence. Sometime between January 11 and January 16, USA, while performing its due diligence, discovered information compelling it to terminate negotiations and withdraw its acquisition proposal.

The plaintiffs contend that USA discovered that TNN had fewer subscribers than its public information indicated and that TNN was in breach of the most-favored-nation clauses in its various contracts with the cable operators which bought TNN's services. The defendants insist that political struggles between the two majority shareholders of USA caused USA to terminate their proposal. Salkind attempted to resurrect the USA proposal without success.

Immediately following the collapse of the potential USA deal, Salkind contacted Janas to determine the company's financial condition. Janas informed Salkind that TNN would exhaust its operating funds by mid-February.

Salkind immediately contacted TCI, Concept, and Gold in an attempt to revive the proposals which the board had rejected at its December 6 meeting. Salkind also contacted DLJ for assistance in locating alternative deals in the wake of USA's withdrawal. Additionally, the board contacted Lifetime Entertainment Services ("Lifetime"), another network, in an

attempt to drum up interest in an acquisition of TNN. TCI declined to negotiate at that point. Concept did not return repeated phone calls from Salkind. Salkind did not attempt to contact AMC. Just before the board met on January 31, 1990, Lifetime contacted Janas and indicated that it was not interested in pursuing an acquisition of TNN. Gold, however, renewed its interest in TNN.

H. Gold Buys Oolie's and Salkind's Stock

On January 16, 1990, just after USA withdrew its proposal, Salkind wrote Gold a letter asking it to "make its offer available to all of Nostalgia's shareholders by means of a tender offer or such other mechanism which it may select."¹⁹ In order to ensure a successful tender offer, Salkind and Oolie informed Gold that they were willing to enter into an agreement to sell their shares to Gold in the form of an agreement to tender, an option, or another mechanism which Gold's counsel might select. Gold rejected Salkind's request for a tender offer, asserting that it did not possess the funds to launch a full tender offer.

Despite its unwillingness to launch a tender offer, Gold still remained interested in acquiring TNN. Accordingly, Gold approached Oolie and Salkind with a proposal to purchase only their personal holdings, which

¹⁹ A 780 (Letter dated Jan. 16, 1990).

constituted a majority of the outstanding shares. Salkind asked if Gold would purchase company shares rather than Salkind's and Oolie's personal shares, but Gold "emphatically" refused, according to Salkind.²⁰ Salkind and Oolie were also aware at this time that Gold had already refused their request for a tender offer to all shareholders.

Oolie and Salkind subsequently entered into negotiations with Gold Chairperson Michael E. Marcovsky ("Marcovsky") to sell their shares. Both Oolie and Salkind said they believed at the time they were negotiating the purchase of their shares with Marcovsky that Gold would later perform a back-end tender offer for the remaining shares.²¹ Although Oolie and Salkind asked Marcovsky to commit to a back-end tender offer in writing, he refused to do so. Oolie and Salkind did, however, negotiate for Gold to immediately fund the operating expenses of the company. At the time,

²⁰ Plaintiffs' Appendix to Brief in Opposition to Defendants' Motions for Summary Judgment ("PA"), p. 112-114 (Salkind Dep.).

²¹ PA 11-112 (Salkind Dep.); A 190-191 (Oolie Dep.).

- Q. When Marcovsky came back and said I can't finance a tender offer to all the stockholders, what else did he say?
- A. He implied that although he couldn't commit to it now, that it was going to happen. That he was going to do it in the future.

Salkind Dep., p. 259-60:

- Q. Now, what was your response when Marcovsky ... first suggested that you would sell your stock to Gold in a transaction in which the rest of the stockholders would not also be bought out?
- A. Well, Marcovsky always took the position with me he would buy out the rest of the stockholders with time, that was consistently said. Now, and I took him at his word, I sincerely believe even to this day that was his intent.. .

according to Janas, the company had almost exhausted its operating budget. Section 4.05 of both Oolie's and Salkind's stock sale agreement provides "[Gold] agrees to fund certain current operating expenses of the Company.. ." ²² On January 26, 1990, Gold purchased 3,416,330 shares which Oolie, Salkind, and another TNN shareholder, Millicent Levy, held. Oolie and Salkind did not disclose to the board that they were negotiating with Gold to sell their shares. On January 30, Oolie and Salkind notified the other directors of their stock sale.

At the January 31, 1990 board meeting, Marcovsky, who Salkind invited to attend, acknowledged the funding requirement written into the share purchase agreement between Gold and Oolie and Salkind, and committed an initial \$300,000 to the company through the exercise of warrants which Gold had just purchased from Oolie and Salkind. Marcovsky also indicated that Gold would commit additional funds if necessary in the future. He said when the occasion arose that he and the board would "sit down and talk." ²³

²² TNN's outside counsel negotiated and drafted the share purchase agreements for Oolie and Salkind, but, according to their depositions, Oolie and Salkind paid for these services from personal funds.

²³ A 790-794 (Draft Meeting Minutes of the TNN Board of Directors dated January 31, 1990).

Following Marcovsky's commitment of operating funds, the board voted three to one to expand the board from four to seven members, and to appoint three Gold designees-Marcovsky, Charles Bush, and Nyhl Henson. Oolie and Salkind both voted in favor of expanding the board and electing the Gold representatives. Janas also voted in favor of expanding the board and electing the Gold representatives, noting that he believed the \$300,000 commitment reflected Marcovsky's good faith, and that he believed that Marcovsky understood that TNN would have other immediate funding needs. Wargo was the sole dissenter, explaining that he needed more time to make an informed judgment, and therefore voted against expansion of the board and against the appointments of the new directors. Oolie resigned as TNN's chairperson, but said he would continue to serve as a director until at least the next shareholder meeting. Salkind said he would continue to serve as a director until he was no longer elected. The board nominated and elected Marcovsky as TNN's new chairperson, and then adjourned the meeting.

