SC 87816

IN THE MISSOURI SUPREME COURT

RICHARD D. WEINSTEIN,
Plaintiff-Appellant

v.

KLT TELECOM, INC.,
Defendant-Respondent

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT

THE HONORABLE CAROLYN WHITTINGTON

SUBSTITUTE BRIEF OF RESPONDENT KLT TELECOM, INC.

R. Kent Sullivan (MO Bar # 46573)
Erin N. Schmidt (MO Bar # 49237)
STINSON MORRISON HECKER LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
(816) 842-8600
Fax: (816) 691-3495

Gretchen Garrison (MO Bar # 33963)
STINSON MORRISON HECKER LLP
100 S. 4th Street, Suite 700
St. Louis, MO 63102
(314) 259-4500
Fax: (314) 259-4599

Attorneys for Respondent KLT Telecom, Inc.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Richard Weinstein's ("Weinstein") claim arises from his attempt to collect $15 million from KLTT in exchange for shares of stock that do not exist. On September 2, 2003 when Weinstein exercised his put option to sell his shares of stock in DTI Holdings, Inc. ("DTI"), the stock in DTI no longer existed. Months earlier, all equity interests in DTI – including Weinstein's stock – had been "cancelled and extinguished" in a bankruptcy proceeding, of which Weinstein was fully aware and actively participated. This is not a case of diminished value as Weinstein suggests. The very object of the parties' put agreement ceases to exist. Weinstein has no stock to sell. Simply put, Weinstein wants KLTT to pay him $15 million for nothing. Neither the parties' contract nor the law permit such a windfall.

STATEMENT OF FACTS

Agreements To Sell Stock In DTI

On December 26, 2000, KLTT and Weinstein executed a Second Amended and Restated Agreement ("Second Amended Agreement"), under which Weinstein sold approximately 20 million shares of his common stock in DTI to KLTT for a purchase price of approximately $32 million. (L.F. 793) This stock sale closed in February of 2001. Pursuant to the terms of the Second Amended Agreement, KLTT granted Weinstein a Put Option, which gave Weinstein the right to sell his remaining 9,906,064 shares of common stock in DTI between the dates of September 1, 2003 and August 31, 2005. (L.F. 793-94, 892-895)

The front page of the Put Option states:

PUT OPTION

to Purchase Common Stock of

DTI Holdings, Inc., a Missouri corporation

(L.F. 892) The Put Option is an:

> irrevocable and exclusive option to sell . . . that number of [Weinstein's] shares of common stock . . . of DTI Holdings, Inc. . . . contemplated by Section 1.3 (the "Put Option Shares") of the Amended and Restated Agreement between the parties hereto, dated as of December 26, 2000, as amended as of January 18, 2001 . . . ."

(L.F. 892) Section 3 of the Put Option provides that KLTT shall pay an aggregate exercise price for all of the “Put Option Shares” being purchased by KLTT. (L.F. 893) "Put Option Shares" are defined as "that number of [Weinstein's] shares of common stock (the "Common Stock") of DTI Holdings, Inc. . . . contemplated by Section 1.3 (the "Put Option Shares") of the Second Amended and Restated Agreement . . . ." (L.F. 892) Section 1.3 of the Second Amended and Restated Agreement states that "KLT[T] shall grant to Weinstein an option . . . to sell to KLT[T] the Shares owned by Weinstein other than the Initial Shares (the "Remaining Shares") . . . ." (L.F. 793) "Shares" is defined in the Second Amended and Restated Agreement as "30,000,000 shares of common stock (the "Shares") of DTI Holdings, Inc. (the "Company")." (L.F. 792)

DTI Bankruptcy

In 2001, before the Put Option became exercisable, the DTI Board (the "Board") created a special committee, consisting of one board member, Mr. Kenneth Hager, to investigate the possibility of DTI filing for bankruptcy. (L.F. 912-913) Weinstein voted in favor of Mr. Hager's appointment to the special committee. (L.F. 913) After investigating DTI's options and consulting with outside attorneys and advisors, the special committee recommended to the Board that DTI initiate bankruptcy proceedings. (L.F. 914)

On December 28, 2001, the Board met and voted unanimously to accept the recommendation of the special committee and passed a resolution authorizing DTI to file a petition in bankruptcy. (L.F. 914-916) Weinstein supported the bankruptcy proceedings by participating in that Board meeting and voting in favor of adopting the resolution. (L.F. 915-916) DTI filed a voluntary petition in bankruptcy on December 31, 2001. (L.F. 920-929)

Weinstein was well aware of the bankruptcy proceedings. He remained an active member of the board of directors for DTI Holdings after the execution of the Second Amended and Restated Agreement through the filing of the bankruptcy petitions and subsequent confirmation of the Plan. (L.F. 909-910) Weinstein studied all materials that were disseminated to the Board so that he would be a knowledgeable participant at the board meetings. (L.F. 910) Weinstein independently monitored the bankruptcy proceedings by reviewing documents and pleadings on PACER and attending hearings held by the Bankruptcy Court. (L.F. 651-653) Through PACER, Weinstein gained facts

about what was being done with the assets of the company in the bankruptcy proceedings. (L.F. 652)

A First Amended and Restated Joint Plan Under Chapter 11 of the United States Bankruptcy Code (the "Plan") was presented to the Board before it was submitted to the Bankruptcy Court for confirmation. (L.F. 916-917) Weinstein reviewed the Plan and he joined in the unanimous vote in favor of a resolution that authorized the submission of the Plan to the Bankruptcy Court. (L.F. 917)

Pursuant to section 5.9.3 of the Plan, all equity interests in DTI (referred to as "Holdings" in the Plan), including Weinstein's equity interests, would be cancelled and extinguished:

> 5.9.3 Subclass 9C – Interest in Holdings. There will be no distribution to Subclass 9C Interests and Holdings will be dissolved as a corporation by operation of this Plan as soon as practicable after the Effective Date by operation of this Plan without further order of the Court or board or shareholder action, and upon the Effective Date Subclass 9C Interests shall be cancelled and extinguished immediately upon the Effective Date without any further act or deed.

