CASE NO. 92120052

Part 2 of ____ Parts

In The Circuit Court for Baltimore City

CIVIL

ASSIGNED TO JUDGE PART II KAPLAN

SEE 3

In the Matter of

MANFULSO, ET. AL.

VS:

DE FRANCIS, ET. AL.

92-12-641

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(28)

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CIRCUIT COURT FOR
BALTIMORE CITY
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CIVIL DIVISION

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR.,	:	IN THE
Plaintiffs	:	CIRCUIT COURT
vs.	:	FOR
JOSEPH A. DE FRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC. PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC. INC.,	:	BALTIMORE CITY Case No. 92120052/ CE147851

NOTICE OF VOLUNTARY DISMISSAL OF COUNT TWO OF COUNTERCLAIM

To the Clerk:

Pursuant to Maryland Rule 2-506, enter Count Two of the Counterclaim of defendants The Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Association, Inc. and Laurel Racing Assoc., Inc. "Dismissed Without Prejudice."

Dated: January 15, 1993

Respectfully Submitted,

By: Jennifer C Archie

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer Archie
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004

Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 1993, a copy of the foregoing Counterclaim was mailed first-class, prepaid postage to: Andrew Jay Graham, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

EXHIBIT 2

ALL-STATE LEGAL SUPPLY CO.

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs	*	FOR
v.	*	BALTIMORE CITY
JOSEPH A. DE FRANCIS, et al.	*	CASE NO.: 92120052
Defendants		

* * * * * * * * * * * * *

NOTICE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 1993, a copy of Joseph A. De Francis''s Responses and Objections to Interrogatories Propounded by Robert T. Manfuso and Response to Robert T. Manfuso's Request for Production of Documents was mailed, first class, postage prepaid, to Andrew J. Graham, Esquire, Kramon & Graham, Commerce Place, One South Street, Suite 2600, Baltimore, Maryland 21202, attorneys for Plaintiffs; Irwin Goldblum, Esquire, McGee Grigsby, Esquire and Jennifer Archie, Esquire, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Suite 1300, Washington, D.C. 20004-2505, attorneys for Defendants, the Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Association, Inc. and Laurel Racing Association, Inc.

James E. Gray

James E. Gray

Linda S. Woolf

Linda S. Woolf
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25 S. Charles Street
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Attorneys for Defendants
De Francis and Jacobs

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs		
	*	**FOR**
v.		
	*	**BALTIMORE CITY**
JOSEPH A. De FRANCIS, et al.		
	*	**CASE NO.: 92120052**
Defendants		

* * * * * * * * * * * * *

JOSEPH A. DE FRANCIS'S RESPONSES AND OBJECTIONS TO INTERROGATORIES PROPOUNDED BY ROBERT T. MANFUSO

Defendant Joseph A. De Francis ("De Francis"), by his undersigned counsel, hereby responds to Plaintiff Robert T. Manfuso's Interrogatories as follows:

The information supplied in these Responses to Interrogatories is not based solely on the knowledge of the executing party, but includes the knowledge of the party, its agents, representatives, and attorneys, unless privileged.

The word usage and sentence structure is that of the attorney and does not purport to be the exact language of the executing party.

General Objections Applicable to Instructions, Definitions, and All Interrogatories

The following General Objections are incorporated by reference into De Francis's Response to each Interrogatory propounded to him by Robert T. Manfuso, as well as the Instructions and Definitions thereto:

1. De Francis objects to Robert T. Manfuso's Instructions, Definitions, and Interrogatories, and each of them, to the extent they purport to impose any obligations that are inconsistent with

or additional to those imposed by the Maryland Rules of Civil Procedure.

2. De Francis objects to Robert T. Manfuso's Instructions, Definitions, and Interrogatories, and each of them, to the extent they seek information protected by any applicable privilege or the work product doctrine.

3. De Francis objects to Robert T. Manfuso's Instructions, Definitions, and Interrogatories, and each of them, to the extent they seek confidential, proprietary or sensitive business or commercial information, including, without limitation, information relating to the involvement of D/J/M Track Consultants ("D/J/M") in Texas Racing, the assets, financial terms and conditions of D/J/M, or other information related to the efforts of Lone Star Jockey Club, Ltd. ("Lone Star") to obtain a Class I racing license from the Texas Horse Racing Commission. The decision of the Texas Horse Racing Commission to award Lone Star a Class I racing license has been appealed to the Texas State Court. Robert T. Manfuso holds an ownership interest, through his ownership of shares in Hollywood Park, in Midpointe Racing, L.C., Lone Star's principal competitor for that license and an appellant in the Texas court, which would be directly benefitted by the disclosure of such information. See, for example, Response No. 6.

Because the financial terms and conditions of D/J/M's involvement in Lone Star's efforts to obtain a Class I racing license have no bearing on any issue in this case, they do not

satisfy the threshold requirement of relevance under Maryland Rule 2-402(a). Instead, these Interrogatories appear to be propounded only to obtain information that could provide Midpointe Racing, L.C. with an advantage in the Texas proceedings and are, therefore, patently improper.

4. De Francis objects to Robert T. Manfuso's Instructions, Definitions, and Interrogatories, and each of them, to the extent that they exceed thirty (30) in number, including subparts, in contravention of Maryland Rule 2-421(a). In part, these Interrogatories are excessive in number because the Plaintiff has improperly combined requests for De Francis to identify documents in twenty-seven (27) of the thirty (30) numbered Interrogatories. See General Objection 5, infra. Additionally, Plaintiff has improperly combined, in twenty-eight (28) of the thirty (30) numbered Interrogatories, a request for De Francis to identify all persons having knowledge relating to the subject matter of the Interrogatory. When these two categories of subparts are counted with the thirty (30) substantive inquiries (and even before counting other miscellaneous subparts), the Interrogatories total eighty-five (85) in number, rather than the thirty (30) allowed under Maryland Rule 2-421.

5. De Francis objects to Robert T. Manfuso's Interrogatories, and each of them, to the extent they request De Francis to identify all documents relating to the particular subject matter therein. First, as set forth above, the inclusion of these requests to identify documents causes the

Interrogatories to exceed thirty (30) in number. Second, this Plaintiff has propounded a comprehensive document request to De Francis which essentially tracks these Interrogatories and to which De Francis will respond in accordance to Maryland Rule 2-422. Requiring De Francis to include in his responses to these Interrogatories a description of contemporaneously produced documents is unduly burdensome and beyond the scope of discovery allowed under the Maryland Rules. Finally, to the extent the Interrogatories require De Francis to identify those particular documents which he and his counsel believe to be relevant to a particular claim or defense, they intrude upon the attorney-client privilege and work product doctrine, i.e., such information would necessarily disclose the mental impressions, conclusions, opinions, or legal theories of counsel.

6. The objection that an Interrogatory "seeks the discovery of irrelevant information" means that the Interrogatory seeks information not germane to the controversy between these parties and is not reasonably calculated to lead to the discovery of admissible evidence.

7. The objection that an Interrogatory is "unduly burdensome and oppressive" means that the Interrogatory requires a search for information that is of little or no benefit to this action and that the value of its production is far outweighed by the burden of producing it, especially when the Plaintiffs are already in possession of the same or substantially similar information.

8. The objection that an Interrogatory is "overly broad" means that the Interrogatory elicits information which is irrelevant to this litigation.

9. The objection that an Interrogatory is "vague and ambiguous" means that this Defendant is unable to ascertain with certainty what information is requested.

10. De Francis's objections and Responses provided herein are based on information now known to De Francis. De Francis has not yet completed his discovery of the facts in this lawsuit nor prepared for trial and, therefore, reserves his right to amend, modify, or supplement his objections and Responses if he learns of new information.

10. All Responses stated below are provided subject to and without waiving any of the Objections stated above. The fact that De Francis chooses not to repeat each of the foregoing Objections for each specific Request shall not waive any of the above-stated objections.

RESPONSES AND OBJECTIONS

INTERROGATORY NO. 1: Give a full and complete account of Mango's duties at Pimlico and Laurel for the last five years and his projected duties at Pimlico and Laurel for the next five years, including in your answer a full and complete account of any manner in which Mango's duties have changed or are expected to change, the identity of any and all documents relating to Mango's past, present, or future duties at Pimlico and Laurel, and the identity of all persons having knowledge relating to Mango's past, present, or future duties at Pimlico and Laurel.

OBJECTIONS: De Francis objects to Interrogatory No. 1 on the grounds that it is overly broad, seeks the discovery of

irrelevant material, and is unduly burdensome and oppressive. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that Plaintiffs are in possession of copies of the employment agreement between the racetracks and James P. Mango and, indeed, have attached that document to papers they have filed in this litigation. As set forth therein, James P. Mango was employed as Vice-President and General Manager of Pimlico and Laurel. In that capacity, Mr. Mango performed numerous diverse duties in connection with the day-to-day operations of the racetracks, which are well known to the Plaintiffs. On January 12, 1993, Mango assumed the position of Senior Vice-President of the racetracks. As Senior Vice-President, Mr. Mango's duties will also include strategic planning and negotiations on behalf of the Maryland racetracks with regard to significant areas of interest, including, but not limited to, multiple signal and cross-breeding simulcasting, off-track betting, and expansion into Virginia. It is not expected at this time that his duties will change over the next five years.

INTERROGATORY NO. 2: Give a full and complete account of Mango's duties regarding Texas Racing from 1989 to the present and his projected duties regarding Texas Racing for the next five years, including in your answer a full and complete account of any manner in which Mango's duties have changed or are expected to change, the identity of any and all documents relating to Mango's past, present, or future duties regarding Texas Racing, and the identity of all persons having knowledge relating to Mango's past, present, or future duties regarding Texas Racing.

OBJECTIONS: De Francis objects to Interrogatory No. 2 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objection Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that, prior to the decision of the Maryland Jockey Club ("MJC") not to participate in Texas Racing, Mango assisted in analyzing the potential opportunities presented by Texas Racing and the related possible changes in Texas law. Since that time, Mango has had no "duties" related to Texas Racing, to the extent that the term "duties" is interpreted to be employment related. Instead, Mango's participation in Texas Racing has been in connection with his role as a partial equity owner of D/J/M. Mango made one overnight trip to Texas to attend a press conference prior to the grant of the license. He had no other role in the efforts of Lone Star to obtain a Class I racing license from the Texas Horse Racing Commission. Since that license was granted, Mango has been involved, on his own time, as an equity owner in D/J/M and, together with De Francis and Jacobs, has performed various consulting services in connection therewith, including several trips to Texas on his own time. At this time, it is not anticipated that Mango will have any employment related duties with regard to Texas Racing over the next five years. He may, from time to time, engage in various activities as an equity owner in D/J/M, on his own time.

INTERROGATORY NO. 3: Give a full and complete account of your involvement in Texas Racing from 1989 to the present, including in your answer an itemization of all of the time that you have spent in Texas Racing from 1989 to the present, an

account of all activities in which you have engaged in Texas Racing from 1989 to the present, an account of all expenses that you have incurred in Texas Racing from 1989 to the present, and the identity of all persons having knowledge relating to your involvement in Texas Racing from 1989 to the present, and the identity of all documents relating to your involvement in Texas Racing from 1989 to the present, including the identity of all documents constituting or relating to an itemization of the time that you have spent regarding Texas Racing from 1989 to the present and all documents relating to expenses that you have incurred regarding Texas Racing from 1989 to the present.

OBJECTIONS: De Francis objects to Interrogatory No. 3 on the grounds that it is overly broad, seeks the discovery of irrelevant information, and is unduly burdensome and oppressive. As clearly stated in Judge Hollander's October 9, 1992 Order, the Plaintiffs' only remaining claims of a possible "breach of obligations related to the employment by the corporations of Martin Jacobs and James Mango as set forth in the Shareholders' Agreement or employment contracts executed pursuant thereto." Judge Hollander specifically dismissed all the claims in Counts I and II of the Second Amended Complaint, which included all those based on De Francis's personal involvement in Texas Racing. See also General Objections Nos. 4 and 5.

INTERROGATORY NO. 4: Give a full and complete account of Jacobs' involvement in Texas Racing from 1989 to the present, including in your answer an itemization of all of the time that Jacobs has spent in Texas Racing from 1989 to the present, an account of all activities in which Jacobs has engaged in Texas Racing from 1989 to the present, an account of all expenses that Jacobs has incurred in Texas Racing from 1989 to the present, the identity of all persons having knowledge relating to Jacobs' involvement in Texas Racing from 1989 to the present, and the identity of all documents relating to Jacobs' involvement in Texas Racing from 1989 to the present, including the identity of all documents constituting or relating to an itemization of the time that Jacobs has spent regarding Texas Racing from 1989 to the present and all documents relating to expenses that Jacobs has incurred regarding Texas Racing from 1989 to the present.

OBJECTIONS: De Francis objects to Interrogatory No. 4 on the basis that it is overly broad, and unduly burdensome and oppressive. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that all activities undertaken by Jacobs with respect to Texas Racing prior to the decision of MJC not to participate in Texas Racing were done with the consent and knowledge of all the stockholders and directors of Pimlico, which includes Robert T. Manfuso and John A. Manfuso, Jr. As for those activities undertaken by Jacobs subsequent to April 27, 1990, De Francis states that, as an officer of Pimlico, he is aware that Jacobs has continued to spend substantially all of his time performing services for the Maryland racetracks. From time to time, Jacobs has engaged in various activities, as an equity owner in D/J/M, in connection with Texas Racing. These activities have been pursued on his own time, i.e., time that was not required to be spent on the business of the Maryland racetracks. Although De Francis has no records of the precise amount of time spent by Jacobs in connection with Texas Racing, he maintains that Jacobs has spent more hours responding to spurious allegations and complaints made by the Manfusos than he has spent in pursuing any interest in Texas Racing.

INTERROGATORY NO. 5: Give a full and complete account of Mango's involvement in Texas Racing from 1989 to the present, including in your answer an itemization of all of the time that Mango has spent in Texas Racing from 1989 to the present, an account of all activities in which Mango has engaged in Texas Racing from 1899 to the present, an account of all expenses that Mango has incurred in Texas Racing from 1989 to the present, the identity of all persons having knowledge relating to Mango's

involvement in Texas Racing from 1989 to the present, and the identity of all documents relating to Mango's involvement in Texas Racing from 1989 to the present, including the identity of all documents constituting or relating to an itemization of the time that Mango has spent regarding Texas Racing from 1989 to the present and all documents relating to expenses that Mango has incurred regarding Texas Racing from 1989 to the present.

OBJECTIONS: De Francis objects to Interrogatory No. 5 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, see Response No. 2. In his capacity as an equity owner in D/J/M, Mango has reviewed architectural plans for the proposed Texas Racing facility and has met with an architectural firm and others to review suggested changes to those plans. None of the expenses that were incurred in connection with those activities were paid for out of the funds of Laurel or Pimlico.

INTERROGATORY NO. 6: Give a full and complete account of any communication involving you and any member of the Board of Directors of Pimlico or Laurel concerning the role that Mango has had in the past, presently has, or will have in the future in Texas Racing, including in your answer the identity of all documents constituting or relating to any such communication, and the identity of all persons having knowledge of any such communication.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis's only communication with members of the Boards of Directors of Pimlico or Laurel, in their capacity as members of the Board of Directors, with respect to Mango's role in Texas Racing occurred on April 13, 1992, at the Board of Directors meetings. At that time, De Francis stated that any participation

by Mango in Texas Racing would not interfere with his duties at Laurel and Pimlico. In a letter to Mango dated April 18, 1992, De Francis confirmed that Mango's participation in Texas Racing must be conducted on Mango's own time so as not to interfere with his responsibilities and duties to Laurel and Pimlico. This letter was subsequently used by Midpointe as a poster-sized exhibit, in connection with the license application proceedings before the Texas Racing Commission.

INTERROGATORY NO. 7: Give a full and complete account of any communication involving you and any person other than a member of the board of Directors of Pimlico or Laurel concerning the role that Mango has had in the past, presently has, or will have in the future in Texas Racing, including in your answer the identity of all documents constituting or relating to any such communication, and the identity of all persons having knowledge of any such communication.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that there were a number of conversations with Mango and Jacobs concerning the need for a general manager for the Texas racetracks and the conclusion ultimately reached in those conversations was that Mango would not be a candidate for that position.

INTERROGATORY NO. 8: Give a full and complete account of any actions taken in anticipation of Mango's departure from Pimlico or Laurel, including in your answer a full and complete account of any inquiries, investigation, or preparation made to replace Mango, the identity of all documents relating to any actions taken in anticipation of Mango's departure from Pimlico or Laurel, and the identity of all persons having knowledge of any actions taken in anticipation of Mango's departure from Pimlico or Laurel.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: See Response No. 7. De Francis has no knowledge that Mango will depart from Pimlico or Laurel.

INTERROGATORY NO. 9: If any person has conducted any study, analysis, or investigation regarding the impact on Pimlico or Laurel of your involvement, Jacobs' involvement, or Mango's involvement in Texas Racing, give a full and complete account of any such study, analysis, or investigation and the identity of all persons having knowledge of any such study, analysis, or investigation.

OBJECTIONS: De Francis objects to Interrogatory No. 9 on the basis that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 3, 4, and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that he has no knowledge that any outside person has conducted a study, analysis, or investigation regarding the impact that Texas Racing would have on Laurel or Pimlico. Since April 27, 1990, all efforts with respect to Texas Racing have been undertaken with private expense and on personal time and, accordingly, have had no adverse impact on the racetracks. De Francis' analysis of the impact of any such involvement is that it will benefit the Maryland racetracks for many reasons, including the following: (1) Maryland racetracks will have greater leverage in negotiating contracts with vendors and sponsors since Laurel and Pimlico could negotiate lower prices for their tracks in exchange for giving the vendors and sponsors an opportunity to contract with a Texas racetrack; and (2) the possibility of common pool wagering and simulcasting

between Texas and Maryland could enhance the visibility and the revenues of the Maryland racetracks.

INTERROGATORY NO. 10: Give a complete account of any communication involving you or Jacobs on one hand and any member of the Board of Directors of either Pimlico or Laurel on the other hand concerning the financial terms and conditions of D/J/M's involvement in Texas racing, including in your answer the identity of all documents constituting or relating to any such communication and the identity of all persons having knowledge of any such communication.

OBJECTIONS: De Francis objects to Interrogatory No. 10 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 3, 4, and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that the financial terms and conditions of D/J/M's involvement in Texas Racing are contained in the Lone Star license application which is a part of the public record and a copy of which is in the possession of its competitor, Midpointe, and consequently in the possession of or available to Robert T. Manfuso.

INTERROGATORY NO. 11: Give a full and complete account of the financial terms and conditions of D/J/M's involvement in Texas Racing, including in your answer a full and complete account of all assets and information to be used in connection with D/J/M's involvement in Texas Racing, the identity of all documents constituting or relating to the financial terms and conditions of D/J/M's involvement in Texas Racing, and the identity of all persons having knowledge of the financial terms and conditions of D/J/M's involvement in Texas Racing.

OBJECTIONS: De Francis objects to Interrogatory No. 11 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 3, 4, and 5.

RESPONSE: Subject to and without waiving these objections, see Response No. 10.

INTERROGATORY NO. 12: Give a full and complete account of any communication involving you or Jacobs on one hand and the Guida Group on the other hand relating to the impact of your involvement, Jacobs's involvement, or Mango's involvement in Texas Racing on Pimlico or Laurel, including in your answer the identity of all documents constituting or relating to any such communication, and the identity of all persons having knowledge of any such communication.

OBJECTIONS: De Francis objects to Interrogatory No. 12 on the grounds that it is overly broad and seeks discovery of irrelevant information. See also General Objections Nos. 4 and 5.

INTERROGATORY NO. 13: Give a full and complete account of any communication involving you or Jacobs on one hand and the Guida Group on the other hand relating to the financial terms and conditions of D/J/M's involvement in Texas Racing, including in your answer the identity of all documents constituting or relating to any such communication, and the identity of all persons having knowledge of any such communication.

OBJECTIONS: De Francis objects to Interrogatory No. 13 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 3, 4, and 5.

INTERROGATORY NO. 14: If you contend that your involvement, Jacobs's involvement, or Mango's involvement in Texas Racing will benefit Pimlico or Laurel, state all facts and identify all documents supporting that contention, including in your answer the identity of all persons having knowledge pertinent to the facts relating to your contention.

OBJECTIONS: De Francis objects to Interrogatory No. 14 on the grounds that it is overly broad and seeks the discovery of irrelevant information. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, see Response No. 9.

INTERROGATORY NO. 15: State all facts and identify all documents supporting the allegations in paragraph 76 of your Counterclaim that the Manfusos knew, prior to their execution of the Stockholders Agreement, that they had no right to operational or managerial control of Laurel or Pimlico, no lawful way to "interfere" with De Francis in regard to operational or managerial decisions, and no way to reach their alleged ultimate goal of acquisition of complete control and ownership of Laurel and Pimlico, including in your answer the identity of all persons having knowledge relating to the factual basis of those allegations.

OBJECTIONS: See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that the Manfusos have always been acutely aware of their status as minority stockholders in the corporations. As evidence of this awareness, prior to the death of Frank J. De Francis, John A. Manfuso, Jr. requested Frank J. De Francis to agree to the institution of a Stockholders Agreement to provide the Manfusos with greater rights than they enjoyed as minority stockholders. Frank J. De Francis agreed that the Manfusos could retain counsel to represent them, at Pimlico's expense, to negotiate and draft a Stockholders Agreement. The Manfusos hired Herb Garten, who presumably advised them further with regard to their status as minority stockholders. Following the death of Frank J. De Francis in August of 1989, De Francis advised the Manfusos that he had absolute authority to assume the positions of Chief Executive Officer and President of both Laurel and Pimlico by virtue of the fact that, together, he and his father's estate owned the

controlling majority interest in the voting stock of the corporations. Thereafter, in connection with the continuing negotiations of the Stockholders Agreement, the Manfusos and their counsel acknowledged the Manfusos' status as minority stockholders in the corporations. The Manfusos admit in paragraph 14 of their Third Amended Complaint that "The estate of Frank J. De Francis, represented by De Francis, controlled a majority of the voting stock of both racetracks."

INTERROGATORY NO. 16: State all facts and identify all documents supporting the allegation in paragraph 77 of your Counterclaim that, in an effort to gain rights and eventual control of Laurel and Pimlico, the Manfusos conspired and agreed to induce you to and Jacobs to enter into the Stockholders Agreement, including in your answer the identity of all persons having knowledge relating to the factual basis of that allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that, following the death of Frank J. De Francis, the Manfusos began a campaign of personal hostility toward De Francis and Jacobs, coupled with threats of litigation and public disputes that would harm Laurel and Pimlico and create unrest and dissension among employees. At all times, the Manfusos acted in concert in connection with this course of conduct. For example, virtually all correspondence during this period was signed by Robert T. Manfuso and John A. Manfuso, Jr. The Manfusos accompanied their threats of litigation and public dispute with demands that De Francis and Jacobs enter into a Stockholders Agreement. In doing so, the Manfusos held out the "carrot" of a Standstill Provision under which De Francis would

obtain a period of peace during which he could exercise the operational and managerial control over the racetracks to which he was entitled by virtue of the controlling majority interest in Laurel and Pimlico held by him and the estate of Frank J. De Francis.

INTERROGATORY NO. 17: State all facts and identify all documents supporting the allegation in paragraph 78 of your Counterclaim that the Manfusos never had an intent to honor the promises that they made under the Stockholders Agreement, including in your answer the identity of all persons having knowledge relating to the factual basis of your allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis maintains that his sole basis for entering into the Stockholders Agreement was to gain a period of peace without fear of public dispute or litigation with the Manfuso brothers. In fact, the only benefit under the Stockholders Agreement conferred to De Francis by the Plaintiffs concerned the Standstill Provision in which the Plaintiffs purportedly agreed to forego all litigation related to the "business or operations of Pimlico or Laurel" until October 1, 1993. However, the Plaintiffs never intended to fulfill this promise. Instead, the Plaintiffs used this inducement as a means of having De Francis and Jacobs agree to a Russian Roulette buy-sell clause whereby the Plaintiffs would be able to secure control of the racetracks.

Notwithstanding their agreement in the Stockholders Agreement to provide De Francis with this period of peace, the Manfusos began interfering with De Francis's management of the racetracks almost immediately after the execution of the

Stockholders Agreement which occurred on February 2, 1990. On or about February 20, 1990, they announced to De Francis and Jacobs their resignation as officers of the racetracks, without any advance notice, and made the same announcement to the public at a press conference the next day. They immediately claimed a $2,500,000.00 termination payment under the Agreement. John A. Manfuso, Jr. stated shortly thereafter that he believed at that time that the corporations would have been unable to make that payment, and would thereby cause the corporations to breach the Stockholders Agreement or, alternatively, cause a major matter, which would trigger the buy-sell provision.

From that time to the present, the Manfusos have continued in their campaign of public and private harassment and interference in the day-to-day operations of the tracks in breach of their obligations under the Stockholders Agreement. The only reasonable inference from the Manfusos' course of conduct is that they had no contemporaneous intent to fulfill their obligations under the Shareholders Agreement.

INTERROGATORY NO. 18: State all facts and identify all documents supporting the allegation in paragraph 78(b) of your Counterclaim that the Manfusos have questioned business decisions made by you and Jacobs without providing any legal or factual basis of their complaints, including in your answer the identity of all persons having knowledge relating to the factual basis for your allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: The examples of the Manfusos questioning the business decisions made by De Francis and Jacobs without providing any legal or factual basis for their complaints are

legion. A prime example is the Manfusos' unceasing questions concerning the allocation of resources between Pimlico and Laurel and certain accounting practices of the corporations' accountants and outside auditors. De Francis and Jacobs have permitted the Manfusos and their personal accountant, Mark Reynolds, with unfettered access, to review the financial statements and records of the corporations. The Manfusos' accountant has had several meetings with the corporations' outside auditor to review and raise questions about work papers and the financial statements. In return, the Manfusos have been asked repeatedly, in writing and orally, to provide their accountant's report or findings for review by the Board. Indeed, to this date, the Manfusos have refused this request.

In addition to the other claims raised in this litigation -- all of which concern business decisions made by De Francis and Jacobs -- the Manfusos have continued to intrude into and question day-to-day business decisions made by De Francis and Jacobs. The Manfusos' interference has ranged in scope from matters concerning employee relations, to the officers' dealings with outside vendors, to contacting the press to provide erroneous information concerning this litigation.

Because the Manfusos' continual interference in matters of this nature are too numerous to describe herein, De Francis will rely for a more detailed response to this Interrogatory upon his option to produce business records, pursuant to Maryland Rule 2-421, including the continuing flow of correspondence from the

Manfusos questioning the minutiae of the track's day-to-day operations.

INTERROGATORY NO. 19: State all facts and identify all documents supporting the allegation in paragraph 79 of your Counterclaim that the Manfusos' alleged misrepresentations were motivated by actual malice, ill-will, and spite toward you and Jacobs, including in your answer the identity of all persons having knowledge relating to the factual basis of your allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Following the death of Frank J. De Francis in 1989, the Manfusos commenced a campaign of public and private hostility to De Francis and Jacobs that was personal in nature and which, by all objective criteria, was intended to usurp De Francis's right to control the racetracks by virtue of his control of the majority of voting stock of both Laurel and Pimlico. The personal hostility directed toward De Francis and Jacobs was accompanied by threats of litigation and public disputes which would harm Laurel and Pimlico.

INTERROGATORY NO. 20: State all facts and identify all documents supporting the allegation in paragraph 80 of your Counterclaim that you and Jacobs reasonably relied on the promises allegedly made by the Manfusos in executing the Stockholders Agreement, including in your answer the identity of all persons having knowledge relating to the factual basis of that allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Without waiving these objections, De Francis states that the entire concept of a Stockholders Agreement was initiated by the Manfusos. The Manfusos retained counsel who represented them at every stage of the negotiation, drafting, and execution of the Stockholders Agreement. After months of

negotiating revisions to the Agreement, the Manfusos executed the Agreement before witnesses. De Francis and Jacobs believed and reasonably relied upon the belief that the Manfusos would honor their contractual obligations therein, including, without limitation, their agreement that no litigation would be instituted by any party concerning the business or operations of Laurel or Pimlico prior to October 1, 1993.

INTERROGATORY NO. 21: State all facts and identify all documents supporting the allegation in paragraph 81 of your Counterclaim that, but for the alleged misrepresentations made by the Manfuso,s you and Jacobs would not have entered into the Stockholders Agreement, including in your answer the identity of all persons having knowledge of the factual basis of that allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: See Response No. 20. De Francis states that, but for the Manfusos' misrepresentation that they would not interfere in the operations and management of the racetracks and would not institute litigation concerning the business and operations of the racetracks, he would not have entered into the Shareholders Agreement.

INTERROGATORY NO. 22: Give a full and complete account of any communication involving you and any persons concerning the circumstances surrounding your decision and Jacobs' decision to enter into the Stockholders Agreement, including in your answer the identity of all documents constituting or relating to any such communication and the identity of all persons having knowledge of any such communication.

OBJECTIONS: De Francis objects to Interrogatory No. 22 on the grounds that it is overbroad, unduly burdensome, vague, and ambiguous. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that, given the passage of time, it is impossible for him to describe with any particularity verbal communications that he may have had with other persons concerning his decision to enter into the Stockholders Agreement. In general, De Francis' decision to enter into the Stockholders Agreement was made jointly with Alec Courtelis, who, with De Francis, serves as personal representative of the estate of Frank J. De Francis, and with Karin De Francis Van Dyke, who shares with De Francis as a beneficiary of stock in the corporations under Frank J. De Francis' testamentary trust. With respect to written communications in this regard, De Francis relies upon his option to produce business records pursuant to Maryland Rule 2-421(c), although he believes no responsive documents exist or, if there are any, they are in the possession of the Plaintiffs.

INTERROGATORY NO. 23: State all facts and identify all documents supporting the allegation in paragraph 82 of your Counterclaim that you and Jacobs have been injured with respect to your (and his) reputations in the racing and banking industries and have suffered a decrease in the value of your (and his) interests in Laurel and Pimlico as a result of the Manfusos' alleged constant harassment and institution of litigation, including in your answer the identity of all persons having knowledge relating to the factual basis of that allegation.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that, as a result of the Manfusos' interference, harassment, and their institution of this litigation, he and Jacobs have had to meet with the lender to allay their concerns regarding the disputes between the owners of

the corporations. De Francis' ability to deal effectively with the legislature, unions, horsemen, breeders, and vendors has been adversely affected in that these groups have questioned De Francis' authority and ability to perform over an extended period of time. Moreover, racing is a business in which the public perception of institutional integrity is crucial. The adverse publicity that has been generated by the Manfusos both prior to and since the institution of this litigation has affected not only his and Jacobs' reputations in the racing and banking industries, but has had a detrimental effect on the financial performance of the racetracks and, consequently, has decreased the value of his interest in Laurel and Pimlico.

INTERROGATORY NO. 24: Give a full and complete account of any communication between you or Jacobs on one hand and Mango on the other hand relating to Mango's involvement in Texas Racing, including in your answer the identity of all documents constituting or relating to any such communication and the identity of all persons having knowledge of any such communication.

OBJECTIONS: De Francis objects to Interrogatory No. 24 on the grounds that it is overbroad, seeks the discovery of irrelevant information, and is vague and ambiguous. See also General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis states that it is impossible for him to describe with any particularity the verbal communications that may have occurred between himself and Mango regarding the latter's involvement in Texas Racing. See, however, Response No. 7.

INTERROGATORY NO. 25: State the handle at Pimlico and Laurel on a day-by-day basis from January 1, 1990, to the

present, including in your answer the identity of all persons having knowledge of the handle at Pimlico and Laurel from January 1, 1990, to the present and the identity of all documents relating to the handle at Pimlico and Laurel from January 1, 1990, to the present.

OBJECTIONS: See General Objection No. 4.

RESPONSE: Pursuant to Maryland Rule 2-421(c), the Answer to this Interrogatory may be derived or ascertained from the business records held by the corporations. Defendant agrees to provide these documents for inspection at a mutually agreed upon time.

INTERROGATORY NO. 26: If the handle at Pimlico or Laurel has declined at any time from January 1, 1990, to the present, state all facts and the identity of all documents relating to your explanation for any such decline, including in your answer the identity of all persons having knowledge relating to your explanation of any such decline.

OBJECTIONS: See General Objections Nos. 4 and 5.

RESPONSE: Subject to and without waiving these objections, De Francis maintains that the handle at Laurel and Pimlico has declined for various reasons, including the following (and not necessarily in the order of importance): (1) the decrease in the number of thoroughbred horses available to run at the racetracks which has resulted in fewer races, fewer horses in races, and reduced quality of racing; (2) the ongoing recession which has impaired revenues in retail, service and entertainment industries generally; (3) the failure of racing to attract new fans to the sport; (4) the adverse publicity generated by this litigation and the Manfusos' interference in and questioning of the day-to-day operations of the track; (5) common pool wagering at nearby out-of-state racetracks on races emanating from California, New York,

Florida, and other jurisdictions; (6) institution of Keno by the Maryland Lottery; and (7) the decreased impact of intertrack wagering as it matures.

INTERROGATORY NO. 27: Provide a full and complete itemization of all damages that you claim in this action, including in your answer the identity of all persons having knowledge of your damages, and the identity of all documents constituting or relating to your computation of damages.

OBJECTIONS: See General Objections Nos. 4 and 5.

ANSWER: At this time, De Francis has not completed an itemization of damages; however, he will supply Plaintiff with an itemization when this task is accomplished.

INTERROGATORY NO. 28: Identify each person whom you expect to call as an expert witness at trial, and, for each person so identified, state the subject matter as to which the person is expected to testify, state the substance of the facts and opinions as to which the person is expected to testify, provide a summary of the grounds for each opinion, provide an account of each occasion during the last five years when the person has given expert testimony, identify all persons having knowledge of the subject matter of this interrogatory, and identify all documents relating to the subject matter of this interrogatory, including, without intended limitation, any report prepared by the person, and all documents consulted or reviewed by the person.

OBJECTIONS: De Francis objects to Interrogatory No. 8 on the grounds that it is overly broad, unduly burdensome and oppressive, and seeks the discovery of irrelevant information.

RESPONSE: Subject to and without waiving this objection, De Francis states that, at this time, he has not retained an expert which he expects to call as an expert witness at trial. However, if and when Defendant does retain any expert witness who will testify at trial, Defendant will provide all information discoverable under Maryland Rule 2-402(a).

INTERROGATORY NO. 29: Identify all persons who have given you a statement, within the meaning of Md. R. 2-402(b), relating to the subject matter of this litigation, including in your answer the identity of the present custodian of each statement.

OBJECTIONS: De Francis objects to Interrogatory No. 29 as vague and ambiguous as framed. Maryland Rule 2-402(b) provides only for the discovery of the existence and contents of insurance agreements under which an insurer might be liable to satisfy part or all of a judgment entered in the subject litigation. In light of the scope of this subsection, De Francis cannot ascertain what information is sought by Interrogatory No. 29.

INTERROGATORY NO. 30: Identify each person furnishing information for the answers to these interrogatories, and, with respect to each such person, state the number of the interrogatory for which each such person furnished information and the substance of the information that he or she furnished.

RESPONSE: Other than the parties and counsel, no person has furnished information for the Answers to these Interrogatories.

I HEREBY DECLARE and AFFIRM under the penalties of perjury that the foregoing Answers to Interrogatories are true and correct to the best of my knowledge, information and belief.

Joseph A. De Francis

James E. Gray

Linda S. Woolf
Goodell, DeVries, Leech & Gray
25 S. Charles Street, Suite 1900
Baltimore, MD 21201
(410) 783-4000

Attorneys for Defendants
De Francis and Jacobs

27
Gy

ROBERT T. MANFUSO, et al. * IN THE

Plaintiffs * CIRCUIT COURT

v. * FOR

JOSEPH A. De FRANCIS, et al. * BALTIMORE CITY

Defendants * Case No. 92120052/CE147851

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CIVIL DIVISION

* * * * * * * * *

NOTICE OF SERVICE

Plaintiff Robert T. Manfuso, by his undersigned attorneys, certifies that on this fifteenth day of January, 1993, he sent copies of:

(1) Plaintiff Robert T. Manfuso's Interrogatories to Defendant Martin Jacobs;

(2) Plaintiff Robert T. Manfuso's Request for Production of Documents to Defendant Martin Jacobs; and

(3) this Notice of Service;

by hand-delivery to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201;

and by first-class mail, postage prepaid, to:

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

by KFA
Andrew Jay Graham
Andrew Jay Graham

LAW OFFICES
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BALTIMORE, MARYLAND 21202-3201
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f:manfuso\jacobs.rfp

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

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CIVIL DIVISION

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs	Civil Action No. 92120052 CE 147851
vs.	
JOSEPH A. DEFRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants	

STIPULATED MOTION FOR EXTENSION OF TIME

Defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (sometimes collectively referred to as the "Corporations") by and through their attorneys, hereby move the court for an order extending the time for the Corporations to file their opposition to Plaintiffs' Motion for Summary Judgment on Count II of the Counterclaim of Defendants The Maryland Jockey Club of Baltimore CIty, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (hereinafter "Plaintiffs' Motion").

Plaintiffs' Motion was served on the Corporations by first class mail on December 7, 1992. The Corporations have requested an extension of the time to respond to this motion until January 15, 1993.

Counsel for the Corporations have conferred with counsel for the plaintiffs about their request for an extension of time to respond, and counsel for the plaintiffs have agreed

that defendants may have until January 15, 1993 to respond to Plaintiffs' Motion.

Dated: January 8, 1993

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer C. Archie
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 637-2200

Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

Agreed to in Form and Substance:

Andrew Jay Graham
Kramon & Graham
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201
(410) 753-6030

Attorneys for Plaintiffs
Robert T. Manfuso and
John A. Manfuso, Jr.

1/18/93

Judge Friedman rejects telephone motion 12/31/93 because not in form & order accompanied the motion. There is no form & rule with this motion.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1993 a copy of the foregoing Stipulated Motion for Extension of Time was delivered by facsimile to: Andrew Jay Graham, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; and James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs vs. JOSEPH A. DEFRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants	Civil Action No. 92120052

STIPULATED MOTION FOR EXTENSION OF TIME

Defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (sometimes collectively referred to as the "Corporations") by and through their attorneys, hereby move the court for an order extending the time for the Corporations to file their opposition to Plaintiffs' Motion for Summary Judgment on Count II of the Counterclaim of Defendants The Maryland Jockey Club of Baltimore CIty, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (hereinafter "Plaintiffs' Motion").

Plaintiffs' Motion was served on the Corporations by first class mail on December 7, 1992. The Corporations have requested an extension of the time to respond to this motion until January 15, 1993.

Counsel for the Corporations have conferred with counsel for the plaintiffs about their request for an extension of time to respond, and counsel for the plaintiffs have agreed

that defendants may have until January 15, 1993 to respond to Plaintiffs' Motion.

Dated: January 8, 1993

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer C. Archie
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 637-2200

Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

Agreed to in Form and Substance:

Andrew Jay Graham
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Sun Life Building
Charles Center
20 South Charles Street
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(410) 753-6030

Attorneys for Plaintiffs
Robert T. Manfuso and
John A. Manfuso, Jr.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1993 a copy of the foregoing Stipulated Motion for Extension of Time was delivered by facsimile to: Andrew Jay Graham, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; and James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

ANDREW JAY GRAHAM**
JAMES M. KRAMON**
LEE H. OGBURN
JEFFREY H. SCHERR
NANCY E. GREGOR+
JAMES P. ULWICK*‡
PHILIP M. ANDREWS
GERTRUDE C. BARTEL+
MARILYN HOPE FISHER*°
MAX HIGGINS LAUTEN+
KATHLEEN A. BIRRANE
KEVIN F. ARTHUR
ARON U. RASKAS+
SETH M. ROTENBERG
PERRY F. SEKUS
GEOFFREY H. GENTH*

*ALSO ADMITTED IN NY
+ALSO ADMITTED IN DC
‡ALSO ADMITTED IN NJ
°ALSO ADMITTED IN CA

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FACSIMILE
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BEL AIR, MARYLAND 21015
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(410) 569-0299
FACSIMILE
(410) 569-0298

OF COUNSEL
FREDERICK STEINMANN

January 11, 1993

Ms. Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Civil Division - Room 462
111 N. Calvert Street
Baltimore, Maryland 21202

RE: Manfuso, et al. v.
De Francis, et al.
Civil Action No. 92120052 CE 147851

Dear Ms. Banks:

Enclosed for filing in the above-captioned action please find a Stipulated Motion for Extension of Time. Please date stamp the extra copy and return it to this office in the enclosed self-addressed, stamped envelope.

Sincerely,

Jane M. Walker

Jane M. Walker
Secretary to Andrew Jay Graham

/jmw
Enclosure

25VB

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CIVIL DIVISION

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs	Civil Action No. 92120052 CE 147851
vs.	
JOSEPH A. DEFRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants	

STIPULATED MOTION FOR EXTENSION OF TIME

Defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (sometimes collectively referred to as the "Corporations") by and through their attorneys, hereby move the court for an order extending the time for the Corporations to file their opposition to Plaintiffs' Motion for Summary Judgment on Count II of the Counterclaim of Defendants The Maryland Jockey Club of Baltimore CIty, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. (hereinafter "Plaintiffs' Motion") from December 28, 1992 until January 8, 1993.

Plaintiffs' Motion was served on the Corporations by first class mail on December 7, 1992. The Corporations' opposition brief is accordingly due on December 28, 1992.

Counsel for the Corporations have conferred with counsel for the plaintiffs about their request for an extension of time to file their opposition brief, and counsel for the

plaintiffs has agreed that defendants may have until January 8, 1993 to respond to Plaintiffs' Motion.

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer C. Archie
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 637-2200

Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

Agreed to in Form and Substance:

Andrew Jay Graham
Kramon & Graham
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201
(410) 753-6030

Attorneys for Plaintiffs
Robert T. Manfuso and
John A. Manfuso, Jr.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

9176

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1992, a copy of the foregoing Stipulated Motion for Extension of Time was delivered by facsimile to: Andrew Jay Graham, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; and James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

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CIVIL DIVISION

ROBERT T. MANFUSO, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * *

NOTICE OF SERVICE

Plaintiff Robert T. Manfuso, by his undersigned attorneys, certifies that on this 15th day of December, 1992, he sent copies of:

(1) Plaintiff Robert T. Manfuso's Interrogatories to Defendant Joseph A. De Francis;

(2) Plaintiff Robert T. Manfuso's First Set of Requests for Production of Documents to Defendant Joseph A. De Francis; and

(3) this Notice of Service;

by hand-delivery to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201;

and by first-class mail, postage prepaid, to:

McGee Grigsby, Esquire
Irwin Goldblum, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

Andrew Jay Graham by AFA
Andrew Jay Graham

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ONE SOUTH STREET, SUITE 2600
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(410) 752-6030

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Kevin F. Arthur

Kramon & Graham, P.A.

Kramon & Graham, P.A.
Commerce Place
One South Street, Suite 2600
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(410) 752-6030

Attorneys for Plaintiffs Robert T. Manfuso and John A. Manfuso, Jr.

Dated: December 15, 1992.

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COMMERCE PLACE
ONE SOUTH STREET, SUITE 2600
BALTIMORE, MARYLAND 21202-3201
(410) 752-6030

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CIVIL DIVISION

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052

CC-147851

* * * * * * * * * * * * *

PLAINTIFFS' ANSWER TO COUNT II
OF THE COUNTERCLAIM OF DEFENDANTS
THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY,
PIMLICO RACING ASSOCIATION, INC.,
AND LAUREL RACING ASSOC., INC.

Pursuant to Md. R. 2-323, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "the Manfusos"), by their undersigned attorneys, hereby answer Count II of the counterclaim brought by defendants The Maryland Jockey Club of Baltimore City and Pimlico Racing Association, Inc. (collectively "Pimlico"), and by defendant Laurel Racing Assoc., Inc. ("Laurel")[1]:

FIRST DEFENSE

The Manfusos generally deny every factual allegation and every other allegation and assertion in Count II of Pimlico's and Laurel's counterclaim.

SECOND DEFENSE

Count II of Pimlico's and Laurel's counterclaim fails to state a claim upon which relief can be granted.

LAW OFFICES
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CHARLES CENTER
20 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 752-6030

[1] On October 9, 1992, the Court dismissed Count I of Pimlico's and Laurel's counterclaim, but denied the Manfusos' motion to dismiss Count II. In accordance with the Court's ruling, the Manfusos now answer Count II.

FIRST AFFIRMATIVE DEFENSE

Pimlico and Laurel are estopped to recover on Count II of their counterclaim.

SECOND AFFIRMATIVE DEFENSE

The applicable statutes of limitations bar Pimlico's and Laurel's recovery on Count II of their counterclaim.

THIRD AFFIRMATIVE DEFENSE

Pimlico and Laurel have waived the right to recover on Count II of their counterclaim.

Andrew Jay Graham

Kevin F. Arthur

Kramon & Graham, P.A.
Sun Life Building, 6th Floor
20 South Charles Street
Baltimore, Maryland 21201
(410) 752-6030

Attorneys for Robert T. Manfuso and John A. Manfuso, Jr.

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SUN LIFE BUILDING
CHARLES CENTER
20 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 752-6030

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c:Manfuso:ans.2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 1992, I sent a copy of Plaintiffs' Answer to Count II of the Counterclaim of Defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. by first-class mail, postage prepaid, to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201; and

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

Kevin F. Arthur

LAW OFFICES
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CHARLES CENTER
20 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 752-6030

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CIVIL DIVISION

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * *

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT II OF THE COUNTERCLAIM OF DEFENDANTS THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC., AND LAUREL RACING ASSOC., INC.

Pursuant to Md. R. 2-501, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr., by their undersigned attorneys, move for summary judgment on Count II of the counterclaim filed by defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. The grounds for this motion are:

(1) There is no genuine dispute as to any material fact; and

(2) By virtue of this Court's Order of October 9, 1992, and the oral opinion delivered from the bench on September 23, 1992, the plaintiffs are entitled to judgment as a matter of law on Count II of the counterclaim of defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.

The grounds for this motion appear in detail in the accompanying Memorandum of Law.

Andrew Jay Graham

LAW OFFICES
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SUN LIFE BUILDING
CHARLES CENTER
20 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 752-6030

KFA:jas:12/3/92.3
M-2:MSJ-II

Kevin F. Arthur

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20 South Charles Street
Sixth Floor, Sun Life Building
Baltimore, Maryland 21202
(410) 752-6030

Attorneys for Plaintiffs
Robert T. Manfuso and John A. Manfuso, Jr.

Dated: December 7, 1992.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 1992, I sent a copy of Plaintiffs' Motion for Summary Judgment on Count II of the Counterclaim of The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc., and a copy of the accompanying Memorandum of Law by first-class mail, postage prepaid, to:

James T. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 South Charles Street
Suite 1900
Baltimore, Maryland 21201; and

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505.

Kevin F. Arthur

LAW OFFICES
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BALTIMORE, MARYLAND 21201
(410) 752-6030

KFA:jas:12/3/92.3
M-2:MSJ-II

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT II OF THE COUNTERCLAIM OF DEFENDANTS THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC., AND LAUREL RACING ASSOC., INC.

On or about June 5, 1992, defendants The Maryland Jockey Club of Baltimore City and Pimlico Racing Association, Inc. (collectively "Pimlico"), and defendant Laurel Racing Assoc., Inc. ("Laurel"), filed a counterclaim in this case against the plaintiffs, Robert T. Manfuso and John A. Manfuso, Jr. (collectively, the "Manfusos").

Count I of the counterclaim sought damages from the Manfusos on the theory that, merely by commencing this lawsuit, they had breached the so-called "standstill provision" of the Stockholders Agreement for Pimlico and Laurel. Similarly, Count II of the counterclaim requested a declaration that, again merely by commencing this lawsuit, the Manfusos had breached the standstill provision of the Stockholders Agreement.

The Manfusos responded to the counterclaim with a motion to dismiss or, alternatively, for summary judgment.

By Order dated October 9, 1992, the Court granted the Manfusos' motion to dismiss Count I, the breach of contract

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claim. In explaining the basis for its ruling in an oral opinion rendered from the bench on September 23, 1992, the Court stated that the Manfusos' filing of this action in and of itself did not violate the Stockholders Agreement. Exhibit A (Excerpts from the transcript of proceedings in Manfuso, et al. v. De Francis, et al., on September 23, 1992), p. 96.

The Court, however, then went on to deny the motion to dismiss Count II, the claim for declaratory relief. In explaining the basis for that ruling, the Court cited authorities (e.g., Broadwater v. State, 303 Md. 461, 465, 494 A.2d 934, 936 (1985)) holding that it is rarely appropriate to grant a motion to dismiss in an action for a declaratory judgment. Exhibit A, p. 96.

While those authorities might have warranted caution in considering whether to grant a motion to dismiss Count II, they do not bar the entry of summary judgment or the issuance of a declaration on the merits of Count II. The Court, moreover, has already effectively decided the merits of Count II when, in dismissing Count I, it ruled that the commencement of this action in and of itself did not constitute a breach of the Stockholders Agreement. Having resolved that issue against Pimlico and Laurel in the Order of October 9, 1992, the Court should proceed to issue a declaration on Count II in accordance with its prior ruling. Hence, the Court should enter summary judgment against Pimlico and Laurel on Count II and declare that

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the Manfusos did not breach the Stockholders Agreement merely by instituting this lawsuit.

Respectfully submitted,

Andrew Jay Graham

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(410) 752-6030

Attorneys for Plaintiffs
Robert T. Manfuso and John A. Manfuso, Jr.

Dated: December 7, 1992.

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KFA:jas:12/3/92.3
M-2:MSJ-II

ROBERT MANFUSO, ET AL., * IN THE

PLAINTIFFS * CIRCUIT COURT

VS. * FOR

JOSEPH DEFRANCIS, ET AL. * BALTIMORE CITY

DEFENDANTS * CASE NO.92120052

* * * * * * * * *

SEPTEMBER 23, 1992

BEFORE:

THE HONORABLE ELLEN HOLLANDER, JUDGE

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

JAMES ULWICK, ESQUIRE

HERBERT GARTEN, ESQUIRE

ADREW GRAHAM, ESQUIRE

ON BEHALF OF THE DEFENDANTS:

JAMES GRAY, ESQUIRE

LINDA WOOLF, ESQUIRE

MCGEE GRIGSBY, ESQUIRE

KENNETH NORRIS

OFFICIAL COURT REPORTER

HOWEVER HE DOES INCORPORATE BY REFERENCE, WHICH I MENTIONED YESTERDAY, ALL OF THE OTHER ALLEGATIONS HE'S MADE AND I BELIEVE THEY ARE ALSO PART OF THE SUIT.

WHEN I SAY THAT I INCLUDED IT IS BECAUSE THAT SUGGESTS TO ME THAT HIS CLAIM IS NOT ONLY THAT PLAINTIFFS' SUIT FOR DECLARATORY OR FOR INJUNCTIVE RELIEF IS GROUNDLESS BUT HE ALSO HAS IN THERE ALL THE CONDUCT THAT HE HAS MADE REFERENCE TO IN COUNTS ONE AND TWO.

IN ANY EVENT, I DON'T FIND ANY MARYLAND AUTHORITY, NONE HAS BEEN SHOWN TO ME, THAT REQUIRES I DISMISS COUNT THREE SOLELY ON THE GROUNDS THAT I HAVE NOT MADE A RULING ON THE MERITS OF PLAINTIFFS' SUIT.

SO ON THAT BASIS AT THE PRESENT TIME I'M NOT PREPARED TO DISMISS COUNT THREE AND THEREFORE THAT MOTION WILL ALSO BE DENIED.

IN CONNECTION WITH THE MOTION TO DISMISS FILED BY THE CORPORATE DEFENDANTS, WE HAVE HAD SOME DISCUSSIONS TODAY ABOUT THAT PARTICULAR MOTION, THAT PARTICULAR COUNTERCLAIM.

MR. GRIGSBY ON BEHALF OF THE CORPORATE DEFENDANTS HAS FILED A TWO COUNT COUNTERCLAIM AND I HAVE ATTEMPTED TO ASCERTAIN IN MY QUESTIONS TO HIM THE EXACT NATURE OF THE ALLEGATIONS IN THAT PARTICULAR COUNTERCLAIM. I AM TO UNDERSTAND THAT ESSENTIALLY HIS CLAIM ADDRESSES THE CONCERNS, THE ARGUMENT THAT BY HAVING FILED THE LAWSUIT, THE FIRST LAWSUIT, SECOND LAWSUIT OR THE THIRD LAWSUIT, KNOWN AS THE

SECOND AMENDED COMPLAINT, THAT THAT ACTION IN AND OF ITSELF HAS BREACHED ROMAN NUMERAL TEN OF THE STAND STILL PROVISION OF THE SHAREHOLDER'S AGREEMENT EXECUTED BY THE PARTIES IN FEBRUARY OF 1990.

I HAVE TAKEN INTO ACCOUNT AND CONSIDERED ALL OF THE ARGUMENTS ADDRESSED IN THE BRIEFS ON THIS PARTICULAR CONTENTION. I WILL NOTE FOR THE RECORD AS I HAVE ALREADY MENTIONED THAT THERE IS A SUBSTANTIAL DIFFERENCE BETWEEN THE ALLEGATIONS OF THE COUNTERCLAIM ASSERTED BY THE INDIVIDUAL DEFENDANTS AND THE ALLEGATIONS OF THE CORPORATE DEFENDANTS' BREACH OF CONTRACT CLAIM.

AGAIN, WHAT I'M REFERING TO HERE IS THAT MR. GRAY HAS ASSERTED, NOT ON THE CLAIM THAT PLAINTIFFS HAVE BREACHED BY FILING A DECLARATORY JUDGEMENT ACTION BUT ALSO THEY HAVE ENGAGED IN SPURIOUS CONDUCT DELIBERATELY DESIGNED TO IMPEED, INTERFERE WITH, OTHERWISE HARM THE CORPORATION.

THAT IS NOT IN CORPORATE DEFENDANT'S COUNTERCLAIM, SO I BELIEVE PRESENTED TO ME IS NOT A QUESTION OF WHETHER HAVING FILED AN ACTION FOR DECLARATORY JUDGEMENT FOR INJUNCTIVE REMEDY WHETHER OR NOT PLAINTIFFS HAVE REACHED THE STAND STILL PROVISION I HAVE DISCUSSED, AND THE ISSUE OF TIME DOES NOT MAKE ME REPEAT MY ANALYSIS OF THE STAND STILL PROVISION IN RULE TEN WHICH PROVIDES SEVERAL EXCEPTIONS TO WHAT IS OTHERWISE A BAR TO THE PARTIES OF THAT SHAREHOLDER'S AGREEMENT BRINGING ANY KIND OF LAWSUIT.

IN THIS PARTICULAR CASE THE PLAINTIFFS HAVE CHOSEN TO SET FORTH AMPLY AND FULLY WHAT THEY BELIEVE WAS A PATTERN OF ABUSE, MISCONDUCT AND THE LIKE, AND WITH THOSE PARTICULAR FACTUAL ALLEGATIONS, BY FILING THE DECLARATORY JUDGEMENT ACTION PURSUANT TO MARYLAND LAW, THEY HAVE INVITED THE COURT TO ANSWER THE QUESTION WHETHER GIVEN THOSE ALLEGATIONS A SUIT TO REMEDY THOSE ALLEGATIONS WOULD OR WOULD NOT BE BARRED IN LIGHT OF THE STAND STILL PROVISION.

DIRE CONSEQUENCES FROM THE CORPORATE DEFENDANTS' POINT OF VIEW MAY HAVE FLOWED FROM THE FACT THAT THE PLAINTIFFS WERE THE EYES OF THE CORPORATION, WERE OVERINCLUSIVE OF THE THINGS THAT WERE ASSERTED -- PERHAPS IT COULD HAVE BEEN A MORE SIMPLY STATED QUESTION TO THE COURT. PERHAPS THEY DID NOT HAVE TO FULLY ADDRESS THEIR ALLEGATIONS AS THEY CHOSE TO DO. PERHAPS THEY DID NOT NEED TO INCLUDE WHAT I CONSTRUE AS THE INJUNCTIVE PORTION OF THE SUIT A REQUEST SAYING IF YOU THINK WE CAN SUE, HERE IS THE REMEDY WE WOULD LIKE.

BUT THAT DOES NOT MEAN THEY WERE WRONG IN HAVING DONE IT. THERE IS CERTAINLY A GREAT LATITUDE OF STYLE IN THE WAY IN WHICH ABLE COUNSEL PRACTICE AND FOR THE PLAINTIFFS TO HAVE SET FORTH FULLY THE FACTS I THINK WAS THE PRUDENT COURSE, EVEN THOUGH IT MAY TURN OUT THAT THOSE INTENTIONS ARE OTHERWISE BARRED BY THE PROVISION OF THE STAND STILL AGREEMENT OR OTHERWISE EVEN ULTIMATELY PROVEN WRONG.

THEY HAVE PRESENTED A FACTUAL SCENARIO AND HAVE ASKED THE COURT TO LOOK AT THAT FACTUAL SCENARIO IN LIGHT OF THE STAND STILL AGREEMENT AND THE SHAREHOLDER'S AGREEMENT ITSELF AND IN ASKING THE COURT TO MAKE A DECLARATION I CANNOT FIND THAT ACTION ALONE VIOLATES THE SHAREHOLDER'S AGREEMENT.

THAT IS THE THRUST OF COUNT ONE OF THE COUNTERCLAIM AND THEREFORE I FEEL COMPELLED TO DENY THE MOTION -- EXCUSE ME, I FEEL COMPELLED TO GRANT PLAINTIFFS' MOTION TO DISMISS COUNT ONE OF THE CORPORATE DEFENDANT'S COUNTERCLAIM.

I WILL NOT, HOWEVER, MAKE THE SAME RULING IN CONNECTION WITH COUNT TWO.

IN COUNT TWO THE CORPORATE DEFENDANTS ASKED THE COURT TO MAKE A DECLARATION AND FOR THE REASONS STATED BY BOTH SIDES WHICH POINT TO A NUMBER OF CASES WHICH I HAVE READ -- WELL I MIGHT AS WELL MENTION THEM.

THEY INCLUDE BROADWATER VERSUS STATE, 303 MARYLAND, 461 AND CASES CITED THERE.

AND SHAPIRO VERSUS BOARD OF COUNTY COMMISSIONERS, 219 MARYLAND, 298.

THESE CASES AND OTHERS SUGGEST IT IS RARELY APPROPRIATE TO DISMISS A DECLARATORY JUDGEMENT ACTION AND I BELIEVE AT THE APPROPRIATE TIME I WILL BE SUFFICIENTLY GIVING AN ANSWER TO THE QUESTION POSED BY COUNT TWO, THEREFORE I WILL NOT DISMISS COUNT TWO OF THE COUNTERCLAIM.

I WANT TO POINT OUT THAT I WILL GRANT LEAVE TO AMEND

TO THE CORPORATE DEFENDANTS WITH REGARDS TO COUNT ONE BECAUSE IT MAY BE THERE IS A FACTUAL SCENARIO THAT CAN BE ASSERTED WHICH WOULD CHANGE MY RULING AS TO WHETHER OR NOT I HAVE CHOSEN TO FILE THE ACTION BY THE PLAINTIFFS ON THE STAND STILL MOTION BUT ON THE ALLEGATIONS THAT HAVE BEEN PRESENTED, I MAKE THE RULING I HAVE JUST ANNOUNCED.

I BELIEVE I'VE TAKEN CARE OF THE COUNTERCLAIMS.

NOW LET ME TURN TO THE MOTIONS TO DISMISS FILED BY THE DEFENDANTS WITH REGARD TO THE SECOND AMENDED COMPLAINT.

AS MR. GRAY DID, I'LL START WITH COUNT THREE.

IN CONNECTION WITH COUNT THREE, IT IS STYLED A SUIT FOR SPECIFIC PERFORMANCE AND ADDRESSES NOT ONLY THE MONTHLY SEVERANCE PAYMENTS BUT ALSO ADDRESSES THE SOCALLED FRINGE BENEFITS.

FRANKLY, I BELIEVE I HAVE HEARD ALL THERE IS TO HEAR IN CONNECTION WITH THE FRINGE BENEFITS. I DON'T THINK IT WOULD SERVE ANY USEFUL PURPOSE TO PROTRACT MATTERS AS TO THE FRINGE BENEFITS. I DON'T KNOW WHAT ELSE I COULD BE PRESENTED.

I HAVE INVITED COUNSEL TO TELL ME WHETHER ANYTHING ELSE IS OUT OF THERE, SO FRANKLY I BELIEVE ALTHOUGH I WASN'T MAKING A RULING ON THE MERITS AT THE TIME MR. GRAY SUGGESTED I CONSIDER THAT PORTION ON A MOTION FOR SUMMARY JUDGEMENT, THAT STANDARD IS PROBABLY WISE AND I WILL ADOPT IT, THEREFORE I WILL GRANT SUMMARY JUDGEMENT IN CONNECTION WITH THE FRINGE BENEFIT PORTION OF THAT COUNT.

ANDREW JAY GRAHAM *†
JAMES M. KRAMON *†
LEE H. OGBURN
JEFFREY H. SCHERR
NANCY E. GREGOR†
JAMES P. ULWICK†‡
PHILIP M. ANDREWS
GERTRUDE C. BARTEL†
MARILYN HOPE FISHER*o
MAX HIGGINS LAUTEN†
KATHLEEN A. BIRRANE
KEVIN F. ARTHUR
ARON U. RASKAS†
SETH M. ROTENBERG
PERRY F. SEKUS

* ALSO ADMITTED IN NY
† ALSO ADMITTED IN DC
‡ ALSO ADMITTED IN NJ
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(410) 569-0299
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(410) 569-0298

OF COUNSEL
FREDERICK STEINMANN

December 7, 1992

HAND-DELIVERED

Ms. Saundra E. Banks, Clerk
Circuit Court for Baltimore City
111 North Calvert Street
Courthouse East
Baltimore, Maryland 21202

RE: Manfuso, et al. v. De Francis, et al.
Case No. 92120052/CE 147851

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
CIVIL DIVISION
92 DEC -7 PM 1:25

Dear Ms. Banks:

I have enclosed for filing in this case the original and one copy of Plaintiffs' Motion for Summary Judgment on Count II of the Counterclaim of Defendants The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc. Please date-stamp and return the extra copy to the messenger. Thank you for your consideration in this matter.

Sincerely,

Kevin F. Arthur

Kevin F. Arthur

KFA/jas
Enclosures
cc: The Honorable Ellen L. Hollander (w/encl.)
Mr. John A. Manfuso, Jr. (w/encl.)
Mr. Robert T. Manfuso (w/encl.)
Herbert S. Garten, Esquire (w/ encl.)
James E. Gray, Esquire (w/encl.)
Linda S. Woolf, Esquire (w/encl.)
Irwin Goldbloom, Esquire (w/encl.)
McGee Grigsby, Esquire (w/encl.)
Jennifer Archie, Esquire (w/encl.)

(21)

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

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BALTIMORE CITY
92 NOV 30 AM 8:57
CIVIL DIVISION

* * * * * * * * * * * * *

PLAINTIFFS' ANSWER TO COUNTS II AND III OF THE COUNTERCLAIM OF DEFENDANTS JOSEPH A. DE FRANCIS AND MARTIN JACOBS

Pursuant to Md. R. 2-323, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "the Manfusos"), by their undersigned attorneys, hereby answer Counts II and III of the counterclaim brought by defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs")[1]:

FIRST DEFENSE

The Manfusos generally deny every factual allegation and every other allegation and assertion in Counts II and III of De Francis's and Jacobs's counterclaim.

SECOND DEFENSE

Counts II and III of De Francis's and Jacobs's counterclaim fail to state a claim upon which relief can be granted.

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[1] On July 15, 1992, the Manfusos answered Count I of De Francis's and Jacobs's counterclaim. The Manfusos now answer Counts II and III in accordance with the Court's denial of their motions to dismiss those counts.

FIRST AFFIRMATIVE DEFENSE

De Francis and Jacobs are estopped to recover on Counts II and III of their counterclaim.

SECOND AFFIRMATIVE DEFENSE

De Francis's and Jacobs's fraud bars their recovery on Counts II and III of their counterclaim.

THIRD AFFIRMATIVE DEFENSE

The applicable statutes of limitations bar De Francis's and Jacobs's recovery on Counts II and III of their counterclaim.

FOURTH AFFIRMATIVE DEFENSE

De Francis and Jacobs have waived the right to recover on Counts II and III of their counterclaim.

Andrew Jay Graham 327356

Kevin F. Arthur 9135[illegible]

Kramon & Graham, P.A.
Sun Life Building, 6th Floor
20 South Charles Street
Baltimore, Maryland 21201
(410) 752-6030

Attorneys for Robert T. Manfuso
and John A. Manfuso, Jr.

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zn:kfa:11/27/92:1
c:Manfuso:ans.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 1992, I sent a copy of Plaintiffs' Answer to Counts II and III of the Counterclaim of Defendants Joseph A. De Francis and Martin Jacobs by first-class mail, postage prepaid, to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201; and

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

Kevin F. Arthur

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zn:kfa:11/27/92:1
c:Manfuso:ans.1

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs	*	FOR
v.	*	BALTIMORE CITY
JOSEPH A. DE FRANCIS, et al.	*	Case No. 92120052
Defendants	*	CE147851

* * * * * * * * *

SCHEDULING ORDER

Counsel for all parties participated in a scheduling conference on October 29, 1992. Accordingly, it is hereby ORDERED by the Circuit Court for Baltimore City as follows:

A. Discovery

1. Discovery shall continue immediately and shall be completed by all parties by November 5, 1993. All interrogatories, depositions and requests for documents shall be filed so that responses will be completed by that date under the Maryland Rules.

2. Motions to compel answers or further answers to interrogatories or answers or further answers to requests for production shall be filed within 10 days of the filing of the answers or objections, or if not so filed, shall be deemed to have been waived. Any such motions must be accompanied by a certificate of compliance with Md. Rule 2-431. Any motion without such certification shall be denied. Any response

to discovery motions must be filed within five days after the service of the motions. This Court will thereafter rule on the Motion to Compel on the papers submitted, unless the Court orders that a hearing be held.

3. Plaintiff shall furnish Defendant with the names of all expert witnesses by August 9, 1993. Defendant shall provide Plaintiff with the name of all expert witnesses by August 30, 1993.

B. Pre-trial Filings

1. All motions, including a Motion for Summary Judgment, shall be filed on or before November 22, 1993. Any responses to such Motion shall be filed on or before December 15, 1993. Any Reply to the Response shall be filed on or before January 7, 1994. A hearing shall be held at 2:00 P.M. on January 17, 1994.

C. Pre-trial Conference

1. A pre-trial conference will be held at 9:15 a.m. on February 21, 1993.

2. A pre-trial order must be submitted to the Court on or before February 14, 1993. Counsel are reminded to comply with the requirements of Md. Rule 2-504. The proposed pre-trial Order shall be drafted by counsel for the Plaintiff and submitted to counsel for the Defendant for revision, review and execution.

3. Proposed pre-trial orders shall not be submitted in separate parts but shall be the joint product of the efforts of all counsel after they have conferred at sufficient length. It shall be signed by the attorneys for all parties. Attorneys shall obtain prior authority from clients to enter into stipulations as to as many facts and issues as may be practicable.