I. Shareholders React to the Directors' Actions

Shortly after the January 31, 1990 board meeting, on February 7, 1990, shareholder Richard Brenner ("Brenner") wrote a letter to Wargo, requesting that an independent director investigate Oolie's and Salkind's

sale of stock to Gold. Wargo forwarded the letter requesting an investigation to TNN's counsel. On March 28, 1990, Wargo resigned from the board, and renewed his request that an independent director investigate Oolie's and Salkind's stock sale. TNN's new counsel, the law firm of Christensen, White, Miller, Fink & Jacobs, wrote Brennan a letter dated March 29, 1990 informing Brennan that the firm had investigated the matter, and concluded that any alleged violations of the insider trading provisions of Section 16(b) of the Securities Exchange Act of 1934 were unfounded.

Shareholders had commenced an action in this Court in late 1989 against TNN's board of directors, and TNN itself, under the caption *Rosenberg v. Oolie*²⁴ challenging various actions of the board not germane to the remaining claim before the Court today. On March 3, 1990, then Vice Chancellor Berger dismissed all plaintiffs' claims except for those which shareholder plaintiff Cooke brought. Consequently, the action's caption changed to *Cooke v. Oolie*. Then, four months later, on July 16, 1990, Cooke and new shareholder plaintiffs filed an amended and supplemental complaint, which added a claim challenging Oolie's and Salkind's sale of their stock.

²⁴ Del. Ch., C.A. No. 11134, Berger, V.C. (Oct. 16, 1989).

Simultaneously, another shareholder brought a similar claim against Oolie, Salkind, TNN, and Gold in a separate action captioned *Endervelt v. The Nostalgia Network, Inc.*²⁵ On July 23, 1991, I dismissed the *Endervelt* action for failure to state a claim. Six years later, on June 23, 1997, I granted summary judgment in *Cooke v. Oolie* in favor of the defendants on all claims except for one class claim. I preserved the one class claim to allow plaintiffs further discovery to develop what I believed to be an insufficient factual record regarding this one claim. Today, I consider defendants resubmitted motion for summary judgment on the sole remaining class claim.

II. PARTIES' CONTENTIONS

The parties' arguments, as I mentioned at the outset, are the proverbial two ships passing in the night. Each interprets the sole remaining class claim in a vastly different way. I specifically described the sole remaining class claim in my June 23, 1997 Opinion:

Plaintiffs allege that Oolie and Salkind favored the USA proposal because, unlike other offers, it included an agreement to repay immediately their outstanding loans. Furthermore, plaintiffs allege that defendants declined Gold's first offer and pursued USA's offer because Gold's initial offer was conditioned on due diligence of this already pending action. According to plaintiffs, defendants also neglected to pursue AMC's offer, even though it was the highest bid, because AMC

²⁵ Del. Ch., C.A. No. 11415, Chandler, V.C. (July 23, 1991).

refused to acknowledge Oolie's and Salkind's loan to TNN. As the record stands, I am unable to conclude that defendants or plaintiffs are entitled to summary judgment on the issue whether defendants may have breached their fiduciary duty of loyalty by improperly favoring those offers that would allow them to receive personal benefits not shared by other shareholders.

This passage makes clear, I thought, that I preserved the class claim alleging that Oolie and Salkind breached their fiduciary duty of loyalty by favoring the USA proposal over the other four proposals. Allegedly, the USA proposal offered the best terms for Oolie and Salkind individually, rather than the best terms for all TNN shareholders generally.

The defendants' two-pronged argument properly focuses on the sole remaining class claim described in my June 23, 1997 Opinion. First, defendants contend plaintiffs' theory-that Oolie and Salkind elected to pursue proposals that favored their loans-lacks factual support. Second, defendants argue that, even assuming Oolie and Salkind acted in their own interests as creditors rather than in the best interests of the shareholders, they did not breach their duty of loyalty as a matter of law. I need not reach the plaintiffs' second argument because I grant their motion for summary judgment based on their first argument.

The plaintiffs, in their brief and at oral argument, cast out a net, hoping to corral as many viable claims against the defendants as possible.

Plaintiffs present what appears to be three claims-one class claim and two derivative claims.

The plaintiffs assert a completely different class claim than the one I preserved in my 1997 Opinion. They contend that the defendants breached their duty of loyalty because they assumed responsibility for soliciting and negotiating acquisition proposals on behalf of TNN and then, after the USA negotiations collapsed, secretly abandoned their continuing duty to find a deal for all TNN's shareholders in order to negotiate a private sale of their own stock to Gold. I never considered this claim in my 1997 Opinion, and I do not recall the plaintiffs articulating such a claim. Nevertheless, I will consider this claim's merits.

The plaintiffs also assert two derivative claims, although again not explicitly. First, they assert, for the first time, that Oolie and Salkind misappropriated nonpublic corporate information. Plaintiffs' counsel during oral argument said:

[D]iscovery has shown that [Oolie and Salkind sold their shares to Gold] with the benefit of inside information. The inside information was that USA had pulled out of the transaction because USA had determined in its due diligence that the subscription agreements, that Nostalgia had not been honoring its most favored nation agreements, and that the public information about what its subscriber base was inaccurate, and that therefore that was the reason that they pulled out.

* * *

[A]t the same time [that Oolie and Salkind were negotiating the sale of their stock to Gold], they were operating on inside information.”