(L.F. 943) As defined in the Plan, Subclass 9C Interests consists of Allowed Interests in DTI Holdings, which means "any equity interest in any of the Debtors." (L.F. 940 at §3.9.3, 931 at §1.3, 935 at §1.50) There is no dispute that Weinstein's shares of stock were among the subclass 9C Interests that were to be cancelled and extinguished under the Plan. On June 11, 2003, the Bankruptcy Court, after notice to Weinstein and the

other equity holders and a hearing, confirmed the Plan in its entirety. (L.F. 999, 1000 at ¶C, 1005 at ¶1, 1009) The Court entered its Order, which was binding on all security holders of DTI, including both KLTT and Weinstein. (L.F. 1005 at ¶ 2) The Order expressly provides:

> The Plan, its provisions and this Order shall be, and hereby are, binding upon the Debtors, and any creditor or equity security holder of the Debtors, whether or not the Claim or Interest of such creditor or equity security holder is impaired under the Plan and whether or not such creditor or equity security holder has accepted the Plan.

(L.F. 1005 at ¶ 2)

Exercise Of The Put Option

On September 2, 2003, Weinstein sent a Notice of Exercise to the Escrow Agent and KLTT attempting to exercise the Put Option to sell 9,906,064 shares of common stock and requested that KLTT pay him $15 million. (L.F. 1063) KLTT did not do so because, when Weinstein exercised the Put Option, there was no stock for Weinstein to sell or for KLTT to purchase. (L.F. 1065) Weinstein filed suit alleging breach of contract. (L.F. 9-11) Both parties filed motions for summary judgment. (L.F. 252, 751) After a hearing on the motions, the trial court granted KLTT's motion for summary judgment and denied Weinstein's motion. (L.F. 1132) Weinstein appealed the trial court judgment to the Missouri Court of Appeals for the Eastern District. The Court of Appeals affirmed the trial court's entry of summary judgment and subsequently denied

Weinstein's motions for rehearing and/or transfer. Weinstein then filed an Application for Transfer with this Court, which was granted on August 22, 2006.

STANDARD OF REVIEW

"Summary judgment is to be sustained on appeal on any theory that supports the judgment that was granted." Boliver Insulation Company v. Bella Pointe Development, LLC, 166 S.W.3d 610, 614 (Mo. App. S.D. 2005). On appeal from summary judgment, the Court "take[s] as true all facts set forth . . . in support of a party's motion unless contradicted by the non-moving party's response to the summary judgment motion." Leiser v. City of Wildwood, 59 S.W.3d 597, 600 (Mo. App. E.D. 2001). "Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law." ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). KLTT "may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." Id. at 381. "Regardless of which of these three means is employed by the 'defending party,' each establishes a right to judgment as a matter of law." Id. "Where the facts underlying this right to judgment are beyond dispute, summary judgment is proper." Id.

ARGUMENT

Weinstein asks two questions on this appeal: "(1) what is the consideration for a put option agreement; and (2) when should this consideration be measured?" Sub.App.Br. at 16. However, in analyzing these two questions, Weinstein completely ignores the very nature and object of the Put Option. In every option contract, there are essentially two separate contracts – a contract to keep an offer to purchase or sell open for a specified period of time and, once accepted, a separate contract to purchase or sell the property -- each of which must be supported by its own consideration and performance. See, Ragan v. Schreffler, 306 S.W.2d 494, 499 (Mo. 1957); Suhre v. Busch, 120 S.W.2d 47, 52-53 (Mo. 1938); Fru-Con Construction Corp. v. KFX, Inc., 153 F.3d 1150, 1157-59 (10th Cir. 1998)(applying Missouri law); Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853 (Tx. Ct. App. 1983).

There is no dispute that KLTT kept open its offer to purchase Weinstein's remaining shares or that the contract to do so was supported by consideration. The dispute here arises from whether consideration exists for the contract to sell Weinstein's remaining shares of stock to KLTT that was created once the option is exercised. Weinstein simply disregards the existence of this contract for sale and the requirement that it be supported by independent consideration. It is the contract for sale of stock that Weinstein is attempting to enforce, not the contract to keep an offer to purchase open for a period of time.

Weinstein argues that the Court of Appeals decision conflicts with basic principles of contract law and he cites only three Missouri cases to support this notion. However,

the appellate court's decision does not conflict with the three cases cited by Weinstein and he points to no authority in Missouri that actually does conflict with the appellate decision. First, the Court of Appeals assessed whether consideration still existed and whether it was possible for Weinstein to perform on the exercise date, not whether the consideration was adequate, which is appropriate under Doss v. Epic Healthcare Management Co., 901 S.W.2d 216 (Mo App. S.D. 1995) and Union Pac. R. Co. v. KC Transit Co., 401 S.W.2d 528 (Mo. App. 1966). Second, this case does not present a situation where one party receives something of lesser value than expected like Union Pac. R. Co. and Vorchetto v. Sappenfield, 14 S.W.2d 685 (Mo. App. 1929). In those cases, the object of the contract was delivered to the contracting party after its value had diminished. Here, KLTT received nothing. No exchange took place at all.

The Court of Appeals applied the law correctly. When Weinstein notified KLTT that he was exercising the Put Option, he had no shares of common stock in DTI to sell. This important and undisputed fact is the basis upon which KLTT's motion for summary judgment, the trial court's judgment, and the Court of Appeals' opinion are premised. Weinstein argues that he is entitled to $15 million because he properly filled out the paperwork referenced in the contract. But Weinstein ignores his obligation to sell stock in exchange for KLTT's obligation to pay $15 million. As of the exercise date here, Weinstein had no stock to sell. KLTT is not obligated to buy something that does not exist.

I. THE TRIAL COURT DID NOT ERR IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, AND THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THESE JUDGMENTS, BECAUSE THERE HAS BEEN A FAILURE OR LACK OF CONSIDERATION IN THAT WEINSTEIN HAS FAILED TO DELIVER OR SELL ANY COMMON STOCK IN DTI TO KLTT.

Weinstein asks this Court to treat the Put Option as though it were an unconditional promise to pay (i.e. a deferred payment). It is not. Weinstein argues that the option was supported by consideration supplied via his original conveyance of shares pursuant to the Second Amended Agreement. See Sub.App.Br. at 19-20. This argument is fundamentally flawed in that Weinstein confuses the option itself with the contract to purchase stock that arises when the option is exercised. It is the latter contract he is attempting to enforce. It is the latter contract for which consideration fails.

Weinstein ignores that the put - or Weinstein's right to sell - created nothing more than an obligation by KLTT to keep open an offer to purchase:

> An option is unilateral and does not ripen into a contract of purchase and sale until exercised by the optionee. Until the optionee accepts there is no enforceable contract, the option being in effect but an offer on the part of the optionor, although an offer binding on the optionor by virtue of the

consideration paid for the option until the time stipulated for the acceptance of the offer has expired.