4. An attorney who will actually participate and who is familiar with all aspects of the case shall appear and participate in the pre-trial conference.

5. Any ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ pre-trial memoranda and motions in limine shall be submitted no later than February 28, 1994. ~~Pursuant to the~~ Agreement of counsel, ~~the~~ parties need not exchange proposed jury ~~instructions until such time~~ as the Court deems it necessary in ~~order to discuss the content of the~~ jury instructions.

D. Trial

1. The trial of this case will begin at _____ on March 7, 1994. Three weeks have been scheduled for the trial of the case. If additional time or lesser time is necessary, or if the case is to be tried other than by jury, counsel should inform the Court immediately.

E. Changes in Schedule

1. The dates ordered in the Scheduling Order shall control the pre-trial preparation and trial of this case. Variations, adjustments or changes in the schedule, without prior concurrence of the Court, will not be permitted. The

dates herein shall become final and binding upon all parties unless written exception(s) has been taken within seven days of this date.

F. Filings

1. A copy of all motions or other filings in this case which have been filed with the Clerk's office shall be filed in the chambers of this Court simultaneously (with the exception of discovery).

VII. Pending Motions, etc.

Hearing on Plaintiffs' Motion for Interlocutory Injunction presently scheduled for February 16, 1993 at 2:00 p.m. and February 17, 1993 at 2:00 p.m.

SO ORDERED, this 30th day of Oct., 1992.

Ellen Hollander

Ellen L. Hollander, Judge

cc: James Ulwick, Esquire
James Gray, Esquire
McGee Grigsby, Esquire
Herbert Garten, Esquire

CL 147851

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
	*	FOR
v.	*	BALTIMORE CITY
JOSEPH A. DE FRANCIS, et al.	*	CASE NO.: 92120052
Defendants		

FILED
OCT 14 1992
CIRCUIT COURT FOR BALTIMORE CITY

ORDER

Before the Court are various motions filed by the parties in this case to dismiss, and/or for summary judgment. The Court, having reviewed the parties' written submissions and having heard oral argument, rendered an oral opinion on the record on September 23, 1992. For the reasons stated in court on the record, it is this 9th day of Oct., 1992, by the Circuit Court for Baltimore City, Maryland;

1. ORDERED that the Manfusos' Motion to Dismiss and/or For Summary Judgment as to the Counterclaim of the Corporations is GRANTED with leave to amend with respect to Count I of the Corporations' Counterclaim;

2. ORDERED that the Manfusos' Motion to Dismiss and/or For Summary Judgment as to Count II of the Corporations' Counterclaim is DENIED;

3. ORDERED that the Manfusos' Motion to Dismiss and/or For Summary Judgment as to Counts II and III of the Counterclaim of De Francis and Jacobs is DENIED;

4. ORDERED that, as to all Defendants' Motions to Dismiss and/or For Summary Judgment as to Count III of the Second Amended Complaint, Summary Judgment is hereby GRANTED

with respect to the claims for benefits outlined in the Letter Agreement of April 27, 1990;

5. With respect to the claims in Count III of the Manfusos' Second Amended Complaint related to the payment of severance payments under the Stockholders' Agreement, Defendants' Motions to Dismiss are GRANTED, and the Manfusos' claims are DISMISSED with leave to amend;

6. ORDERED that Defendants' Motions to Dismiss Counts I and II are GRANTED except insofar as those Counts relate to specific claims for breach of obligations related to the employment by the Corporations of Martin Jacobs and James Mango as set forth in the Shareholders' Agreement or employment contracts executed pursuant thereto; all other claims in Counts I and II of the Second Amended Complaint are DISMISSED with leave to amend;

7. The Clerk is hereby directed to mail copies of this Order to all counsel of record.

Ellen L. Hollander
Circuit Judge, Circuit Court
for Baltimore City

cc: All Counsel

ANDREW JAY GRAHAM *†
JAMES M. KRAMON *†
LEE H. OGBURN
JEFFREY H. SCHERR
NANCY E. GREGOR †
JAMES P. ULWICK †‡
PHILIP M. ANDREWS
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MAX HIGGINS LAUTEN †
KATHLEEN A. BIRRANE
KEVIN F. ARTHUR
ARON U. RASKAS †
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PERRY F. SEKUS

* ALSO ADMITTED IN NY
† ALSO ADMITTED IN DC
‡ ALSO ADMITTED IN NJ
o ALSO ADMITTED IN CA

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OF COUNSEL
FREDERICK STEINMANN

FILED
SEP 18 1992
CIRCUIT COURT FOR
BALTIMORE CITY

September 18, 1992

HAND-DELIVERED

Ms. Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202

RE: Manfuso, et al. v. De Francis, et al.
Case No. 92120052/CE147851

Dear Ms. Banks:

I have enclosed for filing in this case the original and one copy of Plaintiffs' Reply to De Francis's and Jacob's Opposition to Plaintiff's Motion to Dismiss or for Summary Judgment as to Count III of the Counterclaim. Please date-stamp and return the extra copy to the messenger. Thank you for your consideration in this matter.

Sincerely,

Kevin F. Arthur

Kevin F. Arthur

KFA/jas
Enclosures
cc: The Honorable Ellen Lipton Hollander (w/ encl.) (hand-delivered)
James E. Gray, Esquire (w/ encl.)(hand-delivered)
Irwin Goldbloom, Esquire (w/ encl.) (via facsimile and first-class mail)
McGee Grigsby, Esquire (w/ encl.) (via facsimile and first-class mail)
Jennifer Archie, Esquire (w/ encl.) (via facsimile and first-class mail)

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * *

PLAINTIFFS' REPLY TO DE FRANCIS'S AND JACOBS'S OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AS TO COUNT III OF THE COUNTERCLAIM

In opposing the plaintiffs' motion to dismiss or for summary judgment as to Count III of the counterclaim in this case, defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs") argue that, under Maryland's choice of law principles, Texas rather than Maryland law governs the assessment of the validity of their counterclaim. See, e.g., Hauch v. Connor, 295 Md. 120, 453 A.2d 1207 (1983)(in determining which state's substantive tort law to apply, Maryland generally applies the law of the place where the injury occurred).

The reliance on Texas law is somewhat dubious in the first place, because it is hardly clear where De Francis's and Jacobs's alleged injury occurred, given the incorporeal nature of the harm they claim to have suffered on account of the allegedly intentional interference with their prospective economic advantage. See generally E. Scoles & P. Hay, Conflict of Laws § 17.7, at 559-60 (1982)(discussing the difficulty

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inherent in locating the place of harm in cases involving nonphysical injuries). The reliance on Texas law is, in any event, a red herring, because, despite their assertion to the contrary,[1] De Francis and Jacobs have cited no Texas authorities specifically holding that they may continue to pursue Count III once the Court rejects their assertion that the Manfusos have filed a groundless lawsuit. Indeed, De Francis and Jacobs have failed to show how Texas courts applying Texas law would resolve this case in a manner any different from the manner in which a Maryland court applying Maryland law would resolve it.

Generally speaking, Texas law would permit De Francis and Jacobs to state a claim for intentional interference with prospective economic advantage if they can show, among other things, that the Manfusos acted with "malice" and without "privilege." See, e.g., Exxon Corp. v. Allsup, 808 S.W.2d 648, 659 (Tex. Ct. App. 1991). In the context of this case, however, a privilege attaches to the Manfusos' actions if they have made "good faith assertions of [their] legal rights." Victoria Bank & Tr. Co. v. Brady, 811 S.W.2d 931, 940-41 (Tex. 1991)(citing Restatement (Second) of Torts, § 773 (1979))("[O]ne who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to

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[1] Opposition of De Francis and Jacobs to Plaintiff[s'] Motion to Dismiss and/or for Summary Judgment as to Count III of their Counterclaim, at 2.

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perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interests may otherwise be impaired or destroyed by the performance of the contract or transaction"); see also Griffin v. Rowden, 702 S.W.2d 692, 695 (Tex. Ct. App. 1985)(the filing of a lis pendens is absolutely privileged in an action for tortious interference with contract, even in the face of an allegation that the defendant gave notice of the lis pendens in connection with a frivolous lawsuit).

The element of "malice," moreover, cannot exist merely because a party wishes to inflict injury upon another person: in a free-market system, persons are entitled and, in fact, encouraged to inflict injury upon their competitors. Thus, "malice" for purposes of Count III exists only if De Francis and Jacobs have alleged and produced evidence that the Manfusos have committed acts, not for any legitimate competitive purpose, but solely for the purpose of inflicting injury upon De Francis and Jacobs. See, e.g., Morris v. Jordan Fin. Corp., 564 S.W.2d 180, 184 (Tex. Civ. App. 1978)(affirming the trial court's rejection of a counterclaim for tortious interference on the ground that the counterplaintiff had come forward with no probative evidence of malice, the counterdefendant having acted merely to protect its own financial rights and interests).

In support of their position, De Francis and Jacobs have chiefly argued that the Manfusos have brought this lawsuit (1)

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to harm De Francis and Jacobs in their attempts to enrich themselves in the Texas racing industry and (2) to benefit one of De Francis's and Jacobs's competitors, Midpointe Racing, L.C. ("Midpointe"). De Francis and Jacobs have no explanation why the plaintiff John A. Manfuso, Jr., would have any desire to benefit Midpointe, as De Francis and Jacobs have neither alleged nor produced evidence showing that John A. Manfuso, Jr., has any interest in that entity. On the other hand, De Francis and Jacobs have alleged that the plaintiff Robert T. Manfuso has some interest -- albeit minuscule --[2] in Midpointe. On the basis of that allegation, De Francis and Jacobs would have the Court believe that both Manfusos are motivated not by the egregious set of abuses described in their complaint, affidavits, and other papers filed thus far, but by Robert T. Manfuso's economic interest, such as it is, in one of De Francis's and Jacobs's competitors.

Assuming arguendo that the Court could accept such an attenuated theory, it still does not warrant the denial of the Manfusos' motion. In essence, De Francis and Jacobs appear to claim nothing more than that the Manfusos have brought this suit for reasons of competition. De Francis and Jacobs, however, have no right to protection against competition. Martin v.

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[2] Robert T. Manfuso is one of twelve directors and owns approximately 11,000 of the approximately 10 million outstanding shares (or approximately .011%) of Hollywood Park; Hollywood Park, in turn, has a one-third participation in Midpointe. Thus, Robert T. Manfuso's total, indirect interest in Midpointe equals .00367% or less than four-thousandths of one percent.

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Phillips Petroleum Co., 455 S.W.2d 429, 435 (Tex. Civ. App. 1970)("where there is no contract, as here, a party does not have a right to be free from competition, but instead merely has the right to be free from malicious interference with the right to conduct negotiations that have a reasonable probability of resulting in a contract"); Bray v. Squires, 702 S.W.2d 266, 272 (Tex. Ct. App. 1985)("a party to a business relationship is not protected from lawful competition, only against malicious or unlawful interference). Hence, to the extent that De Francis and Jacobs claim to have suffered injuries as a result of competition, they have alleged damnum absque injuria. Martin v. Phillips Petroleum Co., 455 S.W.2d at 441 (quoting Delz v. Winfree, 80 Tex. 400, 404, 16 S.W. 111, 112 (1891)); Brown v. American Freehold Land Mortgage Co., 97 Tex. 599, 610, 80 S.W. 985, 987-88 (1904); see also 2 F. Harper, F. James & O. Gray, The Law of Torts § 6.11, at 342 (2d ed. 1986)(quoting Walker v. Cronin, 107 Mass. 555, 564 (1871)).

Deprived of their reliance on the Manfusos' alleged competitive purposes, De Francis and Jacobs fall back upon their previous suggestion that the Manfusos have brought a groundless lawsuit. Yet, as the Manfusos have previously explained, they have brought this action in good faith to protect their interests as parties to the Stockholders Agreement and as owners and directors of Pimlico and Laurel.

To that end, the Manfusos have asked the Court, first, to declare whether under the Stockholders Agreement they have the

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right to come to Court to remedy the numerous abuses detailed in their pleadings. Should the Court agree that the Manfusos have the right to request such a declaration, then the Court must conclude that the Manfusos have not brought a groundless lawsuit and that the Manfusos have acted in good faith to protect their interests. Should the Court make those determinations, moreover, then the Court must also conclude that the Manfusos have a privilege to bring these claims such that the bringing of the claims themselves could not support a claim for intentional interference with prospective economic advantage. Victoria Bank & Tr. Co. v. Brady, 811 S.W.2d at 940.[3]

In a final attempt to preserve Count III, De Francis and Jacobs make much of an incident during De Francis's cross-examination in a hearing in Texas, when one of Midpointe's attorneys employed a backdated letter that De Francis had written in connection with this lawsuit. The letter, which was self-servingly composed to aid De Francis's and Jacobs's positions in this case, apparently undermined the testimony that

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[3] If the Court decides that Texas law does not govern Count III, then the Court should note the decisions of other courts, which have held that a party cannot use an allegedly groundless lawsuit as the predicate for a claim of tortious interference at least until the allegedly groundless suit has terminated in his or her favor. See, e.g., Nichols v. Merrill Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309, 1353-54 (M.D. Tenn. 1989); Early Detection Center, P.C. v. New York Life Ins. Co., 157 Mich. App. 618, 403 N.W.2d 830, 836 (1986).

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De Francis had given or the position that De Francis and Jacobs had taken in the Texas matter. De Francis and Jacobs imply that the Manfusos (or their attorneys) had a hand in supplying the backdated letter to Midpointe's counsel and thus embarrassing De Francis before the Texas tribunal.

The letter itself, however, was bandied about by De Francis's counsel at the hearing in this case before Judge MacDaniel on June 18, 1992. Neither De Francis, nor Jacobs, nor their attorneys, nor any other party to this case made any effort to submit the letter under seal or otherwise to keep it confidential. To the contrary, the letter was disclosed, with much fanfare, at that public hearing, where the presence of the press was highly conspicuous, probably because De Francis, Jacobs, or their attorneys themselves had invited the press to attend.

Given these circumstances, De Francis has no right to complain if his self-serving letter, so publicly disclosed, was used against him in another forum. Instead, De Francis's argument represents little more than an expression of self-pity at having his prevarications exposed. Alternatively, his argument may represent an attempt to distract the Court from the real issue before it, namely, De Francis's and Jacobs's inability to state a claim for intentional interference with prospective economic advantage if the Court disagrees with their assertion that the Manfusos have brought a groundless lawsuit.

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In either event, the controversy over the backdated letter has nothing to do with the merits of this case.

On the merits, in moving for summary judgment on Count II of the counterclaim, the Manfusos have shown that they have not brought a groundless lawsuit. De Francis and Jacobs, however, cannot prevail on Count III of the counterclaim unless the Manfusos have brought a groundless lawsuit. Therefore, if the Court accepts the Manfusos' arguments and enters summary judgment in their favor on Count II, it must do the same on Count III.[4]

Respectfully submitted,

by KFA

James P. Ulwick

Kevin F. Arthur

[4] De Francis and Jacobs suggest that the Court cannot dismiss Count III because it must accept as true their allegation that the Manfusos have filed a groundless lawsuit. The Court, however, need not accept that allegation as true if it makes a legal determination to the contrary. See United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n. 2 (9th Cir.), cert. denied, 479 U.S. 1009 (1986)(a court need not accept the truth of legal conclusions in the guise of factual allegations).

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Attorneys for Robert T. Manfuso
and John A. Manfuso, Jr.

Dated: September 18, 1992.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 1992, I sent a copy of Plaintiffs' Reply to De Francis's and Jacobs's Opposition to Plaintiffs' Motion to Dismiss or for Summary Judgment as to Count III of the Counterclaim by hand-delivery to:

James E. Gray, Esq.
Linda S. Woolf, Esq.
Goodell, DeVries, Leech & Gray
25 South Charles Street
Suite 1900
Baltimore, Maryland 21201;

and by facsimile and first-class mail, postage prepaid, to:

Irwin Goldbloom, Esq.
McGee Grigsby, Esq.
Jennifer Archie, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505.

Kevin F. Arthur

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ROBERT T. MANFUSO and
JOHN A. MANFUSO, JR.

Plaintiffs

v.

JOSEPH A. DE FRANCIS, et al.

Defendants

FILED
SEP 1 1992
CIRCUIT COURT FOR
BALTIMORE CITY

FILED
AUG 31 1992
CIRCUIT COURT FOR
BALTIMORE CITY

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 92120052/CE147857

* * * * * * * * *

ORDER

Having considered Plaintiffs' Motion for Ex Parte, Interlocutory and Permanent Injunctive Relief, Supporting Memorandum and exhibits, the Opposition of Defendants thereto, the testimony presented by the parties, and the oral arguments of counsel, and for the reasons stated in open court, it is this 28th day of August, 1992, hereby

ORDERED that Plaintiffs' Motion for Ex Parte, Interlocutory and Permanent Injunctive Relief be and the same hereby is DENIED. It is further

ORDERED that within two weeks from the date of this Order, Plaintiffs will make available for return to Pimlico Racing Association, Inc. the two Chrysler automobiles that had previously been provided by Pimlico Racing Association, Inc. for the personal use of John A. Manfuso, Jr. and Robert T. Manfuso.

The corporate Defendants have agreed, and this Court further ORDERS, that:

(a) pending the outcome of this litigation, payments will be made into a separate, interest-bearing account in

the amount of the monthly severance payments that would be payable to John A. Manfuso, Jr. and Robert T. Manfuso under Section VI.4 of the Stockholders Agreement dated as of October 1, 1989. Unless this Court orders otherwise, no withdrawals will be made from this account pending the outcome of this litigation and this Court will be provided with monthly statements reflecting amounts paid into this account and interest accrued thereon.

(b) the corporate Defendants will make available to Plaintiffs John A. Manfuso, Jr. and Robert T. Manfuso, upon payment of the normal and customary charges, the boxes at Pimlico Race Course and Laurel Race Course that have previously been provided for their use.

(c) the corporate Defendants will provide John A. manfuso, Jr. and Robert T. Manfuso with complimentary valet parking at Pimlico Race Course and Laurel Race Course and such other privileges as are or may be provided to other non-management directors of Pimlico Racing Association, Inc. and Laurel Racing Assoc., Inc.

Ellen Hollander

Ellen L. Hollander, Judge

cc: All Counsel

ROBERT T. MANFUSO, et al.,	*	IN THE	
	*	CIRCUIT COURT	
Plaintiffs			
v.	*	FOR	
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY	
Defendants	*	Case No. 92120052/CE147851	

FILED
JUL 15 1992
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * * * * * * * * * *

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Robert A. Manfuso and John T. Manfuso, Jr. ("the Manfusos"), by and through their attorneys, James P. Ulwick and Kramon & Graham, P.A., respond as follows to the defendants' motions to dismiss the Manfusos' complaint[1]:

I. THE LEGAL STANDARD APPLICABLE TO THE MOTIONS TO DISMISS

The defendants' motions to dismiss test the legal sufficiency of the complaint. See, e.g., District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979); United States v. Azrael, 765 F. Supp. 1239, 1242 (D. Md. 1991). Hence, in assessing the motions, the Court must consider the allegations in the complaint in the light most favorable to the Manfusos (Berman

[1] The defendants directed their motions to dismiss against the Manfusos' original complaint. The Manfusos have amended their complaint two times since the defendants filed their motions to dismiss. For that reason, this opposition generally addresses the defendants' arguments only to the extent that it concerns issues common to the original complaint and the present complaint. For the same reason, the term "complaint" in this opposition means both the original complaint and the present complaint, unless otherwise specified.

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v. Karvounis, 308 Md. 259, 264, 518 A.2d 726, 728 (1987)) and must accept as true all well-pleaded material facts as well as any reasonable inferences that may be drawn therefrom. Flaherty v. Weinberg, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985); Black v. Fox Hills North Community Ass'n, 90 Md. App. 75, 79, 599 A.2d 1228, 1230 (1992). Moreover, to withstand the motions to dismiss, the Manfusos need only to have alleged facts that, if proved, would entitle them to relief. Flaherty v. Weinberg, 303 Md. at 136, 492 A.2d at 136; accord Conley v. Gibson, 355 U.S. 41, 45-46 (1957)(under F. R. Civ. P. 12(b)(6), "a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

As Judge MacDaniel recognized in his memorandum opinion of June 19, 1992, this deferential standard of review applies to all claims in the complaint, including the claims for injunctive relief. Accord C.N. Robinson Lighting Supply Co. v. Board of Educ. of Howard County, 90 Md. App. 515, 523, 602 A.2d 195 (1992)(even highly imprecise allegations will state a claim for injunctive relief in this era of notice pleading); Mannings v. Board of Pub. Instruction of Hillsborough County, Florida, 277 F.2d 370, 372 (5th Cir. 1960)(a complaint for injunctive relief may not be dismissed for failure to state a claim "if under any theory of recovery a case can be made out by the proof"); Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316, 323 (S.D. Fla. 1973)(quoting Cook & Nichol, Inc. v. The Plimsoll

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Club, 451 F.2d 505, 506 (5th Cir. 1971))(a court will not dismiss a claim for injunctive relief "unless it appears to a certainty that the plaintiff would not be entitled to recover under any set of facts which could be proved in support of his claim"). Thus, the Manfusos have no heightened obligation to plead specific facts showing their entitlement to injunctive relief, the defendants' contentions to the contrary notwithstanding.[2] Similarly, as Judge MacDaniel also recognized, the balancing of comparative hardships has no place at this juncture in the proceedings. Compare Memorandum of Law in Support of Motion to Dismiss [by De Francis and Jacobs] Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 29-33.

In addition, the Court must proceed with extreme caution in assessing the motions to dismiss the Manfusos' claims for declaratory relief: As the Court of Appeals has pointed out, "Legions of our cases hold that a demurrer, the type of motion to dismiss here involved, is rarely appropriate in a

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[2] See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 14-17, 30. De Francis and Jacobs typically premise their contention on cases such as Mayor of Salisbury v. Camden Sewer Co., 135 Md. 563, 572-73, 109 A. 191 (1920), which predate modern notice pleading.

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declaratory judgment action." Broadwater v. State, 303 Md. 461, 465, 494 A.2d 934, 936 (1985)(collecting authorities).[3] In fact, the Court of Appeals has held that, "generally, it is only when the declaration sought does not present a justiciable issue . . . that a demurrer would be appropriate." Woodland Beach Property Owners Ass'n, Inc. v. Worley, 253 Md. 442, 448, 252 A.2d 827, 830 (1969); see also Shapiro v. Board of County Comm'rs, 219 Md. 298, 302-03, 149 A.2d 396, 399 (1959)("[t]he test of the sufficiency of the bill is not whether it shows that the plaintiff is entitled to the declaration of rights or interest in accordance with his theory, but whether he is entitled to a declaration at all; so, even though the plaintiff may be on the losing side of the dispute, if he states the

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[3] In support of that proposition, the Court of Appeals cited the following cases: State v. Burning Tree Club, 301 Md. 9, 16-18, 481 A.2d 785, 788-89 (1984); City of Bowie v. Area Dev. Corp., 261 Md. 446, 456, 276 A.2d 90, 95 (1971); Borders v. Board of Education, 259 Md. 256, 258-59, 269 A.2d 570, 571 (1970); Balto. Import Car v. Md. Port. Auth., 258 Md. 355, 338-39, 265 A.2d 866, 867-68 (1970); Merc. Safe Dep. & Tr. v. Reg. of Wills, 257 Md. 454, 459, 263 A.2d 543, 545-46 (1970); Kacur v. Employers Mut. Cas. Co., 253 Md. 500, 504 n. 2, 254 A.2d 156 158 n. 2 (1969); Woodland Beach Ass'n v. Worley, 253 Md. 442, 447-48 252 A.2d 827, 830 (1969); Causey v. Gray, 250 Md. 380, 391, 243 A.2d 575, 583-84 (1968); Garrett County v. Oakland, 249 Md. 400, 401-02, 240 A.2d 228, 229 (1968); Hunt v. Montgomery County, 248 Md. 403, 408-10, 237 A.2d 35, 37-39 (1968); Queen Anne's County v. Miles, 246 Md. 355, 362, 228, A.2d 450, 453 (1967); Myers v. Chief Fire Bureau, 237 Md. 583, 591, 207 A.2d 467 (1965); Kelley v. Davis, 233 Md. 494, 498, 197 A.2d 230, 231 (1964); Md. Committee v. Tawes, 228 Md. 412, 419-20 n. 4, 180 A.2d 656, 659 n. 4 (1962); Shapiro v. County Comm., 219 Md. 298, 302-03, 149 A.2d 396, 398-99 (1959). Since Broadwater, the court has reiterated that a demurrer or motion to dismiss is rarely appropriate in a declaratory judgment action: Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 687 n. 2, 526 A.2d 598, 600 n. 2 (1987).

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existence of a controversy which should be settled, he states a cause of suit").

These principles mandate the denial of the motions to dismiss.

II. THE COMPLAINT STATES A CLAIM FOR DECLARATORY RELIEF

Defendants De Francis and Jacobs contend that the Manfusos have no right to a declaration as to whether the Court has the Manfusos may ask the Court to enjoin breaches of duty or as to whether De Francis and Jacobs have in fact breached their duties.[4] As support for their argument, De Francis and Jacobs cite § 3-406 of the Courts and Judicial Proceedings Article (1974, 1989 Repl. Vol.), which provides as follows:

> Any person interested under a deed, will, trust, land patent, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, administrative rule or regulation, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation, land patent, contract, or franchise, and obtain a declaration of rights, status, or other legal relations under it.

According to De Francis and Jacobs, the question of whether they have breached their duties and the question of

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[4] On the other hand, the defendants do not appear to dispute that the Manfusos have the right to a declaration as to whether the standstill provision in the Stockholders Agreement bars them from bringing this suit. See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 5.

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whether the Court may enjoin them from breaching their duties "have no relationship to the validity or construction of any provision, term or condition of the Stockholders Agreement, or to the rights and legal status of the parties thereunder." Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 5.[5] Therefore, they conclude that the Court may not issue a declaration on those questions, because (according to their Memorandum) "a party may only seek declaratory relief when the issue in controversy depends on the construction or validity of some writing, i.e., a contract, statute, regulation, or similar document as described in § 3-406." Id. (emphasis added).

To the contrary, aside from § 3-406, the Declaratory Judgment Act contains many provisions authorizing courts to declare a party's rights. See, e.g., Md. Cts. & Jud. Proc. Code Ann. § 3-409 (authorizing courts, in their discretion, to

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[5] The Court should question that premise at least to the extent that it concerns the Court's ability to entertain the Manfusos' request for a declaration concerning the availability of injunctive relief. Contrary to the defendants' suggestion (Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 5), the Manfusos have not merely requested "that this court enter a declaration as to its own power to grant injunctive relief." Rather, the Manfusos have requested a declaration that, notwithstanding the standstill provision of the Stockholders Agreement, the Court may enjoin the defendants' wrongful conduct at the Manfusos' behest. A declaration of that nature has an obvious relationship to the validity or construction of the Stockholders Agreement and its provisions.

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grant a declaratory judgment if it will serve to terminate the uncertainty or controversy giving rise to the proceeding and if, among other things, an actual controversy exists and antagonistic claims are present); id. § 3-408 (authorizing the entry of declaratory judgments in matters relating to trusts and decedents' estates); id. § 3-408.1 (authorizing the entry of declaratory judgments in land patent proceedings).

Furthermore, in addition to these and other specific grants of authority, the general grant of jurisdiction in § 3-403(a) contains broad language empowering courts to "declare rights, status, and other legal relations" (emphasis added), thus authorizing a declaration as to whether the Manfusos have the right to an injunction barring the defendants from breaching their duties and as to whether the defendants in fact have breached their duties. Section 3-403(b) then goes on to state specifically that "the enumeration" of powers in § 3-406 and elsewhere "does not limit or restrict the exercise of the general powers conferred in subsection (a) in any proceeding where declaratory relief is sought and in which a judgment or decree will terminate the controversy or remove an uncertainty."

In short, the express language of the Declaratory Judgment Act refutes the defendants' contention that the Court can "only" declare the parties' rights in a case involving the

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construction of a written instrument.[6] Thus, the defendants' erroneous contentions notwithstanding, the Manfusos must merely allege the existence of a justiciable controversy in order to state a claim for declaratory relief under Maryland law. Woodland Beach Property Owners Ass'n, Inc. v. Worley, 253 Md. at 448, 252 A.2d at 830.

In the words of the Court of Appeals, "A controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." Hatt v. Anderson, 297 Md. 42, 45-46, 464 A.2d 1076, 1078 (1983). In view of the Manfusos' complaint, as well as the answer, the counterclaim, and the various factual allegations appended to the motions to dismiss, the Court cannot but conclude that this case involves interested parties asserting adverse claims and demanding a legal decision upon a state of facts that has accrued. Therefore, as the Manfusos have alleged a justiciable controversy, the Court should deny the motions to dismiss the claims for declaratory relief.

III. THE MANFUSOS HAVE STANDING TO RAISE THE CLAIMS FOR

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[6] The defendants' contention also flies in the face of the cases where, as here, a litigant has requested a declaration that certain conduct constitutes a breach of a director's fiduciary duty. See, e.g., Gaff v. FDIC, 828 F.2d 1145, 1146 (6th Cir. 1987); Healy v. Axelrod Constr. Co. Defined Benefit Plan and Trust, 787 F. Supp. 838, 844 (N.D. Ill. 1992); Boeing Co. v. Schrontz, 1992 WL 81228 (Del. Ch. 1992), at 5 (available on WESTLAW); Red Carpet Club of Panama City v. Southeast Banking Corp., 580 So.2d 780, 780 (Fla. App. 1991).

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INJUNCTIVE RELIEF IN THEIR COMPLAINT

All of the defendants' have challenged the Manfusos' standing to bring their claims for injunctive relief. According to the defendants, the Manfusos have simply alleged claims for corporate waste, for which they say the remedy lies in a shareholders' derivative suit. The defendants go on to argue that the Court should dismiss the claims for injunctive relief because, they say, the Manfusos have failed to follow the proper procedure for commencing a shareholders' derivative suit.

In dismissing the complaint without prejudice insofar as it concerned Texas racing matters, Judge MacDaniel recognized that the Manfusos claimed standing not just as shareholders, but also as directors and as parties to the Stockholders Agreement. In reaching his decision, however, Judge MacDaniel expressly declined to consider the Manfusos' standing in any capacity other than as shareholders.

In response to Judge MacDaniel's ruling, the Manfusos have amended their complaint to set forth specific allegations concerning their standing. Thus, in conformity with the arguments that they have previously raised, the complaint now alleges that the Manfusos have standing as directors, as parties to the Stockholders Agreement, and as shareholders. Second Amended Complaint, ¶¶ 44-45.

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As directors, the Manfusos have the right and the obligation to examine information concerning the corporations,[7] including records concerning the enormous amounts of money that the corporations have paid in attorneys' fees to outside counsel (Second Amended Complaint, ¶ 33) and information concerning the propriety of management's allocation of expenses as between Pimlico and Laurel. Second Amended Complaint, ¶ 34. At least to that extent, therefore, the Manfusos have standing as directors to protest the defendants' withholding of such information. See Pilat v. Broach Systems, Inc., 108 N.J. Super. 88, 95, 260 A.2d 13, 16 (1969)(upholding director's right to inspect books of record and account in director's action against corporation); Henshaw v. American Cement Corp., 252 A.2d 125, 129 (Del. Ch. 1969)(ordering corporation to produce books and records to director in action by director against corporation).

The Manfusos also have standing as parties to the Stockholders Agreement to ask the Court to remedy breaches of that Agreement and the documents executed pursuant to it. The

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[7] See, e.g., Pilat v. Broach Systems, Inc., 108 N.J. Super. 88, 95, 260 A.2d 13, 17 (1969)("It is the duty of [a director] to keep himself informed of the business of the corporation. To perform this duty intelligently he has the unqualified right to inspect its books and records."); Henshaw v. American Cement Corp., 252 A.2d 125, 128 (Del. Ch. 1969)("A director of a Delaware corporation has the right to inspect corporate books and records; that right is correlative with his duty to protect and preserve the corporation. He is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he often has a duty to consult them.").

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Stockholders Agreement vested De Francis and Jacobs with numerous duties to the Manfusos, including the duties attendant to the positions that De Francis and Jacobs acquired through the Agreement -- for De Francis, the positions of president and co-chairman of the boards of both tracks; for Jacobs, the position as a director and as vice president and general counsel of both tracks. The complaint is replete with allegations establishing that De Francis and Jacobs have breached duties inherent in the Stockholders Agreement. Accordingly, the defendants cannot deny that the Manfusos have standing under the Stockholders Agreement to assert claims predicated on those breaches.

Finally, the Manfusos have standing as shareholders to protest De Francis's and Jacobs's breaches of their fiduciary duties as officers and directors. The Manfusos, moreover, need not demand that the corporations institute the action against De Francis and Jacobs, because De Francis and Jacobs control a majority of the stock and the boards of directors in both corporations and because the so-called "independent" directors are actually beholden to De Francis and Jacobs or under their domination and control. Second Amended Complaint, ¶ 45. Under these circumstances, demand would be futile, and, for that reason, demand is excused. Fletcher, Cyclopedia of Corporations § 5965; see also Parrish v. Maryland & Virginia

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Milk Producers Ass'n, 250 Md. 24, 83, 242 A.2d 512, 545 (1968), cert. denied, 404 U.S. 940 (1971).[8]

In summary, the defendants have underestimated the breadth and scope of the Manfusos' standing to raise the claims for injunctive relief in their complaint. The Manfusos in fact have standing in three separate capacities: as directors, as parties to the Stockholders' Agreement, and as shareholders. Hence, the Court should reject the defendants' contentions as to the Manfusos' purported lack of standing.

IV. THE COMPLAINT STATES A CLAIM FOR INJUNCTIVE RELIEF

Defendants De Francis and Jacobs have challenged the legal sufficiency of the claims for injunctive relief. In so doing, they have converted at least parts of their motion into a motion for summary judgment by attaching Jacobs's affidavit.

As Judge MacDaniel saw in his ruling on Texas racing issues, the Court must deny the motion to dismiss if the Manfusos have alleged such facts that, if proved, would entitled them to injunctive relief. Moreover, the record, even

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[8] In dismissing the original complaint without prejudice insofar as it concerned De Francis's and Jacobs's involvement in Texas racing, Judge MacDaniel found that the Manfusos had neither demanded that the boards of directors bring this suit nor alleged that it would have been futile to make such a demand. For that reason, Judge MacDaniel held that the Manfusos had not properly commenced the action as a derivative suit.

Because the amended allegations demonstrate that demand would in fact have been futile, Judge MacDaniel's ruling does not represent an impediment to the Manfusos' pursuit of the claims concerning Texas racing or any of their other claims.

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at this early stage of factual development, reveals genuine disputes of material fact precluding the entry of summary judgment against the Manfusos. As a consequence, the Court should deny De Francis's and Jacobs's motion.

The Manfusos have set out below the bases for denying the motion as to the specific requests for injunctive relief alleged in their complaint.[9]

A. Loan Accounts.

The Manfusos' complaint seeks to enjoin De Francis's abuse of corporate credit cards and de facto corporate loan accounts. The record discloses the following facts in support of that aspect of the Manfusos' case:

Until very recently, when plaintiff John T. Manfuso, Jr., was denied access to the executive offices of Pimlico and Laurel, it had been his practice to review the checks, paid bills, credit card expenses, and other financial matters of Pimlico and Laurel on at least a monthly basis. As a member of the board of directors of both racetracks, Mr. Manfuso believes he has a duty to insure that the racetracks' funds are properly spent and accounted for. Exhibit A (Affidavit of John T. Manfuso, Jr.), ¶ 4.

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[9] The Manfusos have not addressed the bases for denying the motion insofar as it concerns Texas racing matters, because Judge MacDaniel has already found that that portion of the complaint pleads sufficient facts upon which to predicate a valid claim for injunctive relief.

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Several years ago De Francis decided to issue corporate American Express credit cards to himself, Lynda O'Dea, Jacobs, James Mango, Mr. Manfuso, and his brother, the plaintiff Robert T. Manfuso. Mr. Manfuso opposed the distribution of these cards and suggested that the individuals receiving them should submit any expenditures made on behalf of the racetracks to the corporations for reimbursement. Through such a requirement, Mr. Manfuso believed that there would never be any claim that anyone had improperly used monies belonging to the racetracks. De Francis did not agree with Mr. Manfuso's suggestion, and the corporate cards were ordered. Exhibit A, ¶ 5.

In the course of Mr. Manfuso's review of financial matters of Pimlico and Laurel, he learned that the American Express credit card bills were mailed to Joseph De Francis's secretary on a monthly basis. She would then separate the bill by the persons charging items on the corporate cards, and the Accounts Payable Department would pay the total amount. It became Mr. Manfuso's custom to ask to see the total amount, and he would look at the individual sheets as well. Exhibit A, ¶ 6.

Over time, it became clear to Mr. Manfuso that De Francis and Lynda O'Dea were charging substantial amounts of personal expenditures on their corporate cards. Although both De Francis and Ms. O'Dea should have submitted personal checks on a monthly basis to reimburse the racetracks for these expenditures, they did not do so. The charges began to

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accumulate without payments being made by either De Francis or Ms. O'Dea. Exhibit A, ¶ 7.

During meetings among the owners of the racetracks, Mr. Manfuso advised De Francis that this was a bad practice. Specifically, Mr. Manfuso told De Francis that he was setting a poor example for the employees and was exercising poor business management. On each occasion when Mr. Manfuso raised the subject, De Francis promised that he would straighten out the expenditures. De Francis, however, did not straighten out the expenditures; instead, they were carried over into the next financial year. De Francis, on behalf of the corporations, did not insist that Ms. O'Dea or he repay the expenditures. Moreover, there was no designation in the financial statements that these monies were officer loans. Exhibit A, ¶ 8.

Mr. Manfuso personally asked De Francis on numerous occasions to take steps to terminate the abuse of the corporate credit cards. De Francis specifically promised in January of 1991 that all of the accounts would be cleared and that he would obtain Ms. O'Dea's credit card from her. Yet, in June of 1991, Ms. O'Dea was continuing to charge personal expenses to the corporate card, and neither account had been cleared. Exhibit A, ¶ 9.

At the April 13, 1992, board of directors meeting, De Francis announced that the credit card accounts had been repaid and that all credit cards had been removed except for his. Nevertheless, no action has been taken by the board or

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management to assure that De Francis will not continue to abuse his credit card as he has in the past. Furthermore, contrary to the suggestion in Jacobs's affidavit, it is not sufficient that De Francis has promised not to allow this situation to occur again. De Francis promised over the course of years that he would clear these accounts, but did not. The amounts in question are sizeable. Although Mr. Manfuso has been denied access to the records of the racetracks, his recollection is that the amounts in question charged to the charge accounts were between $75,000.00 and $100,000.00. Exhibit A, ¶ 10.

As directors, both Mr. Manfuso and his brother feel that they have a fiduciary duty to insure that the corporations' money is properly spent and accounted for. It is clear in the charge card situation that the money was not properly spent or accounted for, and no steps have been taken to correct the situation. Exhibit A, ¶ 11.

According to the De Francis and Jacobs, the Manfusos have no right to injunction on these facts because of De Francis's promise not to abuse his credit card in the future. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 21. The Court, however, may reasonably question the efficacy of that promise, given De Francis's many previous promises, all of which went unfulfilled. The defendants, moreover, do not dispute that De Francis has not put in place any system to prevent further

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abuses of the credit cards and the de facto corporate loan accounts. Thus, absent an injunction, the Manfusos have no assurance De Francis will not simply begin to repeat his former pattern of conduct.[10]

Under these circumstances, the Court could reasonably conclude that only an injunction can protect the Manfusos and the corporations from the abuses detailed in the complaint. The Court therefore should deny the defendants' motion insofar as it concerns the corporate loan accounts.

B. Access to Legal Fees.

The Manfusos' complaint also seeks a mandatory injunction requiring De Francis and Jacobs to provide information concerning the enormous legal fees that the corporations have paid to outside counsel. The record discloses the following facts in support of that aspect of the Manfusos' case:

In the course of Mr. Manfuso's review of the corporations' financial records, he, as a member of the board of directors, has requested information regarding the corporations'

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[10] According to De Francis and Jacobs, the Manfusos "have not claimed that credit card abuse will occur in the future." Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 21. To the contrary, the Manfusos have raised the likelihood of future abuses: (1) in their complaint, by alleging that De Francis has not put into place any system to prevent abuses in the future (Second Amended Complaint, ¶ 32); and (2) in Mr. Manfuso's affidavit, by reiterating De Francis's failure to put into place any system to prevent abuses in the future and by enumerating De Francis's many unfulfilled promises to rectify the abuses in the past.

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expenditures on legal fees. Over the past year, Mr. Manfuso became concerned because of the size of the fees (approximately $250,000.00) paid to outside legal counsel, while the corporations were at the same time paying Jacobs almost $400,000.00 to serve as general counsel. Mr. Manfuso became further concerned because the law firms representing the racetracks were the same as those involved in representing the private interests of De Francis, Jacobs and the Estate of Frank J. De Francis. As a result of those concerns, Mr. Manfuso felt it was his duty as a member of the board of directors to investigate and insure that the racetracks were being properly billed for only those matters for which the racetracks should be responsible. Exhibit A, ¶ 12.

Mr. Manfuso asked De Francis for an explanation as to why the racetracks were spending approximately $250,000.00 on outside legal fees, when the racetracks employ, at great expense, a general counsel. De Francis offered the following explanations: (1) that the legal fees had increased because the racetracks picked up the expenses for the negotiations leading up to the Stockholders Agreement; and (2) that Louis Guida, the spokesman for certain limited partners with an interest in Laurel Racecourse, had made a proposal to purchase the racetracks, which required considerable legal work. Exhibit A, ¶ 13.

Both of De Francis's explanations were deficient. In the first place, the negotiations leading up to the Stockholders

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Agreement, and the legal fees attendant thereto, had occurred prior to the time period about which Mr. Manfuso had inquired. Second, the Guida matter was a purely private matter between Mr. Guida's group and De Francis. Mr. Guida had offered to purchase De Francis' stock and that of his father's estate, and it was therefore not a legitimate corporate expense for the racetracks to pay those legal fees. De Francis's answers further heightened Mr. Manfuso's concerns about the misuse of the racetracks' funds. Exhibit A, ¶ 14.

Mr. Manfuso asked repeatedly to see the documentation and backup relating to the legal fees, but never received a satisfactory response. Exhibit A, ¶ 15. One of Mr. Manfuso's attorneys, James M. Kramon, then attempted to negotiate on behalf of the Manfuso brothers to obtain those documents. Despite a promise by the corporations' attorneys, the documents were never produced. Exhibit A, ¶ 16.

After "agreeing" to produce the documents to the Manfusos, the corporation then began to add spurious conditions before releasing the information. The corporations, for example, conditioned the Manfusos' right to see the information on the production of the bills and backup data from one of the Manfusos' attorneys, Herbert Garten. Mr. Garten's bills had no relationship to the subject matter in question, as De Francis and Jacobs well knew. De Francis and Jacobs imposed the condition simply as a technique designed to frustrate the Manfusos' ability, as directors, to investigate an issue of

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concern to them. Nevertheless, Mr. Manfuso and his brother agreed to instruct Mr. Garten to produce his bills and backup data to the corporations if they requested it. Exhibit A, ¶ 16.

Mr. Manfuso still did not receive the bills or backup, and to this day he and his brother have not been provided with that information. Mr. Manfuso believes that, unless the Court orders them to do so, the corporations will never provide the backup information that will allow him and his brother to perform their fiduciary duties as directors. Exhibit A, ¶ 17.

In moving to dismiss the complaint, De Francis and Jacobs charge that "Manfusos and their counsel" have made "a blatant misstatement of fact" by alleging that the defendants have failed and refused to provide the backup information concerning the fees paid for outside counsel. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 26. The record shows which party is misstating the facts.

Notably, De Francis and Jacobs do not assert that the Manfusos have now received the information that they have so often requested. Rather, De Francis and Jacobs simply reiterate that the corporations have promised to produce the information, apparently at some indeterminate point in the future. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief

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and All Claims for Injunctive Relief, at 26. But while the corporations have repeatedly promised to provide the requested information, they have repeatedly failed to fulfill their promises as well.

The Manfusos have no assurance that the corporations will not fail once again to fulfill their promise to provide the backup information concerning legal fees paid to outside counsel. Indeed, given De Francis's implausible explanations for the size of those legal fees and given the possibility that the bill may include fees for services performed on behalf of De Francis individually, Jacobs individually, or the Estate of Frank J. De Francis, the Court may reasonably conclude, as Mr. Manfuso has already concluded, that the corporations will never provide that information unless the Court compels them to do.

Under these circumstances, the Court again could reasonably conclude that only a mandatory injunction can protect the Manfusos and the corporations from the abuses detailed in the complaint. The Court therefore should deny the defendants' motion insofar as it concerns the corporate loan accounts.

C. Misleading Financial Statements, Improper Transfers of Assets, and Access to Accounting Information.

The Manfusos' complaint requests an injunction requiring De Francis and Jacobs to permit the Manfusos and their agents to meet with the corporations' auditors and an injunction barring De Francis and Jacobs from improperly tranferring

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assets from Pimlico to Laurel. As one ground for those requests, the Manfusos allege that the defendants have issued misleading financial statements for Pimlico and Laurel. The record discloses the following facts concerning that allegation:

As a member of the boards of directors of Pimlico and Laurel, Mr. Manfuso has a great concern regarding the accuracy and truthfulness of the financial statements issued by the racetracks. Mr. Manfuso is and has been concerned that Pimlico is improperly being required to bear expenses pertaining to Laurel. Exhibit A, ¶ 17.

This issue first arose in April of 1991 at an owners' meeting, after Mr. Manfuso had reviewed the audited financial statements for the racetracks for the calendar year 1990. Mr. Manfuso noticed in his review of the financial statements that there was approximately $100,000.00 more in expenses in one category for Pimlico than for Laurel. This concerned him, because De Francis and he had agreed that expenses shared by Pimlico and Laurel would be divided equally. Exhibit A, ¶ 18.

Indeed, at that time, the only equitable way to account for such expenses was to divide them evenly between Pimlico and Laurel, since the tracks had approximately the same number of racing days. Furthermore, the ownership structure of Pimlico differs from that of Laurel. Accordingly, any shared expenses should have been evenly divided between the two tracks so as to

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avoid favoring one set of owners over another set.[11] See Exhibit A, ¶ 18.

When Mr. Manfuso noticed the lack of correlation in the expenses for Pimlico and Laurel, he asked De Francis for an explanation. De Francis replied that the expenditures related to the severance payments made to Mr. Manfuso and his brother for the six-month period reflected in the statements. Mr. Manfuso asked why Pimlico alone was bearing those expenses. De Francis answered that it was done to avoid being in default on the Laurel bank loans. Exhibit A, ¶ 19.

Upon further investigation, Mr. Manfuso learned that the expenses had been paid by both Laurel and Pimlico, but subsequently booked only to Pimlico. Exhibit A, ¶ 20.

The promissory notes supporting the loan from the First National Bank of Maryland to Laurel Racing Association Limited Partnership require that Laurel maintain a ratio of "cash flow" to "debt service" during the term of the agreement of not less than 1.5 to 1. De Francis advised Mr. Manfuso that, unless the expenses of Pimlico and Laurel were juggled to place as many expenses on Pimlico as possible, Laurel would be unable to meet this requirement. This response concerned Mr. Manfuso greatly, since it constituted an admission that the books and records of

[11]Of course, this assumes that the racetracks share an equal number of racing days. This is no longer the case. See infra., at pages 25-26.

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Laurel and Pimlico were neither accurate nor truthful. Exhibit A, ¶ 21.

As a member of the board of directors, Mr. Manfuso believes that he has a fiduciary responsibility to insure that the books and records of Laurel and Pimlico are accurate and truthful. He further believes that the appropriate course would be to address the circumstances of the cash flow problem directly with the bank, not to provide false documents to the bank. Providing false documents places Pimlico and Laurel in far greater jeopardy than the transmission of honest information, even if such information raises a concern on the bank's part. Exhibit A, ¶ 21.

For these reasons, Mr. Manfuso and his brother objected to the allocation of expenses to Pimlico. De Francis and Jacobs, however, overrode the Manfusos' objections, and the financial statements were left unchanged. Exhibit A, ¶ 22.

As a result of that experience, Mr. Manfuso and his brother decided to investigate further into other expenditures of Laurel and Pimlico that may have been improperly booked. The Manfusos have discovered that during 1990 De Francis and Jacobs caused Pimlico to transfer to Laurel 100% of the revenue from 13 racing days running from February 1, 1990, through February 16, 1990. The Maryland Racing Commission assigned 134 racing days to Pimlico and 130 racing days to Laurel. Because of De Francis's and Jacobs's actions, Pimlico received income

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for only 121 racing days, while Laurel received income for 143 racing days. Exhibit A, ¶ 23.

The Manfusos have further discovered that an error occurred in the calculation of the amount of certain fees that Laurel had charged to Pimlico. Correcting the error benefited Laurel by increasing the charge charged to Pimlico by $137,053.93. With the auditors' concurrence, De Francis and Jacobs decided that the adjustment was immaterial to Laurel's 1989 financial statement. Consequently, the auditors recorded the adjustment in Laurel's 1990 financial statement, not in a restated financial statement for 1989. By contrast, a similar error occurred in the previous year, 1988. Yet, the 1988 error would have benefited Pimlico by reducing the charge to Pimlico by $44,516.00. The 1988 error was also considered immaterial, but it was never recorded anywhere in Laurel's books, presumably because correcting the error would have benefited Pimlico to Laurel's detriment. Exhibit A, ¶ 24.

Since Laurel now receives 143 racing days to Pimlico's 121 racing days, it is no longer equitable simply to divide the officers' salaries, administrative salaries, telephone expenses, etc. between the two racetracks. That method of allocation benefits Laurel to Pimlico's detriment because Laurel has many more racing days than does Pimlico. Nevertheless, De Francis and Jacobs have refused to properly allocate the expenses between the two racetracks. Exhibit A, ¶ 25.

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In 1989, $130,000.00 in contribution expenses were allocated to Laurel, while $124,000.00 were allocated to Pimlico. In 1990, however, only $127,000.00 in contribution expenses were allocated to Laurel, while $215,000.00 were allocated to Pimlico. When Mr. Manfuso asked De Francis for the reason for this discrepancy, he blithely responded that Pimlico was more community-minded than Laurel. This clearly was not the reason. Again, Mr. De Francis had determined to juggle the books so that Laurel's income would appear to be higher than it actually was. Exhibit A, ¶ 26.

Other accounting inaccuracies were found by the Manfusos. On one occasion, the racetracks had taken money they were not entitled to. Exhibit A, ¶ 27. On another, the racetracks had misleadingly booked as income a $300,000.00 deposit forfeiture. Exhibit A, ¶ 28. The discovery of these matters clearly heightened the concern of the Manfusos, as directors, that the books and records of the racetracks were not properly maintained.

After the Manfusos discovered these facts, they asked to meet with the racetracks' auditors. The Manfusos' purpose was to investigate whether or not the accounting matters described above were proper and to determine whether or not the financial statements were accurate and truthful. As directors, the Manfusos felt that they had a duty to investigate those actions and to speak directly with the auditors. But although the Manfusos are directors and co-chairmen of the boards of Pimlico

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and Laurel, they were forbidden by De Francis and Jacobs from speaking with the auditors. The Manfusos believe that, in order to satisfy their fiduciary duties to the racetracks as directors, they must have the right to discuss the books and records with the auditors who have reviewed them. Exhibit A, ¶ 33.

De Francis and Jacobs do not appear dispute any of the allegations in the complaint, or any of the statements in Mr. Manfuso's affidavit, concerning the inaccuracies in the financial statements for Laurel and Pimlico. Instead, De Francis and Jacobs argue that false statements in previous financial statements do not present an immediate risk of substantial harm to Pimlico or Laurel. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 24. That argument is patently incorrect, as the false financial statements clearly jeopardize Laurel's continuing relationship with its lender. Furthermore, numerous persons, including, lenders, regulators, and potential investors, will continue to rely on past and present financial statements to evaluate and monitor the racetracks' financial status. Thus, Pimlico, Laurel, and others do face an immediate risk of substantial harm as long as the false financial statements go uncorrected.

As for the allocation of the Manfusos' severance payments to Pimlico alone (rather than to Laurel and Pimlico equally),

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De Francis and Jacobs offer Jacobs's sworn legal opinion that "[m]anagement," in its "reasonable discretion," has "determined" that Laurel's limited partners should not bear the burden of any payments to the Manfusos. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 24. But even assuming that the Court can credit Jacobs's opinion as to the "reasonableness" of "management's" decision,[12] De Francis's own statements contradict Jacobs's testimony. In particular, De Francis had suggested that equally allocating the severance payments between Laurel and Pimlico might cause Laurel to default on its loans. Additionally, De Francis had admitted that Laurel would default on its loans unless the expenses of Pimlico and Laurel were juggled to place as many expenses on Pimlico as possible. De Francis's statements raise serious doubts, to say the least, both about Jacobs's explanation for the allocation of severance payments and about the "reasonableness" of "management's" decision in that regard. Those doubts preclude the dismissal

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[12] Compare Md. R. 2-501(c) (affidavits supporting or opposing summary judgment "shall set forth such facts as would be admissible in evidence"). De Francis and Jacobs also present the Court with Jacobs's report that the auditors have ratified the financial statements. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Injunctive Relief and All Claims for Declaratory Relief, at 27. Coming from Jacobs, that statement amounts to hearsay, which the Court cannot consider. Md. R. 2-501(c).

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of the Manfusos' claim for an injunction barring the improper transfer of assets from Pimlico to Laurel.

Furthermore, in view of the false financial statements and in view of De Francis's alarming statements suggesting the reasons why the financial statements constitute false and misleading information, the Manfusos have a fiduciary duty to present their concerns to the corporations' auditors. Yet, De Francis and Jacobs have thwarted the Manfusos in their attempts exercise those duties. Under these circumstances, the Court can readily find that the Manfusos will not be able to discharge their duties absent an order requiring De Francis and Jacobs to permit the Manfusos and their agents to meet with the auditors. The Court therefore should deny the defendants' motion insofar as it concerns the Manfusos' request for access to accounting information.

D. Waste and "Charitable" Contributions.

Finally, the Manfusos' complaint requests an injunction barring De Francis and Jacobs from wasting corporate assets. As grounds for that request, the Manfusos allege that the defendants have made purported charitable contributions serving no corporate benefit. The record discloses the following facts concerning that allegation:

In Mr. Manfuso's monthly review of the corporations' expenditures, he noticed that one of the racetracks had paid $25,000.00 to the Republican Senatorial Group. The Republican Senatorial Group is a political action committee which

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contributes monies to support Republican candidates for senator around the United States. Mr. Manfuso felt that there was no legitimate business purpose for this contribution, which had not been discussed at any meeting of the board of directors or at monthly owners' meetings. Exhibit A, ¶ 29.

Mr. Manfuso confronted De Francis about that contribution, stating that the contribution had nothing to do with the racetracks. De Francis apparently agreed and refunded the money. Exhibit A, ¶ 29.

Shortly thereafter, however, Mr. Manfuso noticed that $25,000.00 had been contributed to the Florida Derby. Mr. Manfuso asked De Francis how he could possibly justify that action. De Francis answered that the contribution would help obtain horses for the Preakness. Mr. Manfuso responded that there was no possible way that a contribution to the Florida Derby was going to have any impact on any horse running in the Preakness. The Preakness is the second jewel of the Triple Crown, and clearly the purses and exposure available to the winning horse are reason enough for top horses and trainers to enter. Exhibit A, ¶ 30.

In fact, the circumstances suggest that, in making the $25,000.00 gift to the Florida Derby, De Francis's true motivation was to help out the wife of Alec Courtellis -- De Francis's co-executor on his father's estate. Mr. Courtellis's wife was the Chairperson of the Ball for the Florida Derby. Exhibit A, ¶ 30.

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Mr. Manfuso has read Jacobs's affidavit, in which Jacobs claims that the contribution would benefit the racetracks because the money ultimately went to a veterinary school. Mr. Manfuso regards Jacobs's explanation as absurd. Pimlico and Laurel use veterinary facilities in Pennsylvania and Virginia. There is absolutely no business justification for an expenditure in Florida, and it was in fact made solely for the purpose of aiding a friend and business colleague of De Francis. Exhibit A, ¶ 31.

Mr. Manfuso and his brother are concerned that there are many other areas where expenditures such as this one have occurred. He believes that, unless he and his brother receive Court-mandated access to the racetracks' books and records, they will never be able to satisfy their fiduciary duties to prevent such abuses. Exhibit A, ¶ 32.

De Francis and Jacobs appear to argue that the remedy for these and other instances corporate waste lies in an action for damages. That argument misconstrues the nature of the Manfusos' claim.

The Manfusos know of at least two examples of waste in the guise of charitable contributions. Those two instances give the Manfusos reason to believe that other, similar examples may have occurred without their knowledge. Yet, despite the Manfusos' right and a duty as directors to assess the threat posed by these and any other examples of waste, De Francis and

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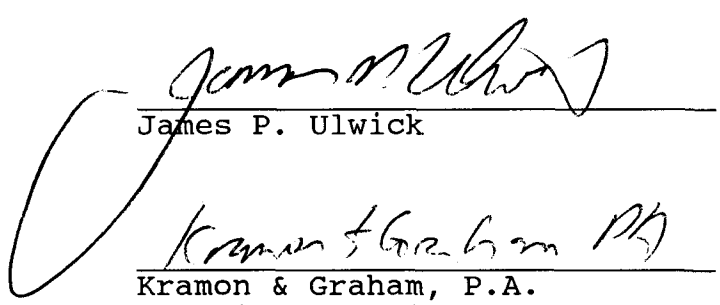
Jacobs have denied the Manfusos access to the corporations' books and records.

Viewed in the light most favorable to the Manfusos, these circumstances suggest that they and the corporations may suffer irreparable harm absent an injunction barring further instances of waste. At the very least, in these circumstances the Manfusos should have the right to conduct discovery and to ascertain the existence of additional examples of waste. Accordingly, the Court should deny the motion insofar as it concerns the Manfusos' allegations of corporate waste.

V. CONCLUSION

The complaint states valid claims for declaratory and injunctive relief, and the Manfusos have standing to raise the claims alleged in the complaint. The Court therefore should deny the defendants' motions to dismiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1992, I sent a copy of Plaintiffs' Opposition to Defendants' Motions to Dismiss by hand-delivery to:

James E. Gray, Esq.
Linda S. Woolf, Esq.
Goodell, DeVries, Leech & Gray
25 South Charles Street
Suite 1900
Baltimore, Maryland 21201;

and via Federal Express to:

Irwin Goldbloom, Esq.
McGee Grigsby, Esq.
Jennifer Archie, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505.

James P. Ulwick

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ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs		
vs.	*	FOR
JOSEPH A. DeFRANCIS, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * *

AFFIDAVIT OF JOHN A. MANFUSO, JR.

John A. Manfuso, Jr., being duly sworn, does depose and state:

1. My name is John A. Manfuso, Jr. I am a competent witness, and I make this Affidavit of my own personal knowledge.

2. I am an owner of Pimlico Racing Association, Inc., and serve as the Co-Chairman of the Board of Directors of Pimlico. I am also a member of the Board of Directors of Laurel Racing Association, Inc., the general partner of the limited partnership which owns Laurel Racecourse. I am a plaintiff in the above-captioned action.

3. I make this Affidavit in support of plaintiffs' oppositions to defendants' Motions to Dismiss.

4. Until very recently, when I have been denied access to the executive offices of Pimlico and Laurel, it has been my practice to review the checks, paid bills, credit card expenses and other financial matters of Pimlico and Laurel on at least a monthly basis. As a member of the Board of Directors of both racetracks, I believe I have a duty to insure that the racetracks' funds are properly spent and accounted for.

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5. Around October, 1989, Joseph De Francis issued corporate American Express credit cards to himself, Lynda O'Dea, Martin Jacobs, James Mango, my brother, Robert Manfuso, and myself. I opposed the distribution of these cards, and suggested that these individuals should submit any expenditures which they made on behalf of the racetracks to the corporations for reimbursement. This procedure significantly reduced the possibility of claims that any of us had, for our personal advantage, improperly used monies belonging to the racetracks. Mr. De Francis did not agree with my suggestion, and the corporate cards were issued.

6. In the course of my review of financial matters of Pimlico and Laurel, I learned that the American Express credit card bills were directed to Joseph De Francis' secretary on a monthly basis. She would separate the bill and request the persons charging items on the corporate cards to document their charges. The Accounts Payable Department would frequently pay the total amount prior to receipt of documentation for all of these charges. It became my custom to ask to see the total amount, and I would look at the individual documentation sheets as well.

7. Over time, it became clear that Joseph De Francis and Lynda O'Dea were charging thousands of dollars of personal expenditures on their corporate cards. Although both Mr. De Francis and Ms. O'Dea should have submitted personal checks on

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a monthly basis to reimburse the racetracks for these expenditures, they did not, thereby utilizing track funds for their personal benefit. In addition, they failed to submit timely and required documentation for these expenditures. The charges began to accumulate without payments being made by either Mr. De Francis or Ms. O'Dea.

8. During meetings between the owners, and through correspondence, I advised Mr. De Francis that this was a bad practice. Specifically, I told him that this practice was setting a poor example for the employees, and, in my opinion, was poor business management. On each occasion that I raised the subject, Mr. De Francis assured me that past due documentation and payment for personal charges would be brought current. Nevertheless, the lack of documentation and their failure to make prompt payment continued for months and even to the extent that they were carried from one fiscal year to the next. Mr. De Francis, on behalf of the corporations, did not insist that Ms. O'Dea or he document or repay these expenditures. Moreover, there was no designation in the financial statements that these monies were outstanding or officer loans.

9. I personally asked Mr. De Francis on numerous occasions to take steps to terminate this abuse of the corporate credit cards. He specifically promised around January of 1991, that all of the accounts would be cleared and

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that Ms. O'Dea's credit card would be revoked. Yet, Ms. O'Dea continued to charge personal expenses to the corporate card, and neither account was cleared.

10. At the April 13, 1992 Board meeting, Mr. De Francis announced that the charges to the credit card accounts had been documented and the personal charges repaid. All credit cards had been or were to be eliminated except for his. Nevertheless, I am unaware of action by the Board or Management to assure that Mr. De Francis will not continue to abuse the use of his corporate credit card. I note that in Mr. Jacobs' Affidavit he claims that it is sufficient that Mr. De Francis has promised to use his card for business only and not for personal expenditures. His assurance is not sufficient. Mr. De Francis promised over the course of years that he would require expenditures' documentation and payment, and did not. The amounts in question are sizeable. Although I do not have access to the records of the racetracks, my recollection is that the undocumented amounts in question charged to the corporate cards were between $75,000.00 and $100,000.00, and had accumulated for over a year.

11. As Directors, both my brother and I feel that we have a fiduciary duty to insure that the corporations' money is properly spent and accounted for. The excessive delay for documentation and payment in the charge card situation was improper and should have been quickly corrected.

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12. In the course of my review of the financial records, as a member of the Board of Directors, I have requested information regarding the corporations' expenditures on legal fees. Over the past year, I became concerned because of the lack of explanation for the services and size of the fees, (approximately $250,000.00), paid to outside legal counsel. The corporations at the same time were paying Martin Jacobs almost $400,000.00 annually to serve as general counsel. I am further concerned because the same law firms were and are involved in representing the racetracks as were and are involved in representing the private interests of Joseph De Francis, Martin Jacobs, the Estate of Frank De Francis and the suit against Freestate Racing Association, Inc., et al. (Case No. 91CA-17037). I was aware that the plaintiffs in this pending Freestate law suit claim that in addition to Martin Jacobs' salary and management fees, his law firm was paid hundreds of thousands of dollars from 1980 to 1988.[1] As a

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[1]Recently I learned that between 1980 and 1988 salaries and management fees totalling $2,920,000.00 were taken by Martin Jacobs and Frank J. De Francis during the same period of time Martin Jacobs' law firm was paid $699,802.00. (See Plaintiffs' Memorandum of Points and Authorities in Opposition to Freestate Defendants' Motion for Summary Judgment at page 32). In fact, plaintiffs claim that in 1988 Frank De Francis and Martin Jacobs took $2,735,045.00 in "extra" management fees from Freestate. (See page 31). Further, plaintiffs claim that while Jacobs and Frank De Francis were selling property on behalf of their partners, they privately obtained $3,000,000.00 in a "non-competition agreement" from the buyer of the property. (See page 31).

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result of these concerns, I felt it was my duty as a member of the Board of Directors to review the expenditures for these charges and to insure that the racetracks were being properly billed for only Laurel and Pimlico matters.

13. I asked Joseph De Francis for an explanation as to why the racetracks were spending, in one year, approximately $250,000.00 on outside legal fees, when we employ, at great expense, a general counsel. Mr. De Francis offered the following explanations: (1) that the legal fees were increased because the racetracks picked up the expenses for the negotiations leading up to the Stockholders' Agreement and were required when my brother and I withdrew from management; and (2) that Louis Guida's, the spokesman for the limited partners at Laurel, proposal to purchase the racetracks required considerable legal work.

14. Both of the explanations by Mr. De Francis were deficient. In the first place, the negotiations which led up to the Stockholders' Agreement, and the legal fees attendant thereto, had occurred prior to the time period in question. Second, most of the legal involvement for the Guida matter was a purely private matter between Mr. Guida's group and Joseph De Francis. The Guida offer to negotiate the sale of both

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Moreover, the Freestate plaintiffs claim that Jacobs made false statements to Freestate's independent auditors. (See page 24). This information obviously heightens the concerns my brother and I have with respect to the accuracy of the financial statements of Laurel and Pimlico.

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racetracks for $80-$85,000,000.00, was rejected out of hand by Joseph De Francis and entailed little, if any, legal work. After that offer, Mr. Guida then offered to purchase Mr. De Francis' stock, and that of the Estate. This was a personal or Estate matter and not a legitimate corporate expense for the legal fees required. Mr. De Francis' answers further heightened my concerns that the funds of the racetracks were not being properly disbursed.

15. I asked repeatedly to see the documentation and backup relating to these legal fees. I never was provided documentation.

16. One of my attorneys, James M. Kramon, then attempted to negotiate on behalf of my brother and I to obtain these documents. Despite a promise by the corporations' attorneys to produce these documents to us, they were never produced. After the corporations agreed to produce the materials to us, they then added spurious conditions before the information would be released to us. The corporations conditioned our right to see this information on the production of the bills and backup data from our attorney, Herbert Garten. Mr. Garten's bills had no relationship to the subject matter in question, as Mr. De Francis and Mr. Jacobs well knew. It was simply a technique designed to frustrate our ability, as Directors, to investigate an issue of concern to us. Nevertheless, my brother and I agreed to instruct Mr. Garten to provide this information to

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the corporations if they requested it. We still have not received the breakdown for bills or backup. We believe that unless ordered to do so, the corporations will never provide the backup information which will allow us to perform our fiduciary duties as directors.

17. As a member of the Board of Directors, I have a great concern regarding the accuracy and truthfulness of the financial statements issued by the racetracks. I am and have been concerned that Pimlico is improperly being required to bear expenses pertaining to Laurel.