This argument does not appear within the most liberal reading of the Amended and Supplemental Complaint in this action. Plaintiffs raise this argument for the first time during a resubmitted motion for summary judgment more than 11 years after TNN shareholders filed the initial complaint in this action. Notwithstanding its egregious untimeliness and the absence of particularized facts in the complaint, *Brehm v. Eisner*²⁶ may compel me to consider it.

Second, the plaintiffs assert a derivative claim that the defendants sold their corporate office in violation of their duty of loyalty. Plaintiffs’ brief provides:

Salkind admitted in his deposition that Gold required Board seats as a condition to the stock sale. However, [TNN’s attorney] misrepresented the facts to the Board on January 31, 1990 when he told it that there was no agreement with Marcovsky regarding Board seats in connection with the stock purchase.²⁷

The brief also contains the following footnote:

In an apparent attempt to cloak their sale of their office in a corporate purpose, defendants have testified that Marcovsky

²⁶ *Brehm v. Eisner*, Del. Supr., 746 A.2d 244 (2000).

²⁷ Plaintiffs’ Brief in Opposition to Defendants’ Motions for Summary Judgment, p. 17-18

agreed in exchange for three seats to provide \$300,000 to TNN...²⁸

Not only do the plaintiffs fail to explicitly brief and argue this derivative claim, merely mentioning it within the discussion of their class claim, they hardly plead it in their complaint.²⁹ Nevertheless I will consider this claim as well.³⁰

In the legal analysis to follow, I first consider the class claim preserved in my 1997 Opinion-whether Oolie and Salkind breached their duty of loyalty when they chose to pursue the USA proposal rather than other proposals submitted to the board of directors in December 1989. Then I consider the plaintiffs' novel class claim and the two derivative claims the Court has gleaned from plaintiffs' argument-the misappropriation of nonpublic corporate information and the sale of corporate office.

²⁸ Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment, p. 18, n. 12.

²⁹ The only language in the Complaint alluding to this derivative claim is as follows: In January 1990, Michael E. Marcovsky, chairman of Gold 'N M Purchased 3,416,330 outstanding shares of TNN at \$3 per share. In addition, he had acquired certain shares of preferred stock and various warrants from certain major shareholders in TNN. Among the sellers were Oolie, who sold his entire ownership interest in TNN, and Salkind. *Contemporaneously, Mr. Marcovsky was named Chairman of the Board of Directors of TNN, and the Board was expanded from five seats to seven seats.* Oolie resigned from the chairmanship, but remains a director of the Company. (Emphasis added.)

³⁰ *Brehm v. Eisner*, Del. Supr., 746 A.2d 244 (2000).

III. LEGAL ANALYSIS

A. Standard of Review for Summary Judgment

The Court appropriately grants summary judgment only where the moving party demonstrates the absence of genuine issues of material fact and that she is entitled to judgment as a matter of law.³¹ On any application for summary judgment, the Court must view all the evidence in the light most favorable to the non-moving party.³² The Court also maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.³³ With this standard in mind, I turn to the primary issues in dispute.

B. The Class Claim: Oolie and Salkind Appropriately Pursued the USA Proposal

The Court begins with the presumption that the business judgment rule applies to Oolie's and Salkind's decision to pursue the USA acquisition proposal. Courts applying the business judgment rule afford substantial deference to corporate directors' business decisions, and resist replacing corporate directors' judgments with their own. Generally speaking, in order to receive the protection of the business judgment rule, a director must

³¹ Ch. Ct. R. 56(c); *Gilbert v. El Paso Co.*, Del. Supr., 575 A.2d 1131, 1142 (1990).

³² *Brown v. Ocean Drilling & Exploration Co.*, Del. Supr., 403 A.2d 1114, 1115 (1979).

³³ See *Alexander Indus., Inc. v. Hill*, Del. Supr., 212 A.2d 917, 918-19 (1965).

(1) make a business decision, (2) be disinterested and independent, (3) act with due care, (4) in good faith, and (5) the decision must have a rational business purpose.³⁴ The plaintiffs bear the burden of rebutting the presumption that the business judgment rule applies to Oolie and Salkind.

To do so, the plaintiffs' allege that the defendants failed to act with disinterest and independence and, therefore, do not deserve the protection of the business judgment rule. The USA deal, argue the plaintiffs, provided the greatest benefit to Oolie and Salkind as individuals, but did not necessarily provide the best option for all shareholders in general.

1. *The Facts Do Not Support Plaintiffs' Claim*

The plaintiffs argue that Oolie's and Salkind's status as both directors and creditors of TNN at the time the board was seeking acquisition proposals gave rise to a potential conflict of interest. The fiduciary duty of loyalty bound Oolie and Salkind, as directors, to seek out the best possible acquisition proposal for the shareholders of TNN. On the other hand, Oolie and Salkind also were creditors of TNN and knew that any acquisition of

³⁴ See *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984); *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985). See also *Stroud v. Grace*, Del. Supr., 606 A.2d 75, 83 (1992); *Kahn v. Sullivan*, Del. Supr., 594 A.2d 48, 59 (1991). For an interesting critique of the application of the business judgment rule, see Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 Del. J. Corp. L. 787 (1999).

TNN might affect their financial interests as TNN creditors. Thus, the defendants' creditor status provided motivation for them to pursue an acquisition proposal that best protected their personal loans to TNN. Salkind's and Oolie's incentives, therefore, seemed to be in tension. Their fiduciary duties compelled them to seek the best deal possible for the shareholders, but their creditor status created the incentive to protect their personal loans despite the shareholders' interests. The potential for a conflict of interest seems present.