Keltner v. Sowell, 926 S.W.2d 528, 530 (Mo. App. S.D. 1996)(*quoting* Lusco v. Tavitian, 296 S.W.2d 14, 16 (Mo. 1956)). Once the optionee accepts the offer through proper performance, the option is considered exercised so as to create a binding bilateral contract, which is specifically enforceable. In re Estate of Schultze, 105 S.W.3d 548, 550 (Mo. App. E.D. 2003).

It is well established that consideration for the option itself is separate and apart from consideration for the contract resulting from its exercise. "It is essential to the validity of an option that it be supported by a consideration, and the consideration for the option is a thing apart from the consideration for the sale of the [subject of the option]." Ragan, 306 S.W.2d at 499 ; see also, Fru-Con Construction Corp., 153 F.3d at 1157-59 (To be valid, an option must be supported by consideration, and "the consideration for the option [must be] a thing apart from the consideration for the [underlying] sale")(applying Missouri law); Hott, 663 S.W.2d at 853 ("Both the option and the underlying contract must be supported by consideration."). Accordingly, the consideration supplied by the Second Amended Agreement - the transfer of Weinstein's initial 20 million shares of stock in DTI - made Weinstein's option irrevocable, nothing more. See Suhre, 120 S.W.2d at 53 (The holder of the option - in this case Weinstein - "gives consideration only to make a continuing offer irrevocable during the option period.").

In Suhre, 120 S.W.2d at 53, this Court made short work of an argument virtually identical to the one Weinstein makes here. There, a shareholder had previously sold her

stock in Anheuser-Busch under an agreement granting her an option to repurchase by paying a stated sum to the buyer. The shareholder gave notice that she was exercising her option within the requisite time period but without tender of the purchase price. The plaintiff, like Weinstein, argued that her option (there, a right to repurchase) was adequately supported by consideration provided by her original stock sale. The original sale agreement, however, was "fully executed by complete performance by both parties and only the right[] to repurchase remained. [This right] was executory and solely optional with plaintiff until accepted; and, except that the sale agreement furnished the consideration for [it], the [option contract was] otherwise a distinct contract." Id. at 54. As found by this Court, the original contract in which the option was granted (here, the Second Amended Agreement) did provide consideration "for making irrevocable the continuing offer to allow plaintiff to repurchase." That consideration, however, created only a one-sided commitment by the defendant to keep the offer open; it did not support a binding repurchase agreement. Id. at 53. This Court correctly recognized that when an option is exercised and the offer "is seasonably accepted, a new bilateral contract arises, and it is . . . *this contract* which is being enforced." Id. (quoting WILLISTON ON CONTRACTS, 2565, §1441)(emphasis added).

Weinstein conveniently ignores the actual contract he is seeking to enforce. Like the plaintiff in Suhre, Weinstein is not attempting to enforce the option itself. He is not alleging that KLTT breached an obligation to keep its offer to purchase open for the specified length of time. Rather, he is asserting entitlement to specific performance of KLTT's obligation to pay him $15 million - an obligation that can only arise under the

new, bilateral contract created by Weinstein's exercise of the option giving him the right to sell shares of common stock and accepting KLTT's offer to purchase same.

As the Court of Appeals correctly analyzed, basic concepts of contract law require the new bilateral contract to have its own consideration supplied by mutuality of obligation before it is enforceable. A bilateral contract is premised upon mutuality of obligation, which exists when both parties to the contract agree to certain obligations to the other. See Hathaway v. Nevitt, 213 S.W.2d 938, 941 (Mo. 1948); Greenpoint Credit, LLC v. Reynolds, 151 S.W.3d 868, 875 (Mo. App. S.D. 2004). Simply put, "[t]he optionee may, but need not, exercise the option; if he does, each party must perform its obligations under the resulting bilateral contract." 17 C.J.S. Contracts, §55 (1999).

By exercise of the option, Weinstein accepted KLTT's offer to purchase[1] and both parties were bound to their respective promises under this new bilateral contract - Weinstein to sell, and KLTT to purchase, 9,906,064 shares of common stock in DTI.

[1] In Suhre, the court found that the optionee's conveyance of the thing promised (payment) was the means by which she was required to accept the optionor's offer (to sell back the stock). See 120 S.W.2d at 54-55. It makes no difference whether Weinstein's conveyance of stock to KLTT is viewed as the obligation supporting the bilateral contract formed upon exercise of his option, or the means of accepting KLTT's offer to purchase. If the former, then failure to deliver stock constitutes a failure of consideration. If the latter, then no contract exists because there has been no acceptance. Either way, the result is the same. KLTT has no obligation to pay and Weinstein's claim fails.

"When the option holder gives notice, a bilateral contract is formed with one party having the duty to convey the property and the other the duty to pay." El Paso Natural Gas Company v. Western Building Associates, 675 F.2d 1135, 1140 (10th Cir. 1982). "When the optionee gives notice or otherwise complies with the terms and conditions of the option – regardless of the existence of consideration for the option – a bilateral executory contract is formed, one party having the duty to convey and the other the duty to pay." Hott, 663 S.W.2d at 854; see also Competrol Acquisition Partnership v. Flag Wharf, Inc., 203 B.R. 914, 918 (Bankr. D. Del. 1996)("Even if the holder does elect to exercise its option, the holder does not acquire the property subject to the option unless and until the grantor of the option and the option holder consummate the sale of the property."). Weinstein could not perform his duty to convey shares of common stock in DTI.

Weinstein's entire argument rests on the premise that "consideration must be assessed at the time the parties enter into the contract." See Sub.App.Br. at 18. He cites to 12A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5575 and Polinsky v. Vaughan, 268 Cal.App.2d 183, 194 (Cal.App. 1968) for the proposition that for option contracts, the adequacy of consideration is to be determined as of the time the option was given rather than the date of its exercise. See Sub.App.Br. at 19. The issue here is not adequacy of consideration. The Court of Appeals decision does not conflict with the authorities cited by Weinstein.

In February of 2001, when the option was given, the parties agreed that Weinstein could sell 9,906,064 shares of common stock to KLTT for its fair market value or a floor of $15 million. This is the consideration for the contract Weinstein is attempting to

specifically enforce – the bilateral contract for the sale of his remaining shares of common stock in DTI. The parties are not challenging whether the exchange of $15 million for 9,906,064 shares of common stock in DTI was adequate consideration in February of 2001 when the option was granted. Assuming that it was, that consideration had failed by the time Weinstein exercised the Put Option because part of the consideration – 9,906,064 shares of common stock – no longer existed. Contrary to Weinstein's assertions, the Court of Appeals did not assess the adequacy of the consideration on the exercise date. It determined that consideration no longer existed for the contract for the sale of Weinstein's remaining shares. This constituted a failure of consideration.