18. This issue first arose around April of 1991 at an owners' meeting, after I had reviewed the audited financial statements for the racetracks for the calendar year 1990. I noticed in my review of the financial statements that there were approximately $100,000.00 more in expenses in one category for Pimlico than for Laurel. This concerned me, because of the difference in ownership of Laurel and Pimlico. It is important that expenses shared by Pimlico and Laurel be divided equally. Indeed, this was the equitable way to properly account for such expenses, since the tracks had approximately the same number of racing days. Accordingly, any sharing of expenses should be strictly accounted for, and not co-mingled.

19. When I noticed the lack of correlation in these expenses, I asked Mr. De Francis for an explanation. Mr. De Francis replied that the expenditures related to the severance

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payments made to my brother and me for six months were reflected in the statements. I asked why Pimlico was bearing these expenses alone. Mr. De Francis answered that it was done to avoid being in default on the Laurel bank loans.

20. Upon further investigation, I learned that, for the actual six-month period, this expense had been shared equally by Laurel and Pimlico. To permit a better Laurel cash flow when preparing the financial statements, the payments were charged only to Pimlico. Mr. De Francis advised Guida by way of a letter dated June 21, 1990 that, "We expect these payments to be shared equally between Laurel and Pimlico." In addition, the Laurel Racing Association audited financial statement for 1989 stated that, "The stockholders of Laurel Racing Association, Inc. and of Pimlico Racing Association, Inc. entered into an Agreement dated October 1, 1989 under which John A., Jr. and Robert T. Manfuso are each entitled upon retirement to monthly severance pay of $5,208.00 from the Association through September 30, 1993."

21. The promissory notes which support the loan from the First National Bank of Maryland to Laurel Racing Association Limited Partnership, require that Laurel maintain a ratio of "cash flow" to "debt service" during the term of the agreement of not less than 1.5 to one. Mr. De Francis advised me that unless the severance payments from both Pimlico and Laurel were charged to Pimlico to help meet this requirement, Laurel would

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be unable to comply. This response concerned me greatly, since it constituted an admission that the books and records of Laurel and Pimlico were neither accurate nor truthful. As a member of the Board of Directors, I believe I have a fiduciary responsibility to insure that the books and records of Laurel and Pimlico are accurate and truthful. Under the circumstances, the appropriate course would be to address the reasons for the cash flow problem directly with the bank, and not to provide false documents to the bank. Such actions place Pimlico and Laurel in far greater jeopardy than the transmission of honest information, even if such information raises a concern of the bank.

22. For these reasons, I objected to the allocation of these expenses to Pimlico. De Francis and Jacobs overrode the objection of my brother and I, and the financial statements were unchanged.

23. As a result of this experience, our concerns demanded a further review of the expenditures by Laurel and Pimlico to determine if other expenditures had been improperly recorded. We have discovered that during 1990 Messrs. De Francis and Jacobs caused Pimlico to transfer to Laurel 100 percent of the revenue from 13 racing days running from February 1, 1990 through February 16, 1990. The Maryland Racing Commission assigned 134 racing days to Pimlico and 130 racing days to Laurel. Because of the actions of Messrs. De Francis and

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Jacobs, Pimlico received income for only 121 racing days, while Laurel received income for 143 racing days.

24. My brother and I have further discovered that an error occurred in the calculation of the amount of certain fees that Laurel had charged to Pimlico. Correcting the error benefited Laurel by increasing the charge charged to Pimlico by $137,053.93. With the auditors' concurrence, Messrs. De Francis and Jacobs decided that the adjustment was immaterial to Laurel's 1989 financial statement. Consequently, the auditors recorded the adjustment in Laurel's 1990 financial statement, not in a restated financial statement for 1989. By contrast, a similar error occurred in the previous year, 1988. Yet, the 1988 would have benefited Pimlico by reducing the charge to Pimlico by $44,516.00. The 1988 error was also considered immaterial, but it was never recorded anywhere in Laurel's books, presumably because correcting the error would have benefited Pimlico to Laurel's detriment.

25. Since Laurel now receives 143 racing days to Pimlico's 121 racing days, it is no longer equitable to simply divide the officers' salaries, administrative salaries, telephone expenses, etc. That method of allocation benefits Laurel to Pimlico's detriment because Laurel has many more racing days. Nevertheless, Messrs. De Francis and Jacobs have refused to permit us to review with the outside auditors proper allocation of the expenses.

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26. In 1989, $130,000.00 in charitable contributions were allocated to Laurel, while $124,000.00 were allocated to Pimlico. In 1990, however, only $127,000.00 in contributions were allocated to Laurel, while $215,000.00 were allocated to Pimlico. When I asked Mr. De Francis for the reason, he blithely responded that Pimlico was more community-minded than Laurel. This clearly was not the reason. Again, Mr. De Francis had determined to allocate contributions so that Laurel's income would appear to be higher.

27. In 1990, gravel from ground on a piece of land owned equally by Laurel and the Cohen family was sold for approximately $40,000.00. This entire sum was credited to Bowie Race Track, which is owned by Laurel and Pimlico. One-half this amount should have been paid to the Cohen family. Only after my brother and I brought this error to Management's attention, it is our understanding, were the Cohen's paid their proper share.

28. It was also discovered that the draft financial statement for 1990 allocated approximately $300,000.00 from a deposit forfeiture to Laurel's racing revenue. This sum was paid to Laurel when the deposit for the purchase of a piece of property was forfeited because the purchaser was unable to settle. By adding this extraordinary income to Laurel's racing revenue, one is misled into assuming this amount represented additional racing revenue. Certainly a footnote should have

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properly identified and explained the $300,000.00 extraordinary income. Our request to discuss this obvious omission and misleading entry with the outside auditors was denied.

29. In my monthly review of the corporations' expenditures, I noticed that the racetracks had paid $25,000.00 to a national Republican Senatorial Group. This Republican Senatorial Group contributes monies to support Republican candidates for senator around the United States. I felt that there was no legitimate business purpose for this contribution, which had not been discussed at any meeting of the Board of Directors, or at our monthly owners' meetings. Both of the senators for Maryland are Democrats, and are likely to remain that way. I confronted Mr. De Francis about this contribution, and told him that I felt it had nothing to do with the racetracks. He refunded the money to the tracks.

30. Shortly thereafter, however, I noticed that $25,000.00 had been contributed to the Florida Derby. I asked Mr. De Francis how he could possibly justify this action. He answered that the contribution would help obtain horses for the Preakness. I responded that a contribution to the Florida Derby would not have any impact on any horse running in the Preakness. The Preakness is the second jewel of the Triple Crown, and clearly the purses and exposure available to the winning horse are reason enough for top horses and trainers to enter. In fact, the true motivation was to help out the wife

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of Alec Courtellis--Mr. De Francis' Co-Executor on his father's Estate. Mr. Courtellis' wife was the Chairperson of the Ball for the Florida Derby.

31. I have read Mr. Jacobs' Affidavit, and have seen that he claims that the contribution would benefit the racetracks because it went to a Florida veterinary school. This explanation is absurd. The owners and trainers and local veterinarians at the Maryland tracks and virtually all breeding farms in Maryland use the facilities of the New Bolton Center in Pennsylvania, a world class veterinary teaching center associated with the University of Pennsylvania, as well as the Marion Dupont Scott Equine Medical Center in Leesburg, Virginia, associated with the Virginia-Maryland Regional College of Veterinarian Medicine. Obviously a contribution of this magnitude might be justified if paid to one or both of these facilities. There is absolutely no business justification for an expenditure in Florida, and it was done solely for the purpose of aiding a friend and wife of the Co-Executor of the De Francis Estate.

32. After April, 1990, although Joseph De Francis had assured my brother and me that no additional funds from either racetrack would be used for the purpose of their personal involvement in the Texas racing venture, I discovered, during a review of monthly payments, that Martin Jacobs had charged personal round-trip airline expenses to Texas. At the owners'

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meeting on September 10, 1990, I brought this to Joseph De Francis' attention, and we were told that an appropriate payment was made to the track.

33. After my brother and I discovered these and other facts, we asked to discuss our concerns with the racetracks' independent outside auditors. Our purpose was to express our concerns about the misleading entries in an effort to understand why the auditors found the entries in question accurate, truthful and not misleading. As Directors, my brother and I felt that we had a duty to present these concerns and to discuss them directly with these auditors. Despite the fact that we are Directors, and Co-Chairmen of the Boards of Pimlico and Laurel, we were forbidden by Mr. De Francis and Mr. Jacobs from speaking with the auditors. We believe that it is our fiduciary responsibility to the tracks, as Directors, to present and review our questions regarding our concerns about the audited annual statements directly with the auditors in an effort to reconcile our differences. This is especially important because these statements are relied upon by the bank, The Racing Commission, the State Legislature and certain of its Committees, and others.

34. My brother and I are concerned that there are many other areas where expenditures such as these could occur. Unless we receive Court-mandated access to the books and records of the racetracks, and are allowed to review our

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concerns with the independent outside auditors, we will never be able to satisfy our fiduciary duties to prevent such abuses by De Francis and Jacobs.

John A. Manfuso, Jr.

Sworn and subscribed to before me this 15th day of July, 1992.

Nancy D. Sumwalt
Notary Public

My Commission Expires: 2/1/96

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IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

JOSEPH L. ELY, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 91CA-17037
	:	
FREESTATE RACING ASSOCIATION, INC., et al.	:	
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF THEIR OPPOSITION TO THE FREESTATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Factual Background

1. The Plaintiffs herein were limited partners in a Maryland Limited Partnership known as "Freestate Racing Association Limited Partnership" (hereinafter referred to as the "Partnership"), formed in accordance with the applicable laws of the State of Maryland on or about June 30, 1980. The purpose of the Partnership was to purchase, own and operate the Laurel Raceway located in Laurel, Maryland.[1]

2. From June 30, 1980 through June 30, 1988, the General Partner of the Partnership was Freestate Racing Association, Inc. At all relevant times herein, the sole shareholders of Freestate Racing Association, Inc., were Defendants MARTIN

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[1] The Laurel Raceway was being sold because certain officers and shareholders of the prior owner, Laurel Harness Racing Association, Inc., were indicted in 1979 by a federal grand jury for fraudulently scheming to obtain money from the corporation and its shareholders. As a result, one of the shareholders was convicted and the individuals, corporation, shareholder and parent corporation were sued for damages arising out of their operation of the race track and monies allegedly converted therefrom. See: Private Placement Memorandum attached hereto and incorporated herein as Exhibit 1.

JACOBS and FRANK J. DeFRANCIS. See: May 20, 1988 Memorandum t Limited Partners from Frank J. DeFrancis attached hereto and incorporated herein as Exhibit 2.

3. The Partnership was formed by obtaining $850,000.00 in capital from the limited partners, including the Plaintiffs herein. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS did no contribute or invest any money into the Partnership. See: Agreement of Limited Partners attached hereto and incorporated herein as Exhibit 3.

4. In April, 1986, Plaintiff BURTON SOLOMON met with Defendant MARTIN JACOBS to discuss the status and viability of the racetrack. At that meeting, Defendant MARTIN JACOBS informed Plaintiff BURTON SOLOMON that the race track was in dire financial straits. Based upon Defendant MARTIN JACOBS' representations, Plaintiff BURTON SOLOMON became immediately concerned about his investment and inquired as to the possibility of selling his Partnership share. In response, Defendant MARTIN JACOBS told Plaintiff BURTON SOLOMON that he was "stuck with it" because the track and the land were "not worth a dime". See: Affidavit of Burton Solomon attached hereto and incorporated herein as Exhibit 4.

5. On or about August 8, 1986, Defendants FRANK J. DeFRANCIS and MARTIN JACOBS forwarded to the Plaintiffs written correspondence regarding the financial status of the Partnership in which the financial status of the track was represented to be poor with limited income. See: Letter dated August 8, 1986 attached hereto and incorporated herein as Exhibit 5. In that

compensation, etc., in excess of $500,000.00 per year to the detriment of the Partnership. See: Financial Statements from 1980 through 1988 attached hereto and collectively incorporated herein as Exhibit 8.

10. Ironically, at the same time Defendants MARTIN JACOBS and FRANK J. DeFRANCIS were representing to the limited partners that the Partnership was in a disastrous financial position and soliciting to purchase their shares, Defendant, MARTIN JACOBS contacted one of his friends, John T. Manfuso, and convinced him to pay one and one half times the original purchase price of the shares. Mr. Manfuso's deposition is scheduled for July 30, 1992. This fact was never disclosed to the seller Plaintiff, BURTON SOLOMON.

11. Ironically, at the same time Defendants MARTIN JACOBS and FRANK J. DeFRANCIS were representing to the limited partners that the Partnership was in a disastrous financial position, the Financial Statement submitted to the Maryland Racing Commission demonstrated that the Operating Revenue of the Partnership actually increased from $3,088,390.00 in 1980, to $7,877,573.00 in 1986. Contrary to the "doom and gloom" report provided by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, the General Partners' Operating Revenue increased more than 100% in just six (6) years.

12. Moreover, despite taking huge management fees, salaries, deferred pension benefits and other compensation by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, the Partnership's net income from 1980 to 1986 actually grew 150%

from a loss of $1,058,057.00 in 1980 to a $545,676.00 profit in 1986.

13. Between the years 1986 to 1987, during which Defendants MARTIN JACOBS and FRANK J. DeFRANCIS represented to the limited partners that the Partnership was in a desperate financial position, the net income of the Partnership was actually $537,592.00 and it was rising to $545,676.00 the next year. See: Paragraph E.4 of the December 21, 1987, Audited Financial Statement of Freestate Racing Association Limited Partnership, a copy of which is attached hereto and incorporated herein as Exhibit 9.

14. Within 15 months after the "doom and gloom" representations by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS and the acquisition of Plaintiff BURTON SOLOMON's sale by Frank J. DeFrancis' associate, the racing assets of the Partnership were sold to Mark Vogel for the sum of $7,750,000.00. See: Exhibit 4 and letter dated May 20, 1988 from Defendant FREESTATE RACING ASSOCIATION, INC. attached hereto and incorporated herein as Exhibit 10. This sale did not include the real estate owned by the Partnership.

15. On or about August 1, 1989, the remaining real estate owned by the Partnership was sold to the Cafritz Group, Inc. for $16,765,000.00. See: Letter dated August 1, 1989 from Defendant FREESTATE RACING ASSOCIATION, INC. attached hereto and incorporated herein as Exhibit 11.

16. On several occasions between August and December, 1986, Plaintiff JOSEPH L. ELY had numerous discussions with Defendants FRANK J. DeFRANCIS and MARTIN JACOBS regarding the financial condition of the Partnership and the alleged accrued management fees. On each such occasion, both Defendants FRANK J. DeFRANCIS and MARTIN JACOBS assured Plaintiff JOSEPH L. ELY that he had "nothing to worry about", his investment was "safe" and that they (DeFrancis and Jacobs) were not going to take any management fees in excess of $150,000.00 per year. See: Exhibit 6.

17. During the eight (8) year period from 1980 to 1988, the Partnership Financial Statements never mentioned any accruing or additional management fees. See: Exhibit 8.

18. In the Summer of 1988, Defendant MARTIN JACOBS visited Plaintiff JOSEPH L. ELY at his house requesting that he sign documents pertaining to the sale of Freestate's racing days to Vogel. Defendant MARTIN JACOBS again repeated to Plaintiff JOSEPH L. ELY that he and Defendant FRANK J. DeFRANCIS would not be paid any management fees in excess of $150,000.00 per year. See: Exhibit 6.

19. Most importantly, Defendant MARTIN JACOBS himself confirmed in writing that he and Defendant FRANK J. DeFRANCIS would not take, and the Partnership was not liable for, any alleged accrued management fees. On March 8, 1989, Defendant MARTIN JACOBS forwarded a letter to the accounting firm of Reznick Fedder & Silverman in response to their financial audit of the Partnership for the year ending July 17, 1988. Paragraph

11 of that letter executed by Defendant MARTIN JACOBS states as follows:

> "Management fees due to the general partner for the period January 1, 1988 through July 17, 1988 are $150,000.00. **Any and all additional accumulative fees for this period and prior years for which the partnership may be held liable, pursuant to Article 7.07 of the Agreement of Limited Partners, have been waived by the General Partner**". (emphasis added)

See: Letter dated March 8, 1989 from Martin Jacobs attached hereto and incorporated herein as Exhibit 12.

20. Despite the fact that (1) the audited Financial Statements of the Partnership made no reference whatsoever of any accruing management fees; (2) the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS represented to the limited partners on a number of occasions that no "management fees" in excess of $150,000.00 per year would be taken by them; and (3) more importantly, that Defendant MARTIN JACOBS in writing, reaffirmed to the accounting firm of Reznick Fedder & Silverman that he and Defendant FRANK J. DeFRANCIS would not take, and the Partnership would not be liable for, any alleged accruing management fees, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS nevertheless decided to pay themselves the sum of $2,735,045.00 as "management fees" from the proceeds of the Vogel sale, to the detriment of the Partnership. See: Exhibit 10.

21. Following the sale to Vogel, the Plaintiffs also discovered in the Independant Auditors Report prepared by the Defendant, REZNICK, FEDDER & SILVERMAN, P.C., reflected payment by the Freestate Defendants of $279,000.00 in "severance pay" to terminated employees which resulted from cessation by the

Partnership of the racing operations which was never disclosed previously. It is still undetermined to whom these "severance payments" were actually made. This fact is admitted by Defendant MARTIN JACOBS in his Affidavit attached to the Freestate Defendants' Motion for Summary Judgment.

22. In his Affidavit, Martin Jacobs similarly admits that in addition to the payment of "severance pay" for terminated employees in 1988, the Freestate Defendants also authorized payment of an additional $250,000.00 in "Employee Bonuses" in fiscal year 1989, more than one full year after the limited partnership terminated its employees and sold the race track which was never previously disclosed. As part of these "employee bonuses", the Defendants paid Lynda O'Dea, who was Frank J. DeFrancis' girlfriend, a $125,000.00 "employee bonus". This amount was 10 times her annual salary of $12,500.00.

23. Moreover, Defendants FRANK J. DeFRANCIS and MARTIN JACOBS, who owed a fiduciary duty to the Partnership, negotiated a separate deal for themselves, to the detriment of the Partnership, in which as a result of the sale of the Partnership assets to Vogel, Defendants FRANK J. DeFRANCIS and MARTIN JACOBS individually were to be paid the sum of $3,000,000.00, plus interest at the rate of 10.5% over five (5) years. See: Freestate Racing Association, Inc. Financial Statement dated December 31, 1989 attached hereto and incorporated herein as Exhibit 13.

24. Notwithstanding the $2,910,000.00 in salaries and annual management fees taken by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS in the eight (8) years, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS also received $2,735.045.00 in "accrued management fees" from the sale to Vogel; $3,000,000.00, plus interest at 10.5% over five (5) years from the sale to Vogel; a deferred pension with a value in excess of $1,000,000.00; legal fees to Defendant MARTIN JACOBS' law firm in the amount of $699,802.00; travel and entertainment reimbursement in excess of $141,000.00; and distributions from the sale of the Partnership in excess of $5,400,000.00 for total compensation in the amount of $15,900,453.00. See: Exhibits 8, 10, 11 and Distribution of Proceeds attached hereto and incorporated herein as Exhibit 14.

25. On or about January 8, 1991, the Plaintiffs filed the instant action seeking both compensatory and punitive damages from various accounting firms as well as Defendants FREESTATE RACING ASSOCIATION, INC., SOUTHFIELD REALTY CORPORATION., INC., the ESTATE OF FRANK J. DeFRANCIS and MARTIN JACOBS. The Complaint sets forth in great detail various improprieties on behalf of Defendants MARTIN JACOBS and FRANK J. DeFRANCIS including but not limited to: breach of fiduciary duty, fraud, breach of contract, negligence, breach of warranty and various Maryland Securities Act violations.

26. Since the filing of the Complaint, the claims against the former Defendants, WATKINS, MEEGAN & DRURY, COMPANY and REZNICK FEDDER & SILVERMAN, P.C., have been settled.

II. Status of the Litigation

A. Trial Schedule.

A two week trial of this case is presently scheduled to begin on November 30, 1992.

B. Discovery.

The Plaintiffs have taken the depositions of Mark Vogel and Andrew Eastwick, the former comptroller for the race track. However, depositions of Defendant MARTIN JACOBS, Lynda O'Dea, and James Mango, the former general manager of the racetrack, have all been scheduled for the week of July 13, 1992 through July 17, 1992. The Plaintiffs will also be deposing John T. Manfuso on July 30, 1992. Mr. Manfuso, a long time business partner of both Frank J. DeFrancis and Martin Jacobs, was the individual who purchased Burton Solomons' limited partnership share in early 1989. In addition, there are numerous other depositions to be taken and outstanding disputes regarding the production of documents by the Freestate Defendants which the parties are still attempting to resolve.

The Freestate Defendants have not produced any documents in response to the Plaintiffs' Request for Production of Documents filed on October 11, 1991. Throughout their Motion, the Freestate Defendants have repeatedly alleged that there are "seventy-five boxes of records available for the Plaintiffs to review ... but the Plaintiffs have not reviewed a single

document".

The Freestate Defendants' repeated assertion that they have been "available" is a complete mischaracterization of the facts. The Freestate Defendants' Response to Request for Production of Documents states, in Paragraph One of its "General Response and Objections", as follows:

> "1. Documents will be made available for inspection at a **mutually convenient time** at the offices of the Laurel Race Course, Route 198 and Racetrack Road, Laurel, Maryland. Freestate will arrange for the copying of any documents requested by plaintiff Ely, at plaintiff's expense, under **mutually satisfactory terms and conditions. Freestate's counsel should be contacted to arrange inspection of the documents at a mutually convenient time.**" (emphasis added)

Immediately upon receipt of this Response, counsel for Plaintiffs forwarded a letter to Irwin Goldbloom, Esquire, one of the several attorneys representing the Freestate Defendants, in which the Plaintiffs requested to "arrange inspection of the documents at a mutually convenient time". There was no response from the Freestate Defendants. Thereafter, in December, 1991, counsel for the Plaintiffs met with counsel for the Freestate Defendants and yet again requested that they be provided with appropriate dates that the documents would be available for review. Once again, there was no response from either of the Freestate Defendants' various attorneys. See: Letter dated November 4, 1991 attached hereto and incorporated herein as Exhibit 15.

On several occasions during the last month, counsel for Plaintiff has, both orally and in writing, requested to be allowed to review these alleged "seventy-five boxes of

documents". See: Letters dated June 17, 1992, June 22, 1992 and June 24, 1992 attached hereto and collectively incorporated herein as Exhibit 16. Despite these repeated requests, there was no response whatsoever from the Freestate Defendants until it was necessary for Plaintiffs' counsel to choose a date that he would appear at the Laurel Race Course to review these documents. Ironically, once counsel for the Freestate Defendants was notified that Plaintiffs' counsel would review the documents at the Laurel Race Course on June 22, 1992, the Freestate Defendants immediately notified counsel for Plaintiffs that the day chosen was not "mutually convenient". It was not until June 25, 1992, that counsel for Plaintiffs was finally given a new date, July 6, 1992, which was convenient for the Freestate Defendants and the Plaintiffs to review the "seventy-five boxes of documents".

Because considerable discovery is still pending, including depositions of the parties, depositions of numerous critical witnesses and production of relevant documents, the Freestate Defendants' Motion for Summary Judgment is premature at this time.

III. Standard of Review

The law in the State of Maryland is well-established that summary judgment is proper only where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Keesling v. State, 288 Md. 579, 420 A.2d 261 (1980); Keyworth v. Industrial Sales Co., 241 Md. 453, 217 A.2d 253 (1966); Meola v. Bethlehem Steel Co.; 246 Md.

226, 228 A.2d. 254 (1967).

One who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and any doubt as to the existence of such an issue must be resolved against the movant. Medical Mut. Liab. Ins. Soc'y v. Mutual Fire, Marine & Inland Ins. Co., 37 Md. App. 706, 379 A.2 739 (1977).

It is not for the Court to decide the issue of fact, but only whether or not such issues exist. Merchants Mtg. Co., v. Lubow, 275 Md. 208, 339 A.2d 664 (1974); Wolfe v. Lamar and Wallace Inc., 201 Md 174, 274 A.2d 121 (1971).

For reasons set forth hereinbelow, there are genuine dispute as to material facts which preclude the entry of judgment as a matter of law.

IV. Argument

A. The Nature and Extent of Fiduciary Duty owed by the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS.

For some unexplainable reason, the Freestate Defendants seeking judgment, as a matter of law, failed to cite any of the applicable law regarding this cause of action and their duties as fiduciaries which would entitle them to judgment. The reaso for this omission is clear.

The law is Maryland is well established that the partnership relationship is of a fiduciary character which carries with it the requirement of utmost good faith and loyalt and the obligation of each member of the partnership to make full disclosure of all known information that is significant an material to the affairs or property of the partnership. Allen

v. Steinberg, 244 Md. 199, 128, 223 A.2d 240 (1965); Hambleton v. Rhind, 84 Md. 456, 36 A. 597 (1896); Herring v. Offutt, 266, Md. 593, 295 A.2d 876 (1972); and cases cited in the notes to 17 M.L.E. Partnership §71; "Joint Adventures", 8 Md. L. Rev., supra at 22.

As the Court of Appeals in Herring stated, "the severity with which adherence to this obligation is demanded by the courts was aptly expressed by Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928)":

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. **A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.** As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions ... Only thus has the level of conduct for fiduciaries been kept at a level higher that that trodden by the crowd".

These well established rules have also been adopted by the Maryland legislature as follows:

Md. Corp. and Ass'n, Code Ann. §9-403 - **Duty of partners to render information**, states as follows:

> "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability".

Md. Corp. and Ass'n, Code Ann. §9-404 - **Partner accountable as fiduciary**, states as follows:

> "(a) Accounting required. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property".

The facts uncovered in this early stage of discovery leave no doubt that there is sufficient evidence from which a jury could conclude that the Defendants owed a fiduciary duty to the Plaintiffs and breached that duty by their various acts and omissions.

B. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS Recognized the Nature and Extent of Fiduciary Duty Which They Owed to the Plaintiffs.

Based on the aforegoing, it is clear that a fiduciary relationship exists, as a matter of law, between the Plaintiffs and Defendants as a result of the formation of the Partnership. Allen v. Steinberg, 244 Md. 199, 128, 223 A.2d 24((1965); Hambleton v. Rhind, 84 Md. 456, 36 A. 597 (1896); Herring v. Offutt, 266, Md. 593, 295 A.2d 876 (1972).

This fiduciary duty was not only imposed as a matter of law, but the Freestate Defendants were well aware of the nature and extent of their legal fiduciary duties and intended for the Partnership to rely on this level of honesty, loyalty and good faith.

As the Freestate Defendants specifically state in their Motion, the organization and capitalization of the limited Partnership was not, in any sense, a "public offering". To the contrary, all of the limited partners were friends or clients o

Defendants MARTIN JACOBS and FRANK J. DeFRANCIS and relied totally upon their trust, honesty, loyalty, and reputations in making their investment. As the Private Placement Memorandum (page 5) itself states:

> "Frank J. DeFrancis may be deemed the 'parent' of the General Partner and the Partnership by virtue of his control over such entities ..."

This strict fiduciary duty imposed on Defendants FRANK J. DeFRANCIS and MARTIN JACOBS to act within the "utmost good faith and loyalty" and to fully and accurately disclose of all information relating to the Partnership, was fully recognized from the inception of the Partnership and was intended by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS to be relied upon by the Plaintiffs herein.

First, the Private Placement Memorandum distributed to the limited partners specifically states under "FIDUCIARY RESPONSIBILITY" that: **"a General Partner is accountable to a limited partnership as a fiduciary and, consequently, must exercise good faith and integrity in handling parties by affairs..."** (emphasis added). See: Exhibit 1.

Second, Section 7.06 of the Partnership Agreement states on two separate occasions that the General Partner shall be liable and **"responsible or accountable for actual fraud, gross negligence, willful misconduct or willful or grossly negligent breach of its fiduciary duty with respect to such acts or omissions"**. (emphasis added). See: Partnership Agreement §7.06 attached hereto and incorporated herein as Exhibit 17.

Consequently, this fiduciary duty was not only imposed as matter of law, but the Freestate Defendants were well aware of the nature and extent of their legal fiduciary duties intended for the Partnership to rely upon this level of honesty, loyalty and good faith.

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants owed a fiduciary duty of honesty, loyalty and good faith and breached this duty by misrepresenting material facts in connection with their acts on behalf of the Partnership.

C. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS Improperly Took Unreasonable and Excessive Management Fees in Violation of the Partnership Agreement and their Fiduciary Duty

First, the Financial Statements prepared by the Defendants make no reference whatsoever to any alleged "accrued" management fees by the Partnership. The assets of the race track were owned by the Partnership from 1980 until the Vogel sale in 1988. During each of the those years, the Freestate Defendants prepared annual audited Financial Statements of the Partnership. Despite the Defendants obligation pursuant to the Partnership Agreement to maintain books reflecting accurate statements pertaining to assets and liabilities (see Section 8.01 of the Partnership Agreement), there was no reference whatsoever in any of those Financial Statements that there were management fees which were allegedly accruing. See: Exhibit 8. This material omission of $2,735,045.00 in "fees" from the Financial Statements for which the Partnership was allegedly liable and which Defendants MARTIN JACOBS and FRANK J. DeFRANCI

intended to and did, in fact, take for themselves only after th sale to Vogel, constitutes fraud, a breach of the Partnership Agreement and a breach of their fiduciary duty of honesty, good faith and loyalty. Allen v. Steinberg, 244 Md. 199, 128, 223 A.2d 240 (1965); Hambleton v. Rhind, 84 Md. 456, 36 A. 597 (1896); Herring v. Offutt, 266, Md. 593, 295 A.2d 876 (1972).

Second, in accordance with the representations in the Financial Statements that there were no accruing management fees, the Defendants repeatedly assured the Plaintiffs herein that they would not take any additional management fees in excess of $150,000.00 per year. In August, 1986, Defendant FRANK J. DeFRANCIS forwarded a letter to all Plaintiffs describing various financial woes facing Freestate as well as the racing industry as a whole. It was in that letter in which the Plaintiffs first discovered any inkling of any alleged "overdue and unpaid management fees" owed to the general partners.

Within days of receiving the August, 1986 letter, Plaintif JOSEPH L. ELY contacted Defendant FRANK J. DeFRANCIS to express his concerns and asked about the management fees. Defendant FRANK J. DeFRANCIS told him that everything would be "fine" and that he should "not worry about" the management fees because th general partners "would not take any management fees in excess of $150,000.00 per year". See: Exhibit 6.

In December, 1986, another letter was forwarded to the Plaintiffs again describing the many financial problems facing the racetrack. In addition, this letter offered to match limited partners who "want to sell with limited partners who want to buy". See: Exhibits 4 and 6. Again, Plaintiff JOSEPH L. ELY contacted Defendant FRANK J. DeFRANCIS and inquired regarding both his investment as well as any accrued management fees. Defendant FRANK J. DeFRANCIS repeated to Plaintiff JOSEP L. ELY the representations made to him some months earlier; tha he "should not worry" because he and Defendant MARTIN JACOBS would not take any management fees in excess of $150,000.00. See: Exhibit 6.

Plaintiff JOSEPH L. ELY had several conversations directly with Defendant MARTIN JACOBS who also represented that he and Defendant FRANK J. DeFRANCIS would not at any time take any management fees other than the $150,000.00 per year. See: Exhibit 6.

In the Summer of 1988, Defendant MARTIN JACOBS visited Plaintiff JOSEPH L. ELY at his house requesting that he sign documents pertaining to the sale of Freestate's racing days to Vogel. Defendant MARTIN JACOBS again repeated to Plaintiff JOSEPH L. ELY that he and Defendant FRANK J. DeFRANCIS would no take any management fees in excess of $150,000.00 per year. See: Exhibit 6.

Third and most importantly, Defendant MARTIN JACOBS himsel confirmed in writing their continuing representations in the Financial Statements to the Plaintiffs that Defendants FRANK J.

DeFRANCIS and MARTIN JACOBS would not take any additional management fees and the Partnership was not liable for any alleged accrued management fees. On March 8, 1989, Defendant MARTIN JACOBS forwarded a letter to the accounting firm of Reznick Fedder & Silverman in response to their financial audit of the Partnership for the year ending July 17, 1988. Paragraph 11 of that letter executed by Defendant MARTIN JACOBS states as follows:

> "Management fees due to the general partner for the period January 1, 1988 through July 17, 1988 are $150,000.00. **Any and all additional accumulative fees for this period and prior years for which the partnership may be held liable, pursuant to Article 7.07 of the Agreement of Limited Partners, have been waived by the General Partner".** (emphasis added)

See: Exhibit 12.

Despite the fact that (1) the audited Financial Statements of the Partnership made no reference whatsoever of alleged accruing management fees; (2) the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS represented to the limited partners on a number of occasions that no "management fees" in excess of $150,000.00 per year would ever be taken by them; and (3) more importantly, Defendant MARTIN JACOBS in writing, reaffirmed to the accounting firm of Reznick Fedder & Silverman that the Defendants would not take, and the Partnership would not be liable for, any additional accruing management fees, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS nevertheless decided to pay themselves the sum of $2,735,045.00 as "management fees" from the proceeds of the Vogel sale, to the detriment of the Partnership. See: Exhibit 10.(letter dated 5/20/88)

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants breached their fiduciary duty of honesty, loyalty and good faith and misrepresented material facts in connection with their acts on behalf of the Partnership.

D. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS Misrepresented the Nature and Extent of the Additional Compensation Which they Paid to Themselves in Violation of the Partnership Agreement and their Fiduciary Duty.

In addition to the annual management fees totalling $1,350,000.00, the $1,560,000.00 in salary and $2,735,045.00 in "additional" management fees taken by the Defendants in 1988, the Freestate Defendants improperly took extensive other sums in compensation, perquisites, salaries, expenses and deferred pension income in violation of the Partnership Agreement and their fiduciary duty.

Section 7.10 of the Agreement of Limited Partnership specifically states that:

> "No salaries or compensation, other than as expressly set forth in this Agreement shall be paid to any partner..."

However, contrary to the Partnership Agreement and reassurances by the Defendants, the evidence demonstrates that the Freestate Defendants improperly took extensive compensation, perquisites, salaries, expenses and deferred pension income for part-time work in breach of their fiduciary duty and the Partnership Agreement.

First, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS paid to themselves excessively large amounts in a deferred income pension plan from Partnership funds in direct violation of Section 7.10 of the Partnership Agreement.

Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, created the "Freestate Racing Association, Inc., Defined Benefit Pension Plan in 1982" for employees which included Defendants MARTIN JACOBS and FRANK J. DeFRANCIS. At the time of its termination, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS "received distributions from the plan". See: Affidavit of Martin Jacobs. It is critical to observe that the pension created by these Defendants is in addition to the pension provided to other employees under the Maryland Harness Track Employees Pension Fund as required by State law. Based upon the Financial Statements, more than $1,000,000.00 was paid into this pension, most of which is for the benefit of Defendants MARTIN JACOBS and FRANK J. DeFRANCIS. See: Exhibit 8. Since discovery is still pending, the exact amount which Defendants MARTIN JACOBS and FRANK J. DeFRANCIS took as "pension" benefits is still not known. However, this additional "compensation" in excess of $1,000,000.00 was simply a device for funneling additional compensation to themselves in violation of the express terms of Section 7.10 of the Partnership Agreement and their fiduciary duty.

Second, the Defendants repeatedly misrepresented in the audited Financial Statements their intention to take accrued management fees in the amount of $2,735,045.00 and, in fact,

made numerous misrepresentations that those fees would not be taken.

Third, the Defendants made payments from Partnership funds to Frank J. DeFrancis' girlfriend, Lynda O'Dea, including a $125,000.00 bonus, one year after the Partnership sold its assets, which represents a bonus of 10 times her annual salary of $12,500.00, in direct violation of the Partnership Agreement. See: Exhibit 8.

Despite the fiduciary duty of honesty, good faith and loyalty, and the Defendants' own representations as set forth in the Partnership Agreement, the evidence demonstrates that the Defendants breached their fiduciary duty, misrepresented material facts and improperly took excessive amounts and various types of compensation, perquisites and expenses, etc., all of which constitutes fraud, breach of the Partnership Agreement, negligence and a breach of their fiduciary duty.

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants breached their fiduciary duty of honesty, loyalty and good faith and misrepresented material facts in connection with their acts on behalf of the Partnership.

E. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS Breached their Fiduciary Duty of Loyalty by Negotiating a Deal for Their Personal Benefit to the Detriment of the Partnership.

The law in Maryland is well established that the rigid duty of loyalty, honesty and good faith owed by a fiduciary in a partnership precludes the fiduciary from taking advantage of a business opportunity for his personal advantage to the detriment

of his partners. Dixon v. Trinity Joint Venture, 49 Md. App. 379, 431 A.2d 1364 (1981). The Court of Special Appeals in Dixon, quoting Alvest Inc. v. Superior Oil Corporation, 398 P.2d 213, 215 (Alaska, 1965) stated: (emphasis added)

> "A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation. **It is inconsistent with a breach of such duty for an officer or director to take advantage of a business opportunity for his own personal profit when applying ethical standards of what is fair and equitable in a particular situation, the opportunity should belong to the corporation. Where a business opportunity is one in which the corporation has a legitimate interest, the officer or director may not take the opportunity for himself.** If he does, he will hold all resulting benefit and profit in his fiduciary capacity for the use and benefit of the corporation".

This law applies with equal force to business opportunities presented to corporate officers and partners. In Faracias v. City Vending Co., 232 Md. 457, 463-64, 194 A.2d 298 (1963) the Court of Appeals said:

> "This Court has long recognized as a corollary to the law of a corporate officer's and director's fiduciary duty, that, when presented with a business opportunity to fulfill a corporate purpose, he should take advantage of it, not for himself, but for the corporation".

In direct violation of the fiduciary duty imposed by law in Maryland, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS negotiated for themselves a deal with the new purchaser (Vogel) in which Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, as former stockholders of Freestate Racing Association, Inc., would receive the sum of $3,000,000.00, plus interest at the rate of 10.5% over five (5) years, couched as a covenant not to

compete. See: Financial Statement and Independant Audit of Freestate Racing Association, Inc., dated December 31, 1989, Paragraph F-10 Note D attached hereto and incorporated herein a Exhibit 18.

However, the deal negotiated by the Defendants for the sal of the Partnership assets was designed to pay $3,000,000.00 to the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS including the assets of the race track being sold were owned by the Partnership and not Defendants MARTIN JACOBS and FRANK J. DeFRANCIS. Defendants MARTIN JACOBS and FRANK J. DeFRANCIS wer shareholders of the General Partners. Under their fiduciary duty of Defendants MARTIN JACOBS and FRANK J. DeFRANCIS they could not, as a matter of law, take advantage of this business opportunity for their own personal profit when, in fact, this asset was owned by and belonged to the Partnership and not them.

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants breached their fiduciary duty of honesty, loyalty and good fait and misrepresented material facts in connection with their acts on behalf of the Partnership.

F. Damages Caused by the Breach of Fiduciary Duty by Defendants FRANK J. DeFRANCIS and MARTIN JACOBS to the Detrimen of the Limited Partners.

The Freestate Defendants argue that because the Plaintiffs actually made a profit on their investment, they have suffered no damages. This argument is intentionally designed to obscure certain relevant facts relating to the Defendants acts and omissions.

Throughout the Freestate Defendants' Motion for Summary Judgment, the Freestate Defendants repeatedly refer to the fact that the Plaintiffs "profited" from their investment in the limited partnership. This fact has never been disputed by the Plaintiffs.

The Defendants argue that simply because the Plaintiffs invested $850,000.00 and "profited" from their investment, they have no basis to complain, even though the profits to which the were legally and properly entitled would have been significantly higher, but for the fraud, negligence and other wrongful acts committed by Defendants, FRANK J. DeFRANCIS and MARTIN JACOBS, during their tenure as general partner, which resulted in the conversion of more than $5,000,000.00 to the Defendants from the Plaintiffs in direct violation of the express terms of the Partnership and their fiduciary duty.

Ironically, the Defendants conveniently omit critical facts relating to the monies which they took from the Partnership in violation of the Partnership Agreement and their fiduciary duty which is strategically designed to obscure the nature and extent of their fraudulent acts and omissions. First, the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS did not contribute any money to the Partnership. All $850,000.00 placed at risk in the Partnership was invested and risked by the limited partners and Plaintiffs herein. Thus, the Partnership was funded by the limited partners' investments and not by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS. Without the investment of the Plaintiffs and the other limited partners, the Freestate

Defendants would have not been able to purchase Freestate. The Defendants used the Plaintiffs' money to accomplish this goal.

Second, in examining the profits earned by the Plaintiffs on their $850,000.00 investment, it is critical to view those profits against the hugh sums taken by Defendants FRANK J. DeFRANCIS and MARTIN JACOBS as "compensation" from the Partnership during their brief tenure as general partners.[3]

From 1980 to 1988, Defendants FRANK J. DeFRANCIS and MARTIN JACOBS were paid $2,920,000.00 by the Partnership in salary and management fees. See: Exhibits 8 and 19.

In addition, from 1980 to 1988, Defendant MARTIN JACOBS' law firm, Ginsburg, Feldman & Bress, was paid $699,802.00 during that same period. See: Exhibits 8 and 19.

Furthermore, in 1988, Defendants MARTIN JACOBS and FRANK J. DeFRANCIS paid themselves an additional $2,735,045.00 in management fees.

In addition, as a result of the deal negotiated by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS with Mark Vogel, MARTIN JACOBS and FRANK J. DeFRANCIS received $3,000,000.00 plus interest at 10.5% over five (5) years.

---

[3] While Defendant MARTIN JACOBS argues that the success of Freestate resulted in large part from his "great personal efforts", Defendant MARTIN JACOBS spent no more than four days per week at the track during the 95 day racing season and "rather infrequently" during the off season. See: Deposition transcript of Andrew Eastwick, pps. 39-40 attached hereto and collectively incorporated herein as Exhibit 20. Furthermore, Defendant MARTIN JACOBS continued to be actively involved and received compensation from his law firm, Ginsburg Feldman & Bress, and begining in 1986, also worked for Pimlico race track *in connection with a separate business "deal".*

In addition, Defendants FRANK J. DeFRANCIS and MARTIN JACOBS were paid from Partnership funds more than $1,000,000.00 to a "pension" in which the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS are the primary beneficiaries.

Finally, as a result of the sale of the Partnership to Mar Vogel and the Cafritz Group, Inc., Defendants MARTIN JACOBS and FRANK J. DeFRANCIS received in excess of $5,400,000.00 in distributions.

In summary, while the Freestate Defendants contend that th Plaintiffs should not complain because they made a profit on their investments, the facts clearly demonstrate that Defendant: FRANK J. DeFRANCIS and MARTIN JACOBS received in excess of $15,900,453.00 in compensation during the operations of the Partnership despite not investing any money.

Compensation, Fees, Pensions, Salaries, Profit Taken by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS	
Salary 1980 - 1988	$1,570,000.00
Management Fees 1980 - 1988	$1,350,000.00
"Extra" Management Fees 1988	$2,735,045.00
Attorneys Fees Paid to Ginsburg, Feldman & Bress	$699,802.00
Travel and Entertainment	$141,606.00
Covenant not to compete from Vogel Sale	$3,000,000.00
	plus int. 10.5% over 5 years
Profit on Sale of Partnership	$5,400,000.00
Pension (estimate)	$1,000,000.00
Total amounts taken by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, excluding benefits for expenses and other perquisites	$15,900,453.00

In their recitation of facts, what the Freestate Defendant conveniently omit the fact that for less than 95 days of active racing per year, Defendants MARTIN JACOBS and FRANK J. DeFRANCI received compensation which averaged almost $1,800,000.00 per year for eight (8) years. See: Exhibits 8 and 19.

If the Freestate Defendants had not defrauded the Plaintiffs and honored their fiduciary duties, the Plaintiffs would have been entitled to their proportionate share of the amounts fraudulently and improperly taken by the Freestate Defendants.

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants breached their fiduciary duty of honesty, loyalty and good fait and misrepresented material facts in connection with their acts on behalf of the Partnership.

G. The Claims of Plaintiff, Burton Solomon, Raise Significant Disputes Pertaining to Material Facts and Therefore, the Defendants Request for Summary Judgment as to His Claims Must be Denied.

The Freestate Defendants allege that the Plaintiff BURTON SOLOMON's claims are "completely unfounded" as shown by the "uncontroverted evidence". To the contrary, the Freestate Defendants ignore the great weight of the evidence which supports the Plaintiff BURTON SOLOMON's claims that he was defrauded by the Freestate Defendants into selling his Partnership interest for approximately 10% of that which he would have received had he not sold his shares before the subsequent sale to Mark Vogel and the Cafritz Group, Inc.

In April, 1986, Dr. Solomon met with Defendant MARTIN JACOBS at his law office to discuss his investment. At the time, Plaintiff BURTON SOLOMON was retired and depended entirely upon his investments for income. In response to Plaintiff BURTON SOLOMON's inquiry into the possibility of selling his interest, Defendant MARTIN JACOBS told him that since the racing industry was in such poor financial straits, neither the track nor the land was not "worth a dime" and that he was "stuck" with his investment. See: Exhibit 4. Interestingly enough, in early 1988, it was determined that the real estate upon which the track was located had a value of between $8,000,000.00 to $10,000,000.00. See: Deposition of Mark Vogel, pages 5 and 14 attached hereto and collectively incorporated herein as Exhibit 21.

In early August, 1986, Dr. Solomon received a letter from the general partner regarding the financial status of the Partnership, as did the other limited partners. This letter repeated, in large part, a "gloom and doom" outlook previously provided to Plaintiff BURTON SOLOMON by Defendant MARTIN JACOBS at their meeting in April, 1986. Immediately after receiving that letter, Plaintiff BURTON SOLOMON forwarded a letter to Defendant MARTIN JACOBS in which he once again expressed a concern about the management fees claimed by the general partners as well as the viability of his investment. Based upon statements made to him by Defendant MARTIN JACOBS in April, 1986 and repeated in the August, 1986 letter, Plaintiff BURTON SOLOMON considered the possibility of selling his Partnership

interest.

In late December, 1986, Plaintiff BURTON SOLOMON received another correspondence from the general partners again outlinir the general "malaise gripping the harness racing industry" nationally and the Freestate raceway in particular. In that letter, the general partners directly solicted the limited partners in an attempt to "match limited partners who want to sell" with "limited partner who want to buy". See: Exhibit 7. Immediately after receiving that letter, Plaintiff BURTON SOLOMON sold his Partnership interest. See: Exhibit 4.

In fact, however, Dr. Solomon's shares were not purchased by a "limited partner who wanted to buy". Rather, they were purchased by Tom Manfuso, an individual well known in the racin industry and who was, at the time, business partners with both Defendants MARTIN JACOBS and FRANK J. DeFRANCIS at the Laurel and Pimlico race tracks. However, this fact was not disclosed to Plaintiffs.

At the same time that Defendants MARTIN JACOBS and FRANK J DeFRANCIS were making repeated representations to the Plaintiff BURTON SOLOMON pertaining to the financial problems of the racing industry in general and the Freestate race track in particular, Mark Vogel, who purchased the track less than 15 months later, testified that the racing industry in Maryland "was very healthy" and did not have any economic or financial problems of any great significance from 1986 through 1988. See: Deposition of Mark Vogel, pages 28-29 attached hereto and collectively incorporated herein as Exhibit 22. In fact, Mr.

Vogel's recollection during that time was that the track "was doing very well" and he wanted to buy it because he thought it was a good investment. See: Deposition of Mark Vogel, pages 18 and 37 attached hereto and collectively incorporated herein as Exhibit 23.

At the same time that Defendants MARTIN JACOBS and FRANK J. DeFRANCIS were making repeated representations to the Plaintiff BURTON SOLOMON pertaining to the financial problems of the racing industry in general and the Freestate race track in particular, Defendant FRANK J. DeFRANCIS was able to call Tom Manfuso and convince him to buy into the Partnership for one and one-half times the original purchase price. Mr. Manfuso's deposition is scheduled for July 30, 1992 and upon information and belief, it is expected that Mr. Manfuso will testify as to the nature and extent of the representations by Defendant MARTIN JACOBS regarding the viability of the Partnership which representations induced Mr. Manfuso to pay one and one-half times the original purchase price based upon the representations of Defendant MARTIN JACOBS.

Despite repeated representations by Defendants MARTIN JACOBS and FRANK J. DeFRANCIS, the Financial Statement filed by the Defendants demonstrated that the Partnership's Operating Revenue had actual increased from $3,088,390.00 to $7,877,573.00 and the Partnership's net income had increased from a loss of $1,058,057.00 to $545,676.00 in net income, all of this despite the enormous fees, pensions, salaries and compensation being taken by the Defendants MARTIN JACOBS and FRANK J. DeFRANCIS.

Based upon the aforegoing, there is sufficient evidence supporting Plaintiff BURTON SOLOMON's claims and therefore the request for summary judgment as to his claims must be denied.

H. The "Consent of Limited Partners" by the Plaintiffs as Part of the Vogel Transactions Does Not Constitute a Release of Any and All Future and Unknown Claims Against the Freestate Defendants.

The Freestate Defendants argue that the "Consent of Limited Partners" executed by the Plaintiffs (except for Plaintiff Burton Solomon) as part of the Vogel transaction in 1988, operates as a waiver of any and all future and unknown claims which any of the Plaintiffs may have. Interestingly enough, the Freestate Defendants, through the four (4) separate attorneys and two (2) separate law firms representing their interests, fail to cite one single shred of authority supporting that position. The obvious reason for that failure is that there is no authority whatsoever which supports their allegation.

First, the paragraph within the Vogel sale documents on which the Defendants rely is not called a release and is not intended to be a release of any and all claims. According to the express terms of the Private Placement Memorandum, the consent of the limited partners "is required to sell, exchange or dispose of the race track". See: Exhibit 1. This "Consent of the Limited Partners", relied upon by the Defendants, was executed as part of the closing documents to comply with the Agreement.

Even if the Freestate Defendants could somehow offer evidence that it was intended to be a "release", it does not operate to release any and all future and unknown claims against

all parties. The law in Maryland is well established that a release is the "giving up or abandoning of a claim or right to the person against whom the claim exists..." Whitcomb v. National Exchange Bank, 123 Md. 612, 91 A.689 (1914). Therefore, a claim which arises subsequent to the execution of a release or is otherwise unknown, certainly cannot be waived by that release. In the instant case, the Freestate Defendants repeatedly represented to and assured the Plaintiffs that any alleged "accrued" management fees "would not actually be paid" to the general partner in excess of $150,000.00 per year. See: Exhibit 6. It was not until after the sale to Vogel that the limited partners discovered the Defendants had improperly taken fees, payments and monies which form the basis of the Plaintiffs' claim herein.

Quite simply, the Freestate Defendants' theory seems to be that this "Consent to Sale of Partnership Assets" constitutes a release which bars any and all past wrongful acts committed by the Defendants which are not yet known by the Plaintiffs and any and all future unknown acts by the Defendants have not yet even occurred. This argument is not supported by any legal authority and is wholly without merit.

In determining whether or not this paragraph was intended to release any and all past and future unknown acts and omissions of the Freestate Defendants, the release is to be construed in accordance with the intention of the parties and the object of the instrument, and therefore has no effect on matters not a subject of the release. Wheaton Triangle Lanes,

Inc. v. Rinaldi, 236 Md. 525, 204 A.2d. 537 (1965); Bernstein Kapneck, 298 Md. 452, 430 A.2d. 602 (1981). In the instant case, the "Consent of Limited Partners" was executed as part o and in furtherance of the sale to Vogel and cannot in any way b construed to relate to the wrongful and fraudulent acts of the general partner unknown to the Plaintiffs at the time of its execution, or which did not yet occur.[4]

Finally, since the Freestate Defendants served in a fiduciary capacity in their relationship and dealings with the Plaintiffs, additional considerations must be given. When the exists a fiduciary relationship, "there must be a full and frar disclosure by the person in the fiduciary relationship in orde to sustain the effectiveness of the release." Parish v. Maryland and Virginia Milk Producers Assoc., 250 Md. 24, 242 A.2d. 512 (1968). In the instant case, at the time this "Consent of Limited Partners" was presented to the Plaintiffs for signature, the Freestate Defendants failed to disclose a number of pertinent facts, including but not limited to: that they would actually take the more than $2,700,000.00 in management fees not previously disclosed; that during the operations of Freestate, significant sums were paid to Defendan FRANK J. DeFRANCIS' girlfriend out of Partnership funds; that improper and unreasonable pension contributions in excess of

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[4] Ironically, the Defendants themselves did not intend this to be a release and have referred to this paragraph not as a release of any sort, but as an "Assignment of Partnership Interest or Alternatively, Consent to Sale of Partnership Property". See: Exhibit 11.

$1,000,000.00 were taken by Defendants FRANK J. DeFRANCIS and MARTIN JACOBS from Partnership funds in violation of the Partnership Agreement; that $527,000.00 was also going to be paid from Partnership funds for "severance pay" and various "employee bonuses"; and that the Defendants had negotiated a private deal in which they would be paid $3,000,000.00, plus interest at 10.5% over five (5) years from Partnership funds.

It is a stretch of credulity to conclude, as a matter of law, the "Consent of Limited Partners" was a release and this release was intended to release any and all past and future acts and omissions of the Freestate Defendants, even though the Plaintiffs were not aware of any yet.

Where the evidence is conflicting or different inferences can reasonably be drawn from evidence, as in the case at bar, the resolution of the issues relating to the release is a question of fact for the jury. Western Maryland Dairy Corp. v. Brown, 169 Md. 257, 181 A. 468 (1935).

In light of the aforegoing, there is more than sufficient evidence from which a jury could conclude that the Defendants breached their fiduciary duty of honesty, loyalty and good faith and misrepresented material facts in connection with their acts on behalf of the Partnership.

V. Conclusion

In light of the foregoing, there are genuine disputes as to material facts and, therefore, the Freestate Defendants are not entitled to judgment as a matter of law. Accordingly, the Plaintiffs respectfully request that the Freestate Defendants'

Motion for Summary Judgment be denied; that the Freestate Defendants be directed to pay a reasonable sum of counsel fees as a result of the preparation and presentation of the instant matter; and award the Plaintiffs such other and further relief as the nature of this case may require and to which this Honorable Court shall appear just and proper.

Respectfully submitted,

WORTMAN, NEMEROFF & BULITT

David Bulitt

DAVID BULITT
Counsel for Plaintiffs
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College Park, Maryland 20740
(301) 220-0865

IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

JOSEPH L. ELY, et al.	:	
Plaintiffs,	:	
v.	:	Case No. 91CA-17037
FREESTATE RACING ASSOCIATION, INC., et al.	:	
Defendants.	:	

O R D E R

UPON CONSIDERATION of the Plaintiffs Opposition to the Freestate Defendants' Motion for Summary Judgment and upon review of the entire record herein, it is this ____ day of _____, 1992, by the Circuit Court for Howard County, Maryland,

ORDERED, that the Freestate Defendants' Motion for Summary Judgment be, and hereby is DENIED; and it is further

ORDERED, that the Freestate Defendants' be, and hereby directed to pay to the Plaintiffs the sum of $_____, as counsel fees incurred as a result of the instant matter.

_____
JUDGE, Circuit Court for
Howard County, Maryland

ANDREW JAY GRAHAM *†
JAMES M. KRAMON *†
LEE H. OGBURN
JEFFREY H. SCHERR
NANCY E. GREGOR †
JAMES P. ULWICK †‡
PHILIP M. ANDREWS
GERTRUDE C. BARTEL †
MARILYN HOPE FISHER * o
MAX HIGGINS LAUTEN †
KATHLEEN A. BIRRANE
KEVIN F. ARTHUR
ARON U. RASKAS †
SETH M. ROTENBERG
PERRY F. SEKUS

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OF COUNSEL
FREDERICK STEINMANN

16

August 26, 1992

Ms. Saundra E. Banks, Clerk
Circuit Court for Baltimore City
111 North Calvert Street
Courthouse East
Baltimore, Maryland 21202

RE: Manfuso, et al. v. De Francis, et al.
Case No. 92120052/CE 147851

Dear Ms. Banks:

I have enclosed for filing in this case the original and one copy of Plaintiffs' Opposition to Defendants' Motion to Dismiss or for Summary Judgment as to the Second Amended Complaint. Please date-stamp and return the extra copy to the messenger. Thank you for your consideration in this matter.

Sincerely,

Kevin F. Arthur

Kevin F. Arthur

KFA/jas
Enclosures
cc: The Honorable Ellen L. Hollander (w/encl.)
Mr. John A. Manfuso, Jr. (w/encl.)
Mr. Robert T. Manfuso (w/encl.)
James E. Gray, Esquire (w/encl., hand delivered)
Linda S. Woolf, Esquire (w/encl., hand delivered)
Irwin Goldbloom, Esquire (w/encl.)
McGee Grigsby, Esquire (w/encl.)
Jennifer Archie, Esquire (w/encl.)
Herbert S. Garten, Esquire (w/encl.)

FILED
AUG 27 1992
CIRCUIT COURT FOR
BALTIMORE CITY

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * * * * * *

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT
AS TO THE SECOND AMENDED COMPLAINT

Plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. ("the Manfusos"), by and through their attorneys, James P. Ulwick, Kevin F. Arthur, and Kramon & Graham, P.A., respond as follows to the defendants' motions to dismiss or for summary judgment as to the Manfusos' Second Amended Complaint:

I. THE LEGAL STANDARD APPLICABLE TO THE MOTIONS

Throughout this litigation, the defendants have consistently evidenced their unwillingness or their abject failure to grasp the standards applicable to their motions to dismiss. The defendants' incessant demand for "specific" factual allegations[1] betrays either an ignorance of the very rudiments of modern notice pleading or, more likely, a craven desire to resolve the case on technicalities so as to preclude

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[1] See, e.g., Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second Amended Complaint, at 6, 14, 18, 26; Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 21, 33-34.

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any discovery concerning the merits of the Manfusos' allegations. The defendants cannot claim with any credibility that the Manfusos' pleadings do not give fair notice, given the reams of paper that the defendants have devoted to addressing the Manfusos' charges.[2] Nevertheless, because the defendants have struggled so mightily to obscure the applicable legal standards, the Manfusos must reiterate the rules that the Court should apply in assessing the defendants' motions.

A. The Standards Applicable Generally to all Motions to Dismiss For Failure to State a Claim.

Insofar as the defendants have moved to dismiss the Second Amended Complaint for failure to state a claim upon which relief can be granted, their motions simply serve to test the legal sufficiency of that pleading. See, e.g., District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979); United States v. Azrael, 765 F. Supp. 1239, 1242 (D. Md. 1991). Hence, in assessing the motions, the Court must consider the allegations in the complaint in the light most favorable to the Manfusos (Berman v. Karvounis, 308 Md. 259, 264, 518 A.2d 726, 728 (1987)) and must accept as true all well-pleaded material facts as well as any

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[2] Consider, for example, the Memorandum of Law in Support of the Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint. That pleading, which is over two inches thick, consists of: 37 pages of argument (including a portion that incorporates by reference an additional 15 pages from an earlier memorandum); a tendentious affidavit, 27 pages and 39 paragraphs in length; and a total of no fewer than 40 exhibits in addition to the affidavit.

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reasonable inferences that may be drawn therefrom. Flaherty v. Weinberg, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985); Black v. Fox Hills North Community Ass'n, 90 Md. App. 75, 79, 599 A.2d 1228, 1230 (1992).

Moreover, to withstand the motions to dismiss, the Manfusos need only to have alleged facts that, if proved, would entitle them to relief. Flaherty v. Weinberg, 303 Md. at 136, 492 A.2d at 136; accord Conley v. Gibson, 355 U.S. 41, 45-46 (1957)(under F. R. Civ. P. 12(b)(6), "a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In fact, the rules themselves provide that:

> a mere informal statement of a cause of action will suffice and that it shall be "brief and concise and contain only such statements of fact as may be necessary to constitute a cause of action."

General Fed. Constr., Inc. v. D.R. Thomas, Inc., 52 Md. App. 700, 705, 451 A.2d 1250, 1253-54 (1982)(quoting Md. R. 301 b, which became Md. R. 2-303(b) in 1984).

B. The Standards Applicable to the Motions to Dismiss the Claims for Injunctive Relief.

As Judge MacDaniel recognized in his memorandum opinion of June 19, 1992, the same highly deferential standard of review applies to all claims in the complaint, including the claims for injunctive relief. Accord C.N. Robinson Lighting Supply Co. v. Board of Educ. of Howard County, 90 Md. App. 515, 523, 602 A.2d 195 (1992) (even highly imprecise allegations will state a claim

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for injunctive relief in this era of notice pleading); Mannings v. Board of Pub. Instruction of Hillsborough County, Florida, 277 F.2d 370, 372 (5th Cir. 1960)(a complaint for injunctive relief may not be dismissed for failure to state a claim "if under any theory of recovery a case can be made out by the proof"); Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316, 323 (S.D. Fla. 1973)(quoting Cook & Nichol, Inc. v. The Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971))(a court will not dismiss a claim for injunctive relief "unless it appears to a certainty that the plaintiff would not be entitled to recover under any set of facts which could be proved in support of his claim").

Thus, the Manfusos have no heightened obligation to plead "specific" facts showing their entitlement to injunctive relief, the defendants' contentions to the contrary notwithstanding.[3] Instead, with the claims for injunctive relief, as with all

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[3] See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 21-22, 33-34. De Francis and Jacobs typically premise their contention on cases such as Mayor of Salisbury v. Camden Sewer Co., 135 Md. 563, 572-73, 109 A. 191 (1920), which predate modern notice pleading.

De Francis and Jacobs had previously argued that the Court should consider the so-called "balance of hardships" in evaluating the legal sufficiency of the Manfusos' claims for injunctive relief. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 29-33 (June 5, 1992). De Francis and Jacobs appear to have abandoned that argument as untenable in light of Judge MacDaniel's ruling that the balancing of comparative hardships has no place at this juncture in the proceedings.

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other claims in the complaint, the motions to dismiss must fail if the Manfusos have alleged facts that, if proved, would entitle them to relief. Flaherty v. Weinberg, 303 Md. at 136, 492 A.2d at 136.

C. The Standards Applicable to the Motion to Dismiss the Claims for Declaratory Relief.

The Court must proceed with extreme caution in assessing the motions to dismiss to the extent that they may still apply to the Manfusos' claims for declaratory relief[4]: As the Court of Appeals has pointed out, "Legions of our cases hold that a demurrer, the type of motion to dismiss here involved, is rarely appropriate in a declaratory judgment action." Broadwater v. State, 303 Md. 461, 465, 494 A.2d 934, 936 (1985)(collecting authorities).[5] In fact, the Court of Appeals has held that,

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[4] The defendants previously asserted that several of the claims for declaratory relief failed to state a claim upon which relief can be granted. See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and all Claims for Injunctive Relief, at 3-6 (June 5, 1992). It is unclear whether the defendants have abandoned that assertion in their present motions.

[5] In support of that proposition, the Court of Appeals cited the following cases: State v. Burning Tree Club, 301 Md. 9, 16-18, 481 A.2d 785, 788-89 (1984); City of Bowie v. Area Dev. Corp., 261 Md. 446, 456, 276 A.2d 90, 95 (1971); Borders v. Board of Education, 259 Md. 256, 258-59, 269 A.2d 570, 571 (1970); Balto. Import Car v. Md. Port. Auth., 258 Md. 355, 338-39, 265 A.2d 866, 867-68 (1970); Merc. Safe Dep. & Tr. v. Reg. of Wills, 257 Md. 454, 459, 263 A.2d 543, 545-46 (1970); Kacur v. Employers Mut. Cas. Co., 253 Md. 500, 504 n. 2, 254 A.2d 156 158 n. 2 (1969); Woodland Beach Ass'n v. Worley, 253 Md. 442, 447-48 252 A.2d 827, 830 (1969); Causey v. Gray, 250 Md. 380, 391, 243 A.2d 575, 583-84 (1968); Garrett County v. Oakland, 249 Md. 400, 401-02, 240 A.2d 228, 229 (1968); Hunt v. Montgomery County, 248 Md. 403, 408-10, 237 A.2d 35, 37-39 (1968); Queen Anne's County v. Miles, 246 Md. 355, 362, 228, A.2d 450, 453

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"generally, it is only when the declaration sought does not present a justiciable issue . . . that a demurrer would be appropriate." Woodland Beach Property Owners Ass'n, Inc. v. Worley, 253 Md. 442, 448, 252 A.2d 827, 830 (1969); see also Shapiro v. Board of County Comm'rs, 219 Md. 298, 302-03, 149 A.2d 396, 399 (1959)("[t]he test of the sufficiency of the bill is not whether it shows that the plaintiff is entitled to the declaration of rights or interest in accordance with his theory, but whether he is entitled to a declaration at all; so, even though the plaintiff may be on the losing side of the dispute, if he states the existence of a controversy which should be settled, he states a cause of suit").

D. The Standards Applicable to the Extent that the Court Treats the Motions as Motions for Summary Judgment.

De Francis and Jacobs have attempted to convert their motion into a motion for summary judgment by attaching De Francis's affidavit. Md. R. 2-322(c). If the Court elects to consider the affidavit,[6] then the Court may enter judgment

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(1967); Myers v. Chief Fire Bureau, 237 Md. 583, 591, 207 A.2d 467 (1965); Kelley v. Davis, 233 Md. 494, 498, 197 A.2d 230, 231 (1964); Md. Committee v. Tawes, 228 Md. 412, 419-20 n. 4, 180 A.2d 656, 659 n. 4 (1962); Shapiro v. County Comm., 219 Md. 298, 302-03, 149 A.2d 396, 398-99 (1959). Since Broadwater, the court has reiterated that a demurrer or motion to dismiss is rarely appropriate in a declaratory judgment action: Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 687 n. 2, 526 A.2d 598, 600 n. 2 (1987).

[6] The Manfusos submit that the Court should not consider De Francis's affidavit for a number of reasons.

First, despite the requirement that an affidavit set forth such facts as would be admissible in evidence (Md. R. 2-

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against the Manfusos if and only if "there is no genuine dispute as to any material fact" and De Francis and Jacobs are "entitled to judgment as a matter of law."

In view of the strictures defining the limited scope of Rule 2-501, the courts have long recognized that summary judgment is not a substitute for trial, but is instead only a procedure to dispose of those rare cases in which there is no genuine controversy. See, e.g., Foy v. Prudential Ins. Co. of America, 316 Md. 418, 421, 559 A.2d 371, 373 (1989); Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 325,

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501(c)), De Francis's affidavit contains a number of hearsay statements, such as those of De Francis's secretary (¶ 4), the summaries of De Francis's and Lynda O'Dea's credit card charges (¶¶ 7-10 and Exhibit 2), and De Francis's recitation of Ernst & Young's alleged conclusions concerning the 1990 financial statements (¶ 27). The presence of these hearsay statements, moreover, draws into question the veracity of De Francis's sworn assertion (¶ 1) that the facts in the affidavit are within his personal knowledge.

Similarly, the affidavit repeatedly departs from the requirement of providing "facts," instead offering legal argument and De Francis's apparently inexpert opinions on a variety of subjects. Those subjects include the scope of the Manfusos' fiduciary duties (¶ 38), the legitimacy of the corporations' alleged "business purposes" (see ¶ 35), and the interpretation of Ernst & Young's reports (¶ 36).