The plaintiffs, however, must show that an actual conflict existed. They must show that the actual terms of the USA deal created a basis for Salkind and Oolie to act disloyally. In other words, Oolie's and Salkind's vote to pursue the USA proposal signals potential disloyalty only if the USA proposal in fact offered superior terms for Oolie and Salkind and inferior terms for the plaintiff shareholders compared to the other proposals available to TNN.

The plaintiffs have failed to carry their burden in this regard. That is, despite viewing the evidence in the light most favorable to the plaintiffs, they have failed to demonstrate an actual conflict of interest sufficient to rebut the business judgment rule. The USA proposal contained terms that capped TNN's debt at \$1,050,000. The other proposals, however, did not

contain any explicit cap. By December 31, 1989, TNN had already drawn \$1,514,000 against Oolie's and Salkind's June loan. Oolie and Salkind, therefore, by electing to pursue the USA proposal, agreed to make a financial sacrifice on behalf of TNN. Clearly, the USA proposal did not benefit creditors.

Oolie and Salkind, moreover, beneficially owned a majority of TNN's outstanding stock on a fully diluted basis as of December 31, 1989.³⁵ They had no incentive, therefore, to pursue a transaction that benefited them as creditors if that transaction did not produce a total net gain to the defendants after considering both their equity and debt positions. In fact, Oolie and Salkind would receive less value under the terms of the USA proposal than any other proposals submitted to TNN. Oolie and Salkind summarize the financial terms of the acquisition proposals as follows:

³⁵ Oolie and Salkind beneficially owned a majority of TNN shares, but did not maintain voting control of TNN.

PROCEEDS TO OOLIE AND SALKIND³⁶

Offer	Stock ³⁷	Non-convertible Debt	Total	Excess Over USA Offer
USA	\$14,749,266	\$1,050,000	\$15,799,266	---
Gold (expired proposal)	\$15,802,785	\$1,514,000	\$17,316,785	\$1,518,510
TCI	\$16,856,304	\$1,514,000	\$18,370,304	\$2,571,038
AMC	\$15,451,612	\$1,514,000	\$16,065,612	\$1,166,346

Accordingly, the defendants' votes to pursue the USA proposal do not imply disloyal behavior.³⁸ I conclude, as a matter of law, that the plaintiffs have

³⁶ The debt column does not seem to account for future interest payments or the time value of money, but illustrates that the defendants would be entitled to receive all their principal back under the Gold, TCI, and AMC proposals, while the USA proposal caps TNN's debt.

³⁷ These values assume that TNN will successfully collect all contingent payments.

³⁸ Even if they could maintain this class claim, the plaintiffs would have trouble demonstrating that they suffered an injury. To show that pursuit of the USA proposal injured the plaintiffs, they would have to demonstrate that pursuit of the USA deal prevented TNN shareholders from obtaining superior value by consummating a deal with one of the other three companies submitting acquisition proposals. The plaintiffs, however, could not demonstrate that TNN would have closed a superior deal with one of the other bidding companies because none of the proposals which the board considered in December 1989 constituted offers the acceptance of which would bind the offeror to acquire TNN. Rather, the proposals represented non-binding offers subject to a number of conditions. AMC submitted an expressly non-binding offer to TNN, and subjected it to AMC board approval. TCI subjected its offer to due diligence and TCI board approval. The November 2, 1989 Gold offer, assuming the board could actually still consider it in December, mandated the completion of due diligence and the execution of definitive agreements. The plaintiffs, therefore, could not demonstrate an injury—that they lost the value between another superior deal and the allegedly inferior USA deal—because they could not demonstrate that TNN would have consummated any other deal

failed to demonstrate actual interest and, therefore, have failed to rebut the business judgment rule.

2. *The Disinterested Directors Voted To Pursue The USA Proposal*

Even assuming that the facts supported the plaintiffs' claim, the two disinterested directors voted to pursue the USA proposal, which removes the alleged taint of disloyalty. Although Section 144 of the Delaware General Corporation Law does not explicitly apply,³⁹ I recognize the policy rationale behind the provision's safe harbor. Under § 144(a)(1), this Court will apply the business judgment rule to the actions of an interested director, who is not the majority shareholder, if the interested director fully discloses his interest and a majority of the disinterested directors ratify the interested transaction. The disinterested directors' ratification cleanses the taint of interest because the disinterested directors have no incentive to act disloyally and should be only concerned with advancing the interests of the corporation. The Court will presume, therefore, that the vote of a disinterested director signals that

whatsoever. The other proposals were non-binding and the TNN board had yet to seriously negotiate them.

³⁹ Section 144 does not apply to Oolie and Salkind for two reasons. First, the statute applies to transactions between a corporation and its directors or another corporation in which the directors have a financial interest. Although a potential conflict exists between Oolie and Salkind as directors and Oolie and Salkind as creditors of TNN, they neither sit on both sides of the potential USA transaction nor do they have a financial interest in USA. Second, § 144 applies to a "contract or transaction," but, in this case, no transaction has occurred. The plaintiffs merely challenge defendants' decision to pursue a transaction which ultimately never took place.

the interested transaction furthers the best interests of the corporation despite the interest of one or more directors.

Although Oolie's and Salkind's actions do not fall explicitly within § 144, the rationale behind the Legislature's creation of the safe harbor is on all fours with TNN's disinterested directors' ratification of the challenged action currently before the Court. The disinterested directors' vote to pursue the same proposal that Oolie and Salkind voted to pursue provides strong evidence to the Court that Oolie and Salkind acted in good faith and with the interests of TNN and its shareholders in mind.⁴⁰ If the USA deal favored Oolie and Salkind to the detriment of the other shareholders, then presumably the independent directors would not have voted to pursue the USA deal. As such, the disinterested directors' votes present the Court with another reason why the business judgment rule remains the appropriate standard with which to review Oolie's and Salkind's actions.