"'Failure' of consideration implies that consideration, once existing and sufficient, had become worthless or ceased to exist, which distinguishes it from 'lack' of consideration." Mobley v. Baker, 72 S.W.3d 251, 257 (Mo. App. W.D. 2002"). The "failure of consideration" defense applies to situations where "a contract, valid when formed, becomes unenforceable because the performance bargained for has not been rendered." First National Bank of Belfield v. Burich, 367 N.W.2d 148 (N.D. 1985). Weinstein did not, and could not, perform his part of the bargain. Without stock for Weinstein to sell, there was nothing for KLTT to purchase and concomitantly, no obligation to pay. Weinstein could not make good on his promise to sell because he

owned no shares of common stock in DTI on the exercise date.[2] Weinstein's failure to effectuate the subject of the bilateral contract, i.e., the conveyance of 9,906,064 shares of common stock to KLTT, constitutes a failure of performance, or failure of consideration, under the bilateral contract created by Weinstein's acceptance of the option. See 17A AM. JUR. 2D CONTRACTS § 670 (2003)("Where there is a total failure of consideration and the defendant has derived no benefit from the contract . . . such total failure of consideration may be shown in bar of the action.").

[2] In his Application for Transfer to this Court and in his Substitute Brief, Weinstein fallaciously states that "the Court of Appeals wholly overlooked . . . the fact that at the time of the exercise of the option, Weinstein's remaining shares in DTI both existed and had value. This fact is dispositive." App. for Transfer at 10-11; Sub.App.Br. at 23. This is simply not true. On June 11, 2003, the Bankruptcy Court cancelled and extinguished all remaining equity interests in the bankrupt DTI. (L.F. 943, 940 at §3.9.3, 931 at §1.3, 935 at §1.50, 999, 1000 at ¶C, 1005 at ¶1, 1009, 1005 at ¶2) Weinstein did not attempt to exercise the option until September 2, 2003, approximately three months after the DTI stock had been cancelled and extinguished by the Bankruptcy Court. (L.F. 1063) The dictionary definition of "cancel" is "to annul or invalidate." WEBSTER'S II NEW COLLEGE DICTIONARY 161 (2001). "Extinguish" is defined as "to put an end to: DESTROY" and "to nullify." Id. at 397. Weinstein's remaining shares in DTI clearly did not exist or have any value when he attempted to exercise the option.

Urging the Court to reach the radical result that he is entitled to $15 million in exchange for nothing, Weinstein rests his entire argument on three cases, none of which is applicable to this case. Weinstein first relies on Vorchetto and Union Pac. R. Co. for the proposition that even though the stock transferred to KLTT is worthless, it does not constitute a failure of consideration. Sub.App.Br. at 19, 23-24. These cases might be applicable if KLTT had received any stock at all. It is undisputed that it did not. KLTT bargained for the purchase of an equity interest, or shares of common stock, in DTI, but it did not receive any stock on the date Weinstein exercised the Put Option. Neither Weinstein nor the Escrow Agent ever delivered, or could they ever deliver, a stock certificate representing 9,906,064 shares of common stock in DTI to KLTT as was required by §1.2 of the Put Option. The stock did not exist on the date of exercise.

Weinstein cites Vorchetto for the proposition that a party's disappointment in its bargain does not constitute a failure of consideration. However, in Vorchetto, the object of the contract was the sale of land and the land and deed were delivered to the purchaser at the consummation of the contract. 14 S.W.2d at 686. Likewise, in, Union Pac. R. Co., the purpose of the contract at issue was to provide for reconstruction and maintenance of a new approach and viaduct for a public highway to replace the former approach, the structures of which had become old, worn out and no longer safe for public travel. 401 S.W.2d at 531-32. In that case, there was no failure of consideration because plaintiff "furnished the consideration entitling it to performance by [defendant] when it built the approach promptly after execution of the 1917 contract and laid double lines of track to suit the structure for street car use, exactly as desired by [defendant's] predecessor." Id.

at 536. The Court also noted that "[f]or more than 35 years thereafter, defendant enjoyed continuous use of the facilities built by plaintiff." Id. These cases are not analogous to the situation at hand because Weinstein is not capable of providing KLTT with the object of the contract between them – common stock.

Weinstein relies on Doss for the proposition that "the law does not concern itself with the adequacy of the consideration." Sub.App.Br. at 23. There is no conflict between the Doss opinion and the Court of Appeals' analysis of Weinstein's claims. Here, the Court of appeals assessed the existence of consideration and found that while the common stock in DTI existed at one time, it did not exist when Weinstein attempted to exercise the Put Option and collect $15 million from KLTT. The Court did not consider whether the common stock of DTI was worth $15 million, which would constitute an adequacy determination. It merely found that the stock no longer existed, and therefore, Weinstein's ability to perform under the terms of the contract had failed.

Finally, in his brief to the Court of Appeals, Weinstein attempted to defeat KLTT's failure of consideration defense by admitting that the contract for the sale of Weinstein's 9,906,064 shares of common stock lacked consideration at its inception: "If . . . the underlying contract is the bilateral contract that was created when Weinstein exercised his option, there could be no consideration at its inception which subsequently failed because . . . there was no common stock in DTI at the time the option was exercised." E.D.App.Br. at 24. Accepting Weinstein's admissions as true, his breach of contract claim must fail for this alternative reason. See In re Estate of Mounts, 39 S.W.3d 499, 506 (Mo. App. S.D. 2000)("A judicial admission is an act by a party which

in effect concedes a point to be true for purposes of the judicial proceeding and which acts as a substitute for evidence and obviates the need to present evidence on the matter. It is conclusive on the party making it."). Without consideration, there is no enforceable contract. See Rice v. James, 844 S.W.2d 64, 67, 69 (Mo. App. E.D. 1992); Ennis v. McLaggan, 608 S.W.2d 557, 561 (Mo. App. S.D. 1980)("Consideration is a necessary element for a valid agreement and the burden of showing it is on the one claiming the benefit of the agreement. Lack of consideration to support the agreement would be a failure of that party's burden . . . ."). Therefore, if the Court rejects KLTT's failure of consideration defense, Weinstein has admitted that the contract for the sale of stock lacks consideration, which precludes Weinstein from recovering under a breach of contract claim and summary judgment in KLTT's favor is still appropriate. Bolivar Insulation Company, 166 S.W.3d at 614 ("summary judgment is to be sustained on appeal on any theory that supports the judgment that was granted").[3]

[3] In his Court of Appeals brief, Weinstein suggested that because KLTT did not raise "lack of consideration" in its summary judgment papers, summary judgment cannot be upheld on that basis. E.D.App.Br. at 25 n. 3. If, however, the contract lacked consideration, an appellate court may affirm summary judgment under its de novo review. Furthermore, absent consideration to support the contract, remand would be futile because a contract did not exist and Weinstein has no breach of contract claim to pursue. Appellate courts will not engage in a futile act. Estate of Johnson v. Kranitz, 168 S.W.3d 84, 100 (Mo. App. W.D. 2005).