Finally, the affidavit is so full of truculent invective, and its intemperate tone is so utterly inappropriate to any civil proceeding, that the Court should consider striking it from the record. Cf. Md. R. 2-322(e). Indeed, as the affidavit serves in large part merely to controvert various assertions in one of the Manfusos' affidavits, the Court must question whether De Francis and Jacobs acted in bad faith or without substantial justification in having the affidavit accompany a motion for summary judgment. Md. R. 1-341.

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389 A.2d 887 (1978); Pullman Co. v. Ray, 201 Md. 268, 272, 94 A.2d 266 (1953).

Consistent with the narrow scope of Rule 2-501, a court, in assessing a motion for summary judgment, must view the facts in the light most favorable to the party opposing the motion. See, e.g., Beard v. American Agency Life Ins. Co., 314 Md. 235, 246, 550 A.2d 677, 682 (1988); Kramer v. Bally's Park Place, Inc., 311 Md. 387, 389, 535 A.2d 466, 467 (1988); Burwell v. Easton Memorial Hospital, 83 Md. App. 684, 687, 577 A.2d 394, 395 (1990). Indeed, a court must afford "great deference" to the party opposing the motion. Syme v. Marks Rentals, Inc., 70 Md. App. 235, 238, 520 A.2d 1110, 1111 (1987). Hence, courts must resolve all reasonable inferences in favor of the party opposing the motion. See, e.g., Clea v. Mayor City Council of Baltimore, 312 Md. 662, 677, 541 A.2d 1303, 1310 (1988); see also Fenwick Motor Co. v. Fenwick, 258 Md. 134, 138, 265 A.2d 256, 258 (1970).[7]

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[7] In their motions the defendants make a number of melodramatic assertions about the purported inability of "the Manfusos and their counsel" (e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 36) to cure what the defendants see as defects in the complaint, the amended complaint, and the complaint now before the Court. The Manfusos would like to respond briefly and to set the record straight about the history of the various amendments.

At an expedited hearing scheduled for the defendants' convenience, Judge MacDaniel dismissed one portion of one count of the original complaint, but granted leave to amend. In reaching his decision, Judge MacDaniel expressly declined to consider two separate grounds upon which he might have upheld the original complaint. To date, no judge has considered those

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II. THE MANFUSOS HAVE STANDING TO RAISE THE CLAIMS ASSERTED IN THE SECOND AMENDED COMPLAINT

In previous papers the Manfusos have patiently refuted the canard that they have no "standing" to bring this case. Specifically, the Manfusos have demonstrated that they have standing in three capacities: (1) as parties to the Stockholders Agreement; (2) as directors of Laurel and Pimlico[8]; and (3) and as shareholders in Laurel and Pimlico. The defendants' latest motions, however, crassly ignore the Manfusos' previous arguments, not to mention the express allegations in the Manfusos' Second Amended Complaint.[9] As a

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grounds in connection with any pleading filed in this case.

The Manfusos originally amended their complaint after they moved for an ex parte and interlocutory injunction concerning matters that did not even arise until after the filing of the original complaint. By adding a new Count III, the amended complaint provided a basis in the pleadings for the ex parte and interlocutory injunctive relief for which the Manfusos had moved. The amended complaint, moreover, was clearly an interim measure, as it did not undertake to address the effect of Judge MacDaniel's ruling.

The Second Amended Complaint contains all of the central allegations of the original complaint as well as the new count added by the amended complaint. Aside from that, the Second Amended Complaint does little more than add a paragraph (¶ 45) that responds to the substance of Judge MacDaniel's ruling.

[8] As used herein, the terms "Laurel" and "Pimlico" have the meanings assigned to them in the Second Amended Complaint.

[9] By way of just one example, the corporate defendants essentially ask the Court to disregard the Manfusos' allegation (Second Amended Complaint, ¶¶ 1, 47, 48) that they have suffered injury as a result of the abuses alleged in their pleadings. Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second

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consequence, the Manfusos are constrained to explain once again the grounds entitling them to bring this action.

A. The Manfusos have standing as parties to the Stockholders Agreement.

Despite the defendants' constant attempts to confuse the issues, the Manfusos have presented the Court with a very simple series of questions. The Manfusos have to come to the Court asking, first, whether they have the right to present their grievances to the Court despite the so-called "standstill provision" in the Stockholders Agreement. If the Court determines that the standstill provision bars the Manfusos' suit at this time, then the Manfusos will resign as directors and wait until October 1993 to seek the Court's assistance in remedying the abuses alleged in their pleadings. If, on the other hand, the Court determines that the standstill provision does not bar the Manfusos' action, then the Court may proceed to the second set of questions in the case -- the questions involving the merits of the substantive allegations in the Manfusos' pleadings.

The Stockholders Agreement plainly provides the Manfusos with standing to present the Court with the first question: It would seem obvious that the Manfusos, as parties to the Stockholders Agreement, have standing to ask the Court to

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Amended Complaint, at 9. The corporate defendants' request is, to say the least, somewhat at odds with the rule requiring the Court to accept the truth of the allegations in the Manfusos' complaint. Flaherty v. Weinberg, 303 Md. at 135-36, 492 A.2d at 628.

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declare their rights thereunder. See, e.g., Md. Cts. & Jud. Proc. Code Ann. § 3-406 (1974, 1989 Repl. Vol.) ("Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations under it"). Thus, the motions to dismiss lack any cognizable basis in law or in fact insofar as they concern the analytically primary question in this litigation: whether the Stockholders Agreement requires the Manfusos to wait until October 1993 before raising their substantive claims against De Francis and Jacobs.[10]

The Stockholders Agreement, moreover, creates various obligations running from De Francis and Jacobs to the Manfusos. For example, through the Stockholders Agreement, De Francis and Jacobs receive in the aggregate more than $1 million per year in exchange for their agreements, express or implicit, to devote their time and energies to Laurel and Pimlico. In addition, De Francis and Jacobs acquired their positions as officers and

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[10] The defendants' motions reiterate their assertion that the Manfusos have breached the standstill provision merely by bringing this suit. See, e.g., Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.], at 2 n. 3. The defendants provide virtually no support for their assertion, which, in any event, conveniently fails to account for the express and implicit exceptions to the standstill provision.

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directors through the Stockholders Agreement.[11] Likewise, through the Stockholders Agreement and an employment contract executed pursuant to it, Laurel and Pimlico secured the vital services of James Mango for a ten-year period.

While the defendants choose to ignore the substance of the Manfusos' specific allegations, the Second Amended Complaint, like its predecessors, does in fact allege that De Francis and Jacobs have breached their obligations under the Stockholders Agreement and the documents executed pursuant to it. Simply stated, the Second Amended Complaint, interpreted in the light

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[11] The defendants dispute that contention, asserting that De Francis and Jacobs could have appointed themselves to the positions that they hold because of their controlling interests in Laurel and Pimlico. See, e.g., Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second Amended Complaint, at 14. The defendants' assertion fails to account for the testimony of the plaintiff John A. Manfuso, Jr., at the hearings on the Manfusos' motion for an interlocutory injunction.

At those hearings, Mr. Manfuso testified that, before Frank De Francis's death, Laurel's owners had adopted a stockholders agreement, under which a Russian Roulette provision would take effect if Frank De Francis's successor were to make unsound business decisions. Mr. Manfuso further testified that the elder De Francis had assured him that he would have a role in selecting a successor at Pimlico, where the owners had yet to put in place a formal shareholders agreement.

When Frank De Francis died, the Manfusos opposed his son's attempt to succeed to his late father's positions and salary. According to Mr. Manfuso, his opposition resulted in an impasse, because of the substantial threat of litigation over the Manfusos' right to have a role in naming Frank De Francis's successor. Only through the Stockholders Agreement did the parties resolve that impasse; therefore, only through the Stockholders Agreement did De Francis and his ally Jacobs acquire the offices that they now hold.

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most favorable to the Manfusos (Berman v. Karvounis, 308 Md. 259 at 264, 518 A.2d at 728 (1987)), alleges: that De Francis and Jacobs have breached the Stockholders Agreement by devoting their best efforts, not to Laurel or Pimlico, but to their pursuit of personal profit in the Texas racing industry; that De Francis and Jacobs have breached the Stockholders Agreement through their breaches of the fiduciary duties attendant to the positions that they acquired through the Stockholders Agreement; and that De Francis and Jacobs have breached the Stockholders Agreement and the documents executed pursuant to it by enticing Mango to join them in their Texas racing ventures. These allegations therefore demonstrate the Manfusos' standing to raise the set of substantive questions that the Court will be called upon to decide once it resolves the initial question of the Manfusos' right to ask for a declaration of their rights under the Stockholders Agreement.

Nowhere do the defendants deny that the complaint, fairly read, establishes these allegations. Nor do the defendants claim to lack notice or understanding of how the complaint could serve as a predicate for those allegations. Instead, the defendants are reduced to raising the asinine argument that the Second Amended Complaint does not expressly "claim" a breach of the Stockholders Agreement. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 20.

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The short answer to that argument is that the Nineteenth Century ended some time ago. Courts today assess the sufficiency of complaints not by playing the types of word games that the defendants have employed to avoid the merits of the case, but rather by looking to whether the complaint gives fair notice to the defendants. In this case the defendants cannot seriously dispute that the Second Amended Complaint satisfies that liberal standard. Accordingly, the Court should reject the defendants' suggestion that the Manfusos lack standing by virtue of their status as parties to the Stockholders Agreement.

B. The Manfusos Have Standing as Directors to Raise the Claims in the Complaint.

As directors, the Manfusos have the right and the obligation to examine information concerning the corporations,[12] including records concerning the enormous amounts of money that the corporations have paid in attorneys' fees to outside counsel (Second Amended Complaint, ¶ 33) and information concerning the propriety of management's allocation of expenses as between Pimlico and Laurel. Second Amended Complaint, ¶ 34. To that

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[12] See, e.g., Pilat v. Broach Systems, Inc., 108 N.J. Super. 88, 95, 260 A.2d 13, 17 (1969)("It is the duty of [a director] to keep himself informed of the business of the corporation. To perform this duty intelligently he has the unqualified right to inspect its books and records."); Henshaw v. American Cement Corp., 252 A.2d 125, 128 (Del. Ch. 1969)("A director of a Delaware corporation has the right to inspect corporate books and records; that right is correlative with his duty to protect and preserve the corporation. He is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he often has a duty to consult them.").

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extent, therefore, the Manfusos indisputably have standing as directors to protest the defendants' withholding of such information. See Pilat v. Broach Systems, Inc., 108 N.J. Super. 88, 95, 260 A.2d 13, 16 (1969)(upholding director's right to inspect books of record and account in director's action against corporation); Henshaw v. American Cement Corp., 252 A.2d 125, 129 (Del. Ch. 1969)(ordering corporation to produce books and records to director in action by director against corporation).[13] Furthermore, it is simply ludicrous to suggest that, despite their status both as directors and as owners and parties to the Stockholders Agreement, the Manfusos must sit on their hands and wait until 1993 before taking any action to remedy the abuses detailed in their pleadings. Hence, the Manfusos must have standing as directors to bring the claims alleged in the Second Amended Complaint.

C. The Manfusos Have Standing as Shareholders, and They Have Adequately Alleged the Futility of Demanding that the Boards of Directors Bring the Action on the Corporations' Behalf.

From the very beginning of the case, the defendants have argued that this is a shareholders' derivative action, which the

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[13] Indeed, despite a great deal of discussion about corporate governance and a director's right to act on a corporation's behalf (e.g., Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second Amended Complaint, at 11-13), the corporate defendants at least no longer seem to deny that the Manfusos, as directors, have at least some right to demand access to materials that they, as directors, have a right and obligation to review. Id. at 6-7.

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Court should dismiss on account of the Manfusos' alleged failure to demand that the boards of Laurel and Pimlico bring suit against De Francis and Jacobs.[14] The Manfusos disagree with the characterization of the case as a derivative action; in the Manfusos' view, this is first and foremost a declaratory judgment action, especially in light of the analytically primary question of whether the Manfusos have the right under the Stockholders Agreement to ask the Court whether they have the right to remedy the abuses detailed in their pleadings. The corporate defendants, moreover, now seem to have acknowledged at least that the claims for access to legal and accounting information represent "direct" claims belonging to the Manfusos rather than "derivative" claims belonging to the corporations. Motion to Dismiss [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.], at 6-7. Nevertheless, if the Court views the case in whole or in part as a derivative action and if the Court concludes that the Manfusos have not made a proper demand, the defendants' motions still fail because the Court should find

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[14] The Manfusos in fact have alleged demand (Second Amended Complaint, 21); the corporate defendants, however, seem to argue again (see supra n. 9) that the Court somehow should simply disregard that allegation, notwithstanding that the Court must assume the truth of all allegations in the complaint. Flaherty v. Weinberg, 303 Md. at 135-36, 492 A.2d at 628.

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that demand is excused under the allegations in the Second Amended Complaint.[15]

To determine whether demand is excused, the Court should look to whether the Manfusos can show any set of facts that would prove the futility of making demand. 13 W. Fletcher, Fletcher's Cyclopedia of the Law of Private Corporations § 5965, at 154 (1991 rev. vol). According to Fletcher, demand is excused where the alleged wrongdoers own a majority of the stock (id. at 155) or control a majority of stock and the board of directors. Id. In addition, according to Fletcher, demand may also be excused where the plaintiff has alleged both the defendant's control of the corporation as well as such additional facts as would demonstrate that through personal or other relationships the remaining directors are beholden to the controlling person. Id.

To establish the futility of making demand upon the boards of Pimlico and Laurel, the Manfusos made the following allegations:

> As shareholders, the Manfusos are excused from making demand upon the Boards of Directors to bring suit, because demand would be futile for the following reasons: First, De Francis and Jacobs, who control Pimlico and Laurel through their control of a majority of the stock in those entities, can neither be expected nor permitted to maintain a suit against themselves. Second, the

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[15] The motions also fail because, as demonstrated above, the Manfusos have standing as parties to the Stockholders Agreement and as directors even if they do not have standing to bring this case as a shareholders' derivative suit.

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> remaining directors, Joseph Sellinger, S.J. ("Father Sellinger"), and Alec Courtelis ("Courtelis"), are under the domination and control of De Francis and Jacobs, because De Francis and Jacobs selected and nominated them for office and because they owe their continued tenure and the continued enjoyment of the benefits and prestige appurtenant to their offices to their alliance with De Francis and Jacobs. Third, Father Sellinger, as President of Loyola College, is particularly beholden to De Francis and Jacobs because of the enormous gifts that Loyola College has received from De Francis and his family and because of Father Sellinger's desire to ensure an unabated flow of similar gifts in the future. Fourth, Courtelis is beholden to and allied with De Francis because he and De Francis serve as co-executors of the estate of Frank J. De Francis, the primary vehicle through which De Francis and Jacobs assert their control over Pimlico and Laurel. Fifth and finally, when the Manfusos detailed the abuses alleged in this Complaint and demanded that the Boards act to remedy those abuses, Father Sellinger and Courtelis approved of or acquiesced in the abuses without conducting any investigation or analysis of the merits of the Manfusos' charges.

Second Amended Complaint, ¶ 45.

In short, the Manfusos have alleged, among other things, that De Francis and Jacobs control a majority of the stock,[16] and thus control the boards of Pimlico and Laurel; under those circumstances, one would hardly expect De Francis and Jacobs to authorize or to permit the corporations to authorize a suit against themselves. Cf. Parish v. Maryland & Virginia Milk Producers Ass'n, 250 Md. 24, 81-82, 242 A.2d 512, 544 (1968),

[16] Paragraphs 3 and 4 of the Second Amended Complaint also show that De Francis and Jacobs control a majority of the stock of both Pimlico and Laurel.

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aff'd on reh'g, 261 Md. 618, 277 A.2d 19, cert. denied, 404 U.S. 940 (1971)(demand is excused when entire board is implicated in wrongdoing). Furthermore, in ¶ 45 of the Second Amended Complaint, the Manfusos have given the Court a list of specific allegations[17] showing that the remaining, supposedly "disinterested" directors are in truth anything but independent from De Francis and Jacobs. Given these allegations, the Second Amended Complaint falls squarely within the class of cases in which, according to Fletcher, demand is excused. Fletcher, supra, § 5965, at 155 (demand is excused where the alleged wrongdoers own a majority of the stock, or where the alleged wrongdoers control a majority of the stock and the board, or where the plaintiff has shown the wrongdoers' control and additional facts demonstrating that the remaining directors are beholden to the wrongdoers).

In assailing the adequacy of the Manfusos' allegations, the defendants rely on cases such as Grill v. Hoblitzell, 771 F. Supp. 709 (D. Md. 1991), in which Judge Motz held that a plaintiff had failed to allege demand futility with the

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[17] The Maryland Rules, unlike the rules applicable in Delaware or the federal courts, do not require a plaintiff to plead futility with "particularity." Compare Aronson v. Lewis, 473 A.2d 805, 808 n. 1 (Del. 1984)(citing Del. Ch. R. 23.1); F. R. Civ. P. 23.1. Nonetheless, any honest reading of ¶ 45 immediately refutes the corporate defendants' cavil (Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second Amended Complaint, at 20) to the effect that it consists only of "conclusory" allegations.

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particularity required under F. R. Civ. P. 23.1 -- a requirement that Maryland law does not impose. In Grill, moreover, the plaintiff apparently had premised his claim of futility on nothing more than a conclusory charge that all of the directors had breached their duties. Grill v. Hoblitzell, 771 F. Supp. at 709. By contrast, the Manfusos have given painstakingly detailed allegations of De Francis's and Jacobs's abuses. In addition, in showing why Sellinger and Courtelis cannot reasonably be expected to conduct an impartial assessment of the Manfusos' claims, the Manfusos have made a number of additionally detailed allegations, including: Sellinger's desire to ensure an unabated flow of the enormous gifts that Loyola College has received in the past from De Francis and the De Francis family; and Courtelis's role as co-executor of the Estate of Frank De Francis, the primary vehicle through which De Francis and Jacobs have exercised their control over Pimlico and Laurel. Complaint, ¶ 45.

These allegations provide far more than the "vague[] assert[ions]" of "personal relationships among the directors"[18] involved in Grill -- they depict Sellinger and Courtelis as the minions of De Francis and Jacobs. Just as important, the Manfusos' allegations effectively rule out the possibility that the boards could find two disinterested directors to serve as a special litigation committee and to assess the Manfusos' claims.

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[18] Grill v. Hoblitzell, 771 F. Supp. at 712.

Compare Grill v. Hoblitzell, 771 F. Supp. at 712; Rosengarten v. Buckley, 613 F. Supp. 1493, 1498-99 (D. Md. 1985).[19]

The defendants also rely on Kamen v. Kemper Fin. Servs., Inc., 939 F.2d 458 (7th Cir. 1991), in which the Seventh Circuit, purporting to apply Maryland law,[20] also held that a plaintiff had not alleged demand futility with the particularity required under F. R. Civ. P. 23.1. Among other things, Kamen holds that a director's receipt of fees for his or her services does not excuse a plaintiff from making demand upon the director. See also Aronson v. Lewis, 473 A.2d 805 (Del. 1984)(allegation that defendant selected "disinterested" directors did not establish demand futility with the particularity required by Del. Ch. R. 23.1).

But even Kamen does not preclude a court from considering the director's receipt of fees or a director's dependence on the defendant, together with other allegations that the director is

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[19] The boards, of course, could consider appointing the Manfusos to a special litigation committee, but the circumstances suggest that that is not likely to occur.

[20] The opinion by Judge Easterbrook, who is notorious for imposing his personal economic views on the law, frankly concedes the absence of any authority from Maryland on the issues before the court. Kamen v. Kemper Fin. Servs., Inc., 939 F.2d at 460, 461. The opinion goes on to engage in recklessly broad speculation about what Maryland "might" (id. at 462) or "could well" (id. at 461) ultimately decide to do on the issues more or less involved in that case. Indeed, the opinion actually goes so far as to suggest (id. at 462) that Maryland might opt to require demand even when it would be futile to make a demand, thereby overruling decades of precedent -- a proposition that would appear highly unlikely to anyone with even a passing familiarity with the work of the Court of Appeals of Maryland.

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beholden to a defendant, in assessing demand futility. In this case the Manfusos have not merely alleged that Sellinger and Courtelis depend on De Francis and Jacobs for their positions and the benefits and prestige appurtenant thereto; the Manfusos have further alleged the intricate details of the alliance among De Francis, Jacobs, Sellinger, and Courtelis. Kamen, therefore, cannot supply the ground for dismissing the Second Amended Complaint.[21]

Finally, De Francis and Jacobs argue that in his order of June 19, 1992, Judge MacDaniel "found" that the corporations had "some disinterested directors." Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary

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[21] The defendants' use of Kamen illustrates the logical fallacy underlying their attack on the Manfusos' allegations concerning the futility of demand. In essence, the defendants parse ¶ 45 (the paragraph containing the allegations of futility), conducting a separate analysis of each separate allegation in the paragraph. The defendants then purport to show that each individual allegation -- considered separately and apart from the others -- fails to establish futility of demand. Then, having satisfied themselves that no single allegation in and of itself establishes futility, the defendants leap to the conclusion that the paragraph as a whole fails to establish futility.

But even assuming arguendo that no single allegation in ¶ 45 would establish futility when considered alone, it certainly does not follow that the various allegations considered in conjunction with one another do not establish futility. Through their flawed reasoning, however, the defendants have avoided any consideration of the cumulative effect of the Manfusos' allegations. In the Manfusos' view, each allegation in ¶ 45 -- when considered on its own, and certainly when considered in conjunction with each of the other allegations in that paragraph -- more than suffices to establish the futility of making demand on the type of directors who serve on the boards of the corporations involved in this case.

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Judgment as to Plaintiffs' Second Amended Complaint, at 11. According to De Francis and Jacobs, Judge MacDaniel's "finding" prevents the Manfusos from alleging the futility of making demand upon the boards. Id.

That argument misrepresents the import of Judge MacDaniel's order, as the Manfusos have already demonstrated.[22] At the hearing that preceded the issuance of his opinion, the judge heard no evidence. Indeed, the Court convened the hearing for the sole purpose of assessing the legal sufficiency of one portion of one count of the Manfusos' original complaint. Hence, Judge MacDaniel had no basis upon which to predicate factual findings, nor any reason to make such findings.[23]

Given these circumstances, it is disingenuous for De Francis and Jacobs to describe Judge MacDaniel's order as having

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[22] See Plaintiffs' Opposition to Defendants' Motions to Dismiss, at 12 n. 8 (July 15, 1992). The corporate defendants appear to make a similarly erroneous argument, but they take fewer liberties than do De Francis and Jacobs with the language and scope of Judge MacDaniel's ruling. See Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.], at 21 n. 17. Nonetheless, according to the corporate defendants, Judge MacDaniel somehow ruled that the Manfusos lacked standing as directors or as parties to the Stockholders Agreement. Id. at 5. To the contrary, Judge MacDaniel expressly declined to consider the Manfusos' standing as directors or as parties to the Stockholders Agreement even though the consideration of those issues might have precluded him from dismissing the portion of the complaint then before the Court.

[23] The Court should also observe that, to permit the Manfusos to address the effect of his ruling, Judge MacDaniel granted them leave to amend -- a circumstances that is certainly inconsistent with any notion that he intended to make some sort of finding of fact binding on the Manfusos.

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resolved a factual dispute in such a way as to bind the parties throughout the remainder of this litigation. Instead, interpreted candidly, Judge MacDaniel's order merely holds that the allegations in the original complaint failed to show that demand was excused, because the complaint failed to allege the absence of interested directors.

In response to the grant of leave to amend, the Second Amended Complaint contains allegations showing how a majority of the board cannot reasonably be expected to take any action to curb De Francis's and Jacobs's abuses. Second Amended Complaint, ¶ 45. As demonstrated above, those allegations suffice to excuse the Manfusos from demanding that the boards remedy the abuses. Accordingly, neither the order nor any of the other "authorities" in the defendants' motions pose an impediment to the Manfusos' pursuit of the claims alleged in the Second Amended Complaint.

III. THE COURT SHOULD DENY THE MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS IN COUNT II FOR INJUNCTIVE RELIEF

De Francis and Jacobs have attempted to convert their motion into a motion for summary judgment by accompanying it with De Francis's lengthy and bellicose affidavit. Md. R. 2-322(c).[24] The motion and affidavit appear to address some,

[24] By adopting the arguments raised in De Francis's and Jacobs's papers, the corporate defendants seem to have joined in that motion. Memorandum of Law in Support of Motion [by The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.] to Dismiss Plaintiffs' Second Amended Complaint, at 1 n. 1.

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though not all, of the specific claims for injunctive relief in Count II of the Second Amended Complaint. To the extent that the present motion and affidavit do not supersede earlier motions to dismiss or for summary judgment as to all the claims in Count II, the Manfusos respectfully refer the Court to the responses that they have made to the earlier motions.[25] To the extent that the present motion and affidavit appear to present new, substantive arguments,[26] the Manfusos will respond below.

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[25] Those responses include: Plaintiffs' Opposition to Defendants' Motions to Dismiss the Complaint Insofar as It Concerns Texas Racing Matters (June 17, 1992); and Plaintiffs' Opposition to Defendants' Motions to Dismiss (July 15, 1992).

[26] De Francis's affidavit contains testimony on a variety of subjects of seemingly questionable legal significance, because the motion itself entirely ignores them. Still, the Manfusos must respond however briefly at least to some of that testimony, given the gravity of the charges that De Francis has made in the affidavit.

For example, the affidavit and the accompanying exhibits dwell at length on the Freestate Racetrack litigation, apparently to show that John A. Manfuso, Jr., (¶¶ 13-16) "or his attorneys" (¶ 16) have made false representations to the Court about the merits of charges against Jacobs in that litigation. In his hysteria, however, De Francis has failed to note that Mr. Manfuso took no position as to the merits of the charges against Jacobs, saying only that the existence of the charges caused him concern. Affidavit of John A. Manfuso, Jr., ¶ 12 n. 1.

As another example, the affidavit and approximately 30 of the exhibits purport to demonstrate that Mr. Manfuso has told "knowing and intentional lies" (¶ 19) in describing the negotiations between De Francis and the so-called "Guida Group." Again, however, De Francis in his haste has either deliberately or carelessly misconstrued Mr. Manfuso's affidavit. Contrary to De Francis's evident assertion, Mr. Manfuso did not describe the entire course of De Francis's negotiations with Guida as a purely personal matter. Rather, Mr. Manfuso accurately applied that description to Guida's offer to buy De Francis's stock and that of his father's estate. Affidavit of John A. Manfuso, Jr., ¶ 14 ("Mr. Guida then offered to purchase Mr. De Francis' stock,

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A. The Court Should Deny the Motion Insofar as It Concerns the Corporate Loan Accounts.

The Second Amended Complaint, like its predecessors, alleges that De Francis and Lynda O'Dea charged numerous personal expenditures on corporate credit cards, that De Francis and O'Dea ultimately reimbursed the corporations for those expenditures only after repeated demands by the Manfusos, that neither O'Dea nor De Francis has reimbursed the corporations for the use of the corporations' money, and that De Francis has established no system to ensure that such abuses do not occur again. Second Amended Complaint, ¶ 32.

In moving for summary judgment on this aspect of the Second Amended Complaint, De Francis and Jacobs rely on De Francis's assertions that he has cancelled all corporate credit cards but his own, that he has curtailed his former practice of running up thousands of dollars per month in personal charges on his corporate credit card, and that now he immediately reimburses the corporations for any credit card charges "of a personal nature." Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 22-23. Based on these

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and that of the Estate. This was a personal or Estate matter and not a legitimate corporate expense for the legal fees required.")

De Francis's shrill accusations, and the ease with which he levels charges of the gravest misconduct, do nothing to inspire confidence in his ability to discharge his obligations to Pimlico and Laurel or to the Manfusos.

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assertions, De Francis and Jacobs argue that "[t]he absence of any evidence of immediate abuse prevents this Court from issuing an injunction with respect to the credit cards." Id. at 23 (emphasis in original).

To the contrary, the facts, viewed in the light most favorable to the Manfusos,[27] undermine the claimed absence of evidence of any threat of "immediate abuse." Despite his $700,000.00 annual salary, De Francis in the past has succumbed to the temptation to use the corporate credit cards as a personal, interest-free line of credit, by his own admission taking over $59,000.00 in 1990 and 1991, including over $17,000 in the month of July 1991 alone.[28] Over the course of two

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[27] Beard v. American Agency Life Ins. Co., 314 Md. at 246, 550 A.2d at 682; Kramer v. Bally's Park Place, Inc., 311 Md. at 389, 535 A.2d at 464; Burwell v. Easton Mem. Hosp., 83 Md. App. at 687, 577 A.2d at 395.

[28] These figures derive from Exhibit 2 to De Francis's affidavit, which accompanies his and Jacobs's Motion to Dismiss and/or for Summary Judgment as to the Second Amended Complaint. The Manfusos do not vouch for the reliability of those figures (see supra n. 6), but note only that De Francis has bound himself by adopting them in his sworn affidavit.

In his affidavit De Francis quibbles with the testimony of John A. Manfuso, Jr., that, to the best of his recollection, De Francis and Lynda O'Dea had made between $75,000.00 and $100,000.00 in personal charges on the corporate credit cards. Affidavit of John A. Manfuso, Jr., ¶ 10. Yet De Francis's own figures show that De Francis and O'Dea together ran up approximately $97,000.00 in personal charges from the end of 1989 until 1991 ($40,000.00 for O'Dea and $57,000.00 for De Francis). Thus, De Francis's own figures bear out Mr. Manfuso's recollection.

On the other hand, De Francis's figures do refute Mr. Manfuso's statement that, to the best of his recollection, the credit card bills had accumulated for over a year. Affidavit of

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years, while abusing his corporate credit card for personal purposes, De Francis consistently promised -- and just as consistently broke his promises -- to repay his loans and to use his credit card only for business purposes. Affidavit of John A. Manfuso, Jr., ¶¶ 8-10. De Francis, moreover, has put in place no system to prevent future abuses. Id., ¶ 10.

Especially when assessed in light of the great deference due to the Manfusos as the parties opposing summary judgment,[29] these facts distinguish the present case from the cases in which a court denies an injunction because of the absence of evidence that the defendant will not desist from his or her wrongful conduct. See Campbell v. City of Annapolis, 44 Md. App. 525, 536-37, 409 A.2d 1111, 1117 (1979), rev'd on other grounds, 289 Md. 300, 424 A.2d 738 (1981)(quoting Whalen v. Dalashmutt, 59 Md. 250, 252 (1883))(an injunction will not issue "where a defendant asserts positively that it is not his intention to do a certain act . . . and there be no evidence to show to the contrary). The egregious nature of De Francis's abuses in the past, his trail of broken promises, and his failure to put in place any internal controls to prevent future abuses provide the

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John A. Manfuso, Jr., ¶ 10. According to De Francis, the credit personal card charges went unpaid only for various periods of six to nine months. In terms of the seriousness of the abuses, however, the Manfusos see no significant difference in allowing the bills to go unpaid for six to nine months as opposed to twelve.

[29] Syme v. Marks Rentals, Inc., 70 Md. App. at 238, 520 A.2d at 1111.

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evidence that should lead the Court to question the efficacy of his current promise not to abuse his credit card any more. Accordingly, the Court should deny the motion for summary judgment insofar as it concerns the corporate loan accounts.

B. The Court Should Deny the Motion Insofar as It Concerns the Manfusos' Access to Information Reflecting Legal Fees Paid to the Corporations' Outside Counsel.

Paragraph 33 of the Second Amended Complaint reiterates the Manfusos' demand for access to information reflecting the enormous sums of money that the corporations have paid to outside legal counsel. The defendants characterize this issue as moot, because they claim to have given all of the relevant information to the Manfusos (albeit reluctantly) in open court on July 24, 1992. See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 24.

The Manfusos disagree that the defendants' actions have made this issue moot. On July 24, 1992, the Manfusos received the pertinent billing data only for Latham & Watkins, not for the corporations' other outside counsel. The Manfusos, however, have requested information showing legal fees paid, not only to Latham & Watkins, but to all of the corporations' outside counsel, including Jacobs's former firm, Ginsberg, Feldman & Bress. Furthermore, in a letter dated March 13, 1992, (Exhibit A) the corporations' attorney, Mr. Grigsby, agreed to provide the requested billing data, not only for his own firm (Latham &

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Watkins), but also for other outside counsel, specifically including Ginsberg, Feldman & Bress.

Given these circumstances, this issue will not become moot until the Manfusos receive all the information which they have requested and which they have a right and obligation to review. For that reason, the Court should deny the motion insofar as it concerns the Manfusos' right of access to information reflecting legal fees paid to outside counsel.

C. The Court Should Deny the Motion to the Extent that It Concerns the Misallocation of Assets and Expenses as between Pimlico and Laurel.

The Second Amended Complaint charges De Francis and Jacobs with sanctioning the issuance of materially false financial statements for Pimlico and Laurel. In particular, the Second Amended Complaint as well as the affidavit of John A. Manfuso, Jr., show, among other things, that De Francis and Jacobs have caused Pimlico to bear expenses properly belonging only to Laurel[30]; that De Francis and Jacobs have permitted the transfer of valuable assets from Pimlico to Laurel without fair or adequate consideration[31]; and that De Francis and Jacobs have caused Pimlico to shoulder a grossly disproportionate share of the two corporations' charitable contributions.[32] The

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[30] Second Amended Complaint, ¶ 34; Affidavit of John A. Manfuso, Jr., ¶¶ 18-22.

[31] Second Amended Complaint, ¶¶ 36-42; Affidavit of John A. Manfuso, Jr., ¶¶ 23-28.

[32] Second Amended Complaint, ¶ 40; Affidavit of John A. Manfuso, Jr., ¶ 26.

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circumstances suggest that De Francis and Jacobs have engaged in these machinations for the purpose of preventing Laurel from defaulting on its loans to its lender.

1. The Manfusos have alleged, and adduced evidence of, the substantial threat of immediate harm flowing from the false financial statements.

At the outset, De Francis and Jacobs attempt to escape any discussion of these issues essentially by repeating their previous claim[33] that false statements of material fact in the 1990 financial statements do not present an immediate risk of substantial harm to Pimlico or Laurel. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 25. As the Manfusos have pointed out, however, that argument is patently incorrect, as the false financial statements clearly jeopardize Laurel's continuing relationship with its lender. Furthermore, numerous persons, including lenders, regulators, and potential investors, will continue to rely on past and present financial statements to evaluate and monitor the racetracks' financial status. Thus, Pimlico, Laurel, and others do face an immediate risk of substantial harm as long as the false financial statements go uncorrected.

2. The Manfusos have come forward with more than enough evidence to defeat the motion for summary judgment on the issue of the allocation of severance payments as between Pimlico and Laurel.

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[33] Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, at 24 (June 5, 1992).

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Turning to the substance of the motion, De Francis and Jacobs have demanded summary judgment first on the portion of the complaint concerning the allocation of the Manfusos' severance payments as between Laurel and Pimlico. On that subject, the record reveals the following facts:

The 1989 financial statement for Pimlico and Laurel indicates that the severance payments should be evenly allocated between the two tracks. Second Amended Complaint, ¶ 41. Jacobs confirmed the principle of equal allocation in a letter to the corporations' auditors dated March 13, 1990. Second Amended Complaint, ¶ 41; Exhibit B. De Francis likewise confirmed the principle of equal allocation in a letter to Louis P. Guida dated June 21, 1990. Second Amended Complaint, ¶ 41; Exhibit C.

In April 1991, however, John A. Manfuso, Jr., noticed a disparity in the expenses charged to Pimlico as opposed to the expenses charged to Laurel. Affidavit of John A. Manfuso, Jr., ¶ 18. According to Mr. Manfuso, when he inquired about the disparity, De Francis replied that Pimlico alone was bearing the expense of the Manfusos' severance payments in order to keep Laurel from going into default on its loans. Id.

De Francis and Jacobs expressly acknowledge De Francis's admission that, in order to keep Laurel from going into default, Pimlico was to bear both its share and Laurel's share of the Manfusos' severance payments. Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary

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Judgment as to Plaintiffs' Second Amended Complaint, at 26 ("Initially, the corporations were concerned that the 1990 financial statements might reflect that Laurel was in violation of its loan agreement and De Francis so advised the Manfusos"). De Francis and Jacobs nonetheless ask the Court to believe that they ultimately decided to allocate the severance payments to Pimlico alone upon discovering that the principle of equal allocation, which they had previously embraced (e.g., Exhibits B and C), might result in a breach of the fiduciary duties owed to the so-called "Guida Group," the limited partners in Laurel. Id. at 26-27.

In light of the record compiled thus far, the Court may legitimately question whether the defendants' purported explanation represents a bona fide assessment of their fiduciary duties or, rather, a post hoc rationale cobbled together to defeat the Manfusos' claims. Any number of facts point to the latter conclusion, including De Francis's admission that the payments were allocated to Pimlico alone, not for any legitimate business purpose, but instead to prevent Laurel from going into default; De Francis's further admission that the racetracks' expenses were juggled to keep Laurel from going into default[34]; and the various additional accounting improprieties that the Manfusos have uncovered to date, which further evidence a pattern of shifting expenses from debt-laden Laurel to Pimlico,

[34] Affidavit of John A. Manfuso, Jr., ¶ 21.

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and which cast grave doubt on the veracity of the defendants' official explanations.[35]

In summary, therefore, on the subject of the allocation of severance payments as between Pimlico and Laurel, the record reveals, at the very least, a genuine dispute of material fact. For that reason, the Court must deny the defendants' motion insofar as it touches upon that subject. Md. R. 2-501.

3. On the issue of the allocation of charitable contributions as between Pimlico and Laurel, the Court cannot enter summary judgment, because the record generates conflicting inferences as to the legitimacy of De Francis's "explanation."

The Manfusos have drawn into question the disproportionate amount of charitable contributions that Pimlico has been forced to bear, to its detriment but to Laurel's benefit. See, e.g., Second Amended Complaint, ¶ 40; Affidavit of John A. Manfuso, Jr., ¶ 26. De Francis and Jacobs have responded by offering De Francis's purported explanation, which is that Pimlico bears the larger share of charitable contributions "'because it is more dependent on the goodwill and support of the business community and public entities tha[n] is Laurel.'" Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 28 (quoting Exhibit 36 to the Memorandum).

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[35] Affidavit of John A. Manfuso, Jr., ¶¶ 23-27. The defendants' purported explanation, in any event, makes no sense: If De Francis and Jacobs are truly concerned about their fiduciary duties, then they should ask whether they are breaching their fiduciary duties to Pimlico's shareholders by requiring Pimlico to bear Laurel's expenses.

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De Francis's explanation, however, does not account for why Pimlico's charitable contributions suddenly increased by more than 73% (from $124,000.00 to $215,000.00) between 1989 and 1990 while Laurel's charitable contributions declined by 2% (from $130,000.00 to $127,000.00) during the same period. Affidavit of John A. Manfuso, Jr., ¶ 26. Nor does De Francis's explanation account for the abrupt departure from the principle of equally allocating expenses, which obviously applied as late as 1989, when Laurel's charitable contributions roughly equalled Pimlico's ($130,000.00 for Laurel versus $124,000.00 for Pimlico). Id. Nor does De Francis's explanation account for why the abrupt departure from the principle of equal allocation occurred at approximately the same time when, according to De Francis's own admission,[36] Laurel faced the very real prospect of defaulting on its loans. Nor does De Francis's explanation account for why Laurel's charitable contributions in 1989 actually exceeded Pimlico's charitable contributions for that year (again, $130,000.00 for Laurel versus $124,000.00 for Pimlico).

The gaping holes in De Francis's explanation, either in themselves or in conjunction with his admissions about juggling Laurel's books to prevent a default, give rise to the reasonable inference that he and Jacobs have in fact manipulated the

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[36] Affidavit of John A. Manfuso, Jr., ¶ 18; Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 26.

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contributions in order to falsely inflate Laurel's income. That inference precludes the entry of summary judgment insofar as De Francis's and Jacobs's motion extends to the allocation of charitable contributions as between Laurel and Pimlico. Md. R. 2-501.[37]

4. Genuine disputes of material fact preclude the entry of summary judgment on the claims challenging the improper transfer of income from Pimlico to Laurel.

The Manfusos have charged that De Francis and Jacobs improperly caused Pimlico to transfer to Laurel 100% of Laurel's revenue for thirteen racing days running from February 1, 1990, through February 16, 1990. Second Amended Complaint, ¶ 37; Affidavit of John A. Manfuso, Jr., ¶ 23. De Francis and Jacobs do not deny that this "adjustment," as they euphemistically call it,[38] did in fact occur. Instead, De Francis and Jacobs employ an obscure explanation to characterize the wholly gratuitous assignment of revenue as "fully appropriate." Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss

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[37] In his affidavit De Francis also sets forth his justification for various charitable contributions, the legitimacy of which the Manfusos have challenged. Affidavit of John A. Manfuso, Jr., ¶¶ 29-30. Simply put, De Francis's affidavit does nothing more than create a factual dispute between his justification and the Manfusos' charges of waste. Therefore, the Court cannot grant summary judgment on the issue of the legitimacy of the various charitable contributions discussed in the Second Amended Complaint. Md. R. 2-501.

[38] Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 28 (quoting Exhibit 34 to the Memorandum).

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and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 27-28 (quoting Exhibit 34 to the Memorandum).

The Court, however, may legitimately question whether the circumstances suggest a different explanation. Given De Francis's admission that he had allocated Laurel's share of the severance payments to Pimlico to keep Laurel from defaulting on its loans, given De Francis's other admission about juggling Laurel's books (again to keep it from defaulting), and given the genuine dispute as to the propriety of allocating charitable contributions to Pimlico's detriment but to Laurel's benefit, the Court could reasonably infer that the admittedly uncompensated transfer of revenue from Pimlico to Laurel forms one more part in a pattern wherein De Francis and Jacobs wrongfully act to benefit Laurel and to harm Pimlico. In light of that reasonable inference in the Manfusos' favor, the Court must deny the motion for summary judgment insofar as it concerns the transfer of revenue from Pimlico to Laurel. Md. R. 2-501.[39]

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[39] The defendants have also moved to dismiss the portion of the Second Amended Complaint requesting an injunction that would order De Francis and Jacobs to permit the Manfusos to meet with the corporations' auditors. In support of their motion, the defendants argue again that De Francis and Jacobs have not refused to permit the Manfusos to meet with the auditors. Rather, according to the defendants, they have merely imposed "reasonable conditions" on the Manfusos' access to the auditors, viz., a requirement that the Manfusos waive the accountant-client privilege by having their accountant present his report to the boards for their review and a requirement that the Manfusos' attorney make a presentation at the board meeting. See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to

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IV. COUNT III OF THE SECOND AMENDED COMPLAINT STATES A CLAIM FOR SPECIFIC PERFORMANCE OF THE LETTER AGREEMENT

In Count III of the Second Amended Complaint, the Manfusos ask for specific performance of a letter agreement dated April 27, 1990. The letter agreement (Exhibit D) served to clarify the nature of the benefits that the Manfusos would have the right to receive under the Stockholders Agreement after stepping down as officers of Pimlico and Laurel. Second Amended Complaint, ¶ 59. The benefits included monthly owners' meetings, offices at the racetracks, company cars, and the use of cellular telephones. The Manfusos have alleged that the defendants, without right or justification, purported unilaterally to withdraw these benefits after the Manfusos commenced this action. Second Amended Complaint, ¶ 61.

The defendants have moved to dismiss Count III essentially on three grounds. First, they argue that the letter agreement is an entirely gratuitous undertaking between De Francis and the Manfusos and, thus, unenforceable for want of consideration.

Plaintiffs' Second Amended Complaint, at 17-19.

The Manfusos have already provided a detailed refutation of those same arguments (Plaintiffs' Opposition to Defendants' Motions to Dismiss, at 22-29 (July 15, 1992)); the Manfusos respectfully refer the Court to those papers. In addition, the Manfusos question whether the defendants' requirements resemble "reasonable conditions" as much as they resemble roadblocks to the exercise of the Manfusos' fiduciary duties (much like the recently rescinded requirement that the Manfusos turn over information reflecting their attorneys' fees before the corporations would allow the Manfusos to view information that they, as directors, had requested reflecting the corporations' attorneys' fees).

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Second, the defendants argue that the letter agreement was terminable at will because it contains no term stating its duration. Third, the defendants resurrect their tired refrain that the Manfusos have failed to allege sufficient facts justifying injunctive relief. See, e.g., Memorandum of Law in Support of Motion [by De Francis and Jacobs] to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint, at 31-36. Each of the defendants' arguments lacks merit.

At the hearings on the Manfusos' motion for an interlocutory injunction, the Court has heard evidence concerning the genesis of the letter agreement. In light of the days of extensive testimony and argument with respect to this matter, the Manfusos need not repeat their positions in detail. Suffice it to say, the Manfusos have come forward with evidence showing that the letter agreement had adequate consideration, that the Court can fix an appropriate termination point for the letter agreement, and that the letter agreement is a proper subject for specific performance. While the Court ruled that the Manfusos' evidence did not support the grant of interlocutory relief, that evidence, viewed in the light most favorable to the Manfusos,[40] nonetheless warrants the denial of a motion to dismiss.

On the issue of consideration, the Manfusos must only show that they have given "some value" in return for the benefits

[40] Berman v. Karvounis, 308 Md. at 264, 518 A.2d at 728.

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under the letter agreement. See, e.g., Blumenthal v. Heron, 261 Md. 234, 242, 274 A.2d 636 (1971). The Manfusos have more than met that standard. Their decision to remain as officers of the racetracks through the Preakness, the negotiated concession of monthly owners' meetings as opposed to monthly board meetings, the benefits provided to the corporations by the savings of money wasted in Texas, the benefit of receiving the full value of their charitable contributions, and the benefit of keeping their employees satisfied, all more than satisfy the requirement of "some" consideration.

As to the absence of any explicit durational limit in the letter agreement, the courts have long abandoned the archaic notion that they should decline to enforce an otherwise valid agreement merely on account of a missing term. See, e.g., Restatement (Second) of Contracts § 204 (1979). Instead, the courts will uphold such an agreement if, for example, they can ascertain the missing term by reference to some other document or transaction. Scarlett v. Young, 170 Md. 358, 362, 185 A. 129 (1936); see also Restatement (Second) of Contracts, supra, § 204 (when an agreement lacks an essential term, the court generally should imply a reasonable term).

In this case the letter agreement refers to benefits that by their nature, and by reference to the letter agreement itself, will cease when the Manfusos cease to be owners. By way of an example, monthly owners' meetings surely will not continue after the Manfusos no longer are owners of Pimlico or Laurel.

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Therefore, because the evidence suggests that the letter agreement will terminate if or when the Manfusos' ownership terminates, the Court should not credit the defendants' account of the letter agreement as a contract terminable at will.

Finally, the defendants argue that Count III fails because, they say, the Manfusos have an adequate remedy in damages for the breach of the letter agreement. That argument misses the point.

The defendants' breach of the letter agreement caused, and was designed to cause, harm greater than any harm that the Manfusos can compute mathematically; the withdrawal of benefits under the letter agreement was deliberately calculated to send a message to the racing industry and to the racetracks' employees that the Manfusos do not count and that the Manfusos have no role in Pimlico and Laurel.

The Court can reasonably infer that damages cannot compensate the Manfusos for the incalculable harm resulting from the defendants' efforts to strip them of their standing in Pimlico, in Laurel, and, indeed, in the Maryland racing industry. For those reasons, therefore, the Court should deny the motions to dismiss Count III.

V. CONCLUSION

The defendants have attacked the Manfusos in nearly every conceivable way in what is obviously a fevered attempt to end this litigation before discovery can commence. The Manfusos have responded by refuting each substantive argument that the

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defendants have raised.[41] The Manfusos have demonstrated that they have standing to bring their claims as parties to Stockholders Agreement, as directors, as shareholders, and in a combination of these capacities. In addition, even without the benefit of discovery, the Manfusos have demonstrated the existence of genuine disputes of material fact precluding the entry of summary judgment.

Under these circumstances, the Court should deny the motions and permit the parties finally to proceed to the true, substantive issues at the heart of this case.

Respectfully submitted,

James P. Ulwick by KFA
James P. Ulwick

Kevin F. Arthur
Kevin F. Arthur

Kramon & Graham, P.A.
Kramon & Graham, P.A.
Sun Life Building, 6th Floor
20 South Charles Street
Baltimore, Maryland 21201
(410) 752-6030

Attorneys for Robert T. Manfuso and John A. Manfuso, Jr.

---

[41] In the interest of not unduly prolonging this memorandum, the Manfusos have not taken the opportunity to respond to each straw-man argument or ad hominem attack that the defendants have made.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August, 1992, I sent a copy of Plaintiffs' Opposition to Defendants' Motions to Dismiss or for Summary Judgment as to the Second Amended Complaint by hand-delivery to:

James E. Gray, Esq.
Linda S. Woolf, Esq.
Goodell, DeVries, Leech & Gray
25 South Charles Street
Suite 1900
Baltimore, Maryland 21201;

and by first-class mail, postage prepaid, to:

Irwin Goldbloom, Esq.
McGee Grigsby, Esq.
Jennifer Archie, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505.

Kevin F. Arthur

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KFA:jas:8/26/92.5
M-2:SMS:r-md.2c

Exhibit A

LATHAM & WATKINS

PAUL R. WATKINS (1888-1973)
DANA LATHAM (1888-1974)

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505 MONTGOMERY STREET, SUITE 1900
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FAX (415) 395-8095

March 13, 1992

James M. Kramon, Esq.
Kramon & Graham, P.A.
Sun Life Building
Charles Center
20 South Charles Street
Baltimore, Maryland 21201

Dear Mr. Kramon:

My apologies for being a bit tardy in responding to your letter of February 24, 1992. I have been out of town, and, after returning, got a bit behind schedule.

Based on your letter, I assume Mr. Reynolds has reviewed the American Express records. Please let me know if there is anything further that he needs.

In response to your request for support for the charges for legal services paid by Laurel, Pimlico and/or the Maryland Jockey Club, my clients have requested Latham & Watkins and Ginsberg, Feldman & Brest to provide the standard computer printouts referred to in your letter for the purpose of making this material available to Mr. Reynolds. We would appraciate your asking your clients to make a similar request of Fedder and Garten. The material requested should be directed to the attention of Mr. Jacobs.

Also, with respect to legal charges, to the best of my knowledge, at no time has our firm performed legal work "for the benefit of Laurel and/or the benefit of both Pimlico and Laurel, at Pimlico's expense." Some time in early 1990, as a matter of internal accounting and record-keeping convenience for me, I asked Joe DeFrancis if it would be acceptable for Latham & Watkins to record all work that was for the joint benefit of Laurel and Pimlico on a single account. He consented and for this purpose, I selected the Maryland Jockey Club account as a collective billing vehicle.

Since a very substantial portion of the work our firm performs is for both entities, using the Maryland Jockey Club as the collective billing vehicle reduces the amount of time I am required to spend monitoring the time recording practices of the various attorneys working on the account. Using a single account also makes it unnecessary for the attorneys to split the time entries. There was never any intent that the joint charges be paid by a single entity. The arrangement was solely for my convenience.

From the time Joe DeFrancis and I agreed upon this practice to this date, the Maryland Jockey Club account has been so utilized. At first, nothing on the bills indicated the 50-50 allocation we had agreed upon, but sometime later, in order to avoid confusion at Laurel and Pimlico, we added two extra entries on the bills indicating the allocation.

In contrast, when work is performed that is not for the benefit of both entities, the time is charged separately to that entity on a separate internal account, and a separate bill is sent to that entity. Since your auditor has reviewed the billing statements I assume he will confirm that there have been three separate billing accounts: Maryland Jockey Club, Laurel and Pimlico.

In sum, while it is possible that some internal logging mistakes may have occurred (although I am not aware of any), we have always endeavored to charge each entity separately for work that was solely on behalf of that entity. The Maryland Jockey Club account has been used solely for work that was on behalf of both Laurel and Pimlico. (I am enclosing for your information a letter dated May 15, 1990 from me to Joe DeFrancis explaining this arrangement.)

I trust this provides the information you and Mr. Reynolds need.

Very truly yours,

McGee Grigsby
of LATHAM & WATKINS

Enclosure

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May 15, 1990

Joseph A. DeFrancis
Laurel Racetrack
P.O. Box 130
Laurel, MD 20707

Dear Joe:

Enclosed are the current and the revised bills for Laurel, Pimlico, the Maryland Jockey Club and Preakness Celebration, Inc. Pursuant to our discussions the revisions are as follows:

1. The Preakness Celebration Inc. charges for December ($1,020), January ($1,525.41) and February ($584.85) which had been included in the Pimlico bill have been subtracted from the Pimlico bill and stated separately.

2. The February Pimlico bill was also reduced by $743.01 to reflect disbursements which should have been on the Maryland Jockey Club bill. Thus, the Maryland Jockey Club bill has been increased in a like amount.

3. Commencing in February, all work which was for the benefit of both Pimlico and Laurel is on the Maryland Jockey Club bill.

4. Also commencing in February the only charges on the Pimlico and/or Laurel statements are for work which concerned only the specified entity.

The total amount outstanding on these statements is $56,001.64. I would very much appreciate your bringing these current by the end of the month.

Very truly yours,

McGee Grigsby

Exhibit B

LAUREL

June 21, 1990

BY TELECOPIER AND
FEDERAL EXPRESS
Mr. Louis P. Guida
LPG Enterprises
100 Franklin Corner Road
Lawrenceville, NJ 08648

Dear Lou:

Your letter dated May 15 stated that you would be out of the country for a month and that you would like to meet personally with me after your return. I am writing at this time to address the matters raised in your letter preliminary to a personal meeting. I respond below to the statements in your letter in the order in which they appeared and not necessarily in their order of importance.

1. The Guida Group was not the only party in the original transaction with substantial money at risk. My father and Bob Manfuso personally guaranteed almost $3.8 million in indebtedness and other obligations given the Seller as part of the purchase. They secured their guarantee with the pledge of more than $3.5 million in cash and cash equivalents. Indeed, a portion of their personal obligation to John Schapiro is still outstanding. Their money was at risk just as was your Group's and in approximately the same amount. In addition, Tommy Manfuso put up $6.5 million in cash in the form of a secured loan. My point is not to belittle your Group's original investment but to note that both groups took significant risks. I do not understand your statement about the nature of your Group's involvement and the press. The ownership interest of your Group has been disclosed since the outset in both public and executive session filings with the Maryland Racing Commission.

2. Your Group was not "compelled" to give up anything to get your "money back." There were a number of issues that were raised by your Group at the time concerning the effect of the allocation of profits and losses for income tax purposes, cash distributions and related subjects. There was a serious disagreement at that time between your Group and

ours. These issues were all resolved, after extensive negotiation, in an amicable fashion and an amended relationship was established which resulted in restructuring and a pay-back of your capital.

3. We have made all reasonable efforts to cooperate with your Group and to provide requested and other information on a timely basis. We know of nothing my father "led you to believe" that has not been addressed. During the past several months you asked us to focus on the possible allocation as between Laurel and Pimlico of the proceeds of any sale, refinancing or similar transaction in the event both entities were jointly involved in such a transaction. Obviously, the facts and circumstances at the time of any such transaction would be most relevant in determining the fairest allocation; those facts and circumstances do not necessarily remain constant. For example, we expect the State of Maryland within the next year or two to build and open a train stop on the Laurel Race Course grounds for the State's commuter rail system; this could enhance Laurel's value. Similarly, we are working on Triple Crown lottery games which could provide additional value to Pimlico. Nevertheless, as I told you in my last letter, we have been working on developing a preliminary methodology for allocation that is fair and reasonable. When we have our meeting, I should be in a position to discuss this with you.

4. The agreement with the Manfusos to which you refer provides for severance pay of $125,000 per year for each of them commencing with their retirement as officers effective June 1, 1990 and ending October, 1993. We expect these payments to be shared equally between Laurel and Pimlico. As for your inquiry regarding employment agreements with others, we anticipate that Laurel Racing Assoc., Inc. and the Maryland Jockey Club will enter into employment agreements with Marty Jacobs, Jim Mango and Lynda O'Dea; none is presently contemplated for me. As you know, all three of these individuals have been vitally important members of the management team since the outset in 1984, and it is in the best interests of Laurel and Pimlico -- and was one of my father's last wishes -- to encourage their continued association with the racetracks. When those agreements have been finalized, I will provide further details to you.

5. As requested, I am enclosing a copy of the audited financial statement of the Bowie joint venture and the Maryland Thoroughbred Purse Account, Inc. (MTPA). Although Race Track Payroll Account, Inc. (RTPA) is audited by Ernst & Young, at this time there is no separate audited financial statement of this entity which functions solely as a payroll disbursing entity for Laurel, Pimlico and Bowie. MTPA and RTPA were both established with 50/50 ownership by Laurel and Pimlico in order to simplify procedures for handling the horsemen's purse account and the payroll, to reduce the costs to both entities of payroll related taxes and to segregate the horsemen's money, as was agreed to with them. Laurel's internal financial statement for the first quarter of the current year should be available soon and I will send you a copy at that time.

6. I am personally familiar with many of Marty Jacobs' conversations with you, and I have also discussed your letter with him. I am certain that his position is not now and never has been, expressly or impliedly, as you stated, and I am sorry you have drawn the inferences you mentioned. That is not to say that Marty has always been in agreement with positions taken by you or your advisors. But I totally disagree that his actions showed "disdain" for any request made by your Group or that he does now or has ever viewed your Group as a "necessary evil."

7. Frankly, I do not understand why you or your Group is, nor do I believe you have any cause to be, "quite disgusted" or "disillusioned." As my letter of April 12 indicated, there was no phantom income reported for 1989 and we will make every effort to deal with that subject for 1990. We have been and will continue to be responsive to the concerns you have raised. On a personal level, in view of the very warm relationship my father had with you, I sincerely hope that you and your Group continue to be our partners and that we not end up in an adversarial position.

I have no particular interest at this time in pursuing your suggestion of buying out your Group, which I hope will, together with us, reap the long-term benefits that we all since the outset have contemplated will be achieved. Nevertheless, I would welcome meeting with you to discuss all of the concerns expressed in your letter as well as any other

matters you might wish to discuss. At that time, I also wish to address the Mt. Ascutney situation, where it now appears that my group will likely sustain a significant loss. I suggest that you join me at the racetrack for a meeting and luncheon at a mutually convenient date and time. Please let me hear from you.

Kind regards.

Sincerely,

Joseph A. De Francis
President and Chief
Executive Officer

Enclosures

cc: Mr. Robert T. Manfuso
Mr. John A. Manfuso, Jr.
Mr. Martin Jacobs

Exhibit C

THE MARYLAND JOCKEY CLUB
P.O. BOX 130
LAUREL, MARYLAND 20707

MEMORANDUM

April 27, 1990

Dear Joe:

You have advised us on several occasions that the below listed items are acceptable and have promised to confirm this fact by providing a written memo of confirmation. We understand the pressures of the Preakness and the other matters you are occupied with, and are therefore providing this memo for you to confirm we have agreed to the following:

1. Present fringes to continue; i.e., cars, boxes, dining room privileges and an office.

2. No further investments in Texas racing.

3. Any future payments from either Pimlico or Laurel will be equitably and properly apportioned.

4. All future charitable contributions should be clearly identified as being made by the entity making the actual contribution, followed by the name of the President, if so desired.

5. Monthly owners' meetings will be conducted, with an agenda to include monthly financial statements and information on anything of material nature or that should be brought to the owners' or to our attention.

Please put this matter to rest by countersigning the enclosed copy of this letter and returning it to us.

Thank you for your cooperation.

Sincerely,

John A. Manfuso, Jr.

Robert T. Manfuso

Agreed:

Joseph A. De Francis
Dated: 4/29/90

Exhibit D

THE MARYLAND JOCKEY CLUB
P.O. BOX 130
LAUREL, MARYLAND 20707

March 13, 1990

Cecil E. Flamer, C.P.A.
Ernst & Young
One North Charles
Baltimore, MD 21201

Dear Cecil:

This letter will confirm the following information I provided to you at our meeting yesterday:

1. I gave you last week a copy of the Stockholders Agreement. Please note that Laurel Racing Association Limited Partnership (the "Partnership") is not a party to that Agreement although Laurel Racing Assoc., Inc. is. The Partnership is, of course, the entity whose financial statements are audited by Ernst & Young.

2. Pimlico and Laurel presently intend to charge the monthly severance payments under the Stockholders Agreement to John A., Jr. and Robert T. Manfuso following their retirement one-half each to the Partnership and Pimlico Racing Association, Inc.

3. Although the Stockholders Agreement provides for various employment agreements to be entered into, other than the agreements with the Manfusos such employment agreements have not been entered into as yet.

Sincerely,

Martin Jacobs
Executive Vice President

cc: Mr. Joseph A. De Francis
Mr. Robert T. Manfuso
Mr. John A. Manfuso, Jr.

CASE NO. 92120052/CE147851 PAGE ___ of ___

DATE	DOCKET ENTRIES	NO.
6/26/92	Dyer's Memorandum in Opposition to Pltff's Motion for Ex parte, Interlocutory and Permanent Injunctive relief filed.	10
6/29/92	Dft's Corporations' Memorandum of points and authorities in opposition to pltff's Motion for ex parte interlocutory and permanent injunctive relief filed.	11
7/15/92	Dft's Memorandum of Points and Authorities in opposition to Motion to Dismiss Counter-Claim of the Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Assn., Inc., and Laurel Racing Assoc., Inc. and/or for Summary Judgment filed.	12
7/15/92	Dft's (DeFrancis & Jacobs) Opposition of DeFrancis and Jacobs to Motion to Dismiss and/or for Summary Judgment as to Count III of their Counterclaim filed.	13
7/15/92	Pltff's Answer to Count I of the Counterclaim of Dft's Joseph DeFrancis and Martin Jacobs filed	14
7/15/92	Second amended Complaint for Declaratory and Injunctive Relief filed.	15
7/15/92	Pltff's Motion to Dismiss or for Summary Judgment as to Count III of the Counterclaim of Dft's Joseph DeFrancis and Martin Jacobs and Memorandum of Law in Support thereof filed.	16
7/15/92	Pltff's opposition to Dft's Motion to Dismiss and affidavit of John Mongiso, Jr. in support thereof filed.	17
8/18/92	Pltff's Motion for Ex parte, Interlocutory and Permanent Injunctive relief "heard and denied"; Order to be filed. (Hell Order)	

7/21/92

CC-65 (1/83)

CIRCUIT COURT FOR BALTIMORE CITY
EXHIBIT LIST

PLAINTIFF Morfuse et al

DEFENDANT DeMarcus et al

REFERENCE # 92126050 / CE147851

JUDGE (Nellmeier)

CLERK Loft. **STENO** Day

COURT Paid $20.

	PLAINTIFF EXHIBIT	DEFENDANT EXHIBIT
1.	✓ Stockholders Agreement	Newsletter
2.	✓ outline of Agreement.	Memorandum to J. DeMarcus
3.		Memorandum 6/11/92
4.		
5.		
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(16)

FILED
JUL 15 1992
CIRCUIT COURT FOR
BALTIMORE CITY

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * * * * * *

PLAINTIFFS' MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT AS TO COUNT III
OF THE COUNTERCLAIM OF DEFENDANTS
JOSEPH A. DE FRANCIS AND MARTIN JACOBS

Pursuant to Md. R. 2-322 and Md. R. 2-501, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "the Manfusos"), by and through their attorneys, James P. Ulwick and Kramon & Graham, P.A., move to dismiss Count III of the Counterclaim brought by defendants Joseph A. De Francis and Martin Jacobs. The grounds for this Motion are:

(1) Count III of the Counterclaim fails to state a claim upon which relief can be granted; and

(2) There is no dispute of any material fact, and the Manfusos are entitled to judgment as a matter of law.

The grounds for this Motion appear in detail in the accompanying Memorandum of Law.

James P. Ulwick

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/Kramon & Graham PA

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20 South Charles Street
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(410) 752-6030

Attorneys for Robert T. Manfuso
and John A. Manfuso, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1992, a copy of Plaintiffs' Motion to Dismiss or for Summary Judgment as to Count III of the Counterclaim of Defendants Joseph A. De Francis and Martin Jacobs and Memorandum of Law in Support thereof was hand-delivered to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201;

and sent via Federal Express to:

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

James P. Ulwick

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06:sms:07/15/92:3
16:a:Manfuso\MD-C3

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT AS TO COUNT III
OF THE COUNTERCLAIM OF DEFENDANTS
JOSEPH A. DE FRANCIS AND MARTIN JACOBS

Defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs") have filed a three-count Counterclaim against plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. ("the Manfusos"). Concurrently with this Motion, the Manfusos have answered Count I, which alleges that they fraudulently induced De Francis and Jacobs to enter into a Stockholders Agreement. On June 10, 1992, the Manfusos moved to dismiss or for summary judgment as to Count II, which alleges that they breached the "standstill provision" of the Stockholders Agreement by filing this suit. Now, the Manfusos move to dismiss Count III, which again alleges that, by filing this suit, they have tortiously interfered with De Francis's and Jacobs's "prospective economic interests" in the Texas racing industry.

In order to prevail on Count III, De Francis and Jacobs must allege and prove:

(1) intentional and wilful acts by the Manfusos,

(2) calculated to cause damage and loss to De Francis and Jacobs in their lawful business,

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(3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the Manfusos' part (which constitutes malice), and

(4) actual damage and loss resulting therefrom.

See, e.g., Natural Design, Inc. v. Rouse Co., 302 Md. 47, 71, (1984).

Briefly stated, Count III alleges that De Francis and Jacobs have legitimately involved themselves in the application of Lone Star Jockey Club, Ltd. ("Lone Star"), to construct and operate a racetrack in Texas. Counterclaim, ¶¶ 106-07. De Francis and Jacobs further allege that "the Manfusos" have "acted maliciously and intentionally" (Counterclaim, ¶ 115) in filing "their frivolous and unjustified Complaint" (Counterclaim, ¶ 112) in order to limit or prohibit De Francis's and Jacobs's involvement in Texas (Counterclaim, ¶ 116), and thus to defeat De Francis's and Jacobs's ability to earn millions of dollars in management fees, consulting fees, development fees, and other income through their relationship with Lone Star. Counterclaim, ¶ 107; Counterclaim, ¶¶ 112-20.

In view of these allegations, De Francis and Jacobs clearly intend to prove the Manfusos have acted "without right or justifiable cause" by proving that the Manfusos have instituted a groundless civil suit. See, e.g., W. Keeton, Prosser and Keeton On Torts § 130, at 1009 (5th ed. 1984). Accordingly, if the Court concludes that the Manfusos have not in fact instituted a groundless civil suit, then Count III must fall.

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As stated above, the Manfusos have moved to dismiss or for summary judgment as to Count II, which alleges that they breached the standstill provision of the Stockholders Agreement by filing this suit. In support of that Motion, the Manfusos have demonstrated that they have not breached the standstill provision merely by asking the Court to issue a declaratory judgment as to whether that provision does or does not bar them pursuing a remedy for the substantive allegations set forth in their Complaint. The Manfusos have also shown that the standstill provision contains an express exception permitting the institution of legal action alleging a breach of the terms of the Stockholders Agreement and that De Francis and Jacobs have in fact breached their duties under that Agreement. Finally, the Manfusos have established that the standstill provision must also contain an implicit exception permitting their suit, because otherwise De Francis and Jacobs could breach their fiduciary obligations with impunity.