3. The Plaintiffs Concede The Sole Remaining Class Claim Properly Before The Court

In addition to the arguments discussed above, the plaintiffs do not even attempt to argue the sole remaining class claim I sustained in my 1997 Opinion. The plaintiffs, instead, explain to the Court that "that particular

⁴⁰ Additionally, DLJ, the investment bank advising TNN's board, expressed the view that the board should pursue the USA proposal.

duty of loyalty claim was substantially undermined by the Court's finding that those loans [which Oolie and Salkind made to TNN] passed the scrutiny of the Court." The plaintiffs then "respectfully take exception" to the Court's earlier ruling.⁴¹ As a result of their failure to offer any evidence or argument on the issue of whether Oolie and Salkind attempted to derive an improper personal benefit by voting to pursue the USA proposal, plaintiffs concede the absence of any material issue of fact on the sole remaining class

⁴¹ To the extent that plaintiffs' oral argument suggested I revisit my decision regarding Oolie's and Salkind's loans to TN-N, I refuse to reconsider my 1997 Opinion upholding those loans. Those loan transactions squarely fall within DGCL § 144 which governs interested director transactions. Under § 144, plaintiffs bear the burden of demonstrating that the defendants have engaged in an interested transaction. Clearly, the plaintiffs successfully carried this burden, demonstrating that the loan transaction between Oolie and Salkind and TNN was a "transaction between a corporation and 1 or more of its directors." Once the plaintiffs demonstrate interest, the burden shifts to the defendants to show that one of § 144's safe harbor provisions protects them and the transaction. The defendants demonstrated to the Court that both disinterested directors, Janas and Wargo, negotiated and then ratified the loan transaction, which rendered §144(1)(a)'s safe harbor applicable. Once the defendants demonstrate that a safe harbor protects the transaction, the plaintiffs can attempt to prove to the Court that the interested directors controlled or dominated the disinterested directors, which would destroy the disinterested ratification. The plaintiffs, however, failed to make such a showing. Oolie and Salkind were two directors of four on the board; therefore, they did not directly control the board's vote. Moreover, the disinterested directors actions definitively demonstrate their independence. The disinterested directors obtained significant concessions through arms-length bargaining with Oolie and Salkind. For example, TNN would pay a reduced interest rate and deferred interest payments if it repaid the loan within six months or if Oolie or Salkind converted the loan into equity. In addition, TNN maintained the right to terminate the loan entirely if it could find another lender within 10 days who would accept the same loan terms. As Oolie or Salkind neither maintained voting control of TNN at that time nor dominated or controlled the disinterested directors, the business judgment rule constitutes the appropriate standard of review for the loan transaction. (Had Oolie and Salkind been majority shareholders with voting control, as I inadvertently assumed in my 1997 Opinion, satisfying the requirements of the safe harbor provision would have merely shifted the burden of proving entire fairness to the plaintiffs.).

claim properly before the Court. Because the facts do not support the plaintiffs' claim, the disinterested directors voted to pursue the USA deal, and the plaintiffs themselves abandoned this claim at oral argument, I grant summary judgment for the defendants.

C. The Plaintiffs' New Arguments

1. The Class Claim

The plaintiffs contend that Oolie and Salkind breached the duty of loyalty they owed as directors to the shareholders of TNN when they sold their personally held TNN shares to Gold rather than fulfill their board appointed responsibility to seek acquisition proposals for all shareholders of TNN. The defendants, on the other hand, portray the plaintiffs' argument as an effort to re-litigate the corporate opportunity doctrine claim on which I already ruled in defendants' favor. Alternatively, if the plaintiffs have in fact formulated a legitimate class claim, the defendants insist they acted in good faith. Ultimately, I believe that the plaintiffs have, in fact, described a distinct, separate class claim, rather than merely relitigating the corporate opportunity claim. Despite the existence of the class claim, I grant defendants' motion for summary judgment because there is no dispute of material fact and, as a matter of law, I must find for the defendants.

The plaintiffs' class claim resides within the Amended and Supplemental Complaint⁴² and arguably satisfies Court of Chancery Rule 8 calling for a "short and plain statement of the claim."⁴³ It is distinct from the previously adjudicated derivative claim for usurping a corporate opportunity. The class claim focuses on the defendants' responsibility to implement the board's decision to seek acquisition proposals for TNN. Oolie was the chairperson of TNN's board, which expressly decided to solicit acquisition proposals for the financially distressed Company. Oolie appointed fellow board member Salkind to be the "quarterback"⁴⁴ of that effort. Both Oolie and Salkind, as directors, had a duty to act in the interests of TNN's shareholders, and the board had determined that seeking and negotiating acquisition proposals for TNN furthered those interests. The plaintiffs allege that rather than pursue the shareholders' interests, Oolie and Salkind,

⁴² The complaint reads in pertinent part: "Class Action Claim. . . . [The Director Defendants] ... denied the minority shareholders the opportunity to sell their TNN shares in a favorable transaction, in order to appropriate for themselves the opportunity to sell their TNN shares at a profit."

⁴³ It is disconcerting, to say the least, that three years after this Court's summary judgment decision, plaintiffs assert this claim for the first time. The claim, and its factual basis, can be found in the amended complaint, notwithstanding its dormancy these many years. I suppose it is unfair to suggest that plaintiffs' counsel have effectively waived the claim because of their studied failure to assert it. Prejudice to the defendants from this last minute claim, however, is difficult to assess. Had I not believed summary judgment appropriate for the defendants despite this disadvantage, I would have elected to allow defendants' counsel the opportunity to submit additional written argument regarding the claim. My decision in favor of the defendants, however, renders additional briefing unnecessary.