II. THE TRIAL COURT DID NOT ERR IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE WEINSTEIN FAILED TO SATISFY A CONDITION PRECEDENT UNDER THE CONTRACT IN THAT WEINSTEIN HAD NO SHARES OF COMMON STOCK TO DELIVER OR SELL TO KLTT UNDER THE PUT OPTION ON THE DATE OF EXERCISE.

It is undisputed that on September 2, 2003 when Weinstein attempted to exercise the Put Option, he owned no stock in DTI. DTI filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 31, 2001 – almost two years before Weinstein attempted to exercise the Put Option. (L.F. 920-929) The Plan presented to the Bankruptcy Court by the debtors, expressly cancelled and extinguished all equity interests in DTI: "[U]pon the Effective Date Subclass 9C Interests shall be cancelled and extinguished immediately upon the Effective Date without any further act or deed." (L.F. 943 at §5.9.3) The Plan specifically defines Subclass 9C Interests as "any equity interest in any of the Debtors." (L.F. 940 at §3.9.3, 931 at §1.3, 935 at §1.50) On June 11, 2003, approximately three months before Weinstein attempted to exercise the Put Option, the Bankruptcy Court entered an Order confirming the Plan in its entirety, including the cancellation and extinguishment of all equity interests in DTI. (L.F. 1005 at ¶1) The Bankruptcy Court's Order specifically declares that the provisions of the Plan and Order

are binding on all equity security holders of DTI. (L.F. 1005 at ¶2) Weinstein did not appeal the Bankruptcy Court's Order.

The Notice of Exercise provided by Weinstein clearly indicates that Weinstein is exercising a right to sell 9,906,064 shares of common stock in DTI. (L.F. 1063) Weinstein did not own, and thus could not sell or deliver, stock in DTI to KLTT. Because Weinstein did not sell any shares of common stock representing an equity interest in DTI, he failed to satisfy a condition precedent under the Put Option and KLTT is not required to pay him anything.

Contrary to Weinstein's arguments, the trial court did not rewrite the parties' agreement. The Put Option is a contract that clearly gives Weinstein the right to sell and, upon exercise, requires KLTT to purchase, shares of common stock in DTI:

PUT OPTION

to Purchase **Common Stock** of

DTI Holdings, Inc., a Missouri corporation

* * *

> FOR VALUE RECEIVED, KLT[T] . . . hereby grants to Richard D. Weinstein . . . an irrevocable and exclusive option to sell . . . that number of [Weinstein's] **shares of common stock** . . . **of DTI Holdings, Inc**. . . . contemplated by Section 1.3 (the "Put Option Shares") of the Amended and Restated Agreement between the parties hereto, dated as of December 26, 2000, as amended as of January 18, 2001 . . . ."

(L.F. 892; see also L.F. 893 at Section 3, 793 at §3, 793 at §1.3, 792)(emphasis added) Weinstein would prefer that this Court ignore the actual language of the Put Option. This is evident by the fact that he prefers to characterize and summarize the contract provisions instead of looking at the plain language of the contract. It is Weinstein who asks the Court to rewrite the parties' agreement to eliminate his obligation to deliver shares of common stock.

Weinstein attempts to convince this Court that put options are a mechanism used to receive money in exchange for nothing. However, put options used in the context of securities are contracts granting a party a right to sell stock in a company to another party. See Wendt v. Wendt, No. FA960149562S, 1998 WL 161165 at *183 (Conn. March 31, 1998)("[A] put option gives the holder the right to sell stock . . . ."); Newitt v. First Union National Bank, 607 S.E.2d 188, 191 (Ga. Ct. App. 2004)("A put option on a share of stock gives the stockholder the right to require a counter party to purchase that stock at a certain price on a specified future date."); Koos v. Storms, No. 84260, 2004 WL 2578915 at *1 (Ohio App. Nov. 10, 2004)("A put option contract gives the owner the right, but not the obligation, to sell a specified amount of an underlying security at a specified place within a specified time."). In order to require KLTT to purchase his stock under the Put Option, Weinstein must properly exercise his rights and, more importantly, he must have common stock to sell. See Gwozdzinsky v. Zell/Chilmark Fund, 979 F.Supp. 263, 266 n. 7 (S.D.N.Y. 1997)("Put options, or options to sell, give the purchaser the right, but not the obligation, to sell a specific number of shares in a stock at a

particular price. . . . [T]he option writer must buy stock if and when a put option is exercised.").

The parties' intent, which is derived from the admittedly unambiguous contract language, requires that Weinstein own, sell and deliver, common stock to KLTT. When interpreting a contract, the rule is to determine the intent of the parties and to give effect to that intent. Schwarz v. Waterway Gas And Wash Co., 108 S.W.3d 71, 73 (Mo. App. E.D. 2003)(summary judgment affirmed). To determine the intent of the parties in an unambiguous contract, the court "give[s] the language used its natural, ordinary, and common sense meaning and consider[s] the entire contract, along with its object, nature and purpose." Id.; see also Wilshire Construction Company v. Union Electric Company, 463 S.W.2d 903, 906 (Mo. 1971)(summary judgment affirmed). The courts do not interpret the language of the contract in a vacuum, but rather, by reference to the contract as a whole. Corbett v. Gerstein, 95 S.W.3d 118, 120 (Mo. App. E.D. 2002). "In contract interpretation, every word in the contract is to be given meaning if possible." Armstrong Business Services, Inc. v. H & R Block, 96 S.W.3d 867, 878 (Mo. App. W.D. 2002). "[E]ach term of a contract is construed to avoid rendering other terms meaningless." Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. banc 2003). "A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement is preferred to one that leaves some of the provisions without function or sense." SD Investments, Inc. v. Michael-Paul, L.L.C., 90 S.W.3d 75, 82 (Mo. App. W.D. 2002). The spirit, purpose and substance of the agreement must control and its terms should not be interpreted without reference to the

facts and circumstances of the case. Wilshire Construction, 463 S.W.2d at 906 (summary judgment affirmed).