For all of these reasons, the Court must conclude that the Manfusos have not instituted a groundless civil action. It follows, therefore, that the Court must reject the predicate for De Francis's and Jacobs's claims that the Manfusos have acted "without right or justifiable cause." Accordingly, the Court must enter judgment against De Francis and Jacobs on not only Count II of the Counterclaim, but Count III as well.

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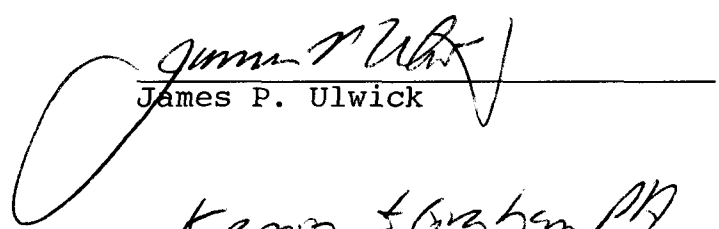
Moreover, where the claim of tortious interference with prospective business advantage is based upon a claim that a plaintiff has filed a groundless suit, the proper procedure is to wait until the conclusion of the first lawsuit. As the Court has stated in Nichols v. Merrill, Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309, 1328 (M.D. Tenn. 1989):

> [I]f a groundless lawsuit can serve as a basis for [a claim of tortious interference with prospective business advantages], the proper vehicle for asserting it can never be a counterclaim during the life of the allegedly meritless suit. Mere common sense teaches us that if a frivolous or malicious suit is to be considered tortious, there must be some sort of judgment on the merits disposing of the suit. To hold otherwise might deter plaintiffs from filing meritorious actions.

For all of these reasons, Count III of defendants' Counterclaim should be dismissed.

Respectfully submitted,



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ROBERT T. MANFUSO, et al.,	*	IN THE	
Plaintiffs	*	CIRCUIT COURT	
v.	*	FOR	
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY	
Defendants	*	Case No. 92120052/CE147851	

FILED
JUL 15 1992
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * * * * * * * * * *

SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "the Manfusos"), by and through their attorneys, James P. Ulwick and Kramon & Graham, P.A., hereby sue Joseph A. De Francis ("De Francis"), Martin Jacobs ("Jacobs"), The Maryland Jockey Club of Baltimore City ("MJC"), Pimlico Racing Association, Inc. ("PRA"), and Laurel Racing Assoc., Inc. ("Laurel"). For cause, the Manfusos state:

I. THE NATURE OF THE ACTION

1. This is an action for declaratory and injunctive relief. The Manfusos have brought this action in order to have the Court declare that De Francis and Jacobs have breached fiduciary and other duties to MJC, PRA, Laurel, and the Manfusos and also to have the Court declare that the Manfusos have the right and obligation to protect MJC, PRA, Laurel, and themselves from those breaches. Once the Court enters the declaratory judgment, the Manfusos respectfully request that the Court issue a permanent injunction barring De Francis and Jacobs from further breaches of their duties.

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II. THE PARTIES

2. The Manfusos are Maryland citizens whose principal place of business is Suite 1010, 8401 Connecticut Avenue, Chevy Chase, Maryland 20815. The Manfusos are shareholders of PRA and Laurel and have been involved in the racing industry for over twenty years.

3. Laurel is a Maryland corporation with its principal place of business at Route 198 and Racetrack Road, Laurel, Maryland 20707. Laurel operates Laurel Racecourse. The stock ownership of Laurel is as follows:

Stockholder	Class A (Voting)	Class B (Non-Voting)	Total
Estate of Frank J. De Francis	550	2,200	2,750
Robert Manfuso	350	1,525	1,875
John Manfuso, Jr.	-0-	1,875	1,875
Jacobs	-0-	1,000	1,000
	900	6,600	7,500

4. MJC and PRA are Maryland corporations with their principal place of business at Pimlico Racecourse, Baltimore, Maryland 21215. MJC and PRA (collectively, "Pimlico") operate Pimlico Racecourse. The stock ownership of PRA is:

Stockholder	Class A (Voting)	Class B (Non-Voting)	Total
Estate of Frank J. De Francis	550	4,150	4,700
Robert Manfuso	210	2,140	2,350
John Manfuso, Jr.	210	2,140	2,350
Jacobs	30	570	600
	1,000	9,000	10,000

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5. De Francis is a Maryland citizen whose principal place of business is Route 198 and Racetrack Road, Laurel, Maryland 20707. De Francis is the President of both Laurel and Pimlico; he is an attorney and the son of Frank J. De Francis.

6. Jacobs is a Maryland citizen whose principal place of business is Route 198 and Racetrack Road, Laurel, Maryland 20707. Jacobs owns 6% of PRA and a 13.33% of Laurel. Jacobs is an attorney and the Vice President of both Pimlico and Laurel. He also functions as the General Counsel of Laurel and Pimlico.

III. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to § 1-501 and § 3-403 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland; the Court has personal jurisdiction over the defendants because they are, variously, Maryland corporations and Maryland domiciliaries.

8. Under § 6-201(a) of the Courts and Judicial Proceedings Article, venue is proper in this Court because all of the defendants carry on a regular business in Baltimore City.

IV. BACKGROUND FACTS

9. In 1984, the Maryland thoroughbred racing industry was in a period of decline. Racing revenues were small, racetracks were being closed, and track attendance was dwindling.

10. In December 1984, Frank J. De Francis and the Manfusos agreed to purchase Laurel, to rejuvenate it, and to endeavor in

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every way to make thoroughbred racing an attractive and profitable enterprise in Maryland. The Manfusos committed millions of dollars of their own money to ensure Laurel's success. The operating duties of Laurel were divided between the Manfusos and Frank J. De Francis. Martin Jacobs negotiated the contracts, provided legal advice, and became an owner as well. Frank J. De Francis served as the President of Laurel, and the Manfusos served as Vice Presidents.

11. In December 1986, Frank J. De Francis and the Manfusos purchased Pimlico, and each allocated three percent of their ownership to Martin Jacobs. The same management team was used to operate Pimlico as was used to operate Laurel.

12. By 1989, Pimlico and Laurel were extremely successful. Racetrack attendance had dramatically increased, and the value of the tracks had likewise increased. In August 1989, however, Frank J. De Francis died.

13. Until the death of Frank J. De Francis, his son De Francis had had minimal involvement in the operation of the tracks. The younger De Francis had in fact been working as an attorney for the law firm of Latham & Watkins. After his father's death, De Francis became one of the executors of his father's estate.

14. De Francis insisted on assuming his father's position as President of Pimlico and Laurel, as well as his father's salary and benefits. The Manfusos objected, pointing out that

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De Francis had no experience in thoroughbred racing, nor any experience that would qualify him to manage such large enterprises. Moreover, the compensation package which De Francis insisted on receiving totaled approximately $700,000.00 per year--a vast overpayment for an executive of his abilities. The estate of Frank J. De Francis, represented by De Francis, controlled a majority of the voting stock of both racetracks. To avoid a lengthy legal battle over the management and control of the racetracks, a letter of understanding was negotiated and signed by the Manfusos and De Francis. The letter of understanding set forth the basic terms of a stockholders agreement to be entered into by the parties.

15. On or about October 1, 1989, the Manfusos, Jacobs, the estate of Frank J. De Francis, De Francis, MJC, PRA, and Laurel entered into the Stockholders Agreement. The Stockholders Agreement is a contract within the meaning of § 3-406 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland. A true and correct copy of the Stockholders Agreement is attached as Exhibit A to the original Complaint and is incorporated herein.

16. The Stockholders Agreement sets forth the agreements between the parties on numerous issues. For example, the Stockholders Agreement provides the terms under which any stockholder can attempt to sell his stock, and it establishes a put/call mechanism to allow either the Manfusos or De Francis

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and Jacobs to purchase the stock of the other side at a time in the future. The Stockholders Agreement also calls for a "standstill" period in which the parties cannot sue one another, with specified exceptions.

17. Pursuant to the Stockholders Agreement, De Francis became President of Laurel and Pimlico. As such, De Francis's duties have included functioning as the Chief Executive Officer and as Co-Chairman of the Boards of Laurel and Pimlico. As an officer and as a director, De Francis was and is required by Maryland law to ensure that the interests of the corporations are protected and that the officers and directors of the corporations place the best interests of the corporations ahead of their own personal interests.

18. Pursuant to the Stockholders Agreement, Jacobs became Executive Vice President, Treasurer, and Director of Laurel and Pimlico. Also pursuant to the Stockholders Agreement, Jacobs received a ten-year employment contract, in return for which he promised to "devote substantially all of [his] time to [his] employment." In addition to his obligations by virtue of his employment contract, Jacobs, as an officer and as a director of Pimlico and Laurel, was and is required by Maryland law to ensure that the interests of the corporations are protected and that the officers and directors of the corporations place the best interests of the corporations ahead of their own personal interests.

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19. Pursuant to the Stockholders Agreement, the Manfusos became Executive Vice Presidents of Laurel and Pimlico, with John A. Manfuso, Jr., serving as Secretary for the corporations. Also pursuant to the Stockholders Agreement, the Manfusos remained on the Boards of both Laurel and Pimlico, with John A. Manfuso, Jr., becoming Co-Chairman of the Board of Pimlico and Robert T. Manfuso becoming Co-Chairman of the Board of Laurel. As officers and directors of Pimlico and Laurel, the Manfusos were and are required by Maryland law to ensure that the interests of the corporations are protected and that the officers and directors of the corporations place the best interests of the corporations ahead of their personal interests.

20. Since the parties executed the Stockholders Agreement, the Manfusos have attempted to fulfill their fiduciary duties to Pimlico and Laurel by offering numerous suggestions and expressing their concerns about the operation of the racetracks. Notwithstanding the Manfusos' best efforts to provide useful information and advice to De Francis and Jacobs, their comments have been largely ignored. The Manfusos resigned their positions as officers of Pimlico and Laurel on June 1, 1990, after numerous disputes with De Francis and Jacobs.

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V. SPECIFIC ALLEGATIONS OF ABUSES

21. The Manfusos have uncovered the following abuses in the operation of Pimlico and Laurel. The Manfusos have demanded that the Boards remedy these abuses. Despite their duties to do so, De Francis and Jacobs have failed and refused to take any steps to protect Pimlico and Laurel from the abuses related below.

A. THE DIVERSION OF RESOURCES TO TEXAS

22. Shortly before Frank J. De Francis's death, Jacobs began to travel to Texas to assist in an effort to change Texas law to benefit the thoroughbred racing industry. Pimlico paid Jacobs's expenses in travelling to Texas.

23. In April 1990, John A. Manfuso, Jr., uncovered a $33,000.00 wire transfer from Pimlico to a Texas lobbying organization. The Manfusos objected to this waste of corporate funds and insisted that no further monies be diverted from the Maryland racetracks to Texas ventures. De Francis promised that no further funds would be expended by Pimlico and Laurel on Texas horse racing.

24. As President and Chairman of the Board of Pimlico and Laurel, De Francis is required to devote his time, attention and skill to advancing the best interests of those corporations. Under his leadership, however, the performance of the racetracks has drastically declined. Despite Pimlico's and Laurel's decreasing performance, De Francis has devoted an increasing

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amount of time to attempt to further his and Jacobs's private interests in Texas horse racing.

25. Lone Star Jockey Club, Ltd. ("Lone Star"), has applied to obtain a license to own and operate a Texas racetrack. De Francis and Jacobs have agreed to assist Lone Star's application. They have formed D/J Track Consultants, which is to receive one-half of the management fee Lone Star will pay to its management company. They will also receive an ownership interest in the racetrack if the application is successful.

26. In breach of his duties to Pimlico and Laurel, De Francis has devoted many hours to D/J Track Consultants and Lone Star.

27. In breach of his duties to Pimlico and Laurel, including his duty under the Stockholders Agreement and his employment contract to devote substantially all of his time to his responsibilities at Pimlico and Laurel, Jacobs has expended many hours of time in assisting Lone Star on behalf of D/J Track Consultants. Jacobs has traveled frequently to Texas on Pimlico's and Laurel's time to assist in this effort.

28. James Mango is a Vice-President of MJC and Laurel and the General Manager of both racetracks. He is the key employee of Pimlico and Laurel. The Stockholders Agreement provides that Mango was to receive a ten-year employment contract as long as he devoted "substantially all of [his] time to [his] employment." On January 1, 1990, MJC and Laurel entered into an

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employment contract with Mango. Under his employment contract, Mango was required to provide "his best efforts and his full time and attention" to his duties to the racetracks.

29. In violation of their duties to Pimlico and Laurel, De Francis and Jacobs have offered Mango an equity interest in D/J Track Consultants and have announced that their entity will now be known as D/J/M Track Consultants. De Francis and Jacobs have also requested or required that Mango travel to Texas to assist the Lone Star application. Mango has spent Pimlico's and Laurel's time in these efforts. Upon information and belief, De Francis and Jacobs intend to require Mango to leave Pimlico and Laurel in the event that the Lone Star application is successful.

30. The successful operation of Laurel and Pimlico, brought about through the efforts of the Manfusos and Frank J. De Francis, involved setting up numerous management systems, the installation of marketing programs and techniques, and the use of other technical and proprietary matters, all of which constitute assets of Pimlico and Laurel. Upon information and belief, Jacobs and De Francis have disclosed or will disclose to Lone Star proprietary, confidential matters belonging to Pimlico and Laurel without either entity receiving fair or adequate consideration therefor.

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31. De Francis and Jacobs have failed and refused to refund monies expended by Pimlico and Laurel for Lone Star's benefit, despite demand by the Manfusos.

B. LOAN ACCOUNTS

32. Since De Francis became President of Laurel and Pimlico, he has used his corporate credit card to charge numerous personal expenditures. He has also permitted Lynda O'Dea ("O'Dea"), an executive employee of Laurel and MJC, to charge personal expenses to Laurel and Pimlico. Notwithstanding that De Francis was paid over $700,000.00, and O'Dea over $150,000.00, and in breach of their fiduciary duties to the corporations, neither repaid those expenditures for a period of years. Although De Francis and O'Dea recently repaid the expenditures after repeated demands by the Manfusos, neither has reimbursed the corporations for their use of this money. Moreover, De Francis has established no system to ensure that such abuses do not occur again in the future.

C. ACCESS TO INFORMATION -- LEGAL FEES

33. Although Pimlico and Laurel jointly pay Jacobs almost $400,000.00 per year to serve as General Counsel, Treasurer, and Vice President of the corporations, and to devote his full time and best efforts thereto, Pimlico and Laurel still pay in excess of $276,000.00 in legal fees to outside counsel. The Manfusos, as Directors of the corporations, have repeatedly requested the invoices, breakdowns, and descriptions of the legal fees paid to

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outside counsel by the corporations, purportedly for corporate purposes. Despite their clear obligation and fiduciary duty to provide such information to the Manfusos, De Francis and Jacobs have failed and refused to do so.

D. ACCESS TO INFORMATION -- ACCOUNTING PRACTICES

34. De Francis and Jacobs have caused Pimlico to bear certain expenses pertaining to Laurel. The Manfusos believe that this practice is improper and that it decreases Pimlico's income to Pimlico's detriment. Consequently, the Manfusos have requested to speak to the independent auditors for Pimlico and Laurel. Although the Manfusos are Directors of both Pimlico and Laurel, De Francis and Jacobs have refused to permit the independent auditors to meet with the Manfusos or their agents.

E. WASTE

35. Despite the Manfusos' objections, De Francis has authorized the expenditure of significant amounts of corporate funds for matters having no business purpose. For example, De Francis caused the corporations to donate $25,000.00 of their funds to the Florida Derby Gala. The Florida Derby Gala was conducted by the wife of Alec Courtelis, the co-executor of the estate of Frank J. De Francis. This contribution served absolutely no legitimate business purpose.

F. THE IMPROPER TRANSFER OF ASSETS FROM PIMLICO TO LAUREL

36. Although De Francis and Jacobs owe fiduciary duties to Pimlico as officers and directors, they have transferred

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valuable assets from Pimlico to Laurel, without fair or adequate consideration, over the Manfusos' objections.

37. For example, during 1990, De Francis and Jacobs caused Pimlico to transfer to Laurel 100% of the revenue from thirteen racing days running from February 1, 1990, through February 16, 1990. The Maryland Racing Commission assigned 134 racing days to Pimlico and 130 racing days to Laurel; however, because of the actions of De Francis and Jacobs, Pimlico received income for only 121 racing days, while Laurel received income for 143 racing days.

38. In 1989, an error occurred in the calculation of the amount of certain fees that Laurel had charged to Pimlico. Correcting the error benefitted Laurel by increasing the charge to Pimlico by $137,053.93. With the auditors' concurrence, De Francis and Jacobs decided that the adjustment was immaterial to Laurel's 1990 financial statement. Consequently, the auditors recorded the adjustment in Laurel's 1990 financial statement, not in a restated financial statement for 1989. By contrast, a similar error occurred in the previous year, 1988; however, the 1988 error would have benefitted Pimlico by reducing the charge to Pimlico by $44,516.00. The 1988 error was also considered immaterial, but it was never recorded anywhere in Laurel's books, presumably because correcting the error would have benefitted Pimlico to Laurel's detriment.

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39. De Francis and Jacobs have directed that many expenses, such as officer's salaries, administrative salaries, telephone expenses, office supplies, etc., be allocated evenly between Pimlico and Laurel. That method of allocation benefits Laurel to Pimlico's detriment because Laurel has many more racing days than Pimlico.

40. In 1989, $130,000.00 in contribution expenses were allocated to Laurel, while $124,000.00 were allocated to Pimlico. In 1990, however, only $127,000.00 in contribution expenses were allocated to Laurel, while $215,000.00 were allocated to Pimlico. This gross discrepancy in the allocation of contribution expenses does not comport with De Francis's and Jacobs's actions in purportedly dividing other expenses "evenly" between Pimlico and Laurel.

41. Pursuant to the Stockholders Agreement, the Manfusos are to receive specified amounts in severance pay. De Francis and Jacobs have caused the Manfusos' severance payments to be charged exclusively to Pimlico. De Francis and Jacobs have done so, moreover, notwithstanding that the 1989 financial statement for Pimlico and Laurel indicates that the payments should be evenly allocated between the two, notwithstanding that Jacobs confirmed the principle of equal allocation in a letter to the corporations' auditors dated March 13, 1990, and notwithstanding that De Francis also confirmed the principle of equal allocation in a letter to Louis P. Guida dated June 21, 1990.

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42. Upon information and belief, De Francis has caused outside counsel's legal fees to be disproportionately borne by Pimlico.

G. MISLEADING FINANCIAL STATEMENTS

43. PRA and Laurel are required to issue financial statements to the Maryland Racing Commission, as well as to PRA and Laurel's senior lender. De Francis and Jacobs have caused misleading financial statements to be prepared for PRA and Laurel. Although the financial statements list figures for "officers' salaries," these figures do not include substantial management fees received by De Francis and Jacobs. Loans to officers of material amounts are also not listed. Racing revenues were artificially inflated for fiscal year 1991, since approximately $300,000.00 in income received as a result of a developer's default on a contract to purchase land adjacent to Bowie Racecourse was included in racing revenue and not separately listed. As Directors, the Manfusos sought to correct the financial statements, but were outvoted at a Board of Directors meeting by De Francis and Jacobs, and Directors under their control.

VI. STANDING

44. The Manfusos have standing to bring this action by virtue of their status as directors, as parties to the Stockholders Agreement, and as shareholders of Pimlico and Laurel.

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45. As shareholders, the Manfusos are excused from making demand upon the Boards of Directors to bring suit, because demand would be futile for the following reasons: First, De Francis and Jacobs, who control Pimlico and Laurel through their control of a majority of the stock in those entities, can neither be expected nor permitted to maintain a suit against themselves. Second, the remaining directors, Joseph Sellinger, S.J. ("Father Sellinger"), and Alec Courtelis ("Courtelis"), are under the domination and control of De Francis and Jacobs, because De Francis and Jacobs selected and nominated them for office and because they owe their continued tenure and the continued enjoyment of the benefits and prestige appurtenant to their offices to their alliance with De Francis and Jacobs. Third, Father Sellinger, as President of Loyola College, is particularly beholden to De Francis and Jacobs because of the gifts that Loyola College has received from De Francis and his family and because of Father Sellinger's desire to ensure an unabated flow of similar gifts in the future. Fourth, Courtelis is beholden to and allied with De Francis because he and De Francis serve as co-executors of the estate of Frank J. De Francis, the primary vehicle through which De Francis and Jacobs assert their control over Pimlico and Laurel. Fifth and finally, when the Manfusos detailed the abuses alleged in this Complaint and demanded that the Boards act to remedy those abuses, Father Sellinger and Courtelis approved of or acquiesced

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in the abuses without conducting any investigation or analysis of the merits of the Manfusos' charges.

VII: COUNT ONE -- DECLARATORY RELIEF

46. The Manfusos reallege each and every allegation in paragraphs 1 through 45 of this Complaint as if those allegations appeared in full in this paragraph.

47. De Francis and Jacobs have breached fiduciary and other duties and have thereby inflicted damage upon Pimlico and Laurel and upon the Manfusos.

48. The Manfusos have the right and the responsibility to prevent De Francis and Jacobs from breaching their duties and from damaging Pimlico, Laurel, and the Manfusos.

49. Nevertheless, De Francis and Jacobs claim that the "standstill" provision of the Stockholders Agreement prevents the Manfusos from seeking the Court's assistance to enjoin the breaches of duty alleged in this Complaint. The Manfusos, on the other hand, believe that the Stockholders Agreement neither does nor legally can prevent them from acting to remedy the breaches of duty by others.

50. An actual controversy exists between the parties, because the abuses will continue unchecked unless the Court permits the Manfusos to remedy the breaches of duty through this action.

WHEREFORE, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr., request the Court to declare that:

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A. The Stockholders Agreement does not prevent the plaintiffs from seeking the Court's assistance in remedying the breaches of duty as described above;

B. That, at the plaintiffs' behest, the Court may grant injunctive relief to redress breaches of duty by the defendants; and

C. That the matters alleged in this Complaint do in fact constitute breaches of duty by defendants Joseph A. De Francis and Martin Jacobs.

VIII. COUNT TWO -- INJUNCTIVE RELIEF

51. The Manfusos reallege each and every allegation in paragraphs 1 through 50 of this Complaint as if those allegations appeared in full in this paragraph.

52. The breaches of duty alleged in this Complaint threaten the integrity and the existence of Pimlico and Laurel. Consequently, those abuses pose a substantial threat of irreparable injury to the Manfusos as shareholders in Pimlico and Laurel.

53. The Manfusos have no adequate remedy at law to redress the injury that they will suffer unless the Court permanently enjoins De Francis and Jacobs from engaging in the breaches of duty abuses alleged in the Complaint.

WHEREFORE, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr., request the Court to enter a permanent injunction:

A. Barring Joseph DeFrancis and Martin Jacobs from

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diverting the resources, key employees, or confidential and proprietary information of Laurel Racing Association, Inc., Maryland Jockey Club of Baltimore City, Inc., and Pimlico

B. Requiring Joseph A. De Francis to take all necessary steps to obtain refunds to reimburse Laurel Racing Assoc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc., within thirty days for any expenses that he or other officers may incur in the future on corporate loan accounts;

C. Requiring Joseph A. De Francis and Martin Jacobs to grant the plaintiffs access to any information or documentation concerning legal fees charged to or paid by Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc.;

D. Requiring Joseph A. De Francis and Martin Jacobs to permit the plaintiffs and their agents to meet with the accountants for Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc.;

E. Barring Joseph A. De Francis and Martin Jacobs from wasting the assets of Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc.; and

F. Barring Joseph A. De Francis and Martin Jacobs from improperly transferring assets of The Maryland Jockey Club of

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Baltimore City, or Pimlico Racing Association, Inc., to Laurel Racing Assoc., Inc.

IX. COUNT THREE -- SPECIFIC PERFORMANCE

54. The Manfusos reallege each and every allegation in paragraphs 1 through 53 of this Complaint as if those allegations appeared in full in this paragraph.

55. Before the execution of the Stockholders Agreement, the Manfusos had a contractual right to salary and numerous benefits.

56. The Stockholders Agreement provided that the Manfusos were to serve as officers and employees of Pimlico and Laurel. Pursuant to the Stockholders Agreement, the Manfusos were to receive their current salary and other benefits so long as each continued to devote substantially all of his normal working time to his employment with Laurel and Pimlico (as in the past) and continued to perform duties substantially similar to those being performed at the time of the Stockholders Agreement.

57. The Stockholders Agreement also provided that the Manfusos could terminate their employment at any time and thereby receive termination payments of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00), monthly severance payments of Ten Thousand Four Hundred Sixteen Dollars and Sixty-Seven Cents ($10,416.67) until October 1993, and continued health insurance premium payments until October 1993. The issue regarding the additional benefits was not addressed.

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58. After the formulation of the Stockholders Agreement, the Manfusos elected to exercise their right to retire and terminate their employment with Laurel and Pimlico as of May 31, 1990.

59. After the Manfusos' decision to terminate their employment with Laurel and Pimlico, the Manfusos sought a clarification of the status of the benefits to which they would remain entitled upon the termination of their employment, since it was their position that they were entitled to continue to receive all benefits. De Francis, on behalf of Laurel and Pimlico, agreed that the Manfusos were entitled to continue to receive all benefits after they stepped down as officers. These benefits are outlined in item number one of a Letter Agreement (Exhibit B hereto) dated April 27, 1990.

60. In addition, De Francis agreed on behalf of Pimlico and Laurel that monthly owners meetings would take place, in return for the Manfusos' decision to step down as officers. Other matters were agreed to as well, as outlined in the Letter Agreement.

61. The defendants, without right or justification, have purported unilaterally to withdraw various benefits to which the Manfusos have a contractual right under the Stockholders Agreement and the Letter Agreement of April 27, 1990. In so doing, the defendants have breached the Stockholders Agreement and the Letter Agreement.

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62. The defendants' breach of the Stockholders Agreement and the Letter Agreement poses a substantial threat of irreparable injury to the Manfusos.

63. The Manfusos have no adequate remedy at law to redress the injury that they will suffer unless the Court enters an interlocutory and permanent injunction in the nature of an order requiring specific performance of the defendants' undertakings as alleged in this Count of the Complaint.

WHEREFORE, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr., request the Court to enter an interlocutory and permanent injunction in the nature of an order requiring specific performance of the obligations of defendants Joseph A. De Francis, Martin Jacobs, The Maryland Jockey Club of Baltimore City, Pimlico Racing Association, Inc., and Laurel Racing Association, Inc., to provide the benefits to which plaintiffs Robert T. Manfuso and John A. Manfuso, Jr., have a contractual right under the Stockholders Agreement and the Letter Agreement of April 27, 1990.

James P. Ulwick

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Attorneys for Robert T. Manfuso
and John A. Manfuso, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1992, a copy of the foregoing Second Amended Complaint for Declaratory and Injunctive Relief was hand-delivered to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201;

and sent via Federal Express to:

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

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16/a:manfuso:amc2

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs vs. JOSEPH A. DE FRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants	FILED Civil Action No. 92120052 CIRCUIT COURT FOR BALTIMORE CITY CE-147851 MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants The Maryland Jockey Club of Baltimore City ("MJC"), Pimlico Racing Association, Inc. ("Pimlico"), and Laurel Racing Assoc. Inc., ("Laurel") (sometimes collectively referred to as the "Corporations" or "Defendants"), by and through their attorneys, hereby move to dismiss the Second Amended Complaint (the "Complaint") filed by plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "The Manfusos," unless otherwise specified) pursuant to Maryland Rule of Civil Procedure 2-322.

Counts One and Two of the Complaint seek the Court's assistance in remedying six specific alleged breaches of fiduciary duty by Joseph De Francis and Martin Jacobs, two officers, directors, and shareholders of the Corporations. Count One seeks various declarations that the Manfusos are entitled to seek the Court's assistance, and to obtain the relief requested n Count Two.

Count Two seeks a permanent injunction: (1) barring De Francis and Jacobs from diverting resources, key employees, or

confidential and proprietary information of the Corporations to any ventures in Texas or other ventures; (2) requiring De Francis and Jacobs to reimburse the Corporations for any future expenses on corporate loan accounts; (3) requiring De Francis and Jacobs to grant the plaintiffs access to any information or documentation concerning legal fees charged to or paid by the Corporations; (4) requiring De Francis and Jacobs to permit the plaintiffs and their agents to meet with the accountants for the Corporations; (5) barring De Francis and Jacobs from wasting the assets of the Corporations; and (6) barring De Francis and Jacobs from improperly transferring assets of MJC or Pimlico to Laurel.

In Count Three, plaintiffs seek an interlocutory and permanent injunction requiring the specific performance of the alleged obligations of the defendants to provide certain benefits to which the plaintiffs allege they have a contractual right under the Stockholders Agreement and a letter to Joseph A. De Francis dated April 27, 1990.

The grounds for this motion, as set forth more fully in the accompanying memorandum, are:

(1) The alleged injuries that allegedly stem from the mismanagement or wrongful use of corporate property by De Francis and Jacobs as corporate officers and directors are without question injuries to the Corporations, and not to the Manfusos as shareholders or directors of the Corporations. This much is revealed by the specific forms of relief sought in the Complaint.

(2) In their capacity as individual directors, the Manfusos have no standing to bring a derivative suit.

(3) The Manfusos have no standing to bring their derivative claims by virtue of their status as parties to the Stockholders Agreement.

(4) To the extent that the Manfusos allege that their status as shareholders confers upon them standing to sue, the Manfusos have failed to make a proper demand upon the Corporations to bring these derivative claims. The Manfusos have additionally failed to allege that the demand requirement should be excused, given that the Manfusos do not allege facts that, if true, would prove that making a demand upon the boards of directors of the Corporations would be futile.

(5) The requests for injunctive relief permitting the Manfusos access to certain corporate information are not the appropriate subject of injunctive relief because the Corporations have not refused to provide the Manfusos with the requested information.

(6) The request for injunctive relief under Count Three seeking specific performance of certain alleged contractual obligations does not allege sufficient facts to show that the plaintiffs will suffer irreparable harm if such an injunction is not ordered.

WHEREFORE, Defendants MJC, Pimlico and Laurel respectfully request that the Court dismiss the Complaint, and that defendants be awarded their fees and costs for responding thereto along with any further relief deemed appropriate by the Court.

Dated: August 7, 1992

Respectfully Submitted,

By: Jennifer C Archie

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer Archie
1001 Pennsylvania Ave., N.W.
Suite 1300
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Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C Archie

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 1992, a copy of the foregoing Motion to Dismiss was mailed to: James Ulwick, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs vs. JOSEPH A. DE FRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants	:	Civil Action No. 92120052

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Dated: August 7, 1992

Submitted by:

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer Archie
1001 Pennsylvania Ave., N.W.
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Washington, D.C. 20004

Attorneys for Defendants
The Maryland Jockey Club of Baltimore City
Pimlico Racing Association, Inc.
Laurel Racing Assoc., Inc.

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OTHER AUTHORITIES

Defendants, The Maryland Jockey Club of Baltimore City ("MJC"), Pimlico Racing Association, Inc. ("Pimlico"), and Laurel Racing Assoc., Inc. ("Laurel") (sometimes collectively referred to as the "Corporations" or "Defendants"), by and through their attorneys, hereby submit this Memorandum of Law in Support of their Motion to Dismiss the Second Amended Complaint filed by plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively the "Manfusos," unless otherwise specified).[1/]

I.
INTRODUCTION

The Manfusos have, for a **third** time, attempted to state a claim for declaratory and injunctive relief to remedy alleged breaches of "fiduciary and other duties" by defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs") (sometimes collectively referred to as "defendant directors"). Complaint ¶ 1.[2/] Unfortunately for the Manfusos, they have once again failed to allege facts which would show that they are entitled to the declaratory and injunctive relief they seek.

As more fully described below, Counts One and Two of the Complaint allege two basic types of claims against the

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1/ On August 7, 1992, defendants De Francis and Jacobs also filed a Motion to Dismiss Second Amended Complaint and Supporting Memorandum. The Corporations incorporate by reference and assert as additional grounds for their Motion to Dismiss the arguments raised in Defendants De Francis' and Jacobs' motion and supporting memorandum.

2/ Cites to the "Original Complaint" refer to the complaint filed on April 29, 1992. Cites to the "Complaint" or the "Second Amended Complaint" refer to the complaint filed on July 15, 1992. The Manfusos first amended their complaint on July 2, 1992. That complaint is superseded by the Second Amended Complaint.

defendants: (1) derivative claims as to which any remedy the Court ultimately ordered would be awarded to the Corporations themselves, and not to the Manfusos, and (2) direct claims that they as directors have been deprived access to certain corporate information. This motion argues that to the extent that the Complaint seeks to remedy breaches of duty that only derivatively cause harm to the Manfusos, the Manfusos lack standing to assert such claims as directors, as parties to the Stockholders Agreement, or as shareholders. The motion further argues that to the extent the Complaint seeks to redress direct harms to the Manfusos, such as the access to corporate information, the Complaint fails to allege sufficient facts to sustain a claim for injunctive relief. Consequently, both Counts One and Two must be dismissed in their entirety.[3/]

Finally, the Manfusos have added a specific performance claim to the Original Complaint as Count Three. This count must also be dismissed because the Manfusos have utterly failed to allege facts which would show the Court that they will suffer irreparable harm if an injunction is not issued.

3/ Subparagraph A of Count One seeks a declaration that the "Stockholders Agreement does not prevent the plaintiffs from seeking the Court's assistance in remedying the breaches of duty as described above." Complaint at 18. The Complaint fails to state a claim for this requested declaratory relief because, as demonstrated in sections A through C below, the plaintiffs lack standing to "seek[] the Court's assistance in remedying the breaches of duty" described in the Complaint. This lack of standing precludes relief regardless of whether the Standstill Provision of the Stockholders Agreement presents an additional impediment to the Manfusos' "seeking the Court's assistance in remedying the breaches of duty" alleged in their Complaint.

II.
PROCEDURAL AND FACTUAL BACKGROUND

The Manfusos filed their first complaint in this action on April 29, 1992. Like the current Complaint, that complaint alleged that Joseph De Francis and Martin Jacobs had breached fiduciary duties to the Corporations through various alleged acts of corporate waste and mismanagement. Each of the alleged wrongful acts concerned the business or operations of the Corporations.[4/] By filing suit against the Corporations and defendants De Francis and Jacobs concerning the business or operations of Pimlico and Laurel prior to October 1, 1993, the Manfusos breached the terms of the so-called Standstill Provision contained in the unanimous Stockholders Agreement dated October 1, 1989 ("Agreement"), under which each party promised not to institute such actions for a four-year period. Agreement § X. In exchange for this promise, the Manfusos received a number of valuable benefits under the Agreement to which they otherwise would not have been entitled.[5/]

On June 5, 1992, the defendant Corporations moved to dismiss the Original Complaint, principally on the grounds that as shareholders, the Manfusos lacked standing to sue the

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[4/] See Memorandum of Law in Support of Motion to Dismiss Certain Claims for Declaratory Relief and all Injunctive Relief at 4-5, filed on June 5, 1992 (hereinafter "Original Motion to Dismiss"), for a description of these alleged abuses.

[5/] These benefits included at least the following: the so-called Russian Roulette Buy-Sell Agreement; positions as directors and officers of the Corporations; lump-sum severance payments of $2.5 million upon their retirement as officers; and $125,000 each in annual severance payments upon their retirement.

Corporations derivatively without first following the procedural prerequisites under Maryland law for instituting such actions. At the same time, the Corporations filed a counterclaim against the Manfusos alleging that their institution of legal action against the Corporations concerning the business and operations of the racetracks prior to October 1, 1993 constituted a material breach of the Stockholders Agreement. The Corporations also announced their intention to cease payment of severance payments to the Manfusos in light of their material breach and also ceased to provide certain perquisites such as use of company cars and car phones.[6/]

On June 11, 1992, the Manfusos filed a motion for an interlocutory injunction seeking the reinstatement of severance benefits and perquisites. The Corporations opposed this motion on June 29, 1992, and the Court has held a series of hearings on this motion. On June 11, the Manfusos also moved to dismiss the Corporations' counterclaim on the ground that the filing of the Original Complaint against the Corporations could not as a matter of law constitute a breach of the Stockholders Agreement, because the action fell within certain explicit and alleged implicit

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6/ These perquisites are described in a letter dated April 27, 1990, which was signed by the Manfusos and De Francis. Exhibit B to Plaintiffs' Motion for Ex Parte, Interlocutory, and Permanent Injunctive Relief filed on June 11, 1992. In exchange for the continuation of these fringe benefits, De Francis received nothing of any value for himself or the Corporations, nor did the Manfusos suffer any detriment by making their demands for the continuation of these fringe benefits. During the course of these proceedings, the Manfusos have attempted to characterize the April 27 letter as an addendum to the Stockholders Agreement, an absurd contention which the testimony on the Manfusos' motion for an interlocutory injunction has revealed.

exceptions to the Standstill Provision of the Agreement. The defendant directors and the Corporations filed oppositions to this motion on July 15, 1992.

On June 18, 1992, a hearing was held before Judge Kemp McDaniel on the issue of whether the Original Complaint stated a claim insofar as it sought to enjoin the defendant directors from pursuing Texas racing activities.[7/] On June 19, 1992, Judge McDaniel ruled that the Manfusos lacked standing to sue for such derivative harms in their capacities as directors or parties to the Agreement. He also ruled that to the extent that they were suing as shareholders, the complaint must be dismissed because the Manfusos had failed to follow the proper procedural prerequisites to filing a shareholders derivative action. See Memorandum Opinion and Order dated June 19, 1992 (a copy of which is attached hereto as Exhibit A). On July 2, 1992, the Manfusos amended their first complaint by deleting the request for an injunction with respect to Texas racing, and adding a claim for specific performance of both the Agreement and the alleged letter agreement of April 27, 1990 regarding the perquisites discontinued on June 5, 1992.

On July 15, 1992, largely in acknowledgement of the defects in the Original Complaint noted by Judge McDaniel and in conjunction with their opposition to the Corporations' and defendant directors' motions to dismiss the Original Complaint,

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[7/] This issue was decided on an expedited basis because of the impact of the request for an injunction on the Texas administrative proceedings to select a licensee for Texas racing.

the Manfusos filed a Second Amended Complaint. The Second Amended Complaint is identical to the Original Complaint with two principal exceptions. First, the Manfusos have unsuccessfully attempted to remedy their obvious lack of standing by adding a few conclusory allegations regarding the alleged futility of observing the procedural prerequisites to instituting a shareholders derivative action. Second, the Second Amended Complaint adds the same claim for specific performance set forth in the First Amended Complaint. As set forth below, these amendments to the Original Complaint do not confer standing on the Manfusos, nor does the Second Amended Complaint state any claims upon which relief may be granted.

III.
DISCUSSION

Like the first two iterations of the Complaint, Counts One and Two of the Second Amended Complaint identify alleged "abuses in the operation of Pimlico and Laurel" that were allegedly "uncovered" by the Manfusos. Complaint ¶ 21.[8/] The alleged abuses fall into two general categories: (1) allegations of various acts of corporate waste and mismanagement that, if true, would harm the Corporations (the "Derivative Claims") (Complaint ¶¶ 22-32, 34-43); and (2) allegations that the

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8/ The Corporations vigorously dispute the truth of the allegations contained in the Second Amended Complaint. The purpose of this motion to dismiss is to demonstrate that even if the allegations of the Complaint were true, the Complaint fails to state a claim upon which relief can be granted by this Court. See, e.g., Tadjer v. Montgomery County, 61 Md. App. 492, 502-03, 487 A.2d 658, 663 (1985) (in order to withstand a motion to dismiss, opponents to motion must allege facts that, if proven, would entitle them to relief).

Manfusos have been deprived access to corporate information to which they are allegedly entitled (the "Direct Claims") (Complaint ¶¶ 33, 34). The first category of alleged abuses constitute derivative harms, which, if true, would harm the Manfusos only derivatively as shareholders. As to the second category of allegations, the Complaint attempts to allege that the Manfusos will be irreparably harmed unless the Court grants an injunction granting them access to the information. However, the Complaint does not allege sufficient facts to state a claim for such injunctive relief.[9/]

The specific performance claim in Count Three also fails to state a claim, because it lacks sufficient factual allegations to support a claim for injunctive relief.

A. The Derivative Claims Allege Harms to the Corporations and Not to the Manfusos as Individual Directors or Stockholders

Whether a cause of action is derivative or direct depends upon whether the alleged wrong and the alleged harm is being suffered by the corporation, or by stockholders individually. See, e.g., Bokat v. Getty Oil Co., 262 A.2d 246,

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9/ This motion does not seek to dismiss the Complaint on the grounds that it violates the Standstill Provision of the Agreement because dismissal of the Complaint on the basis of the Standstill Provision would not cure the Manfusos' material breach, nor redress the damage done to the Corporations by that breach. Furthermore, the relief requested in the present motion -- the dismissal of the Complaint -- would not make the Corporations whole for the harm suffered by the initiation of the lawsuit (and thus the material breach of the Agreement). The Corporations requested the appropriate relief for the violation of the Standstill Provision and the material breach of the Agreement in their Counterclaim filed on June 5, 1992.

249 (Del. 1970). Where, as here, the alleged harms are being suffered by the Corporations, the claim is derivative. Waller v. Waller, 187 Md. 185, 189, 49 A.2d 449, 452 (1946) ("cause of action for injury to the property of a corporation or for impairment or destruction of its business is in the corporation").

The Derivative Claims allege abuses which, if proven, would harm the Corporations and not the Manfusos individually. See Original Motion to Dismiss at 6-8.[10/] In other Words, If the alleged abuses were proven, it is clear that any remedy fashioned by the Court would flow to the Corporations alone and not to the

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[10/] These six alleged abuses are as follows:

(1) the allegedly unauthorized diversion of corporate resources, including the time, attention and skill of Joseph De Francis, Jacobs and Corporate employee James Mango to the prosecution of an application for a license to own and operate a racetrack in Texas, Complaint ¶ ¶ 22-31;

(2) the failure of Joseph De Francis to repay the Corporations for the use of the Corporations' money for a "period of years" in connection with the use of corporate credit cards for certain personal expenses; (the Complaint admits that the Corporations have been fully reimbursed in the amount of the personal charges), Complaint ¶ 32;

(3) an alleged unfair allocation of expenses pertaining to Laurel and to Pimlico, Complaint ¶ 34;

(4) the donation of $25,000 of corporate funds to the Florida Derby Gala which the Manfusos allege had no legitimate business purpose, Complaint ¶ 35;

(5) the allegedly improper transfer of revenue from certain racing days from Pimlico to Laurel, Complaint ¶ ¶ 36-42; and

(6) allegedly misleading statements about officers' compensation in the financial statements, Complaint ¶ 43.

Manfusos individually. Analysis of the Derivative Claims demonstrates this point, but even more compelling evidence of this fact is the Second Amended Complaint. In every instance, the relief sought by the Manfusos for the Derivative Claims is relief flowing to the Corporations. In not one instance do the Manfusos seek relief in an individual capacity.

The Original Complaint conceded that the alleged breaches of fiduciary duty by defendants Joseph De Francis and Jacobs "inflicted damage upon Pimlico and Laurel" and not directly upon the Manfusos as shareholders or directors of the Corporations. Original Complaint ¶ 45. The Second Amended Complaint unsuccessfully attempts to eradicate this deficiency by adding the phrase "and the Manfusos" to every paragraph alleging damage to the Corporations. See, e.g., Complaint ¶¶ 1, 47, 48. However, a court is not bound by the designation employed by the plaintiff in determining whether a complaint alleges a derivative or direct cause of action, but rather must examine the entire complaint to determine the nature of the action. See Moran v. Household Int'l, Inc., 490 A.2d 1059, 1069-1070 (Del. Ch. 1985), aff'd, 500 A.2d 1346 (Del. 1985). The repetitive incantation of the phrase "and the Manfusos" is meaningless and does nothing to change the plain fact that the harms alleged are harms to the Corporations first, and to the Manfusos only derivatively.

The Second Amended Complaint contains no allegations of facts to show how the Manfusos possibly could be suffering harm in their capacity as individual directors. The Complaint also makes no assertion that the alleged acts of corporate waste

violated a fiduciary duty owed to the Manfusos independent of the duties owed to every shareholder. Nor does the Complaint make any assertion that the Manfusos were injured in a manner distinct from any injury to Pimlico or Laurel. See Cowin v. Bresler, 741 F.2d 410, 415 (D.C. Cir. 1984). The Manfusos' complaints of improper management or mismanagement of the Corporations' affairs are obviously acts that only injure them derivatively through dilution in the value of their stock, an injury equally applicable to all shareholders of Pimlico and Laurel. Bokat, 262 A.2d at 249. Accordingly, as explained in further detail below, the Manfusos are required to bring their claims derivatively as shareholders and to observe the procedural prerequisites to filing such an action.

B. The Manfusos Lack Standing to Assert the Derivative Claims Contained in Counts One and Two of Their Second Amended Complaint

To address obvious deficiencies in their standing to bring the Derivative Claims, the Manfusos have added a conclusory allegation to their Second Amended Complaint in which they claim to "have standing to bring this action by virtue of their status as directors, as parties to the Stockholders Agreement, and as shareholders of Pimlico and Laurel." Complaint ¶ 44. This conclusory allegation, first asserted unsuccessfully at the June 18 hearing before Judge McDaniel, does not overcome the plain fact that the Manfusos lack standing to bring the Derivative

Claims in all three capacities alleged as a matter of law and as a matter of the insufficiency of their pleading.[11/]

1. As Directors, the Manfusos Lack Standing to Institute A Cause of Action Against Fellow Directors for Injuries to the Corporations

Under Maryland law, individual directors lack standing to bring derivative suits alleging that breaches of fiduciary duty by other directors or by officers have harmed the corporation. It is the settled rule that "in the absence of statutory authority, a single director, acting as an individual, cannot institute an action against a fellow director for an injury to the corporation; rather, the board of directors must act as a body to bring the suit." 3A William M. Fletcher, Fletcher's Cyclopedia of the Law of Private Corporations § 1275, at 586-87 (Perm. ed. rev. vol. 1986)[12/].

As explained fully in the Corporations' Motion to Dismiss the Original Complaint at 8-12, and incorporated by reference herein, individual directors may only act through the board of directors (see Md. Code Ann., Corps. & Ass'ns § 2-401(b)), and may not, acting as individual directors, institute legal proceedings on behalf of the corporation. For example, in

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[11/] Because the Manfusos lack standing to bring the Derivative Claims alleged in Counts One and Two of their Complaint, they have failed to state a claim upon which relief can be granted, and their Complaint should be dismissed. The Complaint simply does not allege facts, which if proven, would give them standing to sue and thus entitle them to relief. See, e.g., Tadjer, 61 Md. App. at 502-03, 487 A.2d at 663.

[12/] See New York Bus. Corp. Law § 720 (conferring standing upon directors to file derivative actions). Maryland has no such statute.

Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch.), aff'd, 500 A.2d 1346 (Del. 1985), the court expressly rejected a derivative suit filed by a director and shareholder for Household International, Inc. on the grounds that the general prohibition against individual legal actions by directors precludes directors from suing derivatively. Claims relating to shareholders' derivative rights must be brought by shareholders in a derivative suit, after proper demand has been made upon the board of directors to institute legal action. Id. at 1071.

Such a rule makes sense under the statutory scheme regulating the government of corporations. The government of a corporation is divided between the board of directors and the stockholders in general meeting. In the case of Pimlico and Laurel, all powers of management -- with the exception of "major matters" defined in the Stockholders Agreement -- are vested in the officers of the Corporations and the Boards of Directors. See Stockholders Agreement, Exhibit A to Original Complaint.

Where an individual director disagrees with the business judgments exercised by the board of directors acting as a body, the only potential harm he suffers is the possible exposure to suits for breaches of fiduciary duty if the board of directors' business judgment is challenged. The remedy in such a situation is for the dissenting director to announce his dissent at the board of directors' meeting, be certain that his dissent is entered into the minutes of the meeting, and file his written dissent to the action with the secretary of the meeting before the meeting is adjourned. Alternatively, a dissenting director

within 24 hours after the meeting is adjourned, forward his written dissent by registered mail to the secretary of the meeting or the secretary of the corporation. Md. Code Ann., Corps. & Ass'ns § 2-410.[13/] The act of dissenting fully discharges the director's fiduciary obligations, contrary to the assertions of the Complaint that the law somehow requires the Manfusos to bring suit to enjoin perceived breaches by other directors. See Complaint ¶¶ 48, 49 (asserting that Maryland law requires them to file this suit to enjoin breaches of fiduciary duty by other directors).

To the extent that a director may also be a shareholder of the corporation, his status as a shareholder enables him to sue derivatively after following the proper demand procedures. The Manfusos have no statutory or common law authority as directors to sue derivatively, much less the "responsibility" to do so. Complaint ¶ 48..

2. The Manfusos Lack Standing as Parties to the Stockholders Agreement to Bring Counts One and Two of the Second Amended Complaint

The Manfusos allege that they have standing "as parties to the Stockholders Agreement." Complaint ¶ 44. However, the Complaint does not allege breaches of the Agreement, but rather breaches of the statutory and common law standard of care required of corporate directors. See Complaint ¶¶ 46-53. What plaintiffs intend by this conclusory assertion is unclear from

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13/ According to the Complaint, the Manfusos have apparently recognized and exercised their right to dissent with respect to at least one of the "abuses" alleged in the Complaint. See Complaint ¶ 43.

the face of the Complaint, but is perhaps revealed in plaintiffs' opposition to defendants' motions to dismiss the Original Complaint, filed June 5, 1992 (hereinafter "Pl. Opp."). In that brief, the Manfusos argued that the Agreement vested De Francis and Jacobs with "numerous duties" to the Manfusos and that the Complaint was "replete with allegations establishing that De Francis and Jacobs have breached duties inherent in the Stockholders Agreement." Pl. Opp. at 10-11 (emphasis added). In fact, there are no such allegations in the Complaint and no such "duties" to the Manfusos arise from the Agreements.

The Manfusos appear to be claiming by this conclusory allegation of standing that because the Agreement provided for De Francis and Jacobs to hold positions as directors and officers of the Corporations, the Agreement is also the source of the duties owed to the Manfusos and allegedly breached by De Francis and Jacobs. The Agreement and the law provide since otherwise, however. De Francis and Jacobs, as repeatedly alleged in the Complaint, control the majority of voting stock in the Corporations. Complaint ¶¶ 3, 4, 14. In the absence of the Agreement, De Francis and Jacobs could have voted themselves onto the boards of directors, and appointed themselves officers of the Corporations. The Agreement is therefore not the source of their positions as officers and directors (which positions and titles they held prior to the execution of the Agreement). Furthermore, the Agreement is silent concerning duties owed by the officers and directors of the Corporations, including De Francis and Jacobs.

Whatever legal duties De Francis and Jacobs possess derive from the Maryland Corporation law and the Maryland courts, not the Agreement. See Booth v. Robinson, 55 Md. 419, 436-37 (1881) (landmark case holding that directors occupy a fiduciary relation to the corporation and its stockholders); Md. Code Ann., Corps. & Ass'ns § 2-405.1 (1985 and Supp. 1991) (defining the general standard of conduct for directors);[14/] James J. Hanks, Jr. Maryland Corporation Law § 6.19 at 190 (Supp. 1991) ("There is no statutory standard of conduct for officers. They are subject to general agency principles, as are non-officer employees and agents.") (emphasis added). In fact, in the absence of the Agreement, De Francis and Jacobs (indeed, all of the officers and directors of the Corporations) would have the very same duties towards the Corporations.

14/ "A director shall perform his duties as a director . . .:
(1) In good faith;
(2) In a manner he reasonably believes to be in the best interests of the corporation; and
(3) With the care that an ordinarily prudent person in a like position would use under similar circumstances."

Md. Code Ann., Corps. & Ass'ns § 2-405.1(a). A commentator has noted that section 2-405.1 purposefully omits any reference to "fiduciary" "because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation." James J. Hanks, Jr., Maryland Corporation Law § 6.6[b] at 162 (Supp. 1991) (quoting Model Business Corp. Act § 8.30, Official Comment (1991)). The Manfusos repeatedly refer in their Complaint to the "fiduciary duties" of De Francis and Jacobs. For the sake of simplicity and for the purposes of this motion only, the Corporations will treat "fiduciary duty" to be the same as the standard of care that is required of directors.

The Agreement did not create any additional duties that De Francis and Jacobs did not already owe to the Corporations as officers and directors, and does not set forth any such duties. Therefore, the Manfusos cannot assert standing to bring suit for breach of fiduciary duties by virtue of their status as parties to the Stockholders Agreement. The conduct alleged in the Complaint is not -- nor is it alleged to be -- a violation of the Agreement.

3. The Manfusos Do Not Have Standing As Shareholders Because They Do Not Allege That A Proper Demand Has Been Made Upon The Directors Of The Corporations, Nor Do They Sufficiently Allege That Demand Would Be Futile

a. The Manfusos Do Not Allege Facts To Show That a Proper Demand Has Been Made

The Complaint must be dismissed because the plaintiffs have failed to plead sufficient facts which, if true, would excuse them from their obligation to request the boards of directors of Pimlico and Laurel to institute the pending action against De Francis and Jacobs. The Manfusos are not entitled to maintain a shareholder derivative action against the Corporations and De Francis and Jacobs unless and until they have taken the proper legal steps for the redress of the wrongs they intend to allege. Parish v. Maryland & Va. Milk Producers Ass'n, 250 Md. 24, 81-82, 242 A.2d 512, 544 (1968) (citing "well established" Maryland rule requiring exhaustion of intracorporate remedies prior to filing of derivative action), aff'd on reh'g, 261 Md. 618, 277 A.2d 19 (Md. 1971), cert. denied, 404 U.S. 940 (1971). Under Maryland law, shareholders bringing a derivative action on

behalf of a corporation must first make a proper demand upon the corporation to itself institute the requested legal action. Waller v. Waller, 187 Md. 185, 191, 49 A.2d 449, 453 (1946); Eisler v. Eastern States Corp., 182 Md. 329, 333, 35 A.2d 118, 119-20 (1943).[15/]

The purpose of the demand requirement is to permit the board of directors to take its statutorily defined leading role in managing the corporation. Maryland Code Ann., Corps. & Ass'ns § 2-401. Maryland courts have placed the threshold decision as to whether a proposed suit for breaches of fiduciary duty is meritorious, or whether it would subject the corporation to harm, squarely in the hands of the board of directors. See, e.g., Waller, 187 Md. at 192, 49 A.2d at 453. The demand must be directed to the board of directors as a whole, and not merely its chairman and/or general counsel. Greenspun v. Del E. Webb Corp., 634 F.2d 1204, 1209 (9th Cir. 1980). The demand must provide the directors with information necessary for them to assess whether an alleged wrong to the corporation has actually occurred and to determine whether to take steps to rectify it.

Here, even the Second Amended Complaint does not sufficiently allege that the Manfusos have requested the boards of directors of the Corporations to file suit against De Francis or Jacobs for any the alleged instances of waste and mismanagement of the operations of Pimlico and Laurel. The

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15/ The demand requirement under Maryland law is discussed more fully in the Original Motion to Dismiss at 12-18, and incorporated by reference herein.

Complaint alleges in a conclusory manner that the Manfusos "demanded" that the Boards of Directors "remedy" the alleged abuses set forth in the Complaint, but it fails to set forth any specific facts to support this claim, nor does the Complaint allege that the Manfusos demanded that the Boards institute legal action to "remedy" the alleged abuses.[16/] Despite these vague and conclusory assertions, and two opportunities to re-allege the requisite facts showing proper demand, the Complaint still does not identify a single action the Manfusos have taken to request the boards of directors to institute legal action. (After three attempts, it is fair to presume that if such facts existed, they would be pled.)

16/ In a new paragraph added to their Second Amended Complaint, the Manfusos state only that they "detailed the abuses alleged in this Complaint and demanded that the Boards act to remedy those abuses." Complaint ¶ 45. This amendment merely reiterates the previously alleged conclusion that a demand was made. See, e.g., Complaint ¶ 21 ("The Manfusos have demanded that the Boards remedy these abuses.") Such conclusory statements are insufficient to establish that a proper demand upon the boards to institute legal action was made. Moreover, even if the Court were to determine that the Manfusos have somehow made a proper demand upon the Board, the decision of the Board not to bring a lawsuit would then be reviewed pursuant to the statutory standard of conduct set forth in section 2-405.1 of the Maryland General Corporation Law. See Hanks, supra, § 7.21[c] at 265.

> If the demand is properly reviewed and refused, then that is the end of the matter and the stockholder will not be permitted to proceed. In other words, if the plaintiff files suit following a properly-refused demand, the court should dismiss the suit.

Id. See also Grill v. Hoblitzell, 771 F. Supp. 709, 712 n.3 (D. Md. 1991) (If a shareholder is "required to make a demand and the directors determine not to institute the action, their decision is entitled to at least some degree of deference under the 'business judgment' rule.").

Indeed, paragraph 45 of their Second Amended Complaint in effect concedes that the Manfusos have failed to make a proper demand upon the Boards of the Corporations. Paragraph 45 states that "[a]s shareholders, the Manfusos are excused from making demand upon the Boards of Directors to bring suit, because demand would be futile." Complaint ¶ 45. An allegation that demand is excused is obviously only necessary if a proper demand has not been made.

b. The Manfusos Have Failed To Allege Facts to Support a Claim That Demand Would Be Futile

The Manfusos have inserted a new paragraph, alleging futility of demand, in order to avoid the inevitable dismissal of their derivative claims on the grounds that they failed to make a proper demand. Specifically, the Manfusos allege the following five reasons why demand should be excused on futility grounds:

(1) That De Francis and Jacobs, who control a majority of the stock of the Corporations, "can neither be expected nor permitted to maintain a suit against themselves." Complaint ¶ 45.

(2) That the "remaining directors," Father Joseph Sellinger, ("Father Sellinger") and Alec Courtelis ("Courtelis"), "are under the domination and control of De Francis and Jacobs, because De Francis and Jacobs selected and nominated them for office and because they owe their continued tenure and the continued enjoyment of the benefits and prestige appurtenant to their offices to their alliance with De Francis and Jacobs." Id.

(3) That Father Sellinger is "beholden" to De Francis and Jacobs because Loyola College, of which Father Sellinger is President, has allegedly received gifts from De Francis and his family, and "because of Father

Sellinger's desire to ensure an unabated flow of similar gifts in the future." Id.

(4) That "Courtelis is beholden to and allied with De Francis because he and De Francis serve as co-executors of the estate of Frank J. De Francis, the primary vehicle through which De Francis and Jacobs assert their control over Pimlico and Laurel." Id.

(5) That "when the Manfusos detailed the abuses alleged in this Complaint and demanded that the Boards act to remedy those abuses, Father Sellinger and Courtelis approved of or acquiesced in the abuses without conducting any investigation or analysis of the merits of the Manfusos' charges." Id.

The above five reasons constitute the Manfusos' entire allegations as to why demand should be excused on futility grounds. As the case law discussed below clearly reveals, the conclusory allegations contained in paragraph 45 fall far short of establishing that a demand upon the boards of directors of the Corporations would be futile.

As a threshold matter, it is important to clearly understand the import of what the Manfusos are alleging when they assert that demand would be futile. "The premise of a shareholder claim of futility of demand is that a majority of the board of directors either has a financial interest in the challenged transaction or lacks independence or otherwise failed to exercise due care." Levine v. Smith, 591 A.2d 194, 205 (Del. 1991) (emphasis added). The question of whether a director is interested is important, because the "prevailing contemporary view is that demand is necessary if the directors are disinterested -- and because of the business judgment rule directors may be financially disinterested even if they took part

in the acts of which the plaintiff complains." Kamen v. Kemper Fin. Servs., 939 F.2d 458, 461 (7th Cir. 1991), cert. denied, 112 S. Ct. 454 (1991); see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (demand futility is "inextricably bound" to issues of the business judgment rule; for the rule to apply, the directors must be disinterested, in that directors "can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing").[17/]

The Manfusos, therefore must show that the majority of the directors of the Corporations are interested or lack independence. This they fail to do. The first reason provided by the Manfusos as to why demand would be futile, that De Francis and Jacobs cannot be permitted or expected to bring a suit against themselves, can be dismissed rather easily. De Francis and Jacobs are not the only directors on the Boards. There are seven directors on the Boards of the Corporations, not two. The other five directors, including the Manfusos, certainly can be permitted to bring a derivative suit, if such a suit is found to be warranted and in the best interests of the Corporations. The other five directors are not defendants in this action. See, e.g., Parish, 242 A.2d at 545 (demand is excused when the alleged wrongdoers are directors and constitute a majority of the board

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17/ In dismissing the Original Complaint insofar as it alleged harm to the Manfusos from an alleged diversion of resources to Texas, this Court (J. McDaniel) previously ruled that there are disinterested directors on the Boards of the Corporations. See Exhibit A, Memorandum Opinion and Order dated June 19, 1992, at 2 ("[I]n this case, where there were at least some disinterested directors, demand is not excused.") (emphasis added).

of directors); Grill v. Hoblitzell, 771 F. Supp. 709, 712 (D. Md. 1991) ("[P]laintiff has articulated no reason why the board as a whole could not in a disinterested manner consider the propriety of instituting an action on behalf of [the defendant corporation] against the relatively few persons who serve as inside directors"); Grossman v. Johnson, 89 F.R.D. 656, 659 (D. Mass 1981) ("[t]he plaintiff must show not only that some directors were hostile to his suit because of their self-interest, but that a majority of the board at the time of the suit were so implicated in the complained of facts as to make a demand for redress futile" (quoting Heit v. Baird, 567 F.2d 1157, 1160 (1st Cir. 1977)), cert. denied, 459 U.S. 838 (1982), reh'g denied 459 U.S. 1138 (1983); Aronson, 473 A.2d at 818 ("This bootstrap argument [that demand is excused because directors cannot sue themselves] has been made to and dismissed by other courts.").

The Manfusos next allege that two of the outside directors, Father Sellinger and Courtelis, are "under the domination and control of De Francis and Jacobs, because De Francis and Jacobs selected and nominated them for office and because they owe their continued tenure . . . to their alliance with De Francis and Jacobs." Complaint ¶ 45. Courts reject such circular reasoning to support a claim of futility. For example, in Kamen, the Seventh Circuit, applying Maryland law, rejected virtually this same argument in an attempt by a plaintiff shareholder to show that demand should be excused. 939 F.2d at

460. The court held that Parish[18/] does not dictate that demand is futile when the plaintiff merely alleges that directors are under the control of the corporation or defendant directors, or receive fees for their role on a board of directors. Id.

> If allegations of this kind sufficed, the demand rule would be negated -- for almost all directors receive fees, and independent directors come to a board after being slated by corporate insiders. There would have been no need in Parish to inquire into the directors' personal culpability if their status as directors (together with payment for their time) were enough to dispense with demand.

Id. (emphasis added). See also Hanks, supra, § 7.21[c] at 269 ("the fact -- as is typical -- that directors receive fees for their services or the fact -- as is also typical -- that directors were originally nominated or sponsored for the board by directors being sued is not sufficient to excuse demand") (footnotes omitted); Aronson, 473 A.2d at 816 ("[I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director.").

The Manfusos' third and fourth futility arguments allege that Father Sellinger and Courtelis are "beholden" to De Francis and Jacobs because of certain personal relationships between the directors. The Manfusos allege that Father Sellinger is "beholden" to De Francis because he desires "an unabated flow" of gifts to Loyola College from De Francis and his family, and

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18/ The Seventh Circuit stated that "[o]nly one case in [Maryland's] history discusses [the futility] doctrine," citing Parish. Id. at 460.

that Courtelis is "beholden to and allied with De Francis because he and De Francis serve as co-executors of the estate of Frank J. De Francis." Complaint ¶ 45. The Manfusos do not allege any facts to support their implication that Father Sellinger would disregard his statutory duties as a director because of his alleged "desire" for an unabated flow of gifts to Loyola College. Nor do the Manfusos set forth any facts to support the baffling and illogical contention that Courtelis, an equal, co-personal representative of the Estate of Frank De Francis, is "beholden" to Joseph De Francis in any way.

Similar allegations that personal or business relationships between disinterested and interested directors are enough to excuse demand have been rejected by courts applying Maryland law. For example, in Grill v. Hoblitzell, 771 F. Supp. 709 (D. Md. 1991), the plaintiff shareholder first alleged that because he had charged all of the directors of the defendant corporation with "dereliction of duty," he was excused from making a demand upon the board before filing a derivative suit. 771 F. Supp. at 711. The United States District Court for the District of Maryland nevertheless dismissed plaintiff's complaint for failure to make a proper demand on the board of directors.

The complaint in Grill failed because it did not set forth any reason why certain directors of the defendant corporation could not constitute a special litigation committee which would serve to determine the propriety of pursuing the derivative claims. Id. at 712. Instead, the plaintiff in Grill, much like the Manfusos here, "vaguely assert[ed] that because of

personal relationships among the directors, it is unlikely that the board would authorize suit against any of its present or former members." Id. (emphasis added) The court dismissed the Complaint, stating that "to accept this allegation as conclusive would effectively abrogate the demand rule in its entirety." Id.[19/]

Similarly, in Rosengarten v. Buckley, 613 F. Supp. 1493 (D. Md. 1985), the court held that "Maryland would follow the majority rule and permit an interested board of directors to appoint a special litigation committee of independent directors to review a pending derivative suit." 613 F. Supp. at 1499. In so holding, the court looked to whether the litigation committee appointed in the case was indeed independent. The court found that it was, even in the face of allegations that one of the defendant directors served as a director of the corporation that employed one of the challenged independent directors, and that this defendant director also was a member of a management committee that determined the salary of the independent director. Id. at 1500. The court noted that "[o]ther cases have found a committee member to be independent even though the relationships were more extensive." Id. (citing Kaplan v. Wyatt, 484 A.2d 501

19/ Grill recognized that the absence of particularized allegations that the allegedly disinterested directors are themselves alleged to be involved in self-dealing, or are exposed to monetary liability as a result of the claims asserted against the corporation, provides a "crucial distinction" between Grill and Parish, "the case most frequently cited to establish that Maryland law is liberal in excusing demand upon directors." Id. at 712 n.4 (noting that the directors in Parish were alleged to have engaged in self-dealing and to have committed "serious infractions of the anti-trust laws of the United States").

(Del. Ch. 1984) (a committee member who was a major shareholder and director of companies which had business relationships with the corporation totalling many millions of dollars was found to be independent); Genzer v. Cunningham, 498 F. Supp. 682 (E.D. Mich. 1980) (one of the committee members was a paid consultant to the company and found to be independent)).[20/]

Apparently realizing that their first four standing arguments are weak at best, the Manfusos add a final allegation that "when the Manfusos detailed the abuses alleged in this Complaint and demanded that the Boards act to remedy those abuses, Father Sellinger and Courtelis approved of or acquiesced in the abuses without conducting any investigation or analysis of the merits of the Manfusos' charges." Complaint ¶ 45. Significantly, although it is the Manfusos' third attempt to evade the demand requirements of Maryland law, the Complaint does not plead any of the specific facts concerning the time, place and circumstances of the alleged "detailing" of abuses to the boards, nor the specifics of their alleged "demand," nor the "approval of acquiescence" of Father Sellinger and Courtelis to the alleged abuses. Once again, these conclusory allegations are insufficient to demonstrate futility.