⁴⁴ A 660-662 (Minutes of July 21, 1989 board meeting).

without informing the board, abandoned their responsibility to solicit acquisition proposals and sold their personally held shares for their own benefit. The plaintiffs further contend that this sale prevented the remaining TNN shareholders from achieving any deal for their shares and that such actions constitute a breach of the duty of loyalty.

If a fiduciary pursues interests other than those of the corporation and its shareholders, he may breach his duty of loyalty.⁴⁵ A fiduciary may not profit from such a breach and the Court will assess his penalty accordingly. Although I agree that the plaintiffs have stated a legitimate class claim and that Oolie and Salkind owe a duty of loyalty to the TNN shareholders, I cannot find that defendants have breached their duty of loyalty.

The plaintiffs emphasize three facts in order to demonstrate the defendants' disloyal conduct: (1) the defendants never disclosed to the board the sale of their stock; (2) before they sold their stock, Oolie and Salkind did not attempt to revive previously rejected acquisition proposals after USA terminated its proposal; and (3) the defendants did not request that Gold allow all shareholders to participate in its offer to Oolie and Salkind on a pro rata basis before selling their stock.

⁴⁵ *Guth v. Loft*, Del. Supr., 5 A.2d 503 (1939).

a. Failure to Inform the Board of Sale

USA terminated its acquisition proposal at some point between January 11 and 16, leaving TNN without a deal. The board, desperate for an acquisition proposal due to the company's financial condition, attempted to resurrect a number of deals it had previously considered and rejected. Although insisting they too took part in the search for a replacement deal, the defendants, however, had negotiated and signed their deal with Gold by January 26, 1990. They did not inform the board that they were negotiating a private deal with Gold during this time and did not inform the board that they had sold their shares to Gold until one day before the January 31, 1990 board meeting.

b. Oolie and Salkind Abandoned Other Proposals

The plaintiffs contest Salkind's and Oolie's claim that they attempted to resurrect acquisition proposals after USA terminated its offer and argue that the defendants cannot corroborate their claims. Salkind admits he never contacted AMC to attempt to revive that offer. And although he attempted to contact Concept, Salkind never actually spoke to a Concept representative. Accordingly, the plaintiffs allege that such a failure to pursue replacement proposals for the terminated USA proposal demonstrates that the defendants abandoned their responsibilities to TNN.

The defendants dispute the plaintiffs' characterization of the facts.⁴⁶

Either Salkind or a TNN representative contacted 59 companies regarding a possible transaction with TNN. Ultimately, the board considered five proposals at its December 6, 1989 meeting, and elected to pursue the USA proposal. Clearly, before the December 6 board meeting, Salkind vigorously had sought deals for TNN.

Immediately after USA terminated its proposal, Salkind insists he did attempt to resurrect the proposals the board had rejected during its December 6 meeting. Salkind contacted TCI, which refused to negotiate. Salkind attempted to contact Concept, but Concept representatives did not return his calls. Salkind also sought assistance from DLJ. Janas had also contacted Lifetime, but it rebuffed his overtures as well. The plaintiffs dismiss these facts as uncorroborated, yet they have not offered the Court a shred of evidence to the contrary despite having deposed all relevant parties. It is not surprising that the board encountered difficulty sparking interest in TNN, a company operating under extreme financial distress at that time. USA had

⁴⁶ The defendants have not responded to this class claim explicitly in their papers because the parties argued two completely different class claims. The Court only heard defendants' response to plaintiffs' newly minted class claim during oral argument. Accordingly, the Court's discussion focuses on defendants' statements during oral argument and interprets the defendants' position without the luxury of a brief responding to the plaintiffs' last gasp contention.

also abruptly terminated its acquisition negotiations with TNN, an action that no doubt increased other potential acquirors' skepticism.

c. Failure to Include Other Shareholders

The plaintiffs also contend that Salkind and Oolie did not attempt to include all TNN shareholders in a potential Gold transaction and that such failure signals their disloyalty. The defendants never questioned why Gold refused to launch a tender offer for all TNN shares. Moreover, the defendants never asked Gold to make a pro rata offer to all shareholders for up to the same amount of consideration Gold paid for the defendants personal shares. Essentially, the plaintiffs label any attempts the defendants may have made to expand the Gold proposal to all shareholders as half-hearted and superficial. The plaintiffs argue that Oolie's and Salkind's failure to attempt to persuade Gold to include all shareholders, their failure to inquire into Gold's reluctance to include all shareholders, and their subsequent personal stock sale, evidences the defendants' disloyalty.

Despite the plaintiffs' contentions, Salkind specifically requested in a letter dated January 16, 1990 that Gold expand its offer to allow *all* shareholders to participate in any transaction before he and Oolie sold their personal shares to Gold. Salkind's request is significant because none of Gold's proposals had ever contemplated a blanket tender offer to all TNN

shareholders. In previously submitted proposals, Gold sought to purchase the stock of only a select few TNN shareholders with an eye toward performing a backend squeeze out merger at a later date. Thus, Salkind not only tried to revive the Gold proposal, but he also attempted to include all TNN shareholders in any potential transaction despite Gold's unwillingness to do so.