When the contract provisions are considered as a whole, the Put Option required Weinstein to deliver actual shares of common stock to KLTT. The intent of the parties and the purpose of the Put Option were not to give Weinstein $15 million for nothing, or to give Weinstein $15 million for a piece of paper that does not represent any equity interest in DTI. The language used by the parties in their agreements[4] clearly contemplates that under the Put Option, Weinstein was to sell and KLTT was to purchase actual shares of common stock in DTI:

- The Put Option gave Weinstein "an irrevocable and exclusive option to sell . . . that number of [Weinstein's] **shares of common stock** . . . **of DTI Holdings, Inc**. . . . contemplated by Section 1.3 (the "Put Option Shares") of the Amended and Restated Agreement between the parties hereto, dated as of

[4] The parties' agreements include the Second Amended Agreement dated December 26, 2000, the Put Option, the Stock Escrow Agreement and the Notice of Exercise. The terms of the Second Amended Agreement specifically required KLTT to grant Weinstein Put Option. The form and substance of the Put Option and Notice of Exercise were agreed to when the Second Amended Agreement was executed. See L.F. 831-835 (form of Put Option and Notice of Exercise, which were made Exhibits to the Second Amended Agreement)

December 26, 2000, as amended as of January 18, 2001 . . . ." (L.F. 892)(emphasis added)

- Section 1.3 of the Second Amended and Restated Agreement states that "KLT[T] shall grant to Weinstein an option . . . **to sell to KLT[T] the Shares owned by Weinstein** other than the Initial Shares (the "Remaining Shares") . . . ." (L.F. 793) Ex. C (emphasis added)
- "Shares" is defined in the Second Amended and Restated Agreement as "30,000,000 **shares of common stock** (the "Shares") **of DTI Holdings, Inc**. (the "Company")." (L.F. 792)(emphasis added)
- The front page of the Put Option provides:

PUT OPTION

to Purchase Common Stock of

DTI Holdings, Inc., a Missouri corporation

(L.F. 892)(emphasis added)

- Section 3 of the Put Option provides that KLTT shall pay an aggregate exercise price for all of the Put Option Shares purchased by KLTT. (L.F. 893). "Put Option Shares" are defined as "that number of [Weinstein's] **shares of common stock** (the "Common Stock") **of DTI Holdings, Inc**. . . . contemplated by Section 1.3 (the "Put Option Shares") of the Second Amended and Restated Agreement . . . ." (L.F. 892)(emphasis added) See above for language contained in Section 1.3 of the Second Amended Agreement.

- The Notice of Exercise delivered by Weinstein to the Escrow Agent and KLTT stated that he was exercising the Put Option to sell **9,906,064 shares of Common Stock for an aggregate exercise price of $15 million**. (L.F. 1063)(emphasis added)
- Under the Put Option Agreement, once Weinstein delivered proper notice of exercise to the Escrow Agent, "[t]he Escrow Agent shall . . . cause to be executed and delivered, in accordance with such notice, a certificate or certificates **representing the aggregate number of shares of Common Stock** specified therein." (L.F. 892)(emphasis added)

Under the clear terms of the agreements, the Put Option allowed Weinstein to sell and, upon exercise, required KLTT to purchase, actual shares of **common stock** in DTI. Pursuant to the Notice of Exercise executed by Weinstein, he was attempting to sell 9,906,064 shares of **common stock** for an exercise price of $15 million. (L.F. 1063) However, he could not do so because stock in DTI did not exist. In accordance with this Notice of Exercise and the terms of the Put Option, upon Weinstein's exercise of the Put Option, the Escrow Agent was to deliver to KLTT a certificate representing 9,906,064 shares of **common stock** in DTI. (L.F. 892) The Escrow Agent could not do so because no shares of **common stock** in DTI existed when Weinstein attempted to exercise the Put Option. Weinstein cannot demand payment under the Put Option until he transfers actual shares of **common stock** to KLTT. See Conner v. Mid South Insurance Agency, 943 F.Supp. 647, 657, n. 7 (W.D. La. 1995); Gordon & Company, Inc. v. Board of Governors of the Federal Reserve System, 317 F.Supp. 1045, 1046 (D.Mass. 1970)("the buyer of the

option may demand payment by the writer of a fixed price (the 'striking' price) upon delivery by the buyer of a specified number of shares of a stock"); Silverman v. Landa, 200 F.Supp. 193, 195 (S.D.N.Y. 1961)("Options are exercised by delivering them to the endorser together with the stock or purchase price, as the case may be, and are thus turned into actual purchases or sales.").[5]

Weinstein asks this Court to ignore the plain language employed by the parties, including the numerous references to "Shares" of "Common Stock." Acceptance of Weinstein's interpretation of the contract language requires this Court to segregate the phrase "stock certificate" from the rest of the contract and interpret that phrase in isolation and without meaning, disregard the manifest intent of the parties, and nullify the

[5] Even if the Court views Weinstein's and KLTT's obligations to be performed simultaneously, Weinstein's delivery of common stock is still a condition precedent to KLTT's performance. See 8 MCCAULIFF, CATHERINE M.A., CORBIN ON CONTRACTS §30.8 (1999)("The mutual duties of the parties to a contract may be simultaneously conditional, in which case the conditions have sometimes been described as 'concurrent' . . . The concurrent condition is promissory when A and B mutually agree upon the simultaneous exchange of some property for a price in money. The promise of each is conditional upon a tender of performance by the other; the duty to deliver the property is conditional upon tender of the price, and the duty to pay is conditional upon tender of the property or a deed of conveyance. (Observe that in each case the duty to render immediate performance is subject to a condition 'precedent' in traditional terminology))."

very object of their agreement. Such an interpretation constitutes a reconstruction of the contract and clearly is improper. See Dunn Industrial Group, Inc., 112 S.W.3d at 428; Wilshire Construction, 463 S.W.2d at 906; Schwarz, 108 S.W.3d at 73; Armstrong Business Services, Inc., 96 S.W.3d at 878; Corbett, 95 S.W.3d at 120; SD Investments, 90 S.W.3d at 82.