The court in Kamen dealt with virtually the same argument. The plaintiff in Kamen alleged that demand was futile

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20/ See also Hanks, § 7.21[c] at 268-69 ("Vague assertions, without particulars, of personal relationships between directors who are charged with liability and directors who are not charged with liability . . . are not sufficient to disqualify the latter directors from determining whether to pursue the litigation.") (footnote omitted).

because the directors had moved to dismiss her claims on the merits, and during depositions took a "dim view" of the substantive allegations. 939 F.2d at 462. The court noted that this type of argument "confuses futility with failure." Id. The court then stated:

> Demand enables the directors to take the leading role in managing the corporation. Conscientious managers may conclude that legal action is unjustified because not meritorious, or because it would subject the firm to injury. This is why courts assess futility ex ante rather than ex post. [citation omitted] To say that a demand would have been futile because directors proved unsympathetic to the lawsuit is like saying that sending Mickey Mantle to the plate with the bases loaded was futile because he struck out.

Id. (emphasis added).[21/]

In , the plaintiff claimed (once again like the Manfusos), that the directors that were added to the board after the alleged misconduct occurred could not be disinterested because they were "guilty of continuing mismanagement," and sought injunctive relief requiring the directors to meet their fiduciary duties. 771 F. Supp. at 712 n.5. The court held, however, that even if the allegations were true, Maryland law still requires a demand on shareholders. Id. Furthermore, the court stated that even if the shareholders were presented with

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[21/] The Kamen court also found that "[s]o far as we know, no state treats the directors' failure to capitulate in the lawsuit as forfeiting the firm's entitlement to demand before the suit commences." Id. Indeed, the Seventh Circuit stated that "Maryland could well be influenced by the recommendations of the American Law Institute and the American Bar Association, both of which believe that the futility exception to the demand requirement should be eliminated rather than expanded." Id. at 461 (citing ALI, Principles of Corporate Governance: Analysis and Recommendations § 7.03 (T.D. No. 11, 1991); ABA, Model Business Corporation Act § 7.42(1) (1990 rev.)).

the demand, they "might well conclude that, weighing the rather meager benefit of successfully obtaining an injunction (which would merely require the directors to do what they are already legally obligated to do) against the costs, divisiveness and other detriments involved, it would be against [the corporation's] interest to pursue the litigation." Id. (emphasis added). Such a deference to the judgment of the shareholders applies equally well, and perhaps more forcefully, to observing the requirement that a demand be made upon the board of directors. See also Aronson, 473 A.2d at 814 (board approval of a challenged transaction does not automatically connote "'hostile interest' and 'guilty participation' by the directors," because if that were the case, "the demand requirements of our law would be meaningless"); Grossman, 89 F.R.D. 656 ("mere approval by directors of the alleged unlawful action does not constitute sufficient participation in that conduct to excuse demand upon them"); Greenspun, 634 F. Supp. at 1210 ("Futility requires . . . more than mere approval or participation by directors in alleged wrongful conduct.").

It is clear that the proper procedure would be for the Manfusos to make a formal demand upon the boards of directors of the Corporations, at which time the directors, including Father Sellinger and Courtelis, could determine whether an "investigation or analysis of the merits of the Manfusos' charges" is in the best interests of the Corporations. Complaint

¶ 45.[22/] (Making a formal demand, of course, includes making a full presentation of the facts that allegedly support the desired legal action, which the Manfusos do not even allege that they have done.) A requirement that directors investigate or analyze every claim made by a shareholder, no matter how specious, would serve only to end-run the function and purpose of boards of directors and the business judgment rule. The plaintiffs' conclusory allegations regarding the futility of demand are insufficient to provide them with standing to sue as shareholders of the Corporations.

C. The Claims Two Seeking Access to Corporate Information Should Be Dismissed

The Complaint also contains two Direct Claims against the Corporations, both of which are requests that the Corporations provide the Manfusos with certain corporate information, to which they contend they are entitled as directors. First, the Manfusos allege that the defendant directors have refused to provide them with "the invoices, breakdowns, and descriptions of the legal fees paid to outside counsel." Complaint ¶ 33. Second, the Manfusos allege that the defendant directors "have refused to permit the [Corporations'] independent auditors to meet with the Manfusos or their agents."

[22/] The boards of directors could also elect to appoint a special litigation committee of independent directors to review and evaluate whether the Manfusos' derivative suit is in the Corporations' best interest. See Rosengarten, 613 F. Supp. at 1499 ("Maryland would follow the majority rule and permit an interested board of directors to appoint a special litigation committee of independent directors to review a pending derivative suit.").

Complaint ¶ 34. The Complaint must be dismissed as to these claims as well.

With respect to the first request for information, the Complaint asks the court to enter an injunction "requiring Joseph A. De Francis and Martin Jacobs to grant the plaintiffs access to any information or documentation concerning legal fees charged to or paid by Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc." Complaint at 19. This request for relief should be dismissed because there are no grounds for granting injunctive relief. The Defendants never refused to provide the requested information to the Manfusos. Affidavit of Martin Jacobs ¶ 28 (a copy of which was attached as Exhibit A to DeFrancis and Jacobs Motion to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, filed June 5, 1992). Indeed, on July 24, 1992, in the presence of this Court, the defendants provided the Manfusos with all of the requested information. See Affidavit of Joseph A. De Francis (a copy of which is attached to the Memorandum of Law in Support of Motion to Dismiss And/Or For Summary Judgment As To Plaintiffs' Second Amended Complaint filed by De Francis and Jacobs on August 7, 1992). There is no ground for granting injunctive relief where there is no dispute between the parties. See, e.g., Attorney General v. Anne Arundel Cty. Sch. Bus Contractors Ass'n, 286 Md. 324, 372 407 A.2d 749, 752 (Md. 1979) ("an injunction should not issue if the acts sought to be enjoined have been discontinued or abandoned"). Moreover, the

Manfusos never faced a threat of irreparable injury from their alleged failure to receive information about legal bills.

With respect to the second alleged denial of access to information, the plaintiffs request that the Court enter an injunction "[r]equiring Joseph A. De Francis and Martin Jacobs to permit the plaintiffs and their agents to meet with the accountants for Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc." Complaint at 19. This claim must be dismissed for similar reasons. Contrary to the Manfusos allegations (see Plaintiffs' Opposition to Defendants' Motion to Dismiss at 26-27),[23/] the Boards of Directors of Pimlico and Laurel have not "forbidden" such a meeting between the Manfusos and the accountants for the racetracks. See Jacobs Affidavit ¶¶ 29-31. Rather, in the exercise of their business judgment, the boards of directors have taken the position that whether such access will be granted will

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23/ In their Opposition, the Manfusos make the ridiculous assertion that "De Francis and Jacobs do not appear to dispute any of the allegations in the Complaint, or any of the statements in Mr. Manfuso's affidavit, concerning the inaccuracies in the financial statements for Laurel and Pimlico." Id. at 27 (citing arguments made by De Francis and Jacobs in their Memorandum of Law in Support of Motion to Dismiss Certain Claims [in the Original Complaint] filed June 5, 1992). This statement by the Manfusos must be addressed by the Corporations because of two false implications that arise from such an assertion. First, the defendants' first opportunity to respond to Manfuso's affidavit occurs with this motion. The defendants' Original Motions to Dismiss were filed well over one month prior to the introduction of Manfuso's affidavit into the record. Second, in the Motion to Dismiss context, the defendants have properly argued that even if it is assumed that the Manfusos' allegations are true (which we contend they are not), they do not state a claim upon which relief can be granted.

be determined after the Manfusos provide the boards of directors with copies of their own accountants' report describing the accounting issues about which the Manfusos have raised questions, and the instructions given the accountant by the Manfusos or their counsel, and after they present to the boards of directors the factual basis of their concerns about the accounting practices of Pimlico and Laurel. Id. at 31 ("At [the meeting of the Boards of Directors held on April 13, 1992], the Boards requested that the Manfusos present a copy of their accountants' report and related documents and present a factual basis for their alleged concerns so that the Board might then further consider and act upon their request. The Manfusos have failed to comply with this request to this date."); see also De Francis Affidavit.

Further, as more fully set forth in the brief filed today by the defendant directors, this claim must be dismissed because the plaintiffs have set forth no facts in their Complaint from which it reasonably could be inferred that they will suffer irreparable injury if the requested injunction is not issued.

D. Count Three For Specific Performance of The Manfusos' Complaint Should be Dismissed For Failure to Allege The Requirements For Entry of Injunctive Relief

In their Second Amended Complaint, the Manfusos have added a third count seeking an interlocutory and permanent injunction in the nature of an order requiring specific performance of the alleged obligations of defendants to provide the Manfusos with certain alleged contractual benefits.[24/] Complaint ¶ 63. In response to the Manfusos' material breach of the Stockholders Agreement, the Corporations suspended the Manfusos' monthly severance payments and discontinued certain fringe benefits which had previously been provided. In Count Three, the Manfusos allege merely that "[t]he defendants' breach of the Stockholders Agreement and the Letter Agreement poses a substantial threat of irreparable injury to the Manfusos." Complaint ¶ 62. They then add that "[t]he Manfusos have no adequate remedy at law to redress the injury that they will suffer unless the Court enters [the requested injunction]." Id. ¶ 63. These two conclusory allegations constitute the extent of the Manfusos' allegations regarding irreparable injury. No facts are alleged by the Manfusos that even hint at why the Manfusos face a "substantial threat of irreparable injury" from the cessation of payment of monetary benefits to them.

24/ As set forth in the Corporations' opposition to plaintiffs' motion for an interlocutory injunction reinstating these benefits, dated June 26, 1992, there is no contract between De Francis and the Manfusos or the Corporations and the Manfusos concerning the perquisites. See Opposition dated June 26, 1992 at 21-23.

An injunction is to be issued only where necessary to prevent an irreparable injury. Coster v. Department of Personnel, 36 Md. App. 523, 526, 373 A.2d 1287, 1289 (1977) ("The very function of an injunction is to furnish preventive relief against irreparable mischief or injury, and the remedy will not be awarded where it appears to the satisfaction of the court that the injury complained of is not of such character.") (quoting 42 Am. Jur. 2d Injunctions § 48). Courts will not grant an injunction where the plaintiff has merely alleged that he will suffer irreparable injury; instead, the plaintiff must allege sufficient facts to satisfy the court that irreparable injury will occur. Id., at 1289-90, 373 A.2d at 1289-90 ("The mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result.") (quoting 42 Am. Jur. 2d Injunctions § 48) (emphasis added). Furthermore, where the allegations in a complaint demonstrate that the plaintiff has an adequate remedy at law, the action for injunction will be dismissed. See State v. Ficker, 266 Md. 500, 295 A.2d 231 (1972).

As shown above, the Manfusos do not allege facts which would support their conclusion of irreparable injury, nor do they even provide any allegations from which the Court could infer that the Manfusos would suffer irreparable injury if an injunction is not issued.

In addition, it is clear from the other allegations contained in Count Three that because the Manfusos are merely

seeking the restoration of certain benefits, they do indeed have an adequate remedy at law. The only wrong specifically alleged in the Complaint is the withdrawal of monthly severance payments in the amount of $10,416.67 and the continued payment of health insurance premium payments. Complaint ¶ 57.[25/] Assuming for the moment that the Manfusos can convince this Court that they did not breach the Stockholders Agreement by the filing of the present action, and are therefore entitled to the continuation of the severance payments, any payments owed to them can be easily calculated into monetary damages. Since the Manfusos' allegations plainly show, contrary to their conclusory allegation, that they do have an adequate remedy at law, their action for specific performance should be dismissed.

25/ The Manfusos allege that the defendants withdrew "various benefits" the Manfusos allegedly have a "contractual" right to pursuant to the Stockholders Agreement and a "Letter Agreement" dated April 27, 1990. Complaint ¶ 59-61. However, other than stating that De Francis agreed "that monthly owners meeting would take place," the Manfusos do not specify what benefits under the Letter Agreement they are claiming have been wrongfully taken away from them. In any event, because the Letter Agreement is not a valid contract, the Manfusos cannot properly bring a specific performance action to enforce it. See Defendant Corporations' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Ex Parte, Interlocutory and Permanent Injunctive Relief dated June 26, 1992, at 21-23, and incorporated herein (so-called "Letter Agreement" is not a contract).

IV.
CONCLUSION

For the foregoing reasons, the defendant Corporations respectfully request that plaintiffs' complaint be dismissed for failure to state a claim upon which relief may be granted.

Dated: August 7, 1992

Respectfully Submitted,

By: _____

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer Archie
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004

Attorneys for Defendants
Maryland Jockey Club of Baltimore City
Laurel Racing Assoc., Inc.
Pimlico Racing Association, Inc.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

_____

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 1992, a copy of the foregoing Memorandum was hand delivered to: James Ulwick, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

A

ROBERT T. MANFUSO, et al.	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. DEFRANCIS, et al.	*	BALTIMORE CITY
	*	92120052/CE147851

* * * * * * *

MEMORANDUM OPINION AND ORDER

On June the 18th, 1992, argument of counsel was heard in open court, on the record, based on Defendants Joseph A. DeFrancis, et al's Motion to Dismiss Certain Claims for Declaratory Relief and all Claims for Injunctive Relief and the Answer filed thereto by the Plaintiffs, Robert T. Manfuso and John A. Manfuso, Jr. By agreement of counsel, the only issue presented to this Court was the Motion to Dismiss Claims for Injunctive Relief as it applies to the Plaintiffs' request for a permanent injunction (A) Barring Joseph DeFrancis and Martin Jacobs from diverting the resources, key employees, or confidential or proprietary information of Laurel Racing, Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc. to any ventures in Texas. No evidence of any type was presented to the Court but extensive agrument of counsel was heard.

The Defendants' argument that the Plaintiffs' Request for a Permanent Injunction be dismissed on the basis that it lacks sufficient allegations of irreparable harm, is without merit. This Court is not ruling on the merits of granting the permanent injunction. Rather, this Court is only ruling on the Plaintiffs' right to request a permanent injunction. The allegations made by the Plaintiffs against the Defendants in the Bill of Complaint were sufficient, if proven, to allow the Court to grant a permanent injunction. Along these same lines, the Defendants' argument regarding the doctrine of comparative hardship is misplaced. This Court need not weigh the equities when, in effect, the Court is only determining the right to request a permanent injunction.

Having completely reviewed the Bill of Complaint, it would appear that the Plaintiffs have filed this action as a shareholder derivative suit, and possibly as a contract action or director's claim. This Court is only determining whether the action is proper on the basis of a shareholder derivative suit.

Prior to filing a shareholder derivative suit, a shareholder must make a demand upon the corporation to sue in its own name. This prerequisite can be excused where such a demand would be futile. However, in this case, where there were at least some disinterested directors, demand is not excused. And there were no allegations that it would be futile to do so.

It is, therefore

ORDERED this 19th day of June, 1992, that the Defendants' Motion to Dismiss Plaintiffs' Request for Injunctive Relief Barring the Defendants to Any Ventures in Texas is hereby GRANTED with leave to the Plaintiffs to amend their complaint to comply with this opinion. Costs of this proceeding to be divided equally between the parties.

H. Kemp McDaniel
The Judge's Signature Appears
on the Original Document

TRUE COPY
TEST
Saundra E. Banks
SAUNDRA E. BANKS, CLERK

GOODELL, DEVRIES, LEECH & GRAY
ATTORNEYS AT LAW
SUITE 1900
25 SOUTH CHARLES STREET
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2828 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D. C. 20007
470-7244

JAMES E. GRAY
DIRECT DIAL NUMBER
301/783-4009

HAND DELIVER

August 7, 1992

The Honorable Ellen L. Hollander
Circuit Court for Baltimore City
Clarence M. Mitchell, Jr.
Courthouse
100 N. Calvert Street
Baltimore, Maryland 21202

Re: Manfuso v. Joseph A. De Francis, et al
Case No.: 92120052/CC 14785

Dear Judge Hollander:

Enclosed please find courtesy copies of the following pleadings:

1. Motion to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint;

2. Memorandum of Law in Support of Motion to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint; and

3. Opposition of De Francis and Jacobs to Plaintiffs' Motion to Dismiss and/or for Summary Judgment as to Count III of their Counterclaim.

Very truly yours,

James E. Gray

JEG/kav

Enclosures

cc: McGee Grigsby, Esq. **(via mail)**
James P. Ulwick, Esq. **(via hand delivery)**
Herbert S. Garten, Esq. **(via hand delivery)**

	*	IN THE
ROBERT T. MANFUSO, et al.	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. DEFRANCIS, et al.	*	BALTIMORE CITY
	*	92120052/CE147851

* * * * * * *

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Having completely reviewed the Bill of Complaint, it would appear that the Plaintiffs have filed this action as a shareholder derivative suit, and possibly as a contract action or director's claim. This Court is only determining whether the action is proper on the basis of a shareholder derivative suit.

Prior to filing a shareholder derivative suit, a shareholder must make a demand upon the corporation to sue in its own name. This prerequisite can be excused where such a demand would be futile. However, in this case, where there were at least some disinterested directors, demand is not excused. And there were no allegations that it would be futile to do so.

It is, therefore

ORDERED this 19th day of June, 1992, that the Defendants' Motion to Dismiss Plaintiffs' Request for Injunctive Relief Barring the Defendants to Any Ventures in Texas is hereby GRANTED with leave to the Plaintiffs to amend their complaint to comply with this opinion. Costs of this proceeding to be divided equally between the parties.

H. Kemp MacDaniel

Judge H. Kemp McDaniel

Diff - James Ulwick
Kevin Arthur
Herbert Gardner

MD. Jockey / Laurel Racing Assoc. -
Club { Jennifer L. Archie
McGee Grigsby -
James Gray -
Jacobs & DeFrancis

Mitchell Neuhauser.

Mitch Newhouser
(DeFrancis & Jacobs)
783-4021

McGee Grigsby
(202) 637-2200 | 75 ~
6 0 30

CIRCUIT COURT FOR BALTIMORE CITY
CRIMINAL DIVISION

To the Warden of Baltimore City Jail

Bring into Court the following prisoner at 9 A.M.

Date

Name

Alias

Indictment No.

Part

Room

Police Ident. No.

D.O.B.

Issued By

Phone

Inmate is required to appear in court,

daily, until duly discharged.

_____ 19

By Order of the Court:

Clerk

CC-186

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR: 6/18/92

CASE NUMBER -92120052/E147851
CASE TITLE -MANFUSO VS. DEFRANCIS
CATEGORY -
PROCEEDING -

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (____ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEMENT ABSOLUTE (____ ORDER/DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE_____ DATE_____

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR: 6/18/92

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(____ JUDGEMENT ABSOLUTE (____ ORDER/DECREE TO BE SIGNED)

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(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE_____ DATE_____

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

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PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

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JUDGE SIGNATURE_____ DATE_____

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED / /

PRESIDING JUDGE .....

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CASE NUMBER -92120052/E147851
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CATEGORY -
PROCEEDING -

DEFENSE ATTORNEY -
PLAINTIFF ATTORNEY -

TYPE OF PROCEEDING: (____ JURY) (____NON-JURY) (____OTHER)

DISPOSITION: (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (____ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEMENT ABSOLUTE (____ ORDER/DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE_____ DATE_____

(13) D.S.

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs	*	FOR
v.	*	BALTIMORE CITY
JOSEPH A. DE FRANCIS, et al.	*	CASE NO.: 92120052
Defendants		

FILED
AUG 7 1992
CIRCUIT COURT FOR
BALTIMORE CITY

OPPOSITION OF DE FRANCIS AND JACOBS TO PLAINTIFF'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AS TO COUNT III OF THEIR COUNTERCLAIM

Defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs"), by their attorneys, James E. Gray, Linda S. Woolf and Goodell, DeVries, Leech & Gray, submit this Memorandum of Law in Opposition to the Motion to Dismiss and/or for Summary Judgment as to Count III of the Defendant's Counterclaim filed by Robert T. Manfuso and John A. Manfuso (collectively "the Manfusos").

I. INTRODUCTION

In Count III of their Counterclaim, De Francis and Jacobs allege that the Manfusos have tortiously interfered with De Francis' and Jacobs' prospective economic interest in Texas by intentionally filing a meritless lawsuit in clear violation of the Standstill Provision of the Stockholders Agreement. The Manfusos have moved to dismiss and/or for summary judgment, by arguing that De Francis and Jacobs have failed to state a claim for tortious interference under Maryland law and that such a claim should be made following the resolution of the underlying lawsuit. The Manfusos arguments are without merit for the

following reasons: (1) under Maryland's choice of law principles, Texas law applies; (2) Count III sets forth facts which, taken as true, would establish a claim for tortious interference with prospective business interests under Texas law; and (3) Texas law does not require resolution of the underlying claim prior to the filing of a tortious interference action.

II. LEGAL ARGUMENT

A. Under Maryland's Choice of Law Principals, Texas Law Applies to Count III of the Counterclaim.

Maryland courts follow the principle of lex loci delicti in determining the choice of law for a tort action. Under this principle, the law of the place of injury applies. Johnson v. Oroweat Foods. Co., 785 F.2d 503 (4th Cir. 1986) (citing Hauch v. Connor, 295 Md. 120, 453 A.2d 1207 (1983). "The place of the injury is the place where the injury is suffered, not where the wrongful act took place." Johnson, 785 F.2d at 511 (citing Frericks v. General Motors Corp., 274 Md. 288, 296, 336 A.2d 118, 123 (1975)).

Under the foregoing rule, Texas law applies to Count III of the Counterclaim. While the wrongful conduct with respect to the tortious interference occurred in Maryland by the Manfusos' filing of the instant lawsuit, the harm or damage suffered by De Francis and Jacobs arose in Texas. It is in Texas where a license to build a racetrack has to be procured, the racetrack built and the profits from the racing venture earned. Thus, this Court must look to Texas law to determine whether De Francis and Jacobs have set forth allegations which,

taken as true, establish a cause of action for tortious interference under Texas law.

B. Count III of the Counterclaim sets forth a valid claim for tortious interference with prospective contractual relations.

To establish a cause of action for tortious interference with business or prospective contractual relations, De Francis and Jacobs must allege the following elements: (1) a reasonable probability that the parties would enter into a contractual relationship; (2) that the Defendant's acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the Plaintiff; (3) that the Defendants were not privileged or justified; and (4) actual harm or damage occurred as a result of the interference. See Levine v. First National Bank of Eagle Pass, 706 S.W.2d 749, 751 (Tex. App. 4 Dist. 1986). See also Exxon Corp. v. Allsup, 808 S.W.2d 648 (Tex. App. - Corpus Christi 1991); Verkin v. Melroy, 699 F.2d 729 (5th Cir. 1983).

In ruling on a motion to dismiss, the court must accept as true all well pleaded facts in the Counterclaim and any reasonable inferences which may be drawn therefrom. Schwartz v. Merchants Mortgage Co., 272 Md. 305, 307-08, 322 A.2d 544 (1974); Unger v. State, 63 Md. App. 472, 479 A.2d 1336 (1984), cert. denied, 105 S.Ct. 1379 (1986); Nistico v. Mosler Safe Co., 43 Md. App. 361, 405 A.2d 340 (1979).[1]

[1] Although these cases discuss the test for granting the now-defunct demurrer, the Maryland Court of Special Appeals has stated that the function of a motion to dismiss is equivalent to

In Count III of their Counterclaim, De Francis and Jacobs make the following allegations: (1) that De Francis and Jacobs, along with James Mango, have formed a partnership now known as D/J/M Track Consultants for the purpose of obtaining an equity interest in Lone Star Jockey Club, Ltd. ("Lone Star")(Counterclaim, ¶ 107); (2) that Lone Star has filed an application with the Texas Racing Commission to secure a license to construct and operate a Class I parimutuel horse racing facility in the Dallas/Fort Worth, Texas market (Id.); (3) that if Lone Star succeeds in securing a license, De Francis, Jacobs and Mango will receive consulting fees equal to 50% of the management fees and a portion of the development fee to be paid by Lone Star (Id.); (4) that although other groups have submitted applications for the right to build a race track in the Dallas/Forth Worth market, the principal competition to Lone Star is believed to be represented by Midpointe Racing, L.C. ("Midpointe")(Id., ¶ 108); (5) that Robert T. Manfuso is a director and stockholder of an entity which owns and operates Hollywood Park Race Track (Id., ¶ 109); (6) that entity and its Chairman, R.D. Hubbard, own almost 50% of the equity of Midpointe and are to perform substantial management services for Midpointe (Id.); (7) that Robert T. Manfuso has appeared in Texas on behalf of Midpointe and has submitted written testimony on Midpointe's behalf in opposition to Lone Star's

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a demurrer and the test is the same. Unger 63 Md. App. at 479 n.6.

application (Id., ¶ 110); (8) that if Midpointe's application is successful, Robert T. Manfuso intends to be actively involved in the management of the Dallas/Forth Worth Race Track (Id., ¶ 111); (9) that the Manfusos have sought to interfere with Lone Star's ability to obtain the Class I license for the Dallas/Fort Worth market and the relationship of De Francis and Jacobs with Lone Star by filing their frivolous and unjustified Complaint shortly prior to crucial hearings before the Texas Racing Commission which commenced on June 15, 1992 (Id., ¶ 112); (10) that the Manfusos knew that Donaldson, Lufkin and Jenret Securities Corporation ("DLJ") who are assisting Lone Star to finance a horse racing facility in the Dallas/Fort Worth market had written a letter which conditioned their financial obligation on "the continued and ongoing active involvement in the development and, ultimately, the operation of the race track by Joseph A. De Francis and Martin Jacobs" (Id., ¶ 113); (11) that absent the filing of the Manfusos' complaint, a reasonable probability exists that Lone Star will be awarded the license to develop and operate the Class I race track, that Lone Star will receive the necessary financing, and therefore De Francis and Jacobs will receive the fees and benefits set forth in ¶ 107 (Id., ¶ 114); (12) that the Manfusos have acted maliciously and intentionally in filing this action for the purpose of adversely impacting Lone Star's application before the Texas Racing Commission with the specific purpose of financially harming De Francis and Jacobs

and enhancing the likelihood of success of Midpointe in obtaining the license (Id., ¶ 115); (13) that the Manfusos know that their complaint which seeks to enjoin De Francis and Jacobs from being involved in Lone Star's application will prevent DLJ from providing the financing necessary to Lone Star's application and will thereby adversely impact the Texas Racing Commission's assessment of Lone Star's financial strength as a prospective holder of a license (Id., ¶ 116); (14) that the Manfusos know that if Lone Star receives the Class I license, then De Francis' and Jacobs' involvement in that venture will greatly enhance their reputations in the horse racing and financial communities, thereby making it easier for De Francis and Jacobs to purchase the Manfusos' stock of Laurel and Pimlico under the "Russian roulette buy-sell" (Id., ¶ 117; and (15) that De Francis and Jacobs have incurred actual harm or damage as a result of the Manfusos' interference in that the Texas Racing Commission will not seriously consider Lone Star's application (Id., ¶ 118).

Based on the elements which comprise a cause of action for tortious interference, the allegations set forth in the Counterclaim clearly state a valid claim. As discussed above, Texas law requires (1) a reasonable probability that De Francis and Jacobs would enter into contractual relations; (2) that the Manfusos acted maliciously by intentionally preventing the relationship from occurring; (3) that the Manfusos' action was not privileged or justified; and (4) that actual harm or

damaged occurred as a result of the interference. De Francis and Jacobs present these specific allegations in paragraphs 112, 114, 115, and 118 of their Counterclaim. These allegations, coupled with Count III's detailed factual account, more than satisfy the pleading requirements imposed by Texas law.

In their Motion to Dismiss, the Manfusos attempt to refute Count III by arguing that they have demonstrated in other pleadings that their Complaint is not barred by the Standstill Provision and therefore does not constitute a groundless suit. See Plaintiffs' Motion to Dismiss Count III at. p. 3. This argument not only lacks merit but more importantly is irrelevant to the determination of a motion to dismiss. Moreover, even if the Manfusos' Complaint is not barred by the Standstill Provision, it is still groundless.[2]

While the Manfusos continually allege that no breach of the Standstill Provision has taken place, this Court has yet to make such a determination. Thus, the Manfusos have overstepped their position in stating that they have made such a demonstration. More importantly, the Manfusos have failed to

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[2] Judge H. Kemp MacDaniel dismissed the Manfusos' claim with respect to Texas racing on the basis that the Manfusos lacked standing as shareholders to institute the claim because they had failed to make a proper demand on the corporations and such demand was not futile. The Manfusos have intentionally refiled this groundless suit, alleging in direct contravention of Judge MacDaniel's ruling, that demand would be futile. Could there be clearer evidence of malice?

offer any extrinsic evidence in support of this point or with respect to De Francis' and Jacobs' involvement in Texas. The absence of extrinsic evidence requires that the Manfusos' motion be treated as a Motion to Dismiss only. The Manfusos' argument regarding the absence of a breach is misplaced, since this Court must accept as true the allegation that the instant litigation is in fact meritless.

As to the Manfusos' claim that Count III should be dismissed as premature, the Manfusos have failed to cite any Texas case which requires the underlying suit to be determined first. Given the absence of legal authority, this Court must dismiss the Plaintiffs' Motion to Dismiss Count III of the Counterclaim.

C. The Manfusos' Continued Interference

The Manfusos desperately want this Court to Dismiss Count III of the Counterclaim so that they can continue their efforts to maliciously and intentionally interfere with De Francis' and Jacobs' prospective economic advantage in regard to Texas Racing. In a Reply Brief filed by Midpointe on August 4, 1992 with the Texas Racing Commission and its Hearings Examiner, who will be making the recommended decision as to which applicant should be awarded the single Class I racetrack license for the Dallas/Fort Worth area, Midpointe argued that:

> A lawsuit filed in the State of Maryland by Robert and John Manfuso, co-owners of the Pimlico and Laurel racetracks, has charged Jacobs and De Francis with breaches in fiduciary duties and seeks damage and injunctive relief to keep Jacobs and De Francis from participating in

> the LSJC project (Staff Ex. 3, DPS p.8). The action in Maryland against Jacobs and De Francis could also have a significant negative impact on the ability of LSJC to finance its track because the letter from DLJ to LSJC concerning the financing relies on the involvement of D-J Track Consultants. (Staff Ex. 3, DPS P. 10-11). In a Memorandum Opinion and Order, the presiding judge in Maryland ruled that the Manfusos could amend their pleading to seek a permanent injunction barring Jacobs and De Francis from diverting the resources and key employees of Laurel and Pimlico to ventures in Texas and noted that the Manfusos' allegations if proven were sufficient to allow the Court to grant a permanent injunction. (LS Ex. 74; S.F. 3108-3110).

Exhibit A, Jacobs Affidavit ¶4 and Exhibit 2 thereto, p. 35.

The involvement of the Manfusos in Midpointe's effort is clear. The attorney for Midpointe, in his cross-examination of De Francis and Jacobs before the hearing examiner for the Texas Racing Commission, used a large blown-up copy of De Francis' April 8, 1992 letter to James Mango.[3] Jacobs Aff. ¶3 and Exhibit 1 thereto. Neither De Francis, Jacobs nor their counsel provided copies of this letter to Midpointe or their counsel. Copies of this letter were provided to Mr. Ulwick at one of the hearings before this Court. Midpointe undoubtedly obtained these letters from the Manfusos or their Maryland attorneys. Jacobs Aff ¶3. If the Manfusos have no interest in

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[3] The letters to James Mango was also referenced in Midpointe's Reply Brief in support of the proposition that D/J Track Consultants, owned by De Francis, Jacobs and Mango, would not rely on Mango's expertise because he was "obligated to spend all of his working time on the Maryland tracks and will only be permitted to consult on the Texas track in his 'spare time or vacations.'" (Emphasis in original) Jacobs Aff. ¶4, and Exhibit 2, p. 35.

Midpointe's efforts in Texas, then their only motivation in assisting Midpoints is to harm De Francis and Jacobs.

CONCLUSION

For the reasons stated above, De Francis and Jacobs respectfully submit that this Court can neither dismiss nor grant summary judgment in favor of the Manfusos as to Count III of their Counterclaim.

Respectfully submitted,

James E. Gray

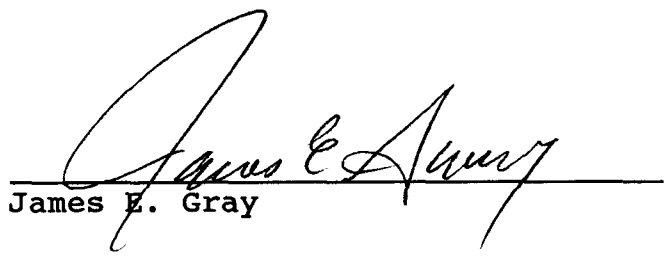
Linda S. Woolf

Linda S. Woolf
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 1992, a copy of the foregoing Memorandum in Support of Motion to Dismiss Count III of Amended Complaint for Declaratory and Injunctive Relief was hand-delivered to: James Ulwick, Esq., Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201, Attorneys for Plaintiffs; and mailed to: Irwin Goldblum, Esq., McGee Grigsby,

Esq., and Jennifer Archie, Esq., Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Suite 1300, Washington, D.C. 20004-2505, Attorneys for Defendants, The Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.



James E. Gray

ALL-STATE LEGAL SUPPLY CO. 1-800-222-0510 EDS11

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs		
	*	**FOR**
v.		
	*	**BALTIMORE CITY**
JOSEPH A. DE FRANCIS, et al.		
	*	**CASE NO.: 92120052**
Defendants		

* * * * * * * * * * * * *

AFFIDAVIT

1. My name is Martin Jacobs. I am over eighteen years of age and competent to testify. The facts set forth herein are true and within my personal knowledge.

2. I am Executive Vice President, Treasurer and General Counsel of the corporate defendants in this litigation.

3. I am also a consultant to Lone Star Jockey Club, Ltd. ("Lone Star") in connection with its application to the Texas Racing Commission for a license to develop and operate a Class I racetrack in the Dallas/Fort Worth area. Public hearings were recently held before a Hearings Examiner designated by the Texas Racing Commission on the applications for such racetrack license filed by four (4) competing applicants. That Hearings Examiner is charged with hearing and receiving all the evidence and making a recommended decision to the Texas Racing Commission as to which of the four applicants should be awarded the single license that is to be issued.

4. I personally attended portions of the hearings held in Texas including the oral testimony of Joseph A. De Francis given in support of the Lone Star application and the cross-

examination of him by the various parties to that proceeding. During the cross-examination of Mr. De Francis by counsel for Midpointe Racing, L.C., that counsel introduced into the record a copy of the letter dated April 8, 1992, from Mr. De Francis to James P. Mango that is attached hereto as Exhibit 1. A large, blown-up copy of this letter with portions highlighted, was used by Midpointe's counsel during his cross-examination of Mr. De Francis and was introduced into the record. I know that copies of that letter were not provided to Midpointe's counsel by Mr. De Francis or me, or by Lone Star or its counsel, or by Mr. Mango.

4. Attached hereto as Exhibit 2 is a copy of three pages contained in the Reply Brief dated August 4, 1992, submitted by Midpointe Racing, L.C. to the Hearings Examiner and the Texas Racing Commission in the licensing proceeding referred to above.

I solemnly affirm under the penalty of perjury and upon personal knowledge that the contents of the aforegoing Affidavit are true.

Martin Jacobs

ALL-STATE LEGAL SUPPLY CO., 1-800-222-0510 ED 11

THE MARYLAND JOCKEY CLUB
P.O. BOX 130
LAUREL, MARYLAND 20725

As of April 8, 1992

Mr. James P. Mango
P.O. Box 130
Laurel, MD 20725

Dear Jim:

I am writing this letter in my capacity as President and Chief Executive Officer of Laurel Racing Assoc., Inc. ("Laurel") and The Maryland Jockey Club of Baltimore City, Inc. ("Pimlico").

D/J Track Consultants ("D/J") is participating in the application of Lone Star Jockey Club, Ltd. ("Lone Star") for a license to conduct racing in Texas. Since Pimlico in the spring of 1990 abandoned its corporate pursuit of activities in Texas started by my father, you have not participated in the activities of D/J with respect to the Lone Star application. As of this date, you will begin participation as an equity partner, along with Martin Jacobs and me, in the consulting entity which will now be renamed D/J/M Track Consultants ("D/J/M"). You are advised that the following limitations on your activities in D/J/M must be strictly observed:

1. You will continue to perform your duties as Vice President/Operations and General Manager of Laurel and Pimlico and you will not neglect any duties or obligations owed by you to Laurel and Pimlico so long as your employment contract is in effect with those entities.

2. Your participation in the activities of D/J/M shall be done in your own spare or vacation time so as not to interfere with or take time away from your responsibilities and duties to Laurel and Pimlico.

As I am sure you will understand, the purpose of the requirements set forth above is to assure that your activity on behalf of D/J/M will not interfere with your duties and obligations as they relate to Laurel and Pimlico. This will

confirm that, based on the requirements set forth above, your participation in D/J/M does not violate your employment contract with those entities.

Sincerely,

Joseph A. De Francis
President and Chief
Executive Officer

ALL-STATE LEGAL SUPPLY CO., 1-800-222-0510 ED 11

REPLY BRIEF

AUGUST 4, 1992

Amazingly, LSJC's management, Carter and Musselman, and consultants Joe DeFrancis and Marty Jacobs **are not contributing a single penny to LSJC** for their 86% equity interests. (See LSJC DPS Report at p. 7 attached as Appendix 4; see also Appendix 5; S.F. 1619-1620, 1630-1631, 1853-1854, 1989).

However, Carter, Musselman, DeFrancis and Jacobs are paying themselves a "Developers Fee" out of the project of about $3.3 million, which is over and above their costs. Under Article IV, Section 4.1(d) of the Management Agreement, (attached as Appendix 6) LSJC Management Company "shall be reimbursed for all ... costs and expenses that manager incurs on behalf of the management of the business." This is in addition to the $3.3 million Development Fee and the Management Fee provided for in the sections immediately preceding Section 4.1(d). (LS Ex. 27, apln Vol., Ex. F). (See Ex 6).

LSJC hopes to fill its void of experience in organizing, building and operating a pari-mutuel racetrack by relying on a "consulting agreement" it entered into with a newly formed entity named "D-J Track Consultants" from Maryland. (See Appendix 7; Jacobs, p. 1853, 1857). The owners of D-J Track Consultants are Joe DeFrancis, Marty Jacobs and James Mango, all from the Maryland tracks of Laurel and Pimlico where the handle and attendance have declined in recent years. (Jacobs, p. 1883). Laurel and Pimlico have shown a loss in 1989, 1990, and 1991. (Jacobs, p. 1823). In fact, Laurel and Pimlico historically show a net loss. (Jacobs, p. 1823). Purses paid to horsemen are only about $135,000 per day in Maryland, as compared to over $300,000 in purses per day at Hollywood Park. (DeFrancis, p. 2005; Hubbard depo., Ex. 7, p. 31). These men have no experience in building or opening a racetrack

from scratch. These men have no experience with quarter horse racing. (Jacobs, p. 1876; DeFrancis, p. 1971). Both DeFrancis and Jacobs were practicing attorneys until three years ago.

Jim Mango is a management employee at the Maryland tracks. (DeFrancis, p. 1994). However, it was revealed during the hearings in a letter to Mango dated April 8, 1992 from DeFrancis that Mango is obligated to spend all of his working time on the Maryland tracks and will only be permitted to consult on the Texas track in his "spare time or vacations." (MP Ex. 30, See Appendix 21). DeFrancis and Jacobs refused to commit to how much time they will spend in Texas, but they both admitted that they were not willing to move to Texas. (Jacobs, p. 1802, 1803, 1880, 1887, 1888; DeFrancis, 2001, 2028).

The DPS investigative report on LSJC questions whether D-J Track Consultants will even be permitted to perform its "consulting agreement." (Appendix 4). A lawsuit filed in the State of Maryland by Robert and John Manfuso, co-owners of the Pimlico and Laurel racetracks, has charged Jacobs and DeFrancis with breaches in fiduciary duties and seeks damage and injunctive relief to keep Jacobs and DeFrancis from participating in the LSJC project (Staff Ex. 3, DPS p. 8). The pending action in Maryland against Jacobs and DeFrancis could also have a significant negative impact on the ability of LSJC to finance its track because the letter from DLJ to LSJC concerning the financing relies on the involvement of D-J Track Consultants. (Staff Ex. 3, DPS p. 10-11). In a Memorandum Opinion and Order, the presiding judge in Maryland ruled that the Manfusos could amend their pleading to seek a permanent injunction barring Jacobs and DeFrancis from diverting the resources and key employees of Laurel and Pimlico to ventures in Texas and noted that the Manfusos' allegations if proven were sufficient to allow the Court to grant a permanent injunction. (LS Ex. 74; S.F. 3108-3110).

(14)

FILED

JUL 15 1992

CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
vs.	*	FOR
JOSEPH A. De FRANCIS, et al.,	*	BALTIMORE CITY
Defendants	*	Case No. 92120052/CE147851

* * * * * * * * * * * * *

PLAINTIFFS' ANSWER TO COUNT I
OF THE COUNTERCLAIM OF DEFENDANTS
JOSEPH A. DE FRANCIS AND MARTIN JACOBS

Pursuant to Md. R. 2-323, plaintiffs Robert T. Manfuso and John A. Manfuso, Jr. (collectively "the Manfusos"), by and through their attorneys, James P. Ulwick and Kramon & Graham, P.A., hereby answer Count I of the Counterclaim brought by defendants Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs")[1]:

FIRST DEFENSE

The Manfusos generally deny every factual allegation and every other allegation and assertion in Count I of De Francis's and Jacobs's Counterclaim.

SECOND DEFENSE

Count I of De Francis's and Jacobs's Counterclaim fails to state a claim upon which relief can be granted.

[1] On June 10, 1992, the Manfusos moved to dismiss Count II of De Francis's and Jacobs's Counterclaim and both Counts of the Counterclaim by Defendants Pimlico Racing Assocation, Inc., Laurel Racing Assoc., Inc., and The Maryland Jockey Club of Baltimore City. Concurrently with this Answer, the Manfusos have moved to dismiss Count III of De Francis's and Jacobs's Counterclaim.

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KRAMON & GRAHAM, P.A.
SUN LIFE BUILDING
CHARLES CENTER
20 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 752-6030

FIRST AFFIRMATIVE DEFENSE

De Francis and Jacobs are estopped to recover on Count I of their Counterclaim.

SECOND AFFIRMATIVE DEFENSE

De Francis's and Jacobs's fraud bars their recovery on Count I of their Counterclaim.

THIRD AFFIRMATIVE DEFENSE

The applicable statutes of limitations bar De Francis's and Jacobs's recovery on Count I of their Counterclaim.

FOURTH AFFIRMATIVE DEFENSE

De Francis and Jacobs have waived the right to recover on Count I of their Counterclaim.

James P. Ulwick

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Attorneys for Robert T. Manfuso and John A. Manfuso, Jr.

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zn:kfa:7/8/92:1
c:Manfuso:ans

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1992, a copy of Plaintiffs' Answer to Count I of the Counterclaim of Defendants Joseph A. De Francis and Martin Jacobs was hand-delivered to:

James E. Gray, Esquire
Linda S. Woolf, Esquire
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201;

and sent via Federal Express to:

Irwin Goldblum, Esquire
McGee Grigsby, Esquire
Jennifer Archie, Esquire
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505.

James P. Ulwick

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c:Manfuso:ans

NoWFNDS 6/30

FILED
JUL 15 1992
CIRCUIT COURT FOR
BALTIMORE CITY

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs	*	FOR
v.	*	BALTIMORE CITY CE 147851
JOSEPH A. DE FRANCIS, et al.	*	CASE NO.: 92120052
Defendants		

* * * * * * * * * * * * *

OPPOSITION OF DE FRANCIS AND JACOBS TO MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AS TO COUNT II OF THEIR COUNTERCLAIM

Defendants and Counter Plaintiffs, Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs"), by their attorneys, James E. Gray, Linda S. Woolf and Goodell, DeVries, Leech & Gray, submit the following Opposition to the Motion of Robert T. Manfuso and John A. Manfuso, Jr. (the "Manfusos") for Dismissal and/or Summary Judgment with respect to Count II of the Counterclaim of De Francis and Jacobs.

I. PROCEDURAL BACKGROUND

On April 29, 1992, the Manfusos filed a Complaint for Declaratory and Injunctive Relief against De Francis, Jacobs, The Maryland Jockey Club of Baltimore City ("MJC"), Pimlico Racing Association, Inc. ("Pimlico"), and Laurel Racing Assoc., Inc. ("Laurel"). The Complaint, containing misstatements of fact, inaccurate characterizations as to motive, and spurious allegations that De Francis and Jacobs have acted in various ways to the detriment of Pimlico and Laurel, seeks multiple declaratory and injunctive relief barring De Francis and Jacobs from further alleged breaches of their fiduciary duties.

De Francis and Jacobs denied that they breached their

fiduciary duties to either Laurel or Pimlico in their Answer to Complaint for Declaratory Relief Requested in Subparagraph A of Count One, moved to dismiss certain claims for declaratory relief and all claims for injunctive relief and addressed the Manfusos' true motivation for the filing of their Complaint in their Counterclaim.

The Manfusos have not responded to Counts I and III of the Counterclaim, despite the time for response having already expired. The Manfusos have responded to Count II of the Counterclaim of De Francis and Jacobs by filing a Motion to Dismiss and/or Motion for Summary Judgment ("Manfusos' Motion").

Count II of the Counterclaim filed on behalf of De Francis and Jacobs requests that this Court issue Declarations that the filing of the Complaint and the Manfusos' interference with De Francis' operational and managerial control of Laurel and Pimlico constitute material breaches of the Stockholders Agreement; that De Francis and Jacobs are excused from any and all future performance under the Stockholders Agreement; that all consideration paid to the Manfusos under the Agreement along with interest thereon and costs be repaid to Pimlico; that De Francis and Jacobs be awarded ten million dollars ($10,000,000.00) in compensatory damages along with interest thereon; that De Francis and Jacobs be reimbursed for all attorneys' fees and costs incurred in defending the Manfusos' claims as well as the attorney fees and costs incurred in

bringing the Counterclaim; and any further relief that the Court deems appropriate.

II. COUNTERSTATEMENT OF FACTS

The Manfusos' Motion is premised upon an emotional appeal designed to distract the Court from applying the proper test to the legal issues. The Manfusos, at page six of their Motion, argue that their violation of the Standstill Provision in the Stockholders Agreement is excused because: (1) they are owners and directors of several substantial corporations; (2) they have invested millions of dollars of their own money and years of their time and effort to make the corporations successful and valuable entities; (3) they fear that the son of their former partner is abusing his position as President and Co-Chairman of the Boards in a way that will drastically and irretrievably damage the corporations and (4) they believe they have a duty to take all steps possible to prevent further abuse of the corporations. Each of these statements is inaccurate.

First, the Manfusos are the owners of a minority interest of the voting stock of Laurel and Pimlico. As minority stockholders, they have no rights to any corporate information other than that provided by statute. See Md. Corp. & Ass'n Code Ann. §§2-512 and 2-513 (1985 Repl. Vol). Likewise, as minority stockholders, they have no statutory right to compel a purchase or sale of the stock of the corporation, absent circumstances which are not relevant here. Id. at §3-413.

Second, the Manfusos are directors only because De Francis, who has control of the voting stock, agreed in the Stockholders Agreement to permit them to continue as directors in return for a promise that the Manfusos would not institute the very types of claims they have brought in their Complaint until October of 1993.[1]

Third, the Manfusos' allusion to the "millions of dollars of their own money" allegedly invested in the corporations is a deliberate attempt to mislead this Court. Every dollar that the Manfusos ever invested in or loaned to the corporations was repaid.[2] The years of time and effort they allegedly spent in making the corporations successful and valuable entities have been paid for many times over by generous salaries and benefits and, since their retirement, severance payments of $10,000 a month which they have received under the Stockholders Agreement.

Fourth, any efforts by the Manfusos to make the corporations successful and valuable ceased abruptly when they

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[1] Otherwise, under the corporations' bylaws, the Manfusos could be removed as directors at any time with or without cause.

[2] As set forth in De Francis' and Jacobs' Counterclaim, the secured loan made by John A. Manfuso, Jr. in connection with the purchase of Laurel was repaid fully when the loan was refinanced in July 1986. The joint pledges made by the Manfusos in connection with the purchase of Laurel were refinanced in October, 1986. Since that time the Manfusos have had no money invested in Laurel. Counterclaim, ¶ 19. Shortly after the execution of the Stockholders Agreement, the Manfusos elected to retire and take a lump sum termination payment of $1,250,000 each, an amount equal to their total investment in Pimlico. Id. ¶ 53.

submitted their resignations shortly after the execution of the Stockholders Agreement and were totally negated by the adverse publicity they visited upon the corporations by filing the instant Complaint two weeks before the Preakness Stakes.

The Manfusos' alleged "fear", that De Francis is somehow causing irretrievable damage to the corporations is not supported by the conclusory allegations in their Amended Complaint. There is no allegation in the Amended Complaint of conduct on the part of De Francis that could reasonably be inferred to threaten irretrievable damage to Laurel and Pimlico. If the Manfusos' overriding concern is to "take all steps possible to prevent further abuses of the corporations", then they should be willing to live with the consequences of their breach of the Standstill Provision, forego their rights under the Stockholders Agreement, and litigate the merits of the Counterclaim. Instead, the Manfusos seek to avoid their obligations under the Standstill Provision by claiming their actions are to protect the corporations while they continue to claim benefits and payments under the Stockholders Agreement.

III. LEGAL ARGUMENT

Apart from their emotional appeal, the Manfusos make the following four arguments to excuse their filing of this Complaint in violation of the Standstill Provision: (1) the Standstill Provision cannot be used to prevent the Manfusos from exercising their fiduciary duties; (2) the Standstill Provision cannot permit De Francis and Jacobs to repeatedly

breach their fiduciary duties; (3) the Standstill Provision cannot apply to a declaratory judgment action; and (4) the Manfusos' claims regarding Texas come within an explicit exception to the Standstill Provision.[3]

The Manfusos urge this Court to rule that the four proffered excuses are sufficient as a matter of law to prevent recovery by De Francis and Jacobs even if the Counterclaim's well pleaded facts are assumed to be true. Whether this Court treats the Manfusos' Motion as one to dismiss or as one for summary judgment, the result will be the same. The Manfusos' feeble attempt to concoct a legal excuse for their blatant and intentional violation of the Standstill Provision fails to meet the legal standard necessary for this Court to dismiss Count II of the Counterclaim at this stage of the proceedings.

A. THE MANFUSOS HAVE FAILED TO SATISFY THE LEGAL STANDARD APPLICABLE TO THEIR MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

The Manfusos attached extrinsic material in support of their Motion in an apparent effort to have this Court treat the Motion as one for summary judgment pursuant to Maryland Rule 2-322(c). The attachments include: Exhibit A - an excerpt from the application submitted by Lone Star Jockey Club to the Texas Racing Commission; Exhibit B - excerpts of De Francis' written testimony in the Texas Racing Commission

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[3] None of the proffered legal excuses for the filing of the Complaint addresses the fact that Count Two of the Counterclaim is also premised upon the Manfusos' interference with De Francis' operation and managerial control of Laurel and Pimlico. See Counterclaim ¶¶ 88-96.

proceeding; Exhibit C - excerpts of the deposition testimony of Preston M. Carter, Jr. in the Texas Racing Commission proceeding; and Exhibit D - an unexecuted draft copy of the employment agreement between James P. Mango and MJC and Laurel. The extrinsic material relates solely to the alleged activity of De Francis and Jacobs in regard to Texas racing and the Manfusos' allegation that this activity is a breach of the Stockholders Agreement that falls within an explicit exception to the Standstill Provision. Under the present posture of this case, the extrinsic material attached in regard to Texas racing is irrelevant to any claim or defense presently pending and should be excluded by this Court. See Md. Rule 2-322(c) (1992).[4]

On June 19, 1992, the Honorable H. Kemp McDaniel dismissed all of the Manfusos' claims for injunctive relief related to the activities of De Francis and Jacobs in Texas. Judge McDaniel found that these claims were filed by the Manfusos as a "shareholder derivative suit", that the Manfusos failed to make a demand upon the corporations to sue in their own names and that such a demand was not excused because the corporations had some disinterested Directors. Finally, Judge McDaniel granted the Manfusos' leave to amend their Complaint to comply with his opinion. To date, the Manfusos have done

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[4] Under Maryland Rule 2-322(c), this Court has complete discretion to exclude the Manfusos' extrinsic material, and therefore refuse to treat their Motion to Dismiss as one for summary judgment. Antigua Condominium Ass'n v. Melba Investors Atlantic, Inc., 307 Md. 700, 719, 517 A.2d 75 (1986).

nothing to comply with Judge McDaniel's ruling.

Subsequent to Judge McDaniel's ruling, the Manfusos filed an Amended Complaint for Declaratory and Injunctive Relief which deleted their request for an injunction prohibiting De Francis' and Jacobs' further involvement in support of the application of the Lone Star Jockey Club.[5] Since the Manfusos' Amended Complaint contains no claim for relief as to De Francis' and Jacobs' activities related to Texas racing, the extrinsic material attached to the Manfusos' Motion should not be considered.

If the extrinsic material submitted by the Manfusos is excluded, then all aspects of their Motion must be treated as a Motion to Dismiss. Even if the Court accepts the extrinsic material, it is only applicable to the argument that DeFrancis' and Jacobs' involvement in Texas falls within an explicit exception to the Standstill provision, and all other aspects of their Motion must be treated as a Motion to Dismiss.

In ruling on a Motion to Dismiss, the Court must accept as true all well pleaded facts in the Counterclaim and any reasonable inferences which may be drawn therefrom. Schwartz v. Merchants Mortgage Co., 272 Md. 305, 307-08, 322 A.2d 544 (1974); Ungar v. State, 63 Md. App. 472, 479 A.2d 1336 (1984), cert. denied, 105 S. Ct. 1379 (1986); Nistico v. Mosler

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[5] The Manfusos' Amended Complaint inexplicably continues to include various allegations related to De Francis' and Jacobs' involvement in Texas. See Amended Complaint, ¶ 22-31. However, the Manfusos do not seek any relief related to Texas, which renders these allegations surplusage.

Safe Co., 43 Md. App. 361, 405 A.2d 340 (1979).[6] In a previously filed Memorandum, counsel for the Manfusos agreed that this is the proper standard. See Plaintiffs' Opposition to Defendants' Motions to Dismiss the Complaint Insofar As It Concerns Texas Racing Matters, p. 1, (citing Berman v. Karvounis, 308 Md. 259, 264, 518 A.2d 726, 728 (1987); Flaherty v. Weinberg, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985); Black v. Fox Hills North Community Ass'n., 90 Md. App. 75, 79, 599 A.2d 1288, cert. denied, 326 Md. 177, 604 A.2d 444 (1992)). As set forth in Section B, infra, the allegations in Count II clearly satisfy this standard and state a legally sufficient claim for material breach of the Stockholders Agreement.

If this Court elects to consider the extrinsic evidence, then the Manfusos' Motion may be treated as one for summary judgment only as to the issue of whether De Francis' and Jacobs' activities in Texas violates the provisions of the Stockholders Agreement. In order to prevail on their Motion for Summary Judgment, the Manfusos must show that no genuine dispute of material fact exists as to whether the Standstill Provision of the Stockholders Agreement bars the institution of their Complaint as it relates to Texas Racing. That is, they must establish that, as a matter of law, De Francis' and Jacobs' involvement in Texas breached obligations

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[6] Although these cases discuss the test for granting the now-defunct demurrer, the Maryland Court of Special Appeals has stated that the function of a motion to dismiss is equivalent to a demurrer and the test is the same. Ungar, 63 Md. App. at 479 n.6.

they assumed pursuant to the Stockholders Agreement, so that the filing of the Complaint as to Texas Racing does not constitute a breach of the Standstill Provision.

In ruling on a Motion for Summary Judgment "the trial court must determine whether the pleadings, answers to interrogatories, depositions and affidavits demonstrate that there is no genuine dispute of material fact. Further, the court must also decide whether the moving party is entitled to judgment as a matter of law. [citations omitted] The trial judge is commanded to resolve all inferences against the movant." Hebb v. Walker, 73 Md. App. 655, 536 A.2d 113, 116 (1988); DeGrazio v. County Exec. for Mont. Co., 228 Md. 437, 418 A.2d 1191, 1196 (1980). Moreover, "[o]ne who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and any doubt as to the existence of such an issue is resolved against the movant." Medical Mutual Liability Insurance Society of Maryland v. Mutual Fire, Marine & Inland Insurance Co., 37 Md. App. 706, 379 A.2d 739, 742 (1978); Syme v. Marks Rentals, Inc., 70 Md. App. 235, 520 A.2d 1110, 1111 (1987). As discussed in Section F, infra., the Manfusos cannot establish as a matter of law that their claims with respect to Texas Racing fall within an explicit exception to the Standstill Provision of the Stockholders Agreement. Thus, their Motion for Summary Judgment must be denied.

B. THE ALLEGATIONS CONTAINED IN THE COUNTERCLAIM ARE LEGALLY SUFFICIENT AND THEREFORE THE MANFUSOS' MOTION TO DISMISS MUST BE DENIED

When considering the Manfusos' Motion to Dismiss, the Court must accept as true the following allegations in the Counterclaim filed by De Francis and Jacobs: (1) that following the death of Frank J. De Francis, and Joseph A. De Francis' announcement that he intended to assume the presidency and operational control of Laurel and Pimlico, the Manfusos were personally hostile to De Francis and Jacobs, and threatened both a public dispute and litigation (Counterclaim ¶ 41); (2) that De Francis realized that the Manfusos threats, if carried out, would adversely impact the business and value of Laurel and Pimlico, employee morale and efficiency and the chances of obtaining legislative approval for off track betting (Id. ¶ 42); (3) that De Francis wished to obtain a reasonable period of time to exercise operational and managerial control of the racetracks without meddling, harassment or actual or threatened lawsuits by the Manfusos (Id. ¶ 43); (4) that for the purpose of obtaining peace and preventing litigation or a public dispute, De Francis and Jacobs agreed to enter into the Stockholders Agreement (Id. ¶ 44); (5) that the primary benefit provided to De Francis and Jacobs under the Stockholders Agreement was a four year period during which De Francis could exercise full operational and managerial control of the racetracks without meddling, harassment or actual or threatened lawsuits by the Manfusos. This four year period of peace was

provided by a Standstill Provision by which the Manfusos agreed to forego all litigation related to the "business or operations of Pimlico or Laurel until October 1, 1993 and an express recognition by the Manfusos that the ownership of the majority of the voting stock of Laurel and Pimlico by the Estate and De Francis gave De Francis full and complete operational and managerial control." (Id. ¶ 46); (6) that, under the Standstill Provision, the Manfusos agreed to forego any litigation related to "the business or operations of Pimlico or Laurel" until October 1, 1993 (Id.); (7) that the Stockholders Agreement conferred numerous and substantial benefits upon the Manfusos that would not otherwise be available to them as minority stockholders in Laurel and Pimlico (Id. ¶ 47); (8) that the Manfusos deliberately and intentionally disregarded the Standstill Provision when they filed the instant Complaint (Id. ¶ 72); (9) that the Manfusos' knowing and intentional filing of the Complaint and interference with the managerial and operational control of Pimlico and Laurel constitute intentional material breaches of the Manfusos' primary obligations under the Stockholders Agreement (Id. ¶ 92); (10) that the Manfusos' material breaches of the Stockholders Agreement are so substantial and fundamental that they defeat the very purpose of the agreement (Id. ¶ 93); (11) that these breaches have deprived De Francis and Jacobs of the primary benefits for which they bargained under the Stockholders Agreement (Id. ¶ 95); and (12) that these breaches damaged De

Francis' and Jacobs' reputations and the value of their interests in Laurel and Pimlico (Id. ¶ 96).

These allegations are sufficient to state claims that De Francis and Jacobs were deprived of the valuable consideration for which they bargained under the Stockholders Agreement (1) when the Manfusos began their campaign of interference with De Francis' managerial and operational control of Pimlico and Laurel and (2) when they embroiled De Francis and Jacobs in this very public litigation that has diverted their and the public's attention from the business and operations of Laurel and Pimlico. The Manfusos do not and cannot contend that the allegations in Count II of the Counterclaim are legally insufficient to state a cause of action for breach of contract. Accordingly, their Motion to Dismiss must be denied.

C. THE MANFUSOS WERE FREE TO EXERCISE THEIR FIDUCIARY DUTIES AS DIRECTORS WITHOUT VIOLATING THE STANDSTILL PROVISION

The Manfusos attempt to excuse their violation of the Standstill Provision by claiming that they are only seeking to obtain corporate information so as to allow them to discharge their responsibilities as directors. The Manfusos' Complaint does not, by any stretch of the imagination, merely request information. The 19 page Complaint makes allegations of corporate waste that are so hyperbolic that they led one journalist to report (albeit inaccurately) that DeFrancis was attempting to clear himself of accusations of embezzlement. See

Daily Record, June 8, 1992, p. 1,5. The Complaint also seeks declaratory relief and seven different injunctions,[7] only two of which concern the Manfusos' access to information.

The Manfusos recognize that the Standstill Provision's very terms bar this action and, therefore, argue that this Court must read into the Standstill Provision an "implicit exception" for litigation brought to assist them in properly fulfilling their fiduciary duties as directors of the corporations. Manfuso Memo., p. 6. As noted above, the Manfusos are only directors of the two corporations by virtue of a provision of the very Stockholders Agreement whose Standstill Provision they seek to avoid. Further, as directors, the responsibility owed by the Manfusos to the corporations is for the benefit of the shareholders and not the public at large. The only shareholders of the two corporations are the De Francis interests, the Manfusos and Jacobs. The Manfusos owe no fiduciary duty to any one other than the very signatories to the Agreement whose provisions they now seek to avoid.

The Manfusos urge this Court not only to ignore the plain language of the Standstill Provision, but also the plain language of the integration clause of the Stockholders Agreement in order to create an implicit exception to the

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[7] As stated by De Francis and Jacobs in their Motion to Dismiss Certain Claims for Declaratory Relief and All Claims for Injunctive Relief, pages 8-14, individual directors have neither standing nor a legal right to seek injunctive relief.

Agreement which was not bargained for and which does not exist. Section XII.B of the Stockholders Agreement provides as follows:

> This agreement is the complete agreement among the parties and is the sole governing instrument concerning the subject matter. This agreement supersedes all prior agreements and understanding among the parties, written or oral, which may have related to the subject matter hereof in any way, including without limitation, the Laurel Shareholders' Agreement.

See Exh. A to Manfusos' Complaint, p. 25-26. As this Court has observed, the Stockholders Agreement is a carefully crafted, lawyer-like document.[8] Had the Manfusos or their counsel felt that, in order to fulfill their fiduciary duties to the corporations, the Manfusos should have the right to institute a legal action to procure corporate information, that exception would have been contained in the Stockholders Agreement.[9]

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[8] Mr. John A. Manfuso, Jr., testified at a hearing before this Court on July 2, 1992, that it took his lawyer nearly six months to finalize the terms of the Stockholders' Agreement. After long negotiation, the parties identified those areas which they wished to except from the Standstill Provision. They expressed their intent that the written document contained the entire agreement of the parties. The Manfusos should not now be heard to argue that this Court should read into the agreement other, implicit exceptions.

[9] This unanimous Stockholders Agreement is consistent with "Maryland's statute and the general trend which allows stockholders who own all of the stock of a close corporation to enter into an agreement to regulate any aspect of the corporation's operations. See Md. Corp. & Ass'n Code Ann. § 4-401 (1985 Repl. Vol.); Bunnett v. Smallwood, 768 P.2d 736, 739 (Colo. App. 1988) (citing Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980)); see also F. Hodge O'Neal and Robert B. Thompson, O'Neal's Close Corporations § 5.30, at 134 (3d ed. 1987) ("Policy considerations positively favor the enforcement of

It is clear that the information sought by the Manfusos - backup data from outside counsel concerning legal fees incurred by the corporations and meetings with the corporations' independent auditors - was demanded to fuel this litigation and not to fulfill any fiduciary duties that the Manfusos owe to the corporations. However, putting aside the alleged motivation for the request for information, the Manfusos knew, prior to filing the Complaint, that the corporations had agreed to provide this information. Laurel and Pimlico satisfied their obligation to provide the Manfusos, as directors, with access to the corporate books and records by providing the Manfusos or their accountant with the records in their possession concerning payments of legal fees to outside counsel. See Jacobs Affidavit, ¶ 28.

De Francis and Jacobs, however, caused the corporations to go beyond all legal requirements to satisfy the Manfusos' unprecedented demands. In a letter dated March 13, 1992, counsel for Laurel and Pimlico informed counsel for the Manfusos that outside counsel had been requested to provide the underlying computer billing printouts and that this information would be provided to the Manfusos' accountant. At a meeting of the Boards of Directors on April 13, 1992, the Manfusos were

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agreements among all the shareholders."). Indeed, "the general trend in Maryland's corporation statutes for more than 120 years has been toward greater flexibility and greater latitude in permitting the stockholders . . . to decide for themselves issues of both economic substance and corporate governance." James J. Hanks, Jr., Maryland Corporation Law § 1.5, at 24 (1991 Supp.).

again informed that the corporations had requested that outside counsel provide the underlying computerized billing records and that this information would be provided when received. Jacobs Affidavit, ¶ 28. This was known by the Manfusos and their counsel before this Complaint was filed and their suggestion that the institution of litigation was necessary to fulfill their fiduciary duties is refuted by the facts.[10]

With respect to accounting information, the Manfusos and their accountant have been give access to all documents and records of the corporation, as well as the work papers of the independent auditors, Ernst & Young. Jacobs Affidavit, ¶ 29. They have made Ernst & Young's principals and employees available for consultation and questioning by the Manfusos' accountant. Id. at ¶ 30. They have presented Ernst & Young with all of the Manfusos' correspondence expressing their concerns regarding the independent auditors' treatment of various items in the financial statements prepared for the racetracks, as well as management's responses thereto. Id. In each instance, Ernst & Young has advised that the questioned items were treated in accordance with generally accepted accounting principles. Id.

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[10] On July 8 date, McGee Grigsby, Esq., counsel for the Corporations advised Herbert Garten, Esq., counsel for the Manfusos, that outside counsel had provided computerized billing data and that it was available for the Manfusos' review as soon as Mr. Garten produced the comparable billing information which the Manfusos promised he would produce with respect to legal services rendered to the Manfusos for which Pimlico paid the fees. A copy of the letter is attached as Exhibit A.

Not satisfied with this action, the Manfusos demanded that management request Ernst & Young to confer directly with them or again with their accountant for some unspecified purpose. On April 13, 1992, the Boards of Directors of the corporations requested that the Manfusos come forward with their accountant's report and present a factual basis for their alleged concerns so that the Boards might then appropriately consider and act upon their request. The Manfusos have failed to do so. Id.