After Gold offered to purchase only Salkind's and Oolie's personal shares, both Salkind and Oolie, in their respective stock purchase agreements, negotiated for Gold to immediately fund the operating expenses of the company. Section 4.05 of both Oolie's and Salkind's agreement provides "[Gold] agrees to fund certain current operating expenses of the Company..." This contract clause is particularly significant because TNN, at the time, faced a severe financial crisis. In fact, pursuant to this clause, Gold representative Marcovsky informed the board at its January 31, 1990 meeting that Gold had exercised warrants allowing \$300,000 in cash to flow into TNN. The cash infusion relieved the operating budget shortfall facing TNN. Marcovsky also recognized at that meeting that TNN would need additional short term funding and that Gold would provide it pursuant to the

purchase agreements.⁴⁷ Negotiating this contract provision in order to help alleviate acute financial pressure, therefore, demonstrates loyalty, not disloyalty.

Delaware law generally entitles the majority shareholder to sell his controlling block of stock for a premium, which he need not share with the corporation's other shareholders.⁴⁸ That the shareholder is also a director does not disable the director-shareholder from negotiating the most favorable terms achievable for the sale of his stock. The director-shareholder, however, may not misuse his corporate office to his own advantage and to the exclusion of the other shareholders. If the director-shareholder does misuse his corporate office, the company may claim the premium the bad faith actor had negotiated. The defendants, in this case, have not misused their corporate offices in any way. As I will discuss in later sections, the defendants neither sold their stock using confidential corporate information, nor sold their corporate offices outright. The defendants also did not sell their shares to a buyer who looted the

⁴⁷ The fact that Gold would receive 243,000 treasury shares at a blended price. of no more than \$1.23 tempers the impact of Gold's \$300,000 capital infusion. 'At that time, TNN shares traded at about \$1.50, down from \$2.125 following the announcement of Gold's purchase; therefore, it was hardly a financial sacrifice for Gold to exercise in-the-money warrants at that time.

⁴⁸ *Citron v. Steego*, Del. Ch., CA. No. 10171, mem. op., Allen, C. (Sept. 9, 1988).

company.⁴⁹ Accordingly, the defendants, as majority shareholders, did not breach any fiduciary duty when they elected to sell their control block for a premium. Thus, the only question that remains is whether the defendants, purely as directors, have, in some way, breached their duty of loyalty to the company.

I find as a matter of law that the defendants have not breached their duty of loyalty. The defendants vigorously pursued transactions in the shareholders' best interests, contacting 59 companies. The board considered five (5) proposals and elected to pursue the USA deal, which unfortunately collapsed. At that point defendants found themselves in a precarious position-the company faced financial disaster in a matter of weeks and had just lost the deal it had been negotiating. The defendants did not "jump ship" as the plaintiffs contend. It is undisputed that the defendants solicited TCI and Concept. They also contacted DLJ for assistance. Janas solicited Lifetime. In spite of these attempts, new options never materialized. The defendants wrote a letter to Gold asking it to launch a tender offer for all shares of all shareholders. Gold refused. The defendants suggested that Gold purchase company shares as opposed to defendants' personal shares. Gold refused. Ultimately, Gold only offered to buy defendants' shares.

⁴⁹ See, e.g., *Harris v. Carter*, Del. Ch., 582 A.2d 222 (1990).

Even at that point, the defendants did not completely abandon TNN. Instead, the defendants negotiated a contract provision with Gold which mandated that Gold fund TNN when necessary. These undisputed actions are not the actions of faithless directors acting in their own self-interest.

The plaintiffs implore me to find a breach of loyalty because the defendants did not disclose their discussions with Gold to the board in a timely fashion and because the defendants did not contact AMC after USA terminated its proposal. Although I agree that, in a more perfect world, the defendants would have immediately and completely disclosed their discussions with Gold to the board and would have called AMC, I do not believe that plaintiffs can hold defendants captive in perpetuity to locate a buyer for TNN. Ultimately, I conclude, as a matter of law, that these facts do not rise to the level of a breach of loyalty. Although we encourage directors to aspire to ideal corporate governance practices, directors' actions need not achieve perfection to avoid liability. Directors must adhere to the minimum legal requirements of the corporation law.⁵⁰ Although the defendants failed to act as a model director might have acted, for the above reasons and on the undisputed facts I conclude, as a matter of law, that they did not breach a legal duty.

⁵⁰ *Brehm v. Eisner*, Del. Supr., 746 A.2d 244, 255-6 (2000).

As I do not find that a dispute of material fact exists, and as I conclude no breach of the duty of loyalty occurred on these facts, I grant defendants' motion for summary judgment on this claim.

2. The Misappropriation of Nonpublic Information Claim

Plaintiffs argue that Oolie and Salkind improperly used inside information. The defendants sold their shares to Gold because they knew, say the plaintiffs, that TNN had breached the "most-favored-nation" clause in a number of TNN's contracts with cable operators and that TNN did not have as many subscribers as it claimed publicly.

Inside information is a corporate asset; its misuse gives rise to a derivative claim, not a class claim.⁵¹ Delaware law confers upon a corporation's board of directors the authority to commence litigation on the corporation's behalf.⁵² Thus, shareholders seeking to bring a lawsuit derivatively must make a pre-suit demand on the board for its approval. Absent such a demand, a shareholder plaintiff bringing a derivative suit must demonstrate that pre-suit demand would be futile. The shareholder plaintiffs complaint must contain particularized allegations of fact sufficient to create a reasonable doubt (1) regarding the directors' disinterest and

⁵¹ See *Brophy v. Cities Service Co.*, Del. Ch., 70 A.2d 5 (1949).