Weinstein sets forth a new argument that KLTT should have bargained for an extension of the representation and warranty contained in Section 3.6 of the Second Amended Agreement that Weinstein was to hold "good, valid and marketable title" to the remaining shares.[6] While the representation and warranty of "good, valid and marketable title" had expired before the exercise period, this representation and warranty governs Weinstein's ability to encumber the title of the stock, not the existence of the stock. Nothing in this representation and warranty indicates that upon its expiration, Weinstein can collect $15 million even if he has no stock to sell. Weinstein also suggests that KLTT could have "bargained for a representation and warranty from Weinstein that DTI was still an operating entity before he could exercise his rights under the Put Option Agreement . . . ." The absence of such a representation or warranty is an indication that the parties did not foresee the future bankruptcy of DTI at the time they entered into the

[6] This new argument should be striken because it was not raised before the Court of Appeals, but is argued for the first time to this Court. Mo.R.Civ.P. 83.08 provides that "[t]he substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief . . . ."

Second Amended Agreement and Put Option Agreement. In late 2000 and early 2001, the parties could not have predicted that DTI would go bankrupt and its equity interests would be cancelled and extinguished. This eventuality was not something that either party foresaw. See, infra at Point VI.

The Put Option required Weinstein to sell stock in DTI to KLTT. Weinstein failed to do so. This failure to sell stock to KLTT relieved KLTT from any obligation to pay for it. Consequently, KLTT has not breached the contract. There was no error by the trial court and summary judgment in KLTT's favor was appropriate.[7]

---

[7] Weinstein's argument that KLTT has somehow acknowledged liability through its accounting treatment of the Put Option and its filings with the SEC is absurd. See Sub.App.Br. at 29 n.2. When DTI filed for bankruptcy, GPE and its subsidiaries reflected the Put Option's "aggregate floor amount of $15 million" (the "Reserve") in its consolidated financial statements. (L.F. 670) The Reserve and continued disclosure of the Put Option merely reflected management's view that Weinstein would seek to exercise the Put Option upon the exercise date, which ultimately "would lead to litigation." (L.F. 670) KLTT's decisions to book the Reserve and to disclose the Put Option in its filings with the SEC are a function of Generally Accepted Accounting Principles (GAAP) and SEC disclosure requirements, not admissions of liability. (L.F. 630 at ¶4); Rety v. Green, 546 So.2d 410, 423 (Fla. Dist. Ct. App. 1989)(The $10 million contingent liability entered on company's financial statements for legal claim asserted against it was "in no sense an admission by [defendant] that the asserted claim was

meritorious; a 'contingent' liability, by definition, is dependent on the occurrence of some future and uncertain event, and, in this context, is nothing more than a statement of a disputed claim"); Continental Ins. Co. v. Beecham, Inc., 836 F.Supp.1027, 1047, n. 12 (D.N.J. 1993)("The mere setting of a reserve by an insurer does not have the probative force of an admission"). "[M]any companies today, for financial statement purposes, accrue charges for contingent liability without intending thereby to acknowledge legal liabilities." The Contingent Liability Abyss: Tensions for Insurers and Reinsurers, 22 T. Marshall L. Rev. 1 at 7 (1996). Any other determination requires GPE and other companies to violate SEC rules and procedures and discourages full disclosure to shareholders.

III. THE TRIAL COURT DID NOT ERR IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE WEINSTEIN'S CLAIM IS BARRED BY CONFIRMATION OF THE BANKRUPTCY PLAN IN THAT WEINSTEIN'S ATTEMPT TO ENFORCE THE PUT OPTION IS A COLLATERAL ATTACK ON THE BANKRUPTCY COURT'S ORDER, WHICH CANCELLED AND EXTINGUISHED WEINSTEIN'S EQUITY INTERESTS IN DTI.

In Point III, Weinstein argues that the Bankruptcy Court's Order did not discharge the Put Option contract entered into between KLTT and Weinstein. KLTT agrees. The salient point, however, is that the Bankruptcy Court did extinguish the stock of DTI, the very object of the contract between KLTT and Weinstein. (L.F. 943; see also L.F. 940 at §3.9.3, 931 at §1.3, 935 at §1.50, 1005 at ¶1) Weinstein had no equity interest in DTI at the time he exercised the Put Option due to the Bankruptcy Court's Order. Therefore, he could not transfer any equity interest to KLTT under the terms of the Put Option. By attempting to do so, Weinstein is collaterally challenging the Bankruptcy Court's Order.[8]

[8] As an equity security holder in DTI, Weinstein is expressly bound by the provisions of the bankruptcy court's Order and he cannot assert rights inconsistent with the Order or the

Pursuant to 11 U.S.C. § 1141, the provisions of a confirmed bankruptcy plan are binding on equity security holders, including Weinstein. In In re Wrenn Insurance Agency of Missouri, Inc., 178 B.R. 792 (Bankr. W.D. Mo. 1995), the Bankruptcy Court set forth the following rules concerning the effect of confirmation:

> A confirmed plan is a contract. Once a plan is confirmed, it is binding upon the debtor and all claimants dealt with thereunder. Upon confirmation, the debtor and all creditors are bound by a Chapter 11 plan. The plan and order of confirmation fixes the rights of the parties. Once a plan is confirmed, neither a debtor nor a creditor may assert rights that are inconsistent with its provisions.

Id. at 796. Pursuant to 11 U.S.C. §1141(a), a confirmed plan is binding on equity security holders in the same manner that it is binding on debtors and creditors. Therefore, after confirmation, a shareholder of a corporation cannot assert rights that are inconsistent with the provisions of the bankruptcy plan. In re Wrenn, 178 B.R. at 796. Despite the clear language of the confirmed Plan that he has no remaining equity interest in DTI, Weinstein attempts to enforce a contract for the sale of the very stock that was cancelled and extinguished under the Plan. This action is inappropriate. See In re Newstar Energy of Texas, LLC, 280 B.R. 623, 626 (B.R. W.D. Mich. 2002)("A confirmed chapter 11 plan normally cannot be collaterally attacked."); Gaunt v. State

---

Plan. 11 U.S.C. § 1141; In re Wrenn Insurance Agency of Missouri, Inc., 178 B.R. 792, 796 (Bankr. W.D. Mo. 1995).

Farm Mutual Automobile Insurance Company, 24 S.W.3d 130, 139 (Mo. App. W.D. 2000)("Collateral attacks . . . are attempts to 'impeach a judgment in a proceeding not instituted for the express purpose of annulling the judgment' and are prohibited.").

This Court must give effect to the Bankruptcy Court's actions and Order. "[A] confirmed plan has the effect of a final judgment issued by the district court." In re Wrenn, 178 B.R. at 796. Weinstein cannot collaterally attack the Bankruptcy Court's Order by attempting to collect on an equity interest the Bankruptcy Court specifically eliminated. Weinstein is bound by the confirmation of the Plan and cannot relitigate any aspect of it, including the cancellation and extinguishment of his equity interests in DTI. As a consequence of the Court's confirmation of the Plan, Weinstein has no right to receive $15 million under the Put Option because his stock in DTI does not exist.