It is clearly within the Boards' rights to impose reasonable restrictions upon the Manfusos' accountant in connection with access to corporate books and records. See Gorton v. Dow, 202 N.Y.S.2d 841, 843 (1967) (although trustee of a municipal corporation has a right to inspect books and records, corporation has right to impose reasonable restrictions upon access, e.g., limiting it to normal business hours and requiring inspection be on the premises).[11] Rather than comply with the Boards reasonable requests, the Manfusos instituted the instant action, claiming corporate waste at a

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[11] The Manfusos cite Rosenbloom v. Electric Motor Repair Company, 31 Md. App. 711, 358 A.2d 617 (1976) for the proposition that they are entitled to compel the corporations to produce corporate information. While the Rosenbloom court did compel officers of a corporation to produce documents, the reason underlying the court's decision does not apply to the instant case. In Rosenbloom, the court found that a receiver may compel officers of a debtor corporation to produce corporate documents because under Maryland law, the receiver has a statutory duty to prepare a schedule of a debtor's property and debts, which requires the use of corporate records. 31 Md. App. at 716. In the instant case, the Manfusos have no equivalent statutory duty or obligation.

time designed to ensure that the very corporations which the Manfusos claim that they are trying to protect would sustain the maximum damage from adverse publicity.

It is undisputed that the Manfusos have not been denied any information relevant to the business and operations of the corporations. Further, in light of the Standstill Provision of the Stockholders Agreement, their remedy, if they felt they lacked the necessary information to protect their interests as shareholders was to abstain from a particular vote, vote against a proposed action, register their inability to intelligently vote due to a lack of relevant information and/or resign. See Md. Corp. & Ass'n Code Ann. §2-410 (1985 Repl. Vol.).[12] Their mere claim that they have been denied the right to information as directors, cannot as a matter of law compel the dismissal of Count II of the Counterclaim.

D. THE STANDSTILL PROVISION IS VALID AND ENFORCEABLE UNDER MARYLAND LAW, DOES NOT VIOLATE PUBLIC POLICY AND CANNOT BE SEVERED FROM THE STOCKHOLDERS AGREEMENT

In their Motion, the Manfusos repeatedly suggest that the "mere filing of this lawsuit" is not a breach of the Standstill Provision in which they explicitly agreed "that, prior to October 1, 1993, they will not institute or join in any legal dispute or action against any party to this agreement concerning the business or operations of Pimlico or Laurel."

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[12] On page 3 of the Manfusos' Memo, the Manfusos state that they will resign their positions as directors of the corporations if this Court finds that as directors they cannot protect the corporations through litigation.

When faced with the foreseeable consequences of their breach, i.e., demands by the other contracting parties that their future performance under the contract be excused, the Manfusos suggest that this Court find that as a matter of law the Standstill Provision is unenforceable because it violates public policy. In a classic attempt to "have their cake and eat it too", the Manfusos demand that the Court not enforce the Standstill Provision, the primary consideration received by De Francis, Jacobs and the corporations, but hold De Francis and Jacobs to their obligations.

1. The Standstill Provision is valid and enforceable under Maryland law.

Courts clearly recognize that parties to a contract may limit their right to take action they previously had been free to take. See Universal Gym Equipment, Inc. v. ERWA Exercise Equipment, Ltd., 827 F.2d 1542 (Fed. Cir. 1987). In fact, Maryland has long recognized forbearance to sue as consideration for a contract. See e.g., Hoffman v. Seth, 207 Md. 234, 114 A.2d 58 (1955).

The Manfusos do not cite a single case[13] which

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[13] The two cases upon which the Manfusos primarily rely, Holloway v. Faw, Casson & Company, 78 Md.App. 205, 238 (1989) aff'd in part, reversed in part on other grounds, 319 Md. 324 (1990) and Hebb v. Stump, Harvey & Cook, Inc., 25 Md. App. 478 (1975), both involved issues arising from overly restrictive, non-competition covenants contained in employment contracts. As pointed out by the Holloway court, "Maryland, like other jurisdictions, has never considered non-competition clauses according to strict traditional contract theories." 78 Md. App. at 237. In both Holloway and Hebb, the courts examined diverse authority that discussed the particular rules that control the reformation of overly restrictive non-competition clauses. These

suggests that the Standstill Provision, as a matter of law, is unenforceable as a matter of public policy.[14] The reason is obvious -- "unless clearly prohibited by statute, contractual limitations on judicial remedies will be enforced absent a positive showing of fraud, misrepresentation, overreaching, or other unconscionable conduct on the part of the party seeking the enforcement." Maryland-National Capital Park & Planning Commission v. Washington National Arena, 282 Md. 588, 611, 386 A.2d 1216 (1978). Maryland courts are reluctant to nullify contractual agreements on public policy grounds because it "serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle." Id., 282 Md. at 606, citing Restatement (Second) of Contracts, Introductory Note to Ch. 14, at 46 (Tent. Draft No. 12, 1977); Baltimore & Ohio etc. Railway v. Voight, 20 S. Ct. 385 (1900); Miller v. Continental Ins. Co., 40 N.Y. 2d 675, 389 N.Y.S.2d 565, 358 N.E.2d 258 (1976); Printing & Numerical Reg. Co. v. Sampson, L. R. 19 Eq. 462, 465 (Ch. 1875).

The Standstill Provision of the Stockholders

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cases stand only for the position that such clauses may be reformed under certain specific circumstances.

[14] As noted by the court in Kenneweg v. Allegany County, 102 Md. 119, 125, 62 A. 249 (1905), "[P]ublic policy . . . is but a shifting and variable notion appealed to only when no other argument is available, and which, if relied upon today, may be utterly repudiated tomorrow."

Agreement is a voluntary limitation on judicial remedies entered into by the Manfusos, reflects the expectations of the parties, is couched in terms drafted by competent counsel after six months of complex negotiation, and is an enforceable promise. Given the absence of any fraud, misrepresentation, overreaching or unconscionable conduct by De Francis, Jacobs or the corporations, none of which has or can be alleged, this Court must find the Standstill Provision to be enforceable.

2. The Standstill Provision may not be severed from the Stockholders Agreement

Assuming solely for the purpose of this Motion that the Court could find the Standstill Provision so patently offensive to the public good as to be unenforceable as a matter of public policy, the Court must void the entire Stockholders Agreement and not just the Standstill Provision. Section 184 of the Restatement (Second) of Contracts sets forth the standard under which a Court may enforce part of an agreement when certain provisions are found to be unenforceable. The drafters of the Restatement cautioned that, when a court finds part of an agreement unenforceable, it should not enforce the rest of the agreement unless "corresponding concessions are made on both sides." "[I]f the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable." Section 184, comment (a) (1981). Whether the performance is an essential part of the agreed exchange depends on its relative importance in the light of the

entire agreement between the parties. Id.

As stated in the Jacobs' Affidavit, the primary reason that De Francis and Jacobs entered into the Stockholders Agreement was to obtain the period of place afforded by the Standstill Provision. See Jacobs' Affidavit at ¶ 6. In exchange, they accorded the Manfusos' numerous rights to which they would otherwise not be entitled as minority stockholders. The Manfusos cannot choose to disregard their obligations under the Standstill Provision while demanding continued benefits under the Stockholders Agreement. The Manfusos made a calculated decision to institute a legal action calling into question the integrity and competence of De Francis and Jacobs in clear violation of the Standstill Provision. They should not now be permitted to avoid the consequences of their actions by asserting that a voluntary agreement made with advice of counsel violates a public policy that is not manifested in a single judicial decision or statute.

E. THE MANFUSOS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF VIOLATED THE STANDSTILL PROVISION

The Manfusos argue that the Standstill Provision cannot be breached by the "mere filing of a declaratory judgment action" to construe the scope of the Standstill Provision. See Manfusos' Motion to Dismiss, p. 4. The Manfusos, however, have not cited any legal authority for the novel proposition that a party to a voluntary covenant not to sue can avoid the consequences of that agreement by styling the Complaint as a declaratory judgment action. Instead, they

simply make a circular argument that, because the Maryland Declaratory Judgment Act allows parties to a contract to seek a declaration as to the rights, status or other legal relations arising under the contract, the "mere filing of a declaratory judgment action" cannot have breached the Stockholders Agreement.

This argument fails to recognize that statutory rights can be waived and/or circumscribed by contractual agreement. See Maryland-National Capital Park and Planning Commission v. Washington National Arena, 282 Md. 588, 386 A.2d 1216 (1978). The Standstill Provision provides that the parties to the Stockholders Agreement will not, prior to October 1, 1993, "institute or join in any legal dispute or action against any party to this agreement concerning the business or operations of Pimlico or Laurel." See Exhibit A to Manfusos' Complaint, ¶ X. An examination of each key term of this provision mandates the conclusion that it is all inclusive except for the enumerated exceptions.[15]

The Court of Appeals of Maryland has stated that the term "any" is "uncompromising" and has equated it with the word "all". See Latrobe Brewing Company v. Comptroller of Treasury, 232 Md. 64, 70, 192 A.2d 101 (1963). The term "dispute" is defined as "a conflict or controversy; a conflict of claims or

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[15] The Standstill Provision explicitly excepts "litigation based on criminal activity or on the breach of the terms of the Agreement or documents executed pursuant hereto." Exh. A to Complaint, ¶ X.

rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other; the subject of litigation; . . ." Black's Law Dictionary, p. 424 (5th ed. 1979). Similarly, the term "action" "in its usual legal sense means a suit brought in a court, a formal complaint within the jurisdiction of a court of law." Id. p. 26. "It includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right, and its enforcement or denial upon the court." Id. Since the merger of law and equity, the term "action" embraces all actions formally denominated suits in equity and actions at law. Id.; Md. Rule 2-301 (1992). "'Action' means collectively all the steps by which a party seeks to enforce any right in a court . . . ." Md. Rule 1-202(a) (1992).

The Manfusos cannot seriously contend that the Complaint filed against De Francis, Jacobs and the corporations falls outside the broad scope of the Standstill Provision. The Complaint asserts rights, claims or demands against the Defendants, was brought in a court of law and requests the Court to determine and enforce alleged rights. As such, the Complaint clearly sets forth a legal dispute or action concerning the business or operations of Pimlico or Laurel.[16]

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[16] At a hearing on July 2, 1992, the court asked whether allegations of abuse could, by definition, concern "the business or operations" of the racetracks. The Manfusos' Complaint and Amended Complaint, on their face, request the "court's assistance in remedying" their "concerns" regarding "the operation of the

The Court of Appeals of Maryland recognizes the basic principal of construction expressio unius est exclusio alterius - the expression of one thing is the exclusion of another. Under this principle, when parties express certain exceptions to a general rule or provision, an intention to exclude all other exceptions may be inferred. Black's Law Dictionary, p. 521 (5th ed. 1979). Maryland courts have followed this well-recognized principle in considering questions of both statutory and contract construction. See Montgomery v. State, 292 Md. 155, 162, 438 A.2d 490 (1981) (holding that where a statute grants a right to certain designated parties "only such parties as are designated (by statute) have the right and all omissions should be understood as exclusive"), superseded by statute as stated in Spielman v. State, 298 Md. 602, 471 A.2d 730 (1984); Cox v. Prince George's County, 86 Md. App. 179, 194-195, 586 A.2d 43 (1991) ("[u]nder this maxim, if a statute or ordinance, . . . specifies particular use subject to modification, unlisted uses are excluded from modification"); Millson v. Laughlin, 217 Md. 576, 142 A.2d 810 (1958) (rule of

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racetrack" (Complaint, ¶ 20) and the alleged abuses "in the operation of Pimlico and Laurel" (Id. ¶ 21). The finding by Judge McDaniel that the Manfusos' claim with respect to Texas racing is a shareholders derivative suit logically applies to each of the other claims for corporate waste, i.e., each of these claims are, in fact, a shareholder derivative claim. Accordingly, Judge McDaniel's ruling goes to the very heart of this Motion to Dismiss. Shareholder derivative claims, by definition, involve the business and operations of the corporations and, therefore, are precisely the type of actions which, under the Standstill Provision, cannot be brought prior to October 1, 1993.

construction which holds that an express grant negatives an implied grant precludes finding easement by implication where deeds contained express easements (concurrence opinion)).

The parties, here, specifically agreed to two exceptions to the Standstill Provision -- litigation based on criminal activity or based upon a breach of the Agreement. The Manfusos' personal counsel participated in the negotiation and drafting of this Agreement. No exception was carved out for declaratory judgment actions to construe the scope or validity of the Agreement. Despite the enumeration of express exceptions and the inclusion of an integration clause, the Manfusos now seek to re-write the Standstill Provision to include an unbargained for and unmentioned exception. Having previously expressed a contrary intention, the Manfusos cannot now argue that another exception exists.

Finally, the Manfusos did not "merely file a declaratory judgment action." The legal action instituted by them, which is entitled "Complaint for Declaratory and Injunctive Relief" is far broader in scope and seeks remedies far beyond an interpretation of the Agreement. Count I seeks a three part declaratory judgment, including a declaration that the Manfusos have the right to seek injunctive relief notwithstanding the explicit terms of the Standstill Provision and a request for a specific declaration that various alleged conduct on the part of De Francis and Jacobs constitutes breaches of fiduciary duties to the Corporations. Count II

requests this Court to issue six different injunctions that, if granted, would directly affect the managerial and operational control of Pimlico and Laurel.[17] The Manfusos' futile attempt to re-characterize this litigation as a "mere" request for Declaratory Judgment should not be countenanced.

F. THE LITIGATION INSTITUTED BY THE MANFUSOS DOES NOT COME WITHIN ANY EXCEPTION CONTAINED IN THE STANDSTILL PROVISION

The Manfusos assert for the first time in their Motion that their Complaint is not barred by the Standstill Provision because it comes within an explicit exception therein, i.e., the exception for litigation based on a breach of the terms of the Stockholders Agreement or documents executed pursuant thereto. The Manfusos post hoc attempt to transform this action into one for breach of contract is simply another attempt to avoid the consequences of their breach of the Standstill Provision. This assertion is based upon a mischaracterization of the clear and unambiguous allegations of the Complaint. There is no allegation in the Complaint that

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[17] The various injunctions requested by the Manfusos, if entered by the court, would require De Francis and Jacobs to enact a specifically articulated policy with respect to the use of corporate credit cards by any officer of the corporation; would preclude management from placing any reasonable restrictions, regardless of business necessities, upon the Manfusos' access to the books, records and independent auditors of the corporations; would require management to clear any charitable contribution by the corporation with the Manfusos; and would subject every decision management made in regard to the expenditure of corporate funds or the allocation of resources between the racetracks to attack by the Manfusos. The net effect of these injunctions would hamstring management's operational control of Pimlico and Laurel.

the action instituted by the Manfusos is premised upon a breach of the Stockholders Agreement. There is no count for breach of contract and no allegation that De Francis and Jacobs breached any provision of the Stockholders Agreement.

As set forth above, if this Motion is treated as a Motion to Dismiss, the Court's analysis is confined to the legal sufficiency of the allegations in Count II of the Counterclaim. In the Counterclaim, De Francis and Jacobs allege that the Manfusos' filing of the Complaint and their campaign of harassment and interference with the managerial and operational control of Laurel and Pimlico both constitute breaches of their obligations under the Stockholders Agreement. In determining the legal sufficiency of Count II, this Court may not consider whether the Manfusos were entitled to bring any action other than the one that they filed.

If this Court elects to treat the Manfusos' Motion as one for Summary Judgment, the Manfusos have failed to provide a sufficient factual record to allow summary judgment to be entered in their favor. There is no evidence in the record that would permit this Court to find, as an undisputed fact, that De Francis and Jacobs have breached any obligations, contractual or otherwise, owed to Laurel and Pimlico. Indeed, at this juncture, the only admissible factual evidence is set forth in the Affidavit of Martin Jacobs. As set forth in Jacobs' Affidavit, there have been no investments in Texas racing by the corporations since the Manfusos rejected this

business opportunity (see Jacobs Affidavit, ¶ 7); De Francis and Jacobs have paid all of their expenses related to their activities in Texas (Id. ¶ 10); there have been no disclosures by De Francis or Jacobs of any proprietary, confidential information belonging to Laurel or Pimlico (Id., ¶ 11); he and De Francis have not required Mango to travel to Texas to assist in the Lone Star application and will not require him to leave Laurel and Pimlico if Lone Star's application is successful (Id. ¶ 12); and, notwithstanding his activities in Texas, Jacobs has devoted to his duties at Pimlico and Laurel the time required for their performance. Id. ¶ 14.

The Manfusos have not provided this Court with any evidence to dispute Jacobs' Affidavit.[18] As set forth below,

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[18] At the hearing on June 18, 1992, counsel for the Manfusos submitted an Affidavit executed by Robert T. Manfuso ostensibly to refute the Jacobs' Affidavit. The Manfuso Affidavit has not, to date, been offered in support of the instant Motion. However, if so offered, the Manfuso Affidavit is patently deficient in that it is based upon inadmissible hearsay and opinion. "An affidavit supporting . . . a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated in the affidavit." Maryland Rule 2-501(c). See Erlich v. Board of Education, 257 Md. 542, 263 A.2d 853 (1970)(affidavit ineffective where it was not made upon the personal knowledge of the affiant.); Fletcher v. Flourney, 198 Md. 53, 81 A.2d 232 (1951) (affidavit based on an affiant's information and belief must be disregarded), cert. denied, 372 S. Ct. 649 (1952). Specifically, Robert T. Manfuso states that he "[has] been advised by racetrack employees that Mr. Jacobs has been unavailable for Pimlico and Laurel matters on many occasions." Manfuso Aff. ¶ 4. He also states that, "the time that [De Francis and Jacobs] have spent and are spending on [the Lone Star] application takes away from their duties to Pimlico and Laurel, and is directly responsible, in my opinion, for the decline in the value of both racetracks, and the decline in racing revenues." Declarations by third parties made to Robert T. Manfuso, as well as his "opinion" as to

the extrinsic material attached to the Manfusos' Motion - the application of Lone Star submitted to the Texas Racing Commission, testimony before that commission and the Mange Employment Agreement - do nothing to establish that De Francis or Jacobs breached any obligation set forth in the Stockholders Agreement.

With respect to De Francis, the Manfusos cannot identify any particular provisions(s) of the Stockholders Agreement that was allegedly breached. In fact, the Stockholders Agreement does not contain any provision that delineates De Francis' duties nor does it provide any quantum of time that he is required to devote to the Corporations. Undaunted by the absence of any such provision, the Manfusos again attempt to rewrite this agreement to include implied obligations. They argue that, since De Francis "assumed the positions of President and Co-Chairman of the Boards pursuant to the Stockholders Agreement," any breach of duty occurring while he occupies these positions constitutes a breach of the Stockholders Agreement. This argument deliberately attempts to confuse the clear distinction between common law fiduciary duties that an officer and/or director may owe to a corporation

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the reason for the decline in racing revenues, would be inadmissible as evidence in this matter and, as such, cannot be considered in support of a Motion for Summary Judgment.

and obligations assumed under a contract.[19] The Manfusos should not be allowed to transform allegations of common law breaches of fiduciary duty into contract claims so that, after the fact, they can argue that their Complaint comes within an exception to the Standstill Provision.

Although the Manfusos insinuate in their Motion that De Francis has diverted many hours from his duties at Pimlico and Laurel, they offer no factual support for this allegation. In De Francis' testimony before the Texas Racing Commission, he did not testify that he had spent "many hours" in Texas. Rather, when asked to estimate how many hours he and Jacobs had spent with regard to the Lone Star application, he responded:

> I can't give you specific hours. I can tell you that many hours have gone into Texas racing starting as early as 1988. Many hours were put into it by my father and Marty Jacobs before Frank's death in August 1989, and Marty and I have spent whatever time has been required since then.

Exh. B to Manfuso Motion, p. 26-27. There is nothing in this testimony that would allow this Court to conclude, as a matter of law, that De Francis has breached any obligation owed to the corporations, contractual or otherwise.

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[19] Additionally, the argument is premised upon the implicit but incorrect assumption that De Francis would not hold these positions except for the Stockholders Agreement. De Francis announced that he would assume these positions, formerly held by his father, Frank J. De Francis, following Frank J. De Francis' death. Jacobs Aff. ¶ 4-5. By virtue of the majority control of voting stock held by the De Francis' interests, De Francis could have assumed these positions with or without the acknowledgement that he had done so that is contained in the Stockholders Agreement.

The Manfusos' argument that Jacobs has breached the Stockholders Agreement is based upon misquoting the Agreement. Jacobs is not required by the Stockholders Agreement to devote "substantially all of his time to his employment." The Stockholders Agreement provides that the corporations shall execute employment agreements with certain individuals, including Jacobs. The Agreement then provides that these employment agreements shall contain certain terms including the following:

> 1. Employees shall receive his/her current salary with normal increases as long as Employee continues to devote substantially all of his/her time to his/her employment and continues to perform duties substantially similar to those currently being performed. . . .

Exhibit A to Complaint, ¶ VII.A at p. 19.

Thus, the Stockholders Agreement simply provides that, if the employee continues to devote substantially all of his time to his employment and continues to perform duties substantially similar to those performed at the time of the execution of the agreement, then the employee would receive his current salary with normal increases. As explained in Jacobs' Affidavit, the Stockholders Agreement does not prohibit Jacobs from devoting time to activities in Texas.[20]

To compensate the corporations for the time he has spent in Texas, Jacobs has foregone the normal increases in

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[20] Indeed, the Stockholders Agreement explicitly recognizes the parties' right to participate in other business ventures "of any kind whatsoever." Id., ¶ IX. A at p. 22.

salary to which he was entitled for the past two years under the Stockholders Agreement. Jacobs Aff. ¶ 14. Moreover, he has continued to devote to his duties at Pimlico and Laurel the time required for their performance. Id. The Manfusos have not provided this Court with any legally sufficient evidence to conclude that, as a matter of law, Jacobs has breached an obligation imposed by the Stockholders Agreement.

The Manfusos argument with respect to the alleged attempt to divert the services of James Mango from Laurel and Pimlico is absolutely devoid of factual support. They have done no more than repeat the conclusory allegations stated in the Complaint, that Jacobs and De Francis "have involved" Mango in their activities in Texas and that they "intend to use Mango" to run the Texas operation. These allegations are denied in Jacobs' Affidavit. Id., ¶ 12. The Manfusos have not provided this Court with any evidence to the contrary.

Again, the testimony before the Texas Racing Commission, submitted by the Manfusos in support of their Motion, refutes the allegation that De Francis or Jacobs has an intent to divert Mango to Texas. De Francis testified that, if Lone Star's application is successful, he and Jacobs intend to "do a very directed search to find the best qualified general manager," through their contacts on the Board of Directors of the Thoroughbred Racing Associations of North America ("TRA") and the TRA Executive Committee. Exh. B to Manfuso Memo, pp. 16-17. Mango is never mentioned as a potential candidate for

this position.[21] Obviously, if Mango was intended to be tapped as the general manager of the Dallas, Texas racetrack, there would be no need for the extensive search described in De Francis' testimony.

The Manfusos' argument that this Court should find, as a matter of law, that Jacobs and De Francis have breached some provision of the Stockholders Agreement, thereby excusing the Manfusos' willful violation of the Standstill Provision, is unsupported by the record and cannot serve as a basis for summary judgment in favor of the Manfusos.

IV. CONCLUSION

The Manfusos attempt to excuse their willful and intentional breach of the Standstill Provision of the Stockholders Agreement by claiming that their sole motivation in the filing of their Complaint was to protect the corporations in which they had invested substantial time and money. The Manfusos have no financial investment still remaining in the corporations and have not devoted any time to the benefit of the corporations since their resignations as officers. The only interest that the Manfusos have sought to protect through the filing of the Complaint is their own financial interest in advancing the date of the Russian Roulette buy-sell provision. Their right to bring this

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[21] In fact, the only mention of Mango in the testimony provided by the Manfusos appears at page 16, where De Francis mentions that Pimlico employees, including Mango, have employed extensive procedures for crowd control at events like the Preakness Stakes.

shareholder's action is precisely the right that they deferred until October of 1993 when they signed the Stockholders Agreement and subsequently accepted $2,500,000.00 in termination payments and $250,000.00 a year in severance payments. If the Manfusos truly believe that this action was necessary in order to protect the corporations' interests, then they should be more than willing to forego all benefits under the Stockholders Agreement and to resolve this dispute on its merits. The Manfusos cannot and should not be permitted to bring a lawsuit to further their own financial agenda and retain benefits they are only entitled to under the Stockholders Agreement by claiming that they only acted in the best interests of the corporations.

Respectfully submitted,

James E. Gray

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1992, a copy of the aforegoing Opposition of De Francis and Jacobs to Motions to Dismiss Counter Claims and/or Motion for Summary

Judgment was hand delivered to James Ulwick, Esquire, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201, Attorneys for Plaintiffs; and mailed to Irwin Goldblum, Esq., McGee Grigsby, Esq., and Jennifer Archie, Esq., Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Suite 1300, Washington, D.C. 20004-2505, Attorneys for Defendants, The Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.

James E. Gray

James E. Gray

EXHIBIT A

LATHAM & WATKINS

PAUL R. WATKINS (1889-1973)
DANA LATHAM (1898-1974)

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July 8, 1992

Herbert S. Garten, Esq.
Fedder and Garten
36 South Charles St.
2300 Charles Center South
Baltimore, MD 21201

Dear Herb:

This is to confirm our conversation of earlier this morning regarding your providing detailed time records for your firm's legal fees which were billed to or paid by Laurel, Pimlico or the Maryland Jockey Club. As we discussed, I believe the only occasion on which this occurred was in connection with the Stockholders Agreement.

In our conversation this morning, I indicated that the relevant time frame was September 1989 through the spring of 1990. On reflection, I think the period should also include the earlier negotiations which, as I recall, commenced in 1988.

In any event, you agreed to have someone determine the availability of these records and to provide them promptly. You indicated you would call me if you encounter a problem.

I appreciate your assistance in this matter. As I indicated, we now have the detailed time entries from Latham & Watkins and from Ginsburg, Feldman & Bress. Your firm's records will complete the package.

Very truly yours,

McGee Grigsby

cc: Martin Jacobs

Holinder Ltr 408 12

FILED
JUL 15 1992
CIRCUIT COURT FOR
BALTIMORE CITY

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs, vs. JOSEPH A. DE FRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants,	Civil Action No. 92120052

CE147851

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS COUNTER-CLAIM OF THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC., PIMLICO RACING ASSOCIATION, INC., AND LAUREL RACING ASSOC., INC. AND/OR FOR SUMMARY JUDGMENT

Dated: July 15, 1992

Submitted By:

LATHAM & WATKINS
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McGee Grigsby
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Attorneys for Defendants
The Maryland Jockey Club of
Baltimore City, Inc.
Pimlico Racing Association, Inc.
Laurel Racing Assoc., Inc.

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OTHER AUTHORITIES

Defendants The Maryland Jockey Club of Baltimore City, Inc. ("MJC"), Pimlico Racing Association, Inc. ("Pimlico"), and Laurel Racing Assoc., Inc. ("Laurel") (sometimes collectively referred to as the "Corporations" or "Defendants"), by and through their attorneys, hereby oppose Plaintiffs' Motion to Dismiss (hereinafter "Pl. Motion") the Corporations' Counterclaim and/or for Summary Judgment.[1/]

I.

INTRODUCTION

By their motion, plaintiffs and counter-defendants Robert T. and John A. Manfuso, Jr. (collectively the "Manfusos") seek dismissal of the Corporations' Counterclaim for breach of contract and declaratory relief on the grounds that it fails to state a claim upon which relief can be granted, or alternatively, that the court should grant summary judgment in the Manfusos' favor because there are no genuine issues of material fact, and as a matter of law, the filing of the Complaint on April 29, 1992 does not constitute a breach of contract. The Corporations' Counterclaim alleges that by filing their Complaint the Manfusos breached the Standstill Provision of the unanimous stockholders agreement among the Manfusos, Joseph A. De Francis ("De Francis")

1/ Cites to the "Counterclaim" herein refer to the Counterclaim filed by MJC, Laurel and Pimlico on June 5, 1992. Cites to the "Complaint" refer to the complaint filed April 29, 1992 by the Manfusos. On July 2, 1992, the Manfusos filed and served an Amended Complaint, dropping their claim for an injunction relating to Texas horse racing, and adding a count seeking specific performance of the Stockholders Agreement.

and Martin Jacobs ("Jacobs"), and the Corporations, and that this act constitutes a material breach of the unanimous stockholders agreement itself. Counterclaim ¶¶ 19, 28. The Standstill Provision provides, in part, that "prior to October 1, 1993, [the parties] will not institute or join in any legal dispute or action against any party to this Agreement concerning the business or operations of Pimlico or Laurel." Stockholders Agreement, § X.

The Standstill Provision has only three exceptions to its application to legal disputes or actions concerning the business or operations of the two racetracks:

(1) "litigation based on criminal activity;"

(2) "litigation based on . . . a breach of the terms of this Agreement"; or

(3) "litigation based on . . . a breach of the terms of . . . documents executed pursuant" to the Agreement.

Agreement, § X. The Manfusos allege in their Motion that one of their nine requests for declaratory and injunctive relief -- the claim relating to the pursuit of an outside venture in Texas horse racing -- falls within exceptions (2) and (3) above.

In order to avoid the application of the Standstill Provision to the other eight requests for relief, the Manfusos ask the Court to read three specific "implicit" exceptions into the plain language of the Standstill Provision:

(1) an implicit exception because their Complaint allegedly "merely" seeks a declaration that "the Stockholders

Agreement does not prevent the plaintiffs from seeking the Court's assistance in remedying the breaches of duty as described" in paragraphs 1 through 48 of their Complaint (Complaint ¶ 50.A) on the grounds that their rights to seek a declaratory judgment interpreting the Stockholders Agreement cannot be waived voluntarily as a matter of law;

(2) a broad implicit exception for lawsuits by the Manfusos in their capacity as directors and shareholders to file their complaint because "it is unquestionably against public policy to permit directors to breach their fiduciary duties to corporations" (Pl. Motion at 14); and

(3) an implicit exception for lawsuits by the Manfusos in their capacity as directors to obtain access to certain information about legal fees (Complaint ¶ 51.C) and outside accountants (Complaint ¶ 51.D) that the Corporations have allegedly refused to make available to them; and

To the extent that the motion is one to dismiss the Counterclaim, none of these exceptions applies. Each alleged exception of the Standstill Provision now urged by the Manfusos after the fact is contrary to the allegations of the Counterclaim, which must be deemed true for the purposes of deciding a motion to dismiss. Nor can plaintiffs meet the standard for granting summary judgment at this preliminary stage of the case. They have not met their burden of proving that there are no genuine issues of material fact, and that as a matter of law, one or more of these alleged exceptions exempts the Complaint from the application of the Standstill Provision.

Faced with multiple motions to dismiss their Complaint (as well as two substantial counterclaims for breach of contract), the Manfusos now seek in their motion papers to re-write their Complaint to force it within some exception to the Standstill Provision after the fact. However, the Manfusos must live with the consequences of the lawsuit that they actually filed on April 29, 1992, and may not now -- at the motion to dismiss stage -- transform their Complaint from the shareholders derivative action it is into a breach of contract action, or a "mere" declaratory judgment action, or read some other implicit exception into the plain language of the Standstill Provision.

II.

STATEMENT OF FACTS

Shortly after his father's death in August 1989, Joseph De Francis informed the Manfusos of his intention to assume the presidency and operational control of Pimlico and Laurel, which he had the power and ability to do by vote of the shares of the Corporations owned by him personally and by the Estate of Frank J. De Francis. Counterclaim ¶¶ 2-6. The Manfusos objected to his proposed assumption of the positions and titles formerly held by his father, and threatened litigation and a public dispute. In order to avoid such wasteful and damaging litigation and disputes, Joseph De Francis entered into negotiations with the Manfusos with the intent to reach an understanding that would ensure a smooth transition and a period of peace and stability in the ownership and management of the racetracks after his father's death. Affidavit of Martin Jacobs at ¶ 6 (a copy of this

affidavit is attached as Exhibit A to the Memorandum in Support of Motion to Dismiss filed on June 5, 1992 on behalf of Defendants DeFrancis and Jacobs) (hereinafter Jacobs Affidavit).

On February 2, 1990, following several months of negotiations, the stockholders of Pimlico and Laurel and MJC entered into a unanimous Stockholders Agreement (hereinafter the "Agreement") setting forth certain rights and obligations and understandings among the parties. Counterclaim ¶ 11. The individual Corporations were also parties to the Agreement, which required them to confer a number of significant benefits upon the Manfusos, including without limitation, the right to serve as officers of Pimlico and Laurel, the right to termination payments of $1,250,000 each upon their retirement as officers of Pimlico and Laurel, the right to be elected to seats on the Boards of Directors, and the right to receive until October 1, 1993 severance payments at the rate of $125,000 per year each after they ceased performing services as officers of Pimlico and Laurel. Counterclaim ¶ 10. The Manfusos also benefitted by the inclusion in the Agreement of a so-called "Russian Roulette" buy/sell provision, pursuant to which the Manfusos could force De Francis and Jacobs to sell their stock in Pimlico and Laurel to the Manfusos, or compel De Francis and Jacobs to purchase the Manfusos' stock, upon the occurrence of a "major matter" as defined in the Agreement (§ XI), or at any time after October 1, 1993. Id. Absent the Agreement, the Manfusos would not have been entitled to any of these benefits. Id. ¶¶ 13-15.

Section X of the Stockholders Agreement (hereinafter "Standstill Provision") memorializes the parties' understanding with respect to the creation of a four-year period of peace among the stockholders of the Corporations during which no party would be permitted to institute or join in any legal dispute or action against any other party concerning the business or operations of the racetracks. The provision provides as follows:

> With the exception of litigation based on criminal activity or on a breach of the terms of this Agreement or documents executed pursuant hereto, the parties to this Agreement agree that, prior to October 1, 1993, they will not institute or join in any legal dispute or action against any party to this Agreement concerning the business or operations of Pimlico or Laurel. If, after October 1, 1993 but prior to October 1, 1994, any party to this Agreement institutes or joins in any legal action dispute or action against any other party to this Agreement concerning the business or operations of Pimlico or Laurel, the party against whom such dispute or action is brought agrees not to raise the statute of limitations as a defense to such action.

Within days of signing the Agreement, the Manfusos announced their intention to retire and to receive the retirement benefits they had insisted upon including in the Agreement. Counterclaim ¶ 17. In June 1990, the Corporations paid the $2,500,000 in termination payments to the Manfusos, and -- until the Manfusos materially breached the Agreement by filing their complaint -- also paid monthly severance which now total $500,000. Counterclaim ¶ 12.

On April 29, 1992, the Manfusos filed their complaint against the Corporations and De Francis and Jacobs, which on its face, concerned "the business and operations of Pimlico and Laurel." Agreement § X; Complaint ¶ 21 (Complaint identifies

seven alleged "abuses in the operation of Pimlico and Laurel" that were allegedly "uncovered" by the Manfusos). The Counterclaim alleges this, and the Manfusos' motion adduces no evidence (or even argument) to the contrary.

The alleged "abuses" are as follows:

(1) the allegedly unauthorized diversion of corporate resources, including the time, attention and skill of Joseph De Francis, Jacobs and corporate employee James Mango to the prosecution of an application for a license to own and operate a racetrack in Texas, Complaint ¶¶ 22-31;

(2) the failure of Joseph De Francis to repay the Corporations for the use of the Corporations' money for a "period of years" in connection with the use of corporate credit cards for certain personal expenses; (the complaint admits that the Corporations have been fully reimbursed in the amount of the personal charges), Complaint ¶ 32;

(3) the failure to provide the Manfusos with "invoices, breakdowns, and descriptions of the legal fees paid to outside counsel by the Corporations", Complaint ¶ 33;

(4) an alleged unfair allocation of expenses pertaining to Laurel and to Pimlico, and an alleged failure to permit the Manfusos to speak to the independent auditors for Pimlico and Laurel on this subject, Complaint ¶ 34;

(5) the donation of $25,000 of Pimlico's funds to the Florida Derby Gala which the Manfusos allege had no legitimate business purpose, Complaint ¶ 35;

(6) the allegedly improper transfer of revenue from certain racing days from Pimlico to Laurel, Complaint ¶¶ 36-42; and

(7) allegedly misleading statements about officers' compensation in the financial statements, Complaint ¶ 43.

To remedy these alleged "abuses in the operations of Pimlico and Laurel," the complaint requests the following nine forms of declaratory and injunctive relief:

(1) A declaration that "the Stockholders Agreement does not prevent the plaintiffs from seeking the Court's assistance in remedying the breaches of duty as described" in paragraphs 1 through 48 of their complaint, Complaint ¶ 50.A;

(2) A declaration that "at the plaintiff's behest, the Court may grant injunctive relief to redress breaches of duty by the defendants," Complaint ¶ 50.B;

(3) A declaration that "the matters alleged in this Complaint do in fact constitute breaches of duty by defendants Joseph De Francis and Martin Jacobs," Complaint ¶ 50.C;

(4) A permanent injunction "barring Joseph De Francis and Martin Jacobs from diverting the resources, key employees or confidential and proprietary information of Laurel Racing Assoc. Inc., The Maryland Jockey Club of Baltimore City, Inc., and Pimlico Racing Association, Inc. to any ventures in Texas or to any other ventures,"[2/] Complaint ¶ 51.A;

[2/] On June 19, 1992, Judge H. Kemp McDaniel ordered this request for relief dismissed with leave to amend on the grounds that the alleged harm was to the Corporations, that the Manfusos lacked standing to sue for such harms in their capacities as directors or parties to the Agreement, and

(5) a permanent injunction "requiring Joseph De Francis to take all necessary steps to obtain refunds to reimburse Laurel Racing Assoc., the Maryland Jockey Club of Baltimore City, and Pimlico Racing Association Inc. within thirty days for any expenses that he or other officers may incur in the future on corporate loan accounts," Complaint ¶ 51.B;

(6) a permanent injunction "requiring Joseph De Francis and Martin Jacobs to grant the plaintiffs access to any information or documentation concerning legal fees charged to or paid by Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, Inc., and Pimlico Racing Association, Inc.," Complaint ¶ 51.C;

(7) a permanent injunction "requiring Joseph De Francis and Martin Jacobs to permit the plaintiffs and their agents to meet with the accountants for Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, Inc., and Pimlico Racing Association, Inc.," Complaint ¶ 51.D;

(8) a permanent injunction "barring Joseph De Francis and Martin Jacobs from wasting the assets of Laurel Racing Assoc., Inc., The Maryland Jockey Club of Baltimore City, Inc., and Pimlico Racing Association, Inc.," Complaint ¶ 51.E;

(9) a permanent injunction "barring Joseph De Francis and Martin Jacobs from improperly transferring the assets of The

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that to the extent they were suing as shareholders, they had failed to follow the proper procedural prerequisites to filing a shareholders derivative action. See Memorandum Opinion and Order dated June 19, 1992 (a copy of which is attached hereto as Exhibit A). On July 2, 1992, the Manfusos filed the Amended Complaint which deleted the request for an injunction with respect to Texas.

Maryland Jockey Club of Baltimore City, or Pimlico Racing Association, Inc. to Laurel Racing Assoc., Inc.," Complaint ¶ 51.F.

Each allegation and each request for relief plainly "concern[ed] the business and operations of Pimlico or Laurel." Agreement § X. Because the filing of this Complaint was flatly contrary to the plain language and intent of the Standstill Provision, the Corporations filed a counterclaim against the Manfusos on June 5, 1992, alleging that the Manfusos willfully and intentionally breached the Agreement.[3/] Counterclaim ¶ 19. The Corporations further alleged that the filing of the Complaint by the Manfusos constituted a material breach of the Agreement by the Manfusos, because the Standstill Provision was the primary benefit obtained by the Corporations from the Manfusos under the Agreement. The Corporations have requested that they be excused from future performance under the Agreement, and that the Court award them monetary damages for the consequential damages resulting from the Manfusos' breach of the Agreement. Counterclaim at 9.

3/ At the same time, the Corporations filed a motion to dismiss subparts (a) and (b) of the Manfusos claim for declaratory relief, and all six subparts of their claim for injunctive relief. This motion was partially decided by Judge McDaniel's June 19 order. The non-Texas portions of the motion remain to be decided.

III.

DISCUSSION

A. Plaintiffs' Motion Should Be Treated As A Motion To Dismiss Only

The plaintiffs' motion is entitled "Motion to Dismiss Counterclaim of [the Corporations] and/or Motion for Summary Judgment." While the plaintiffs appear to treat their motion as one for summary judgment, it actually should be considered a motion to dismiss for failure to state a claim. Under Maryland Rule 2-322(b), the court may elect to treat a motion to dismiss as one for summary judgment where the moving party has included extrinsic evidence in support of its motion. Here, the court should exercise its discretion to exclude the proffered extrinsic evidence, and treat the motion solely as one to dismiss the Counterclaim for failure to state a claim.

The only extrinsic evidence provided by the plaintiffs in support of their motion concerns the merits of plaintiffs' claim regarding Texas racing matters in the Complaint. The four exhibits attached to plaintiffs' motion are used solely to support plaintiffs' allegation that De Francis and Jacobs breached their fiduciary duties to the Corporations by their involvement in activities in Texas.[4/] Because the exhibits do

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[4/] The exhibits are: (1) an excerpt of the Application of the Lone Star Jockey Club to the Texas Racing Commission (Exhibit A); (2) testimony of De Francis before the Texas Racing Commission regarding the Lone Star Jockey Club's application (Exhibit B); (3) testimony by Preston M. Carter, Jr., before the Texas Racing Commission regarding the Lone Star Jockey Club's application (Exhibit C); and (4) an unexecuted copy of the employment agreement between MJC and Laurel and employee James P. Mango (Exhibit D). See Pl. Motion at 9-11, n. 1-2.

not address the merits of the defendants' Counterclaim -- whether the filing of the Complaint by the plaintiffs constituted a material breach of the Agreement -- the Court should exercise its discretion and disregard the exhibits, thus treating the plaintiffs' motion as a motion to dismiss and not as a motion for summary judgment. See Maryland Rule 2-322(c) ("If, on a motion to dismiss . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment.") (emphasis added).

Plaintiffs' motion has utterly failed to meet the standard applied to a motion to dismiss, as is essentially conceded by the complete silence in their motion papers regarding the proper standard for deciding on motion to dismiss. In order for the Corporations to withstand a motion to dismiss for failure to state a claim upon which relief can be granted, the Counterclaim need only to allege facts which, if proven, would entitle the Corporations to relief. See Zion Evangelical Lutheran Church of the United Church of Christ of Stemmers Run v. State Highway Admin., 276 Md. 630, 634, 350 A.2d 125, 127 (1976); Tadjer v. Montgomery County, 61 Md. App. 492, 502-03, 487 A.2d 658, 663 (1985); see also General Fed. Constr., Inc. v. D.R. Thomas, Inc., 52 Md. App. 700, 704-05, 451 A.2d 1250, 1253 (1982) ("Appellee alleged facts that would have proven a contract, its compliance and appellants' respective liabilities thereunder and General's breach by nonpayment. That clearly set forth a cause of action."). As the plaintiffs note in one of their earlier filings in this case, in the context of a motion to dismiss:

> [T]he Court must consider the allegations in the complaint in the light most favorable to the [non-moving party] (Berman v. Karvounis, 308 Md. 259, 264, 518 A.2d 726, 728 (1987)) and must accept as true all well-pleaded material facts as well as any reasonable inferences that may be drawn therefrom. Flaherty v. Weinberg, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985); Black v. Fox Hills North Community Ass'n, 90 Md. App. 75, 79, 599 A.2d 1228, 1230 (1992).

Plaintiffs' Opposition To Defendants' Motions to Dismiss The Complaint Insofar As It Concerns Texas Racing Matters ("Opposition"), at 1.

In other words, the plaintiffs must prove that even if all the facts alleged in the Corporations' Counterclaim are shown to be true, the Corporations have not stated a claim upon which relief may be granted. Plaintiffs simply do not meet this stringent standard. Accepting as true all of the facts alleged by the Corporations, as well as all inferences that may be drawn from those facts, a claim for breach of contract is clearly stated in the Counterclaim. The Corporations allege that the parties entered into a Stockholders Agreement, Counterclaim ¶ 11; that under this Agreement the plaintiffs agreed not to sue the Corporations prior to October 1, 1993 concerning the business and operations of Pimlico and Laurel, id. ¶ 16; and that on April 29, 1992, the plaintiffs instituted legal action concerning the business and operations of Pimlico and Laurel in direct contravention of the Agreement, id. ¶¶ 18-19, and that the Corporations have been injured as a result, id. ¶ 21. If these allegations are true, and they must be taken as such on a motion to dismiss, then the Manfusos have breached the Agreement. See, e.g., Tadjer, 61 Md. App. at 502, 487 A.2d at 663 ("In ruling on

a demurrer, we must accept the facts pleaded as true.") (citation omitted). Taking as true all the allegations in the Counterclaim, the Corporations have clearly stated a cause of action for breach of contract, and the plaintiffs motion to dismiss must be denied.

Furthermore, special deference is given to claims brought pursuant to the Declaratory Judgment Act when such claims are attacked by motions to dismiss. The plaintiffs recognize this deference, warning in their Opposition that "the Court must proceed with extreme caution in assessing the motions to dismiss the [non-moving parties'] claims for declaratory relief: As the Court of Appeals has pointed out, 'Legions of our cases hold that a demurrer, the type of motion to dismiss here involved, is rarely appropriate in a declaratory judgment action.' Broadwater v. State, 303 Md. 461, 465, 494 A.2d 934, 936 (1985) (collecting authorities)." Plaintiffs' Opposition to Corporations' Motion to Dismiss at 2 (footnote and authorities cited omitted). The deference to declaratory relief actions is no less applicable in the context of the Corporations' claim for declaratory relief than in the context of the Manfusos' claim. Because the Corporations have clearly presented a justiciable controversy -- a claim that the plaintiffs intentionally and willfully breached the Stockholders Agreement by instituting legal action concerning the business and operations of the Corporations before October 1, 1993 -- the present counterclaim cannot be dismissed. See, e.g., Woodland Beach Property Owners' Ass'n v. Worley, 253 Md. 442, 448, 252 A.2d 827, 830 (1969) ("[G]enerally, it is only when the

declaration sought does not present a justiciable issue . . . that a demurrer would be appropriate."). Here, the Corporations' Counterclaim presents many justiciable issues, including whether the Complaint materially breached the Agreement.

B. If The Plaintiffs' Motion Is Treated As One For Summary Judgment, The Motion Must Be Denied Because Genuine Disputes Of Material Fact Exist

The plaintiffs attach four exhibits (but no affidavits) to their motion, thereby hoping to convince the Court to treat their motion as one for summary judgment under Maryland Rule 2-501.[5/]

For the reasons explained in Section A, the Court should exclude these exhibits and treat the motion as solely a motion to dismiss. However, if the Court nonetheless elects to consider the exhibits, and therefore must treat the motion as one for summary judgment, then a different standard applies. In order to succeed on a motion for summary judgment, the plaintiffs must show that there is no genuine dispute of material fact as to whether their institution of legal action against the Corporations prior to October 1, 1993 falls within the explicit

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5/ See Maryland Rule 2-322(c) ("If, on a motion to dismiss . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501."); see also Memorandum Of Law In Support Of Plaintiffs' Motion For Ex Parte, Interlocutory, And Permanent Injunctive Relief, at 3 ("Concurrently with this request for injunctive relief, the Manfusos have moved for summary judgment on the question of whether they have the right to ask for a declaration of their rights or whether, in so doing, they have breached the Stockholders' Agreement.") (emphasis added).

or alleged implicit exceptions of the Standstill Provision, and that, as a matter of law, the filing of the Complaint does not constitute a breach of the Agreement.[6/] The Court of Appeals has held that the purpose of the summary judgment procedure is not to decide factual disputes, but rather to determine whether there is a genuine dispute about material facts that should be tried. See, e.g., DiGrazia v. County Executive for Montgomery County, 228 Md. 437, 445, 418 A.2d 1191, 1196 (1980); Tellez v. Canton R.R. Co., 212 Md. 423, 430, 129 A.2d 809, 813 (1957).

Furthermore, in the context of interpreting a contract, "[w]here contractual language is susceptible of at least two fairly reasonable interpretations, this presents a triable issue of fact, and summary judgment would be improper." Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 169 (D.C. Cir. 1981).

As explained more fully in sections C-F below, plaintiffs' motion does not demonstrate clearly the absence of a genuine dispute of material fact as to whether their institution of legal action against the Corporations prior to October 1, 1993

6/ "When weighing a motion for summary judgment, the trial court must determine whether the pleadings, answers to interrogatories, depositions, and affidavits demonstrate that there is no genuine dispute of a material fact. Further, the court must also decide whether the moving party is entitled to judgment as a matter of law. [citations omitted] The trial judge is commanded to resolve all inferences against the movant." Hebb v. Walker, 73 Md. App. 655, 661-62, 536 A.2d 113, 116, cert. denied, 312 Md. 601, 541 A.2d 964 (1988). Moreover, "[o]ne who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and any doubt as to the existence of such an issue is resolved against the movant." Med. Mut. Liab. Ins. Soc. of Maryland v. Mutual Fire, Marine & Island Ins. Co., 37 Md. App. 706, 711-12, 379 A.2d 739, 742 (1978) (citations omitted).

somehow falls within the explicit or alleged implicit exceptions of the Standstill Provision, and that, as a matter of law, the filing of the Complaint did not breach the Agreement.[7/]

C. The Complaint Does Not Fall Within the Explicit Exceptions to the Standstill Provision

The plaintiffs argue that the filing of the Complaint falls within two of the three explicit exceptions to the Standstill Provision: (1) litigation based on breach of the Agreement itself, or (2) litigation based on breach of a document executed pursuant to the Agreement. Pl. Motion at 8-11. In support of this argument, plaintiffs first assert that the time and attention De Francis and Jacobs have devoted to Texas breaches their fiduciary duties as officers and directors, positions which they assert (by motion but not affidavit) that De Francis and Jacobs received only by virtue of the Agreement. Based upon this unsupported assertion (that is contrary to the allegations of the Counterclaim), the plaintiffs argue that "the failure of De Francis and Jacobs to devote their full time and

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7/ In addition, the plaintiffs do not support their motion for summary judgment with an affidavit, in violation of the Maryland Rules. See Maryland Rule 2-311(d) ("A motion or response to motion that is based on facts not contained in the record or papers on file in the proceeding shall be supported by affidavit and accompanied by any papers on which it is based.") (emphasis added). The extrinsic evidence provided by the plaintiffs is not accompanied by an affidavit, and furthermore, relates to the merit of substantive allegations contained in the plaintiffs' Complaint, not to the Counterclaim that is the subject of the present motion. See Pl. Motion, at 9-10 n.1 and exhibits A - C (discussing the alleged breach of fiduciary duties by De Francis and Jacobs by their activities in Texas). (Accordingly, as argued above, the court should disregard this evidence, and treat the motion as a motion to dismiss.)

attention to the corporations . . . is a clear violation of the Stockholders Agreement." Pl. Motion at 9. Next, plaintiffs argue that the Complaint is "based on" a breach of track employee James Mango's employment agreement.

As explained below, neither of these exceptions to the Standstill Provision apply here. The Manfusos did not institute litigation alleging breach of the Agreement, nor breach of any documents executed pursuant to the Agreement. Their Complaint is based exclusively upon alleged common law breaches of fiduciary duties to the Corporations by De Francis and Jacobs through various acts of alleged mismanagement of the business and operations of Pimlico and Laurel.

1. The Complaint Is Not Based On A Breach of the Stockholders Agreement

Indisputably, the Complaint is not a breach of contract action. See Complaint ¶ 1 (describing nature and purpose of suit). The Complaint is a two count action: Count One is entitled "Declaratory Relief" and Count Two is entitled "Injunctive Relief." Pursuant to these counts, the Complaint sought three forms of declaratory relief and six forms of permanent injunctive relief, all alleging that De Francis and Jacobs abused their fiduciary duties in the management of Pimlico and Laurel. Not one of the forms of relief sought by the plaintiffs or even the specific allegations of the complaint

refers to a breach of any contract, much less a breach of the Agreement. See Complaint ¶¶ 44-51.[8/]

Moreover, no matter how liberally the Complaint is read -- and all inferences must be resolved in favor of the counter-claimants -- it nowhere alleges or implies that the suit against the Corporations is based upon their breach of the Agreement. Indeed, the plaintiffs' Motion does not even allege that they have sued the Corporations for breach of the Agreement. The plaintiffs' filing of the Complaint clearly breached the Standstill Provision as to the Corporations, even if the court somehow concluded that the suit against the individual defendants fell within an explicit exception of the Standstill Provision.

The plaintiffs claim in their motion that De Francis and Jacobs breached the Agreement by failing to devote the time and energy to the business and operations of Pimlico and Laurel allegedly required by the Agreement. (Once again, on its face, this aspect of the Complaint concerns "the business or operations of Pimlico or Laurel."). This assertion is not supported by any extrinsic evidence offered by the plaintiffs, and runs contrary to the language of the Agreement, the language of the April Complaint, and the sworn affidavit offered by the defendants.

First, the plain language of the Agreement does not require Jacobs and De Francis to devote their full time and attention to their positions at Pimlico and Laurel. In fact, the

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8/ It is no surprise that plaintiffs' motion does not cite to a single word of the Complaint to advance and support this new theory that the Complaint is based upon a breach of the Agreement. No such allegations are in the Complaint.

Agreement specifically contemplates that one or both may become involved in "other ventures" such as Texas horse racing. Agreement § IX ("nothing in this Agreement shall preclude any party to this Agreement from entering into any business venture with any other party to this Agreement"). Plaintiffs have offered no affidavits or other evidence to contradict this interpretation of the Agreement.

Second, the Complaint itself asserts that the alleged deficiencies in the time and attention De Francis and Jacobs have devoted to the racetracks constitute breaches of fiduciary duties to the Corporations. Complaint ¶¶ 26, 27, 29. No mention is made of any breaches by De Francis or Jacobs of a contract.

Third, a genuine dispute of material fact exists regarding whether De Francis' and Jacobs' activities in Texas have caused them to in fact devote less time and attention to their duties than required under the Agreement. Plaintiffs assert in their motion that "many man-hours" or "many hours" have been expended by De Francis and Jacobs on the Texas racing venture, and that the agreement between De Francis and Jacobs and the entity applying for a license to operate a racetrack in the Texas venture calls for either De Francis or Jacobs to be in Texas full time if and when the Texas racetrack is opened. See Pl. Motion at 9-10 n.1; Exhibits A - C to Pl. Motion. The plaintiffs fail to prove that these "facts," even if the Court elects to consider them, are (a) material to a determination of whether they have breached the Standstill Provision, or (b) undisputed.

Whether De Francis and Jacobs have spent "many hours" in Texas is not material to whether the Complaint falls within the "breach of the Agreement" exception. This "fact" does not clearly demonstrate that they failed to devote the time and energies to the racetracks even implicitly required by the Agreement. Similarly, the "fact" that De Francis or Jacobs may be required to be in Texas full time in the future does not establish that a complaint for breaches of fiduciary duty is actually "based on" a breach of the Agreement. This type of speculation about future activities proves absolutely nothing relevant to the single issue at hand: whether the Manfusos have instituted legal action that is "based on" a breach of the Agreement.

Moreover, the facts regarding the alleged failure to devote sufficient time and attention to the business and operations of Pimlico and Laurel are disputed. The defendants have provided an affidavit that contradicts the bare assertions of fact that the plaintiffs have alleged in their motion, and any contrary inferences that may even arguably be drawn from Exhibits A - C to plaintiffs' motion. In his affidavit, Jacobs states that while "I have devoted time to activities in Texas, my employment agreement does not prohibit me from doing so." Jacobs Affidavit ¶ 14. Moreover, Jacobs states that he has "continued to devote to my duties at Pimlico and Laurel the time required for their performance in accordance with [the Agreement]." Id. Finally, Jacobs states that the involvement by De Francis and himself in Texas racing "is permitted by law and

under the Stockholders Agreement dated as of October 1, 1989." Id. at ¶ 8.[9/] In these respects, Jacobs' affidavit is in direct conflict with the bare allegations of facts or other interpretations of the Agreement contained in the plaintiffs' motion, as well as the "evidence" submitted in plaintiffs' Exhibits A - C. The plaintiffs do not provide an affidavit to support their allegations. Because the only pertinent evidence before the Court on the subject of whether Jacobs has devoted his full time and attention to his duties is Jacobs' affidavit, and because the Court must resolve all inferences from the three exhibits against the moving party, plaintiffs clearly have not carried their burden of demonstrating the absence of any genuine issue of fact regarding the Texas activities.[10/]

[9/] Again, the Agreement specifically authorizes De Francis and Jacobs to participate with one another in other ventures to the exclusion (or possible inclusion) of the Manfusos. Agreement § IX.

[10/] The fact that plaintiffs have not alleged a breach of the Agreement, and that this legal action does not fall within the exceptions to the Standstill Provision, is further demonstrated by the Court's recent decision that the plaintiffs' lacked standing to assert their claim seeking an injunction against the diversion of resources to Texas. During oral argument, plaintiffs asserted that the Manfusos had standing in three capacities: (1) as parties to the Agreement asserting a claim of breach of contract; (2) as directors; and (3) as shareholders. June 18 Transcript at 62. After oral argument, the Court determined that the Manfusos' had not brought their suit in the first capacity, were not entitled to sue in the second capacity and in reality had only sued in the third capacity, as shareholders. The Court dismissed the count of the plaintiffs' complaint relating to Texas racing because the Manfusos had failed to follow proper procedures for instituting such an action. See Memorandum Opinion and Order dated June 19, 1992.

2. The Complaint Is Not Based on a Breach of Documents Executed Pursuant to the Stockholders Agreement

Plaintiffs next assert that their Complaint is based on breach of an employment contract allegedly executed pursuant to the Agreement, and that accordingly the Complaint falls within an exception to the Standstill Provision. Specifically, they allege that De Francis and Jacobs may at some undefined point in the future "attempt to divert the services of the tracks' key employee -- James Mango -- to their private interests in Texas," Pl. Motion at 10-11, and that De Francis and Jacobs "clearly intend to use Mango to run their private operation" in Texas. Id. at 11 (emphasis added).

Once again, the plaintiffs provide no affidavit to support these allegations and, once again, the plaintiffs fail to carry their burden of "demonstrating clearly the absence of any genuine issue of fact." Medical Mutual, 37 Md. App. at 712, 379 A.2d at 742. Instead, plaintiffs merely attach as Exhibit D to their motion an unverified and unauthenticated document that they describe as a copy of Mango's Employment Agreement. Pl. Motion at 11. Because Exhibit D would not be admissible in evidence, it must be disregarded by the Court for the purposes of this motion. Vanhook v. Merchants Mut. Ins. Co., 22 Md. App. 22, 321 A.2d 540, 542 (1974) ("But a court cannot rule summarily as a matter of law until the parties have supported their respective contentions by placing before the court facts which would be admissible in evidence.").

Even assuming that Exhibit D accurately sets forth the terms and conditions of Mango's Employment Agreement (which it does not because it is not the final version of that agreement), and assuming it is in fact a "document executed pursuant to" the Agreement (which defendants do not concede), the Complaint does not allege that Mango has violated this agreement, nor even that De Francis and Jacobs have attempted to induce him to do so. See April 29 Complaint ¶¶ 28-29. Plaintiffs' bare assertion in their brief that De Francis and Jacobs "intend" to direct Mango to Texas racing activities is insufficient to contradict the sworn statement of Jacobs to the contrary. The defendants have stated in an affidavit that De Francis and Jacobs do not intend to require, nor could they require, Mango to leave Pimlico and Laurel to pursue Texas racing activities. Jacobs Affidavit ¶ 12. This is an obvious material factual dispute. Moreover, disposition by summary judgment is particularly inappropriate in cases involving motive or intent. DiGrazia, 288 Md. at 445, 418 A.2d at 1196.

Furthermore, the plaintiffs do not provide any arguments or evidence that would explain how even an actual breach by Mango (which, of course, has not occurred) of his employment contract would permit them to institute legal action against the corporate defendants.[11/] The Manfusos are not parties

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11/ In fact, Mango's Employment Agreement, as stated in the unauthenticated and unverified copy provided by the plaintiffs, provides that Mango may voluntarily terminate his employment at any time upon giving thirty days prior notice. See Exhibit D to Pl. Motion, at 7. (This provision also exists in the true and accurate copy of his actual Employment Agreement.)

to his employment agreement and Mango is not a party to the Agreement. The Standstill Provision applies to suits by parties against parties. Agreement § X. The Manfusos would not even have standing to sue the Corporations for some imagined potential breach by Mango of his employment agreement with the Corporations. It is therefore absurd to suggest that the Standstill Provision was intended to permit such suits against the Corporations. In any event, the Manfusos have not met their burden of clearly demonstrating no genuine issues of material fact on this point.

D. No "Implicit" Exception Permits the Filing of the Manfusos' Complaint Merely Because It Includes a Request for a Declaration

Having failed to fall within either of these explicit exceptions to the Standstill Provision, plaintiffs ask the court to rewrite the plain language of that clause to create an implicit exception for all declaratory judgment actions, regardless of whether they concern the business or operations of the racetracks. The plaintiffs claim that "the mere filing of a declaratory judgment action cannot have breached the Stockholders' Agreement, as a matter of law." Pl. Motion at 4. The plaintiffs appear to argue that they cannot as a matter of law waive their rights to seek a declaratory judgment. Id. at 4-8. Because the Manfusos, by voluntarily and knowingly entering into the Stockholders Agreement, did indeed bargain away their rights to seek a declaratory judgment concerning the business or operations of the Corporations prior to October 1, 1993, and because the plaintiffs' complaint seeks far more than the "mere"

declaration of their rights under the Agreement, this attempt to rewrite the Agreement and the Complaint after the fact must fail as well.

1. The Manfusos Voluntarily and Knowingly Entered Into an Agreement that Waived Their Right to Seek the Requested Declaration Prior to October 1, 1993

The plain language of the Standstill Provision indicates without ambiguity that the Manfusos cannot, without violating the provision, bring a lawsuit prior to October 1, 1993 concerning the business or operations of Pimlico or Laurel. Because the Manfusos do not allege in their complaint or in their Motion (nor can they under the facts) that the Standstill Provision was not entered into voluntarily and knowingly by all parties to the Agreement, they must be deemed to have voluntarily and knowingly entered into the Agreement for the purposes of this motion. By entering into the Agreement, the Manfusos waived their rights to bring "any legal dispute or action" -- whether in the form of a declaratory judgment action or not -- concerning the business or operations of Pimlico or Laurel prior to October 1, 1993. Therefore, the "mere" institution of this action, plainly concerning the business and operations of the

racetracks,[12/] violates the plain language of the Standstill Provision and constitutes a breach of the Agreement.

"[U]nless clearly prohibited by statute, contractual limitations on judicial remedies will be enforced absent a positive showing of fraud, misrepresentation, overreaching, or other unconscionable conduct on the part of the party seeking enforcement." Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 611, 386 A.2d 1216, 1231 (1978) (citations omitted). The issue in Maryland-National was "whether a lessee may, consistent with the public policy of this state, voluntarily agree to relinquish in advance his statutory

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12/ The plaintiffs Complaint clearly concerns the business or operations of Pimlico and Laurel. This much is conceded by the plaintiffs in their Complaint, and various filings with the court. See, e.g., Complaint ¶ 21 ("The Manfusos have uncovered the following abuses in the operation of Pimlico and Laurel.") In any event, if there were a dispute about whether the parties intended the Standstill Provision to prohibit suits seeking redress for differences of business judgment about the proper management of the racetracks, such a dispute is inherently a factual dispute, requiring a determination of facts not found in the plain language of the Stockholders Agreement. Miller Lumber Indus. v. Brown, 46 Md. App. 399, 405, 416 A.2d 302, 305 (1980) (when contract language is found to be vague or ambiguous, a factual dispute exists and resolution of the ambiguity by summary judgment is inappropriate); see also International Bhd. of Elec. Workers, Local 47 v. Southern California Edison Co., 880 F. 2d 104, 107 (9th Cir. 1989) ("When meaning of an agreement is ambiguous on its face and contrary inferences as to intent are possible, an issue of material fact exists for which summary judgment ordinarily is inappropriate."). A summary judgment procedure is not the correct method in which to decide a factual dispute about whether the phrase "business or operations" was intended by the parties to cover suits such as this one concerning differences in business judgment about the proper management of the racetracks. See, e.g., DiGrazia, 288 Md. at 445, 418 A.2d at 1196; Miller Lumber, 46 Md. App. at 404-05, 416 A.2d at 305. All inferences should be resolved against the plaintiffs, as the moving parties. DiGrazia, 288 Md. at 445, 418 A.2d at 1196.

right to challenge a determination by the Supervisor of Assessments that the demised premises is subject to real property taxation." 282 Md. at 591, 386 A.2d at 1220.

The Court of Appeals, noting that "Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds," reversed the Circuit Court's ruling striking down a noncontestability clause in the lease in question. Maryland-National, 282 Md. at 606, 386 A.2d at 1228. The Court of Appeals went on to state:

> This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

282 Md. at 606, 386 A.2d at 1228-29 (citations omitted). The Court further noted that enforcement of a contractual provision "will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh 'the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement' of the contested term." 282 Md. at 607, 386 A.2d at 1229 (citation omitted).

The Court of Appeals examined the public policy contentions of the party seeking to strike down the noncontestability provision. The first argument given, similar to the Manfusos' argument in their motion, was that enforcement of the clause would "thwart the purpose of the General Assembly"

by depriving the party of its right to appeal administrative action. Id. In upholding the contractual waiver entered into by the parties, the Court noted that there was nothing in the statute in question which could be interpreted to prohibit a voluntary waiver of the right to appeal, and "[t]o the contrary, the decision to appeal under [the statute] is purely discretionary with the taxpayer." Maryland-National, 282 Md. at 608, 386 A.2d at 1229.

Similarly, there is no language in the Maryland Uniform Declaratory Judgment Act which could be interpreted to prohibit parties from voluntarily agreeing to waive the right to seek legal redress for a period of four years. See Md. Code Ann., Courts and Judicial Proceedings §§ 3-401 - 3-415 (1989). Moreover, a decision to resort to the Declaratory Judgment Act, or more broadly, to bring a legal action regarding the breach of fiduciary duties by directors of a corporation, is purely discretionary. See Glens Falls Ins. Co. v. American Oil Co., 254 Md. 120, 136, 254 A.2d 658, 667 (1969) (seeking of declaratory relief is "entirely permissive" and not mandatory).

The party in Maryland-National that sought to avoid application of the waiver clause next argued that the application of the provision would challenge the jurisdiction of the Maryland courts. 282 Md. at 608, 386 A.2d at 1230. The Court of Appeals dismissed this argument, stating first that "courts in recent years have grown more tolerant of innovative contractual devices designed to terminate disputes quickly and equitably without the need for protracted formal litigation." 282 Md. at 610, 386 A.2d

at 1231 (citation omitted). The Court then stated that "unless clearly prohibited by statute, contractual limitations on judicial remedies will be enforced, absent a positive showing of fraud, misrepresentation, overreaching, or other unconscionable conduct on the part of the party seeking enforcement." Id. (citation omitted). Finally, and most significantly for the present dispute, the Court found that:

> [a]nticipating that a formal resolution of this issue might prove to be both costly and time-consuming, and recognizing that neither party could unilaterally provide a solution, the parties agreed that it was in their mutual interest to avoid lengthy appellate review of the thorny legal question by designating the Supervisor of Assessments as the final arbiter of the taxability issue.