⁵² *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984).

independence; or (2) that the transaction resulted from the directors' valid business judgment.⁵³

I find in favor of the defendants on this claim for two reasons. First, plaintiffs neither made demand upon the board nor plead any particularized facts evidencing demand futility. Second, the evidence in the record fails to substantiate the claim factually. Rather than prove that TNN actually breached various contracts, plaintiffs only argue that USA withdrew its acquisition proposal because USA *believed* that TNN had breached various cable operator contracts. Additionally, they have not pointed to evidence that the alleged breaches, in fact, motivated USA's withdrawal. The plaintiffs, moreover, have not offered any evidence that Oolie and Salkind actually knew of the alleged breaches or erroneous subscriber numbers. Finally, the plaintiffs have not demonstrated that the defendants did not disclose the alleged contract breaches and erroneous subscriber numbers to Gold. Plaintiffs counsel raised this issue belatedly and half-heartedly during oral argument and has not supported it with any evidence despite years of discovery.

Assuming for the sake of argument that the defendants did possess this nonpublic information and failed to disclose it to Gold, the defendants'

⁵³ *Id.* at 818.

actions presumably injured Gold because Gold would have purchased the defendants' shares for more than they were actually worth. If Gold overpaid, it would have a potential fraud claim against the defendants. Gold has not brought a fraud action, however. The undisputed facts do not support plaintiffs' misappropriation claim and, therefore, I grant summary judgment in favor of defendants regarding it.

3. Defendants Did Not Sell Their Corporate Offices

Plaintiffs assert that Oolie and Salkind sold their corporate offices in breach of their fiduciary duty of loyalty. They allege that as part of Oolie's and Salkind's agreement to sell their shares to Gold, they agreed to expand the board of directors from five to seven seats and install Marcovsky and two other Gold representatives on the board. This assertion constitutes a derivative claim.⁵⁴ Absent pre-suit demand, the Court must decide whether the particular facts alleged in the complaint give rise to a reasonable doubt that the directors were disinterested and independent or that the business judgment rule protects the challenged transaction from judicial scrutiny.⁵⁵ The plaintiffs, however, do not assert particularized facts in their complaint that suggest such reasonable doubt. In fact, the only reference to this claim,

⁵⁴ See *Stein v. Orloff*, Del. Ch., C.A. No. 7276, slip op., Hartnett, V.C. (May 30, 1985).

⁵⁵ *Aronson* at 818.

aside from the plaintiffs' perfunctory mention of it in their brief and at oral argument, consists of the following language:

In January 1990, Michael E. Marcovsky, chairman of Gold 'N M Purchased 3,416,330 outstanding shares of TNN at \$3 per share. In addition, he had acquired certain shares of preferred stock and various warrants from certain major shareholders in TNN. Among the sellers were Oolie, who sold his entire ownership interest in TNN, and Salkind. *Contemporaneously, Mr. Marcovsky was named Chairman of the Board of Directors of TNN, and the Board was expanded from five seats to seven seats.* Oolie resigned from the chairmanship, but remains a director of the Company.⁵⁶

The above assertions are insufficient to excuse pre-suit demand. This language neither explicitly alleges that the defendants sold their corporate offices nor constitutes a particularized pleading demonstrating demand futility. As a result, the complaint contains inadequate facts to support this purported claim.

Even assuming that the complaint did properly allege this claim, I still would grant defendants motion for summary judgment regarding it. Courts have regularly upheld agreements for the sale of a majority of the outstanding shares of stock in a corporation, or of less than a majority but enough to ordinarily carry voting control, which contain a provision⁵⁷ that

⁵⁶ Amended and Supplemental Complaint, p. 11 (emphasis added).

⁵⁷ The purchase agreement at issue between Gold and Oolie and Salkind did not contain an explicit provision under which Oolie and Salkind agreed to deliver management control of the company. The alleged existence of such an agreement arises from

the seller will arrange for a majority of the existing directors to resign and be replaced by the purchaser's designees. Courts have upheld these provisions because they have realized that such a contractual provision merely accelerates a change that would occur anyway at the next shareholders' meeting.⁵⁸ Here, Gold purchased shares from Oolie and Salkind conferring upon Gold 44.3 percent of all TNN votes. Thus, Gold could have elected Marcovsky and his slate at the next shareholder meeting, even if the board had not expanded itself and appointed Marcovsky and his slate.

The plaintiffs, furthermore, have not demonstrated that the transfer of managerial control which accompanied the transfer of the controlling shares has injured TNN. Indeed, Marcovsky immediately relieved the operating funds shortfall facing TNN after the board appointed him to one of the newly created positions and agreed to continue to financially support the company as needed. The immediate transfer of management control benefited TNN. For these reasons, I grant defendants' motion for summary judgment regarding this claim, even assuming the complaint stated particularized facts (which it does not).

Salkind's deposition in which he admits that Gold required board seats as a condition of the stock sale.

⁵⁸ *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

IV. CONCLUSION

For the foregoing reasons, I grant defendants' motion for summary judgment with regard to plaintiffs' claim that Oolie and Salkind breached their duty of loyalty by pursuing the USA acquisition proposal. I also grant defendants' motion for summary judgment with regard to plaintiffs' newly minted class claim and both derivative claims-that Oolie and Salkind misappropriated nonpublic corporate information and that Oolie and Salkind sold their corporate offices.

An Order has been entered consistent with this decision.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JACK KENT COOKE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 11134
)	
SAM OOLIE, et al.,)	
)	
Defendants,)	
)	
and)	
)	
THE NOSTALGIA NETWORK,)	
INC.)	
)	
Nominal Defendant.)	

ORDER

For the reasons assigned by this Court in the Memorandum Opinion issued on this date, it is

ORDERED that summary judgment of dismissal as to all claims in the Amended and Supplemental Complaint is entered in favor of defendants and against the plaintiffs.

William B. Chandler III

Chancellor

DATED: May 24, 2000