Maryland-National, 282 Md. at 611, 386 A.2d at 1231 (emphasis added).

In the instant action, the parties to the Agreement agreed to enter into the Standstill Provision in order to provide and obtain a "period of peace" during which disruptive litigation between the parties would be avoided in favor of concentrating on the operation and management of the racetracks. See Jacobs Affidavit ¶¶ 5-6. The plaintiffs do not assert that they were the victims of "fraud, misrepresentation, overreaching, or other unconscionable conduct." Maryland-National, 282 Md. at 611, 386 A.2d at 1231. The plaintiffs do not allege in their Complaint, in their motion, nor by supporting affidavit that the defendants enjoyed any appreciable bargaining power over them. See id. at 614, 386 A.2d at 1233 ("All participants in the negotiations were experienced in business and financial affairs and are presumed to

have comprehended the meaning of the waiver term."). As plaintiff John A. Manfuso, Jr. freely admitted in his July 2 testimony before the Court, the plaintiffs were represented by counsel during the six month process of negotiating and drafting the Agreement. See also Jacobs Affidavit ¶ 6. The plaintiffs have never even alleged that they did not "fully underst[an]d the import of the [Standstill Provision] and the nature of the rights it relinquished thereby, as well as the risks inherent in such a waiver." Maryland-National, 282 Md. at 613, 386 A.2d at 1232. As stated by the Court of Appeals, "[u]nder these circumstances it would be unthinkable to release [the plaintiffs] from [their] voluntarily assumed obligation on public policy grounds." Id.

This conclusion is even more inevitable given the fact that the Agreement was entered into by all the shareholders of the Corporations. "It is generally recognized that stockholders who own substantially all of the stock of a corporation may lawfully contract with one another concerning the management of corporate affairs." Bunnett v. Smallwood, 768 P.2d 736, 739 (Colo. App. 1988) (citing Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980)), rev'd, in part, on other grounds, 793 P.2d 157 (Colo. 1990); see also F. Hodge O'Neal and Robert B. Thompson, O'Neal's Close Corporations § 5.30 at 134 (3d ed. 1987) ("Policy considerations positively favor the enforcement of agreements among all the shareholders."). Indeed, "the general trend in Maryland's corporation statutes for more than 120 years has been toward greater flexibility and greater latitude in permitting the stockholders . . . to decide for themselves issues

of both economic substance and corporate governance." James J. Hanks, Jr., Maryland Corporation Law § 1.5 at 24 (1991 Supp.).

One example of this general trend is the Maryland Close Corporation Law, which provides that "[u]nder a unanimous stockholders agreement, the stockholders of a close corporation may regulate any aspect of the affairs of the corporation or the relations of the stockholders." Md. Code Ann., Corporations and Associations § 4-401 at 148 (1985). See also O'Neal § 5.11 at 52 ("the courts rather readily accept an effort to assure continuity or stability of management in the corporation as an objective which is in the interest of the Corporation and all the shareholders" [footnote omitted]).

Because the plaintiffs have failed even to allege facts that would show that the Declaratory Judgement Act precludes waiver of its provisions, and because the plaintiffs' complaint and motion are utterly devoid of any allegations that the Standstill Provision was not entered into voluntarily and knowingly by a party of comparable bargaining power and represented by counsel, the plaintiffs have failed to demonstrate clearly that there is no dispute as to material facts regarding the validity and application of the Standstill Provision, and their motion for summary judgment must be denied.

2. The Complaint Filed by the Manfusos Does Not "Merely" Seek a Declaration of Their Rights Under the Agreement

Again, wishing to re-write history, the plaintiffs now re-characterize the Complaint as an action "merely" seeking a declaration that the "standstill provision of the Stockholders

Agreement does not prevent them from asking this Court to restrain defendants from further abuses of the corporations." Pl. Motion at 4. Yet, the Complaint speaks for itself on this point: it does much more than merely seek a declaration. The Complaint consists of nearly twenty pages of detailed, inflammatory and damaging allegations about the business and operations of the Corporations which the Manfusos then widely publicized to the press and others. See infra at 6 (listing allegations). Moreover, the Complaint seeks two other forms of declaratory relief and six specific forms of permanent injunction, all regarding the business and operations of the Corporations' and all far beyond a mere request for judicial interpretation of the Standstill Provision. See Complaint, Counts One and Two, at 16-19; infra at 7-8 (listing requests for relief).

At the least, there exists a genuine dispute of fact as to whether the Manfusos have "merely" requested the declaration of their rights under the Agreement, and the plaintiffs' motion for summary judgement must be denied.

E. Public Policy Does Not Provide An Implied Exception for the Filing of a Derivative Action Prior to October 1, 1993

The plaintiffs advance a third argument to support the contention that they have not as a matter of law breached the Stockholders Agreement by instituting legal action against the Corporations concerning the business and operations of Pimlico and Laurel prior to October 1, 1993. The plaintiffs ask the court to "restrict the operation of the Standstill Provision to

circumstances which do not protect and encourage breaches of fiduciary duty," on the grounds that to interpret the clause otherwise would "violate public policy." Pl. Motion at 13. The plaintiffs advance only two arguments in support of this interpretation of the Standstill Provision: (1) the application of the Standstill Provision will permit "[the defendant] directors to breach their fiduciary duties to corporations," Pl. Motion at 14; and (2) because "equity will not suffer a wrong without a remedy," the defendants "are estopped to raise the standstill provision under the circumstances presented by this case." Pl. Motion at 14-15. Neither of these arguments has merit in light of the fact that in substance the Complaint is nothing other than a premature shareholders derivative action, filed without exhaustion of intracorporate and other remedies.

1. The Manfusos Complaint Is Simply A Poorly Disguised Shareholders Derivative Action Alleging Mismanagement of the Business and Operations of the Racetracks

Notwithstanding the false assertions in the Complaint to the contrary, the Manfusos have not filed suit as directors to seek redress of breaches of fiduciary duty because no such cause of action exists under Maryland law.[13/] See Corporations' Memorandum in Support of Motion to Dismiss dated June 5, 1992, at 8-12 (individual directors lack standing under Maryland law to file derivative suits). In all material respects, the plaintiffs' complaint is a shareholders derivative action couched

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13/ Indeed, it would be absurd for a court to imply that the Standstill Provision contains an unwritten implicit exception permitting the Manfusos to file a cause of action which does not even exist under Maryland law.

in language intended to disguise it as a suit by directors to redress "abuses in the operation of Pimlico and Laurel." Complaint ¶ ¶ 19, 21, 46, 47.

Five of the seven abuses alleged in the Complaint are unquestionably abuses which, if proved, would harm the Corporations, and not the Manfusos directly as directors or shareholders.[14/] The Complaint does not make any assertion that the wrongs injured the Manfusos distinct from any injury to Pimlico or Laurel. See Cowin v. Bresler, 741 F.2d 410, 415 (D.D.C. 1984). The Manfusos' complaints of improper management or mismanagement of the corporations' affairs are obviously acts that only injure them derivatively through dilution in the value of their stock, an injury equally applicable to all shareholders of Pimlico and Laurel. Bokat v. Getty Oil Co., 262 A.2d 246 (Del. 1970).

If the Manfusos wish to seek redress for these alleged derivative harms, the proper procedure is for the Manfusos to

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14/ These five are as follows: (1) the allegedly unauthorized diversion of corporate resources, including the time, attention and skill of Joseph De Francis, Jacobs and Corporate employee James Mango to the prosecution of an application for a license to own and operate a racetrack in Texas, Complaint ¶¶ 22-31; (2) the failure of Joseph De Francis to repay the Corporations for the use of the Corporations' money for a "period of years" in connection with the use of corporate credit cards for certain personal expenses; (the complaint admits that the Corporations have been fully reimbursed in the amount of the personal charges), Complaint ¶ 32; (3) an alleged unfair allocation of expenses pertaining to Laurel and to Pimlico. Complaint ¶ 34; (4) the donation of $25,000 of corporate funds to the Florida Derby Gala which the Manfusos allege had no legitimate business purpose, Complaint ¶ 35; and (5) the allegedly improper transfer of revenue from certain racing days from Pimlico to Laurel, Complaint ¶¶ 36-42.

first make a demand upon the Corporations' Boards of Directors. See Memorandum Opinion and Order dated June 19, 1992 at 2.[15/] This they have not done. Id. In any event, because the plaintiffs have options available to them to redress any alleged wrongs to the Corporations (indeed, options that they must first exercise in order to have legal standing to sue), it is clear plaintiffs are wrong in asserting that the application of the Standstill Provision will "permit [the defendant] directors to breach their fiduciary duties to Corporations." Pl. Motion at 14.

2. The Standstill Provision Has Not Deprived the Manfusos of a Remedy for Alleged Mismanagement of the Corporations

The Manfusos also urge the court to create an implied exception for their shareholders derivative action on the grounds that "equity will not suffer a harm without a remedy." Pl. Motion at 15. However, the plaintiffs provide no facts to support their contention that they lack a remedy other than this derivative action. The undisputed facts point to the opposite conclusion and the single case cited by plaintiffs in support of this proposition likewise supports a contrary conclusion.

The plaintiffs rely upon Manning v. Potomac Elec. Power Co., 230 Md. 415, 187 A.2d 468 (1963), for the proposition that equity should not allow the Standstill Provision to bar their action. Manning was a suit by a power company for specific performance of an option to purchase land for a prospective

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15/ As stated in the June 19, 1992 Order, the plaintiffs do not allege in their Complaint that it would be futile to make such a demand on the Boards of Directors.

electrical transmission line. In that case, the court sitting in equity decided that the contract in question was fair, reasonable and certain, and affirmed the lower court's decree specifically enforcing the contract. While the court did cite the general maxim relied upon the plaintiffs in this matter -- that "equity will not suffer a wrong to be without a remedy" -- the court also set forth the following "well-defined and important limitations" on this general rule: (1) the right in question must be one not recognized as existing by the law; (2) the legal right must be one which the law does not or cannot administer; (3) the remedy at law must be inadequate, incomplete or uncertain; and (4) "the principle does not apply where a party has destroyed, lost or waived his right to an equitable remedy by his own actions, or lack of action." 187 A.2d at 472 (emphasis added).

Here, the plaintiffs are overwhelmingly defeated by the limitations to the general maxim. By freely and voluntarily entering into a valid, unanimous stockholders agreement, the plaintiffs waived their right to assert derivative claims prior to October 1, 1993. See supra Section C.

More importantly, the plaintiffs are not "without a remedy" even if their alleged wrongs have merit. Contrary to their conclusory statements in their motion papers, there are many other "steps possible to prevent [the alleged] further abuses of the corporation." Pl. Motion at 6. First, the Manfusos may file their suit after October 1, 1993. Second, prior to that time, the Manfusos are free to demand that the Boards of Directors of Pimlico and Laurel take action to

investigate and/or remedy the alleged instances of corporate waste and abuse, in accordance with the procedures set forth under Maryland law. See Corporations Memorandum in Support of Motion to Dismiss, dated June 5, 1992. The Manfusos have not offered any evidence to contradict the factual evidence that there are disinterested (non-defendant) directors on these Boards to whom the Manfusos could present their claims for consideration.[16/] See Jacobs Affidavit. Third, the Manfusos could have brought their claims of mismanagement to the attention of the state authorities which have oversight responsibility for the business and operations of Pimlico and Laurel. Instead, they sought a judicial remedy, thereby causing great harm to the business and reputation of the Corporations.

For these reasons, the plaintiffs' reliance upon the maxim that equity will not suffer a harm without a remedy simply does not exempt their Complaint from the application of the Complaint.

3. Application of the Standstill Provision to the Manfusos' Complaint Does Not Reward the Defendants for Alleged Breaches of Fiduciary Duty

The plaintiffs also argue that equity will not "aid" the defendant directors in securing or protecting gains from their wrongdoing, or escaping the consequences thereof. Pl. Motion at 15. The only case they cite to support this argument is Niner v. Hanson, 217 Md. 298, 142 A.2d 798 (1958). In Niner,

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16/ Indeed, the Court found in its June 19, 1992 Order that there are "at least some disinterested directors" on the Boards of Pimlico and Laurel. See Memorandum Opinion and Order, at 2.

a member of a union local sued for reinstatement to membership, and the local defended on the grounds that the union member had unclean hands because he had committed perjury in a previous related action, and should not now receive the benefit of reinstatement. The court disagreed, and ordered the union member reinstated on the grounds that the present suit did not arise out of his prior misconduct, nor was he seeking to obtain any benefit therefrom. 217 Md. at 310-11, 142 A.2d at 804.

In this case, the Corporations are not even alleged to be guilty of any prior misconduct. Collectively, they have paid millions of dollars in cash and other benefits to the Manfusos in reliance upon their promise not to institute legal action against the Corporations regarding the business and operations of Pimlico or Laurel prior to October 1, 1993.[17/] The Corporations bargained for and the parties agreed upon a four year period of peace. As of the date the Complaint was filed, the Corporations had fully performed their obligations under the Stockholders Agreement. See Counterclaim ¶¶ 10-17. Now, with over a year to go under the four year window of peace, the Manfusos instituted legal action in direct violation of the letter and spirit of the Standstill Provision. The only parties who stand to be unjustly rewarded for their prior misconduct are the Manfusos who received material

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17/ In exchange for their promise not to sue, the Manfusos received substantial benefits under the Agreement. See supra 5-6. As holders of less than a majority of the voting stock of the Corporations, the Manfusos did not have the ability, in the absence of the Agreement, to elect themselves as directors or appoint themselves as officers of Pimlico and Laurel, nor did they have the ability to grant themselves any of the benefits they have received under the Agreement. Id. ¶¶ 13-15.

benefits from the Corporations under the Stockholders Agreement, while utterly failing to fulfill their own obligations.

F. The Standstill Provision Contains No "Implicit" Exception Permitting the Manfusos to Institute Legal Action Against the Corporations to Receive Access to Information About the Business and Operations of the Racetracks

In addition to the five derivative claims, the Manfusos' Complaint also seeks injunctions ordering the defendant directors to provide to them certain written information about legal fees paid to outside law firm for Pimlico and Laurel, and information with regard to accounting practices.

On their face, these two claims concern the business and operations of Pimlico and Laurel. The services performed by outside law firms (and the charges for these services) are part and parcel of the business and operations of the racetracks. The accounting practices of the outside accountants to the racetracks are integral to the business and operations of the racetracks. The Manfusos' claims that as directors they are being deprived of information about the business and operations of the racetracks also necessarily falls within the Standstill Provision.

In fact, as with their derivative claims, plaintiffs do not dispute -- by offering any facts or even assertions to the contrary -- that with respect to these two claims their lawsuit "concerns the business and operations of Pimlico and Laurel." Instead, the Manfusos ask this court to invent an implicit, unwritten exception to the Standstill Provision permitting legal actions against the other parties to the Agreement in order to

receive information about the business and operations of the racetracks.

The plaintiffs provide no facts and no legal authority to support this contention, offering only the bare conclusion that the Agreement gives them the right to be elected as directors of the Corporations, and that "responsible director[s] must be permitted access to information necessary for the performance of [their] duties, the standstill provision cannot be deemed to be an impediment to this Complaint." Pl. Motion at 13.

With respect to the legal fees, the issue was never the subject of an actionable controversy, and in any event, it has been mooted by the delivery to the Manfusos of all requested information pertaining to legal fees charged to the Corporations by outside law firms. As stated in the Jacobs Affidavit, the Corporations had, prior to the filing of the Complaint, provided the Manfusos or their accountant with the records in their possession regarding the payment of fees to legal counsel. Jacobs Affidavit, ¶ 28. Furthermore, at a meeting of the Boards of Directors, held over two weeks prior to the filing of the plaintiffs' Complaint, the Manfusos were informed that the Corporations had requested outside counsel to provide the Corporations with the computerized billing records related to their legal fees, and that the information would be available for the Manfusos once it was received.[18/] Id. Obviously, the

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[18/] In a letter dated July 8, 1992, McGee Grigsby, Esq., counsel for the Corporations, advised Herbert Garten, Esq., counsel for the Manfusos, that the requested records of Latham & Watkins and Ginsburg, Feldman & Bress were available for inspection, and that only Mr. Garten's records remained to

plaintiffs did not need to file the instant action to obtain this information.

Similarly, contrary to the unsupported allegations of their complaint, and as fully set forth in the Jacobs Affidavit (¶¶ 29-30), the Manfusos have never been deprived access to the "information regarding the accounting practices of the corporations." Pl. Motion at 13. Instead, the Corporations' accounting records have been provided to the Manfusos on a regular basis, and the Corporations authorized their outside certified public accountants to provide the Manfusos' accountant with access to their work papers. Jacobs Affidavit, ¶ 29.

Based upon this uncontroverted factual evidence and the allegations of the two pending counterclaims against the Manfusos, the Corporations contend that the Manfusos' institution of legal action on April 29, 1992 against the Corporations to obtain information about the business and operations of the racetracks -- which information in fact has never been denied to them -- constitutes a willful breach of the Standstill Provision, and a material breach of the Agreement itself.

Nothing in the Manfusos' motion for summary judgment contradicts these undisputed facts or the plain language of the Standstill Provision prohibiting such suits prior to October 1, 1993. Plaintiffs' motion for summary judgment fails to meet the standard for granting a summary judgment to the effect that there is any such "implicit" exception to the Stockholders Agreement.

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be provided. A copy of the letter is attached hereto as Exhibit B.

IV.

CONCLUSION

For the reasons stated above, the Corporations respectfully request this Court to deny plaintiffs' Motion to Dismiss and/or for Summary Judgment.

Dated: July 15, 1992

Respectfully Submitted,

By: _____

LATHAM & WATKINS
Irwin Goldbloom
McGee Grigsby
Jennifer Archie
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004

Attorneys for Defendants
The Maryland Jockey Club of
Baltimore City, Inc.
Pimlico Racing Association, Inc.
Laurel Racing Assoc., Inc.

RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1992, a copy of the foregoing Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Dismiss was hand delivered to: James Ulwick, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; and James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

	*	IN THE
ROBERT T. MANFUSO, et al.	*	CIRCUIT COURT
v.	*	FOR
JOSEPH A. DEFRANCIS, et al.	*	BALTIMORE CITY
	*	92120052/CE147851

* * * * * * *

MEMORANDUM OPINION AND ORDER

On June the 18th, 1992, argument of counsel was heard in open court, on the record, based on Defendants Joseph A. DeFrancis, et al's Motion to Dismiss Certain Claims for Declaratory Relief and all Claims for Injunctive Relief and the Answer filed thereto by the Plaintiffs, Robert T. Manfuso and John A. Manfuso, Jr. By agreement of counsel, the only issue presented to this Court was the Motion to Dismiss Claims for Injunctive Relief as it applies to the Plaintiffs' request for a permanent injunction (A) Barring Joseph DeFrancis and Martin Jacobs from diverting the resources, key employees, or confidential or proprietary information of Laurel Racing, Inc., The Maryland Jockey Club of Baltimore City, and Pimlico Racing Association, Inc. to any ventures in Texas. No evidence of any type was presented to the Court but extensive agrument of counsel was heard.

The Defendants' argument that the Plaintiffs' Request for a Permanent Injunction be dismissed on the basis that it lacks sufficient allegations of irreparable harm, is without merit. This Court is not ruling on the merits of granting the permanent injunction. Rather, this Court is only ruling on the Plaintiffs' right to request a permanent injunction. The allegations made by the Plaintiffs against the Defendants in the Bill of Complaint were sufficient, if proven, to allow the Court to grant a permanent injunction. Along these same lines, the Defendants' argument regarding the doctrine of comparative hardship is misplaced. This Court need not weigh the equities when, in effect, the Court is only determining the right to request a permanent injunction.

Having completely reviewed the Bill of Complaint, it would appear that the Plaintiffs have filed this action as a shareholder derivative suit, and possibly as a contract action or director's claim. This Court is only determining whether the action is proper on the basis of a shareholder derivative suit.

Prior to filing a shareholder derivative suit, a shareholder must make a demand upon the corporation to sue in its own name. This prerequisite can be excused where such a demand would be futile. However, in this case, where there were at least some disinterested directors, demand is not excused. And there were no allegations that it would be futile to do so.

It is, therefore

ORDERED this 19th day of June, 1992, that the Defendants' Motion to Dismiss Plaintiffs' Request for Injunctive Relief Barring the Defendants to Any Ventures in Texas is hereby GRANTED with leave to the Plaintiffs to amend their complaint to comply with this opinion. Costs of this proceeding to be divided equally between the parties.

H. Kemp McDaniel
The Judge's Signature Appears
on the Original Document

TRUE COPY
TEST
Saundra E. Banks
SAUNDRA E. BANKS, CLERK

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

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July 8, 1992

Herbert S. Garten, Esq.
Fedder and Garten
36 South Charles St.
2300 Charles Center South
Baltimore, MD 21201

Dear Herb:

This is to confirm our conversation of earlier this morning regarding your providing detailed time records for your firm's legal fees which were billed to or paid by Laurel, Pimlico or the Maryland Jockey Club. As we discussed, I believe the only occasion on which this occurred was in connection with the Stockholders Agreement.

In our conversation this morning, I indicated that the relevant time frame was September 1989 through the spring of 1990. On reflection, I think the period should also include the earlier negotiations which, as I recall, commenced in 1988.

In any event, you agreed to have someone determine the availability of these records and to provide them promptly. You indicated you would call me if you encounter a problem.

I appreciate your assistance in this matter. As I indicated, we now have the detailed time entries from Latham & Watkins and from Ginsburg, Feldman & Bress. Your firm's records will complete the package.

Very truly yours,

McGee Grigsby

cc: Martin Jacobs

(13) M.S.

ROBERT T. MANFUSO and JOHN A. MANFUSO, JR.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs	*	**FOR**
v.	*	**BALTIMORE CITY**
JOSEPH A. DE FRANCIS, et al	*	**CASE NO.: 92120052**
Defendants	*	

FILED
AUG 7 1992
CIRCUIT COURT FOR
BALTIMORE CITY

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants, Joseph A. De Francis ("De Francis") and Martin Jacobs ("Jacobs"), by and through their attorneys, James E. Gray, Linda S. Woolf, and Goodell, DeVries, Leech & Gray, hereby move to dismiss and/or move for summary judgment as to Plaintiff's Second Amended Complaint for the reasons stated in the accompanying Memorandum of Law in Support of Motion to Dismiss and/or for Summary Judgment as to Plaintiffs' Second Amended Complaint which is incorporated herein.

Respectfully submitted,

James E. Gray

Linda S. Woolf

Linda S. Woolf
Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 1992, a copy of the foregoing Motion to Dismiss and/or for

Summary Judgment as to Plaintiffs' Second Amended Complaint was hand delivered to: James Ulwick, Esq., Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201, Attorneys for Plaintiffs; and mailed to: Irwin Goldblum, Esq., McGee Grigsby, Esq., and Jennifer Archie, Esq., Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Suite 1300, Washington, D.C. 20004-2505, Attorneys for Defendants, The Maryland Jockey Club of Baltimore City, Inc., Pimlico Racing Association, Inc., and Laurel Racing Assoc., Inc.

James E. Gray

FILED

JUN 29 1992

CIRCUIT COURT FOR
BALTIMORE CITY

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ROBERT T. MANFUSO, and JOHN A. MANFUSO, JR., Plaintiffs, vs. JOSEPH A. DE FRANCIS, MARTIN JACOBS, THE MARYLAND JOCKEY CLUB OF BALTIMORE CITY, INC. PIMLICO RACING ASSOCIATION, INC. LAUREL RACING ASSOC., INC., Defendants.	Civil Action No. 92120052 CE 147851

DEFENDANT CORPORATIONS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR EX PARTE, INTERLOCUTORY AND PERMANENT INJUNCTIVE RELIEF

Defendants, The Maryland Jockey Club of Baltimore City, Inc. ("MJC"), Pimlico Racing Assoc., Inc. ("Pimlico"), and Laurel Racing Association, Inc. ("Laurel") (sometimes collectively referred to as the "Corporations" or "Defendants"), by and through their attorneys, hereby oppose Plaintiffs' Motion for Ex Parte, Interlocutory, and Permanent Injunctive Relief [hereinafter Pl. Motion] filed by plaintiffs and counter-defendants Robert T. Manfuso and John A. Manfuso, Jr. [collectively the "Manfusos," unless otherwise specified] pursuant to Maryland Rule BB70-80.

I.

STATEMENT OF FACTS

Prior to his death in August 1989, Frank J. De Francis owned a majority of the voting stock of Pimlico and Laurel. Following his death, his son, Joseph De Francis, became the co-personal representative of his father's estate. In that capacity and as a stockholder himself in Pimlico, Joseph De Francis controls a majority of the voting stock of Pimlico and Laurel. Counterclaim ¶ ¶ 4, 5. After suffering his heart attack but before he died, Frank J. De Francis asked his son Joseph De Francis to take over at Laurel and Pimlico in the event Frank did not recover. Shortly after the death of Frank J. De Francis in August 1989, Joseph De Francis informed the Manfusos of his father's request and his intention to assume the presidency and operational control of Pimlico and Laurel. The Manfusos objected to his proposed assumption of the positions and titles formerly held by his father, and threatened litigation and a public dispute. See De Francis' and Jacobs Motion to Dismiss Manfusos' Complaint, Jacobs Aff. ¶ 5. In order to avoid such wasteful litigation and disputes, Joseph De Francis entered into negotiations with the Manfusos to ensure a smooth transition in his assumption of operational and managerial control of the tracks and to allow for a period of peace and stability in the ownership and management of the racetracks after his father's death. Jacobs Aff. ¶ 6.

These negotiations culminated in a memorandum of understanding that was reached among De Francis, the Manfusos and the Corporations on or about October 1, 1989. This memorandum of understanding served as the basic blueprint for a unanimous stockholders agreement that was produced after intensive negotiations among the Corporations, De Francis, the Manfusos, Jacobs and their attorneys between October 1989 and February 1990.

On February 2, 1990, the stockholders of Pimlico, Laurel and MJC executed a unanimous Stockholders Agreement [hereinafter the Agreement] setting forth certain rights and obligations and understandings among the parties.[1/] The individual Corporations were also parties to the Agreement. The Corporations promised under the Agreement to confer a number of significant benefits upon the Manfusos, including without limitation, the following: (1) the appointment of the Manfusos as officers of the Corporations; (2) the entry into employment agreements with the Manfusos guaranteeing them at least the same salaries and benefits they then enjoyed as long as they continued full-time employment, with increases if compensation to De Francis and members of his family exceeded their combined salaries; (3) the obligation to pay the Manfusos termination payments of $1,250,000 each upon their retirement as officers of

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1/ The Agreement was executed on February 2, 1990, but by agreement of the parties, the effective date was October 1, 1989, the date on which De Francis and the Manfusos had reached the original understanding which formed the basis of the Agreement.

Pimlico and Laurel; (4) the election of the Manfusos to seats on the Boards of Directors of Pimlico and Laurel; (5) and monthly severance payments to the Manfusos of $10,416.67 each after they ceased performing any services as officers of Pimlico and Laurel. See Agreement § § VI, VIII.

In exchange for these substantial benefits, the Corporations received a promise that the Manfusos would not sue them prior to October 1, 1993 concerning the business or operations of the Laurel or Pimlico. Section X of the Stockholders Agreement [hereinafter Standstill Provision] memorializes the parties' understanding with respect to the creation of this four-year period of peace among the stockholders of the Corporations during which no party would be permitted to institute or join in any legal dispute or action against any other party concerning the business or operations of the racetracks. The Standstill Provision provides as follows:

> With the exception of litigation based on criminal activity or on a breach of the terms of this Agreement or documents executed pursuant hereto, the parties to this Agreement agree that, prior to October 1, 1993, they will not institute or join in any legal dispute or action against any party to this Agreement concerning the business or operations of Pimlico or Laurel. If, after October 1, 1993 but prior to October 1, 1994, any party to this Agreement institutes or joins in any legal action dispute or action against any other party to this Agreement concerning the business or operations of Pimlico or Laurel, the party against whom such dispute or action is brought agrees not to raise the statute of limitations as a defense to such action.

Just days after executing this Agreement, the Manfusos announced their intention to retire as officers of the Corporations and demanded the $2,500,000 termination payments

provided for in the Agreement. Accordingly, in June 1990 John and Robert Manfuso each received a termination payment of $1,250,000. Until the Manfusos materially breached the Agreement by filing their complaint in this action, the Corporations also paid the Manfusos the monthly severance payments of $10,416.17 each ($125,000 each per year), compensation which the Manfusos have received for two years for doing no work.

Shortly after the Manfusos announced their retirement, Joseph De Francis agreed that notwithstanding their retirement as officers of the Corporations, he would cause the Corporations to continue to make available to the Manfusos certain "fringe benefits" that the Manfusos had previously enjoyed. These perquisites, all of which were provided without charge, included the use of two Chrysler automobiles, cellular telephones, office and parking space at the racetracks, membership and signing privileges in the Jockey Club at Pimlico and the Skysuite Members' Club at Laurel, and use of box seats at Laurel and at Pimlico [hereinafter collectively referred to as Fringe Benefits]. De Francis' agreement to cause the Corporations to continue the Fringe Benefits is memorialized in a memorandum dated April 27, 1990, drafted by the Manfusos, and attached as Exhibit B to Pl. Motion . In exchange for the continuation of the Fringe Benefits, De Francis received nothing of any benefit for himself or the Corporations. Nor did the Manfusos suffer any detriment by making their demands for continuation of these

fringe benefits. The memorandum does not state a period of time for the duration of these benefits.

On April 29, 1992, the Manfusos filed a lawsuit against the Corporations, Joseph De Francis and Jacobs alleging that De Francis and Jacobs had committed seven distinct abuses of their fiduciary duties to the Corporations. See Complaint filed April 29, 1992 ¶¶ 22-43. The nature of the breaches alleged, the sweeping scope of the declaratory and injunctive relief sought, and the language of the complaint itself irrefutably reveal that the Manfusos have "institute[d] legal . . . action against [the Corporations] concerning the business or operations of Pimlico or Laurel," in clear violation of the spirit and letter of the Standstill Provision. See Agreement § X. On its face, the Manfusos' complaint does not allege that they are suing for breach of contract. Instead, the complaint seeks three forms of declaratory relief and six specific forms of permanent injunction, all related to the business and operations of Pimlico and Laurel, and none seeking a declaration or injunction due to breach of the Agreement or documents executed pursuant to the Agreement.

On June 5, 1992, the Corporations took a number of actions designed to protect and enforce their rights and to preserve the best interests of the Corporations. First, the Corporations filed an Answer to the Manfusos complaint. Second, the Corporations filed a counterclaim against the Manfusos alleging that their institution of legal action against the

Corporations constituted a material breach of the Agreement, and seeking declaratory relief and compensatory damages for the breach.[2/] Third, the Corporations notified the Manfusos that they considered their institution of legal action against the Corporations concerning the business or operations of Pimlico or Laurel prior to October 1, 1993 to be a material breach thereby excusing the Corporations from further performance under the Agreement. See Letter dated June 5, 1992, Exhibit A to Pl. Motion. Fourth, the Corporations informed the Manfusos that the Fringe Benefits that had been continued as a mere courtesy were no longer appropriate in view of their deliberate and continuing efforts to damage the business of Pimlico and Laurel.[3/] Fifth, the Corporations informed the Manfusos that in light of their breach of the Agreement and their general course of conduct designed to harm the business of the Corporations, the protective measures outlined in the letter attached as Exhibit A to Pl. Motion were being instituted.

In response to these actions, the Manfusos filed a Motion to Dismiss the Corporations' Counterclaim and/or for Summary Judgment. The Manfusos also filed the pending motion seeking an ex parte, interlocutory and permanent injunction barring defendants De Francis and the Corporations from any of

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[2/] De Francis and Jacobs also filed an answer, and a Counterclaim alleging breach of the Agreement on the same date.

[3/] The continuation of their health benefits will, of course, be governed by COBRA.

the following acts: refusing to continue payment of monthly severance benefits; refusing to permit the Manfusos access to the Corporations' executive offices; interfering with communications between the Manfusos and managerial employees of the Corporations concerning the business or operations of Laurel or Pimlico or both; instructing managerial employees of the Corporations not to provide the Manfusos with information concerning the business of Laurel or Pimlico or both; or depriving the Manfusos of certain benefits to which they allege that they "have a contractual right pursuant to a Letter Agreement executed on or about April 29, 1990." Pl. Mem. at 1.[4/]

On June 11, 1992, at the joint request of the parties, the Court held an informal conference among counsel representing all of the parties. At this conference, the Court expressed reservations about the scope of the restrictions on communications with employees contemplated by the letter to the Manfusos dated June 5, 1992, and attached as Exhibit A to Pl. Motion. Employees were notified of the restrictions by memorandum dated June 11, 1992. To address the Court's concerns, De Francis and the Corporations distributed a memorandum to all track managerial employees and departments. A copy of this

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[4/] By agreement of the parties, the Corporations are only responding to plaintiffs' motion for ex parte, interlocutory and permanent injunction today. A hearing has been set for that motion on July 2, 1992. The parties have agreed to extend the time for the Corporations, De Francis, and Jacobs to respond to the plaintiffs' motion to dismiss and/or for summary judgment to July 10, 1992. The Court has scheduled a hearing on that motion for July 21, 1992.

memorandum is attached as Exhibit A to this opposition memorandum.

The most recent memorandum to employees makes clear that the intent of the previous notice to track employees was not to "deny [the Manfusos] information to which they might be entitled or to suggest that any individual employee who so desired was forbidden to communicate with the Manfusos." The memorandum further informed employees that they are free to communicate any concerns they have about the management of Pimlico or Laurel either to De Francis or Jacobs directly, or to Father Joseph J. Sellinger, S.J., who is now a member of the Board of Directors of both Laurel and Pimlico. The memorandum provided Father Sellinger's address and telephone number. Finally, the memorandum explicitly authorized employees to "call or write the Manfusos and communicate [concerns about the Management of the tracks] directly to them. Please be assured that no disciplinary action will be taken against you for any such communication."

II.

DISCUSSION

A. Maryland Courts Apply a Four Factor Test for Granting an Interlocutory Injunction

To be entitled to an interlocutory injunction, the Manfusos must meet four requirements. Failure to meet any one of the four requirements precludes relief.

See Nationwide Mutual Ins. v. Hart, 73 Md. App. 406, 410, 534 A.2d 999, 1001 (1988).[5/] The four requirements are as follows:

(1) that there is a substantial likelihood that the Court will determine that the Manfusos' institution of legal action against the Corporations is not a violation of the Standstill Provision of the Agreement;

(2) that the Manfusos will suffer irreparable injury unless the injunction is granted;

(3) that the benefits to the Manfusos from an injunction are equal to or greater than the harm to the Corporations from that injunction ("balance of convenience"); and

(4) that the public interest will be served by the granting of an injunction. Id.

The burden of producing evidence to show the existence of these four factors is on the Manfusos, as the moving parties. If the facts "are not 'full and sufficiently definite and clear, in

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[5/] Because the Court is not going to decide the plaintiffs' motion for an injunction until after an adversary hearing on July 2, 1992, the plaintiffs' motion for an ex parte injunction is moot. See Maryland Rule BB70. Accordingly, this memorandum is directed to plaintiffs' request that an interlocutory injunction be granted after the July 2 hearing but before a determination of the merits of the Corporations' counterclaim. Even if the Court were to treat the plaintiffs' motion as one seeking an ex parte injunction, the plaintiffs have utterly failed to meet the prerequisites for granting such an injunction. See Maryland Rule BB72 (plaintiffs must show "specific facts shown by affidavit, or a verified pleading with or without supporting affidavit or sworn testimony, that immediate, substantial and irreparable injury will result" to the Manfusos before an adversary hearing can be had). Here, plaintiffs have neither submitted an affidavit nor a verified pleading, nor have they attempted to assert facts to meet the standard of Rule BB72.

support of the right asserted, and that such right has been violated,' the court will not order preliminary relief." State Dep't of Health & Mental Hygiene v. Baltimore County, 281 Md. 548, 554, 383 A.2d 51 (1977). As noted above, failure to prevail on any one of the four required grounds precludes the issuance of an interlocutory injunction. Here, as explained below, the plaintiffs have not met their burden of proof as to any of the four factors.

B. The Plaintiffs Are Not Likely To Succeed on The Merits of Their Claim

In order to meet the burden of demonstrating likelihood of success on the merits plaintiffs assert in a conclusory fashion that their "motion for summary judgment demonstrates . . . that the Manfusos are very likely to prevail on the merits of this litigation as a whole as well as on the decisive question in this request for injunctive relief: Whether, in view of the Stockholders' Agreement, they do or do not have the right to ask the Court to declare their rights." Pl. Mem. at 4.[6/] However,

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[6/] This, of course, is not the only "decisive question." Also at issue are the withdrawal of Fringe Benefits and the protective measures set forth in the June 5, 1992 De Francis letter to the Manfusos attached as Exhibit A to their motion. The Corporations' right to withdraw Fringe Benefits and to institute protective measures is not dependent upon a finding that the Manfusos' breached the Agreement. Plaintiffs' motion and memorandum offer no factual or legal support for the proposition that they are likely to succeed as the merits with respect to Fringe Benefits, or communications with employees. Even if the Manfusos have not materially breached the Agreement, the Corporations have the right to cease their Fringe Benefits, and establish proper procedures relating to the time, place and manner of providing them with access to information.

even if the plaintiffs' summary judgment motion is incorporated into the present motion, the plaintiffs have not met their burden of showing a likelihood of success on the merits.

1. The Manfusos' Institution of Legal Action Violates The Standstill Provision

Under the Standstill Provision, the plaintiffs agreed that they would not institute a legal action regarding the business or operations of Pimlico or Laurel prior to October 1, 1993. See Agreement § X. On April 29, 1992, the plaintiffs filed their complaint identifying seven alleged "abuses in the operations of Pimlico and Laurel" allegedly caused by De Francis and Jacobs. Complaint ¶ 21. The Complaint first requested "a declaration that, under the Stockholders' Agreement, [the Manfusos, as directors,] had the right to bring a suit to remedy the breaches of fiduciary duty alleged in their complaint." Pl. Motion at 2 (emphasis added). Thus, even this first request for declaratory relief necessarily concerns the business or operations of Pimlico or Laurel.

However, the plaintiffs' complaint goes much further than this request for a declaration of whether they contracted away their right to institute this action before October 1, 1993. Their complaint also seeks the following remedies, each of which concerns the business or operations of Laurel or Pimlico: (1) a declaration that "at the plaintiff's behest, the Court may grant injunctive relief to redress breaches of duty by the defendants," Complaint ¶ 48.B; (2) a declaration that "the matters alleged in

this Complaint do in fact constitute breaches of duty by defendants Joseph De Francis and Martin Jacobs, Complaint ¶ 48.C; (3) a permanent injunction "[b]arring Joseph De Francis and Martin Jacobs from diverting the resources, key employees, or confidential and proprietary information of [the Corporations] to any ventures in Texas or to any other ventures", Complaint ¶ 51.A; (4) a permanent injunction "[r]equiring Joseph De Francis to take all necessary steps to obtain refunds to reimburse [the Corporations] within thirty days for any expenses that he or other officers may incur in the future on corporate loan accounts," Complaint ¶ 51.B.; (5) a permanent injunction "[r]equiring Joseph De Francis and Martin Jacobs to grant the plaintiffs access to any information or documentation concerning legal fees charged to or paid by" the Corporations, Complaint ¶ 51.C; (6) a permanent injunction "[r]equiring Joseph De Francis and Martin Jacobs to permit the plaintiffs and their agent to meet with the accountants" for the Corporations, Complaint ¶ 51.D; (7) a permanent injunction "[b]arring Joseph De Francis and Martin Jacobs from wasting the assets of [the Corporations]," Complaint ¶ 51.E; and (8) a permanent injunction "[b]arring Joseph De Francis and Martin Jacobs from improperly transferring the assets of" the Corporations, Complaint ¶ 51.F. Thus, in <u>every</u> respect, the complaint concerns the business and operations of Pimlico or Laurel.

Plaintiffs have also urged in their motion for summary judgment that the Court find that notwithstanding the absence of

any such claim or reference in their complaint, their complaint falls within one of the certain explicit or implicit exceptions to the Standstill Provision. See Agreement § X. Plaintiffs are highly unlikely to succeed with respect to this argument for two simple reasons. First, even the most generous reading of the complaint reveals no allegations of or claims for breach of the Agreement or of documents executed pursuant thereto. Furthermore, even if this argument were accepted, it would only apply to the claims with respect to activities by De Francis and Jacobs concerning Texas racing which is only one of the seven claims for alleged breaches of fiduciary duty. There is no possibility that the remaining six allegations can be construed as a "breach of the Agreement or of documents executed pursuant thereto." Agreement § X.

Second, this Court has already rejected the Manfusos' belated attempt to characterize their lawsuit as anything other than a straightforward shareholders derivative suit seeking relief from corporate waste. On June 19, 1992, the Court held an expedited hearing to consider the defendants' motions to dismiss the plaintiffs' complaint insofar as the complaint sought to enjoin defendants De Francis and Jacobs from pursuing certain activities in Texas. In their briefs and oral arguments, the Corporations argued that the plaintiffs lacked standing to raise their claims as directors and that their complaint was merely a poorly disguised shareholders derivative suit which must be dismissed because the Manfusos did not follow the proper

procedural prerequisites to instituting such an action. See Corporations' Motion to Dismiss, dated June 5, 1992 at 6-8. In opposition to this motion, the plaintiffs urged the Court to find that they had standing to raise their claim regarding Texas in three capacities: (1) as directors; (2) as shareholders suing for breach of the Agreement or documents executed pursuant to that Agreement; and (3) as shareholders seeking to remedy alleged harms to the Corporations. See Pl. Opposition to Motion to Dismiss at 7-11.

After five hours of oral argument and upon consideration of the briefs filed by all the parties, the Court dismissed the count of the complaint relating to Texas racing on the grounds that plaintiffs' complaint at least with respect to Texas racing issues was nothing other than a shareholders derivative action, and that the Manfusos had failed to follow proper procedures for instituting such an action. Thus, the Manfusos are unlikely to prevail on their claim that the action they instituted against the Corporations falls within any implicit or explicit exceptions to the Standstill Provision.

In footnote 1 of their brief, the Manfusos rely upon Section XII. D. of the Agreement for the proposition that even if their institution of legal action materially breached the Agreement, the Corporations cannot suspend their performance. This is an absurd proposition. On its face, Section XII. D. speaks only to the consequences to the Agreement where a term of the Agreement is held to be "illegal, invalid or unenforceable."

Agreement § XII. D. It makes no provision for the consequences to the Agreement of one party's material breach of the Agreement. It is ludicrous to suggest that by including such a clause the parties intended to waive their rights to sue for material breach of one provision of the Agreement. The Manfusos have breached the Standstill Provision -- the heart of the bargain from the Corporations' standpoint. Under these circumstances, the Corporations may declare the contract at an end and sue for breach. This much is obvious from the language of the Standstill Provision which explicitly permits suits for breach of the Agreement. See Agreement § X.

For these reasons, plaintiffs cannot and have not set forth clear and definite facts sufficient to support their right to the continuance of their monthly severance payments under the Agreement.

2. The Plaintiffs' Material Breach Discharged the Corporations from Any Duty of Continued Performance Under the Agreement

The plaintiffs' willful and material breach of the Agreement gives the Corporations a legal right to cease performance under the Agreement. Restatement (Second) Contracts § 237 (1981); M.L.E. Contracts § 310, at 413 (1982). The Standstill Provision was the only significant benefit received by the Corporations from the Manfusos under the Agreement. The plaintiffs' breach of the Standstill Provision rendered performance under the remaining clauses of the Agreement substantially different in substance than what the parties had

bargained for, thereby relieving the Corporations from any continuing obligation to make severance payments to the Manfusos. See Dialist Co. v. Pulford, 42 Md. App. 173, 178, 399 A.2d 1374, 1379 (1979).

In Dialist, the court found that the alleged breach of an exclusive distributorship contract was material and substantial because the breach was such that further performance of the contract would be 'different in substance from that which was contracted for'." 42 Md. App. at 178, 399 A.2d at 1379 (emphasis added) (citation omitted). The court went on to note that "[a]ppellee, having bargained for an exclusive distributorship, could not reasonably be expected to settle for something less, or to continue with the arrangement once the important feature of exclusivity had been repudiated by appellant." Id. (emphasis added) (citation omitted). See also Wilcom v. Wilcom, 66 Md. App. 84, 94, 502 A.2d 1076, 1081 (1986) ("Appellant not only refused to perform the contract, he denied that a contract existed. Because of appellant's failure or refusal to perform, appellees' duty to perform or tender performance was suspended.") (emphasis added), cert denied, 305 Md. 622, 505 A.2d 1342 (1986); Equitable Trust Co. v. G&M Constr. Corp., 544 F. Supp. 736, 742 (D. Md. 1982) ("One party's material breach 'excuses' the other's nonperformance in the sense that he may elect to treat the contract as terminated."); Restatement (Second) of Contracts § 237 (1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at

an earlier time"); accord Frank Stamato & Co. v. Borough of Lodi, 71 A.2d 336, 339 (N.J. 1950) ("The fact that the defendant has been guilty of substantial breaches of essential obligations under the contract would ordinarily give the plaintiff the right to deem itself discharged from further performance and to sue the defendant for damages under the contract."); Panasonic Co. v. Zinn, 903 F.2d 1039, 1042 (5th Cir. 1990) ("A contract may be repudiated by words or conduct that show 'a fixed intention to abandon, renounce and refuse to perform the contract' . . . . Once a party repudiates a contract, the other party is discharged from their duties under the contract.").

The anticipated benefit to the Corporations from the Standstill Provision was a period of four years in which neither resources nor personnel would be diverted by litigation between the Manfusos and De Francis or Jacobs. There would be no adverse publicity generated by controversy among the shareholders, directors and the Corporations. Management's energy and the Corporations' resources would be focused on the business of the Corporations. The Manfusos' institution of the legal proceedings negated all such benefits, and the foundation upon which future performance by the Corporations was premised was destroyed.

By refusing to adhere to their contractual obligations under the Standstill Provision, the plaintiffs created a situation where any further performance by the defendants pursuant to the Agreement would have been "different in substance from that which was contracted for." Dialist, 42 Md. App. at 178, 399 A.2d at 1379.

Plaintiffs' actions therefore constituted a "material and substantial breach" of the Agreement, excusing the Corporations from further performance under the contract. Id.; Restatement (Second) of Contracts § 237 (1981). Contrary to plaintiffs' assertions in their motion, defendants did not have to wait for a court to decide that the plaintiffs were in breach. If plaintiffs were in material breach by bringing this legal action, the defendants had a right to cease further performance under the Agreement. See, e.g., Wilcom, 66 Md. App. at 94, 502 A.2d at 1081.

Moreover, had the defendants not given notice to the plaintiffs that the plaintiffs were in material breach of the Agreement, and taken action to demonstrate that the defendants considered the plaintiffs to have materially breached the Agreement, the defendants ran the risk of waiving the material breach by the plaintiffs. Contracts Section 310 of the Maryland Law Encyclopedia discusses the dilemma facing the non-breaching party:

> One party may waive the breach of a contract and later be bound by his election. A waiver may be express or implied, and may be implied from actions or conduct, and a breach of contract is waived if the other party acts on the theory that the contract is still in force. Acts relied on as constituting a waiver must be inconsistent with an intention to insist on the rights of the party under the contract.

M.L.E. Contracts § 310, at 413 (1982) (footnotes omitted). Since a waiver may be implied from actions or conduct, it is clear that had the defendants continued to perform under the Agreement by continuing to pay the Manfusos their monthly severance of $10,416.17 each even after the plaintiffs violated the plain language of the Standstill Provision, they would have risked a

claim that they had waived the material breach by the plaintiffs. See, e.g., Stamato, 71 A.2d at 339 ("In a case of 'a material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract . . . the injured party has a genuine election offered him of continuing performance or of ceasing to perform, and any action indicating an intention to perform will operate as a conclusive choice, not indeed depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part.'") (quoting 5 Williston on Contracts (Rev. Ed.) 3749).

3. The Manfusos Have Not Been Deprived Access to Corporate Information or Employees

Because the Manfusos do not even address the likelihood of their success on the merits of their request that they be provided access to the corporate office, information and employees, there can be no question that they have failed to satisfy their burden of producing evidence to support this claim.

In fact, the Manfusos cannot demonstrate any chance of succeeding on the merits of this claim for the simple reason that they have not been deprived the access to information they desire. See Letter dated June 5, 1992 (Manfusos will be provided all information to which they are entitled regarding racetracks); Memorandum dated June 26, 1992, Exhibit A. The Corporations have never stated that the Manfusos will not be permitted access to corporate books and records. Rather, the Corporations have established reasonable procedures for the means and mode of disseminating such information to the Manfusos. The Manfusos

elected to retire from the management of the racetracks, and are now directors and stockholders only. As such, they have the right to access to examine personally or by representative all corporate books, contracts, accounts, correspondence, and other records, and to copy those records. However, "the common law right of a shareholder to inspect the books of the Corporations is not an absolute right -- it rests on conditions of propriety and reasonableness as to time, place and purpose." Goldman v. Trans-United Industries, Inc., 171 A.2d 788, 790 (Pa. 1961). Nor is a director's right absolute. Happerin v. Airking Products Co., Inc., 49 N.Y.S. 2d 672 (Sup.Ct. 1945 (time for inspection may be limited so as not to interfere with the other necessary activities of the corporation); Melup v. Rubber Corp. of America, 43 N.Y.S. 2d 444 (Sup.Ct. 1943) (restricting right to director-shareholder to inspect premises, examine books and records or question employees during work hours on grounds that his purposes were 'hostile to the interests of the corporation").

Here, the Corporations are not in anyway limiting the information to which the Manfusos may have access. Rather, the memoranda to employees and the June 5, 1992 letter to the Manfusos have put in place procedures to accomplish the necessary access in a reasonable time, place and manner to minimize the disruption to the day-to-day business of managing the tracks.

4. The Plaintiffs Are Not Entitled to a Continuation of The Fringe Benefits

Finally, it should be briefly noted that the Plaintiffs' contention that they have a "contractual right" to continuation of Fringe Benefits under a "Letter Agreement

executed on or about April 29, 1990" is totally without merit. Pl. Mem. at 1. Plaintiffs do not have a "contractual right" to Fringe Benefits because the document in question is not a contract.

Because De Francis did not receive any consideration in return for his promise to the plaintiffs, a valid contract does not exist. See, e.g., Shimp v. Shimp, 287 Md. 372, 385, 412 A.2d 1228, 1234 (1980) ("In Maryland either detriment to the promisor or benefit to the promisee is sufficient valuable consideration to support a contract.") (emphasis deleted). De Francis did not receive a benefit in return for his promise, nor did the plaintiffs incur any detriment. Nothing was promised to De Francis in return for his promise. The mere signature on a page does not create a contract -- there must also exist adequate consideration. M.L.E. § 52, at 226 (1982) ("a contract must be supported by a legal consideration to be valid and legally binding, and no executory promise or agreement without a consideration is enforceable. . . . [A]n agreement, without sufficient consideration, is termed a nudum pactum.") (footnotes omitted).

Moreover, even if this letter were to be constructed as a contract, the failure of the parties to specify a definite term of duration renders the contract terminable at will. See, e.g., In re W.S.M. Enter., Inc., 102 B.R. 461, 470, 472 (Bankr. D. Md. 1989) (where an agreement lacks a definite term of duration, it "is terminable at the will of either party;" moreover, since termination of a terminable at will contract does not constitute a breach, "an injunction will not lie against such termination

[footnote omitted]."). Thus, even if it were a contract (which it is not) De Francis was entitled to terminate the Fringe Benefits at any time.

In neither their motion for injunction, and their supporting memorandum, nor in their motion for summary judgment do Plaintiffs adduce any law or evidence to support the claimed right to Fringe Benefits other than a copy of the document dated April 29, 1990. This document, on its face, is inadequate to constitute a contract, and the Plaintiffs will not succeed on the merits of their claim to the Fringe Benefits.

C. The Plaintiffs Have Not Demonstrated the Existence of an Irreparable Injury to their Alleged Rights as Directors or Parties to the Stockholders' Agreement

With respect to the third prerequisite to the issuance of an interlocutory injunction, the Manfusos identify only two harms that are allegedly irreparable: (1) "the harm that they will certainly suffer if, at the outset of this potentially protracted piece of litigation, the defendants should succeed in forcing potential witnesses not to speak with and not to give testimony in any way favorable to the Manfusos;" and (2) "the harm that the Manfusos will suffer as a result of their inability to exercise the fiduciary duties with which they are charged under Maryland law." Pl. Mem. at 6-7.[7/] These two allegedly

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[7/] The Plaintiffs concede that other alleged harms such as the Corporations' cessation of severance payments to the Manfusos and the withdrawal of Fringe Benefits are fully compensable by an award of monetary damages. Pl. Mem. at 6. Moreover, no injunction is appropriate because the Plaintiffs have no cognizable right to these benefits. Anne Arundel County v. Whitehall Venture, 384 A.2d 780, 783 (Md. App. 1978) (mere existence of injury is no guarantee that injunctive relief will issue. There must be some cognizable

irreparable harms are in fact not the appropriate subject of an interlocutory injunction.

1. There Are No Impediments to The Ability of Potential Witnesses to Speak With the Manfusos or to Give Testimony Favorable to the Manfusos

The Manfusos assert that they will suffer irreparable harm if the "defendants should succeed in forcing potential witnesses not to speak with and not to give testimony in any way favorable to the Manfusos." Pl. Mem. at 7. In this respect, the Manfusos' motion for interlocutory injunction has been mooted by subsequent events. After the conference in the Court's chambers on June 11, 1992, the Corporations issued a new memorandum to all track managerial employees and department heads advising them as follows:

(1) they should feel free as always to raise any concerns they may have about the management of the Corporations with De Francis and Jacobs directly;

(2) if they are uncomfortable doing so directly to De Francis or Jacobs, they may direct their concerns to Father Joseph Sellinger, an independent member of the Board of Directors who is neither affiliated with the De Francis Group nor the Manfuso Group; or

(3) they are perfectly free to speak to or communicate with the Manfusos directly about their concerns.

See Exhibit A.

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legal right which will be irreparably harmed if the injunction does not issue).

Injunctions are extraordinary remedies that may only be granted to prevent irreparable harm or the threat thereof. An injunction should never be issued without cause nor should it be issued to enforce compliance with the law where no refusal to comply has been made by the party to be enjoined. Campbell v. Mayor & Aldermen of Annapolis, 44 Md. App. 525, 536-37, 409 A.2d 1111, 1117 (1980) (refusing to grant injunction ordering city to permit reasonable inspections of certain premises as permitted by city ordinance where the evidence did not support a conclusion that the city was refusing to comply with the ordinance in question), rev'd, in part, on other grounds, 289 Md. 300, 424 A.2d 738 (1991).

> It is a well settled principle in the practice of injunction that where a defendant asserts positively that it is not his intention to do a certain act, or to violate any particular right asserted by the plaintiff, and there be no evidence to show to the contrary, the Court will not interfere by injunction. It will neither grant nor continue an injunction in the face of such a disclaimer.

Whalen v. Dalashmutt, 59 Md. 250, 252 (1883) (quoted in Campbell, 44 Md. App. at 526-37, 409 A.2d at 1117). See also Hirsch v. Green, 382 F. Supp. 187, 192 (D. Md. 1974) ("'A suit for an injunction deals primarily, not with past violations, but with threatened future ones;' [citations omitted] 'The necessary determination (regarding the propriety of an injunction) is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.' [citations omitted] 'When the parties discontinue the acts of which complaint is made, the questions become moot and injunctive relief should not then be granted.'"); State v.

Ficker, 255 Md. 500, 506-07, 295 A.2d 231, 235 (1972) (dismissing suit for injunctive relief because campaign signs allegedly offending local county ordinance had been removed since the request for injunction was filed, and accordingly the acts sought to enjoined had ceased).

Thus, the memorandum to the track personnel distributed subsequent to the filing of the plaintiffs' motion requires the Court to deny their request for an injunction with respect to communications between employees and the Manfusos.

2. The Manfusos Ability to Fulfill Their Duties Will Not Be Harmed

In this proceeding for interlocutory injunctive relief, the only way in which the Manfusos assert that their ability to exercise their fiduciary duties as directors will be harmed is the claimed denial of access to information. But this assertion is demonstrably false. The De Francis letter of June 5, 1992 imposes no restrictions on the information available to the Manfusos. Therefore, their ability to obtain this information and to perform their fiduciary duties will not be impaired in the slightest. A fortiori irreparable injury cannot be demonstrated.

The only restriction imposed on the Manfusos by the June 5, 1992 letter is a restriction on their continuing ability intentionally to inflict damage on Laurel and Pimlico through disruptive behavior. Surely, an attempt by management to mitigate the harm caused by such distractions cannot form the basis of injunctive relief.

D. The Balance of Convenience Does Not Favor Granting the Interlocutory Injunction

To satisfy the "balance of convenience" requirement, the plaintiffs must demonstrate that the benefits to the plaintiffs are equal to or outweigh the potential harm which the Corporations may incur if the injunction is granted. See Rowe v. Chesapeake & Potomac Tele. Co. of Md., 56 Md. App. 23, 30, 466 A.2d 538, 542 (1983) (explaining balance of convenience element). In their discussion of this factor, the plaintiffs have failed to give any weight to or even acknowledge the obvious harms to the Corporations of the granting of an injunction.

Furthermore, instead of identifying the benefits, if any, to the Manfusos from the issuance of an injunction, the plaintiffs point to two "harms" they will suffer if the injunction does not issue. Apparently, the Manfusos are arguing that the only benefit they will enjoy if the injunction is granted is the prevention of these two harms.

The first harm to the Manfusos identified in their memorandum is the prevention of success by the defendants in "expropriating the Manfusos' valuable rights under the Stockholders' Agreement and the Letter Agreement." Pl. Mem. at 4. This argument collapses the third prong of the four factor test into the first, as it is really just a restatement of the plaintiffs' argument they are likely to succeed on the merits. Moreover, if the defendants are correct in their assertion that the Manfusos' complaint constitutes a material breach of the Stockholders Agreement, then no "valuable rights" have been "expropriated" at all. Rather, the Corporations have exercised

their legal right to declare the Agreement at an end, and to sue for damages, as explained in section B above.

If the plaintiffs mean to imply by this statement that an injunction will benefit them by reinstating their severance payments under the Agreement, then this benefit is outweighed by the harm of the Corporations' continuing to pay them $125,000 a year for doing no work notwithstanding their breach of the Agreement. The plaintiffs -- both of whom have substantial personal wealth and alternative sources of income -- do not offer any evidence to support the claim that they will suffer any personal economic hardship if their severance payments are discontinued. As to the Fringe Benefits under the memorandum dated April 29, 1990, the Manfusos have no legally cognizable right to these benefits, and the Corporations would clearly suffer the greater harm for being forced to reward them with perquisites inappropriate in light of their current status and conduct.

Plaintiffs identify a second harm to them if the injunction does not issue: namely that "the defendants will cripple the Manfusos' ability to discharge their obligations as directors by almost completely eliminating their access to information concerning the corporations to which they have fiduciary obligations under Maryland law." Pl. Mem. at 5. This theme that the Manfusos are somehow being deprived access to corporate information is a recurrent theme in plaintiffs' complaint, motion to dismiss, and now, motion for an interlocutory injunction. This argument fails because no injunction is necessary to provide the Manfusos with full access

to all the information concerning the Corporations to which they are entitled under Maryland law.

To the extent their complaints refer to the instructions about communications with track employees in De Francis' June 5, 1992 letter to the Manfusos, that concern -- if ever justified -- has now been corrected. A memorandum was distributed to employees encouraging employees to speak to anyone about their concerns, if any, about management, including the Manfusos.[8/] See Exhibit A.

In fact, the balance of convenience favors the denial of an injunction. Their status as directors and stockholders does not confer upon them an unfettered right to 24-hour unescorted access to the executive offices. Moreover, the Corporations have every right to set up reasonable procedures governing the means and mode of dissemination of information to individual directors.

The Manfusos have chosen to litigate. In addition, they have chosen to disparage De Francis and Jacobs in public, in the press and to racetrack employees. Both the litigation and the Manfusos' chosen course of conduct are disruptive to the daily conduct of the business of Laurel and Pimlico.

8/ Restriction of employees' communications with directors or shareholders does not implicate the First Amendment because no government action is involved. See Lawrence H. Tribe, American Constitutional Law § 18-1, at 1688 n.1 (2d ed. 1988) (the first eight amendments to the constitution on their face constrain only the conduct of the federal government, and by the Fourteenth Amendment the actions of state governments). The only rights implicated in such restrictions would be statutory or common law rights of directors and stockholders to information about the Corporations' business affairs, which rights have not been violated in this instance.

Laurel and Pimlico are being harmed by this litigation. Laurel and Pimlico are being harmed by the Manfusos conduct. Consequently, the Corporations are entitled to take reasonable steps to minimize this harm. The imposition of reasonable restrictions on the Manfusos access to the executive offices is the least restrictive alternative available to the Corporations. Requiring requests for information to be directed to De Francis or Jacobs is simply a means of eliminating the distractions previously caused by the Manfusos.

The Manfusos' status as shareholders and directors does not confer upon them a right to distract employees or harm the business. No business should be required to endure such intentional infliction of injury. Consequently, the modest restrictions set forth in the De Francis letter of June 5, 1992 -- when considered in light of the relative harm to the parties -- should be allowed to remain in place for the duration of the litigation.

E. The Public Interest Will Not Be Served By Granting the Requested Interlocutory Injunction

Finally, the Manfusos argue that "[t]he public interest is always served by requiring persons to adhere to the agreements that they have voluntarily made, . . . [and] by facilitating, rather than frustrating, a director's ability to exercise his or her fiduciary duties, . . . [and] by preserving a potential witness's ability to speak openly and truthfully." Pl. Mem. at 7. As explained in the previous sections, none of these asserted benefits to the public will occur if the Manfusos' motion is granted.

The first asserted public benefit is dependent upon an ultimate determination of whether the Manfusos' institution of legal action concerning the business and operations of the racetracks constituted a material breach of the Agreement. As a matter of law, if the Corporations succeed in this claim, they are discharged from the very promises to which the Manfusos state that they have failed to adhere. The Corporations might as readily assert that the public interest is served by "requiring [the Manfusos] to adhere to the agreements they have voluntarily made," thus preventing the Manfusos from reaping the substantial monetary benefits of a bargain that they have willfully and materially breached. See Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 606-07, 386 A.2d 1216, 1229 (1978) (identifying the "public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle" and in "protecting the expectations of the parties").

The second asserted benefit to the public, facilitating a director's ability to exercise his or her fiduciary duties, is not relevant because, as demonstrated in sections B and C above, the Manfusos are in no way being restrained in the performance of their fiduciary duties to the Corporations.

Finally, the supposed benefit to the public regarding the testimony of potential witnesses in this case hinges upon a determination that the defendants have somehow restricted witnesses in their ability to speak openly and truthfully. As explained in section C above, there is no risk of this occurring,

and, therefore, no benefit to the public in granting the requested injunctive relief.

The public interest in this case clearly lies with not rewarding the Manfusos for their total breach of the Agreement, not rewarding the Manfusos for a course of conduct that is harmful to Laurel and Pimlico, and not requiring the Corporations to continue to provide severance payments and Fringe Benefits to persons who perform no services and have chosen to force the Corporation to spend valuable time and resources defending a spurious lawsuit.

F. The Court Should Not Grant an Interlocutory Injunction Unless and Until the Plaintiffs Have Filed a Bond to Answer to the Corporations Any Damages They May Sustain By Reason of the Issuance of the Injunction

Under Maryland Rule BB75, the Court may not issue an interlocutory injunction "unless there is filed a bond in such amount as may be determined by the court and with such surety as may be approved pursuant to Rule 1-492(b) or with other security approved by the court, conditioned to answer to the adverse party for any damages which he may sustain by reason of the issuance of such injunction if it shall ultimately be determined, when such action is heard on the merits, that such injunction should not have issued." Maryland Rule BB75. Here, if the Court grants that part of plaintiffs' motion ordering the Corporations to pay severance and other benefits to plaintiffs during the pendency of their Counterclaim for material breach, the plaintiffs should be required to post a bond of $200,000. The value to each of the Manfusos of the benefits of the severance payments and various fringe benefits is in excess of $12,000 per month.

III.

CONCLUSION

For the reasons above, the plaintiffs have failed to meet any of the four required elements prerequisite to the issuance of an interlocutory injunction. Wherefore, the Corporations respectfully request this Court to deny the Manfusos' motion for an interlocutory injunction during the pendency of this action.

Dated: June 26, 1992

Respectfully Submitted,

By: _____

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Laurel Racing Assoc., Inc.
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RULE 1-313 CERTIFICATION

Pursuant to Maryland Rule 1-313, I, Jennifer C. Archie, hereby certify that I am admitted to practice law in the State of Maryland.

Jennifer C. Archie

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 1992, a copy of the foregoing Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Ex Parte, Interlocutory and Permanent Injunctive Relief was hand delivered to: James Ulwick, Kramon & Graham, Sun Life Building, Charles Center, 20 South Charles Street, Baltimore, Maryland 21201; and James Gray and Linda Woolf, Goodell, DeVries, Leech & Gray, 25 S. Charles Street, Suite 1900, Baltimore, Maryland 21201.

Jennifer C. Archie

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

THE MARYLAND JOCKEY CLUB
P.O. BOX 130
LAUREL, MARYLAND 20725

MEMORANDUM

June 26, 1992

TO: All Managerial Employees and Department Heads

FROM: Joseph A. De Francis
President and Chief Executive Officer

I provided you a memorandum dated June 11 which addressed communications with the Manfusos about the business and operations of Laurel or Pimlico while the litigation instituted by them is pending. The purpose of my request that all communications from the Manfusos regarding our business be directed through proper channels, to me or to Marty Jacobs, was to assure that our day-to-day business operations are not interrupted by requests for information from the Manfusos directed to individual employees. It was not my intent to deny them information to which they might be entitled or to suggest that any individual employee who so desired was forbidden to communicate with the Manfusos.

I have always taken the position that any activity on the part of Management which any employee feels is not in the best interests of our business or Maryland racing should be brought to my attention so that the concern may be addressed and, if necessary, corrected. I sincerely hope that every employee feels free to communicate to me or to Marty Jacobs any concerns related to the conduct of Management. If you feel uncomfortable in expressing such concern to us, please feel free to communicate with Father Joseph J. Sellinger, S.J., who is now a member of the Board of Directors of both Laurel and Pimlico and may be reached in writing at Loyola College, Evergreen Campus, Baltimore, MD 21210, or by telephone at (410) 323-1010, ext. 2202.

If you feel it inappropriate to communicate any concern you may have to either Management or Father Sellinger, you may feel free to call or write the Manfusos and communicate such concerns directly to them. Please be assured that no disciplinary action will be taken against you for any such communication.

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WADE VS BECKER Box 1997 Case No. 92051045 [MSA T2691-4635, OR/12/15/25]
File should be named msa_sc5458_82_150_
[full case number]-####

MANFUSO VS DEFRANCIS, ET. AL. Box 2097 Case No. 92120052 [MSA T2691-4735, OR/12/16/41]
File should be named msa_sc5458_82_150_
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