Weinstein also waived any right to recover under the Put Option by failing to object to the Plan before it was approved, and by failing to file an appeal after the Order confirming the Plan became a final judgment. "A waiver is an intentional relinquishment of a known right that may be implied from a party's conduct." Farris v. Farris, 75 S.W.3d 345, 348 (Mo. App. W.D. 2002). "To be so implied, the conduct must clearly and unequivocally show a purpose to relinquish the right." Id. (internal citations omitted). "[T]he determination of whether a waiver is knowing and intelligent is based on the totality of the circumstances." Id. (citing State v. Pope, 50 S.W.3d 916, 920 (Mo. App. W.D. 2001)).

Weinstein remained an active member of the board of directors for DTI after the bankruptcy petitions were filed. (L.F. 909-910) He voted in favor of placing DTI into

bankruptcy. (L.F. 915-916) He studied all materials that were disseminated to the Board, including the bankruptcy plan. (L.F. 910, 917) After he reviewed the Plan, he joined in the unanimous vote in favor of submitting the Plan to the bankruptcy court for approval. (L.F. 917)

Throughout the bankruptcy proceedings, Weinstein independently reviewed PACER to obtain information about the DTI bankruptcy. (L.F. 651-653) He reviewed documents and pleadings on PACER and gained knowledge of facts about what was being done with the assets of the company in the bankruptcy proceedings. (L.F. 652) On at least one occasion, Weinstein went to the Bankruptcy Court to observe what was happening in the case. (L.F. 653)

Despite being actively involved in the bankruptcy process, having knowledge of the terms of the Plan, being represented by legal counsel, and following the events occurring in the bankruptcy court, Weinstein never raised an objection to DTI or the bankruptcy court concerning the provision in the Plan that extinguished his stock. He never objected to the confirmation of the Plan, and he never appealed the Bankruptcy Court's Order confirming the Plan. His failure to take any steps to protect his interests under the Put Option constitutes a knowing relinquishment of his right to collect any money under the Put Option for his previous interest in DTI. Because Weinstein waived his right to recover under the Put Option, KLTT is entitled to judgment as a matter of law.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE WEINSTEIN'S CLAIM IS BARRED BY SECTION 1.3(C) OF THE SECOND AMENDED AGREEMENT IN THAT WEINSTEIN DISPOSED OF ALL OF HIS REMAINING SHARES OF COMMON STOCK IN DTI.

As an alternative theory to Points I and II, KLTT submits that the Put Option was not drafted as an all or nothing, take it or leave it agreement, as Weinstein would have this Court believe. Rather, the Second Amended Agreement provides for the pro-rata reduction of the exercise price in the event that Weinstein does not own all 9,906,064 shares of common stock in DTI on the exercise date. Section 1.3(c) of the Second Amended Agreement provides that "if Weinstein has sold or disposed of any of the 9,906,064 Remaining Shares that he owned immediately after the Initial Shares Closing, then the Floor Value shall be reduced proportionately to reflect the reduced number of Remaining Shares to be transferred pursuant to exercise of the Remaining Shares Put Option." (L.F. 794) As a member of the board of directors for DTI, an equity holder in DTI, and a grantee of a put option, Weinstein actively participated in the decision to place DTI into bankruptcy, the submission of the Plan that cancelled and extinguished his equity interests in DTI, and the confirmation of that Plan. (L.F. 909-910, 912-917)

Weinstein "disposed" of his shares by failing to object to the extinguishment of his stock before the Bankruptcy Court and by not appealing the Bankruptcy Court's Order

that cancelled and extinguished his stock. Weinstein participated and acquiesced in the cancellation and extinguishment of his stock, which constitutes a "disposal" of his stock.

When Weinstein delivered his Notice of Exercise, he owned no shares of stock in DTI because all 9,906,064 shares of the Remaining Shares of common stock that Plaintiff owned in DTI on December 26, 2000 were cancelled and extinguished through the confirmation of the Plan. Because Weinstein does not own any shares of common stock representing an equity interest in DTI that he can transfer to KLTT, the amount owed by KLTT should be reduced proportionately. When the floor amount was reduced to reflect that no shares of common stock were transferred to KLTT, KLTT owed Weinstein nothing. Therefore, KLTT has not breached the contract with Weinstein and KLTT is entitled to summary judgment.

V. THE TRIAL COURT DID NOT ERR IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE WEINSTEIN IS NOT ENTITLED TO PAYMENT OF $15 MILLION UNDER THE TERMS OF THE PUT OPTION AGREEMENT IN THAT KLTT'S AFFIRMATIVE DEFENSES PREVAIL, KLTT IS EXCUSED FROM PERFORMANCE AND WEINSTEIN IS UNABLE TO PROVE EVERY ELEMENT OF HIS CAUSE OF ACTION.

It is well settled under Missouri law that the denial of a motion for summary judgment is not a final judgment and, therefore, is not an appealable order. Boliver Insulation Company, 166 S.W.3d at 614; Leiser, 59 S.W.3d at 605; State ex rel. Division

of Child Support Enforcement v. Hill, 53 S.W.3d 137, 140-41 (Mo. App. W.D. 2001); Strain-Japan R-16 School District v. Landmark Systems, Inc., 51 S.W.3d 916, 919 (Mo. App. E.D. 2001). "This rule applies with equal vigor to situations, such as this, where the order denying summary judgment to one party is entered at the same time as an appealable order granting summary judgment to the other party." Leiser, 59 S.W.3d at 605; see also Strain-Japan R-16 School District, 51 S.W.3d at 919. Weinstein is seeking review of the denial of his motion for summary judgment, which, under Missouri law, is clearly not an appealable order. No exception should be made in this case. This Court should decline to review Points V through VII raised in Weinstein's brief.

Weinstein's arguments under Point V are merely a recitation of the arguments set forth in Points I through IV and are without merit for the same reasons set forth above. If the Court decides to consider the trial court's denial of Weinstein's motion for summary judgment in this appeal, KLTT incorporates the arguments set forth under Points I through IV above in response to Weinstein's Point V.

Because Weinstein had no shares of common stock in DTI to deliver to KLTT, KLTT has no obligation to pay $15 million for non-existent stock. Consequently, there is no breach of the contract and Weinstein's claim fails as a matter of law. Summary judgment for Weinstein is improper.

VI. THE TRIAL COURT DID NOT ERR IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE KLTT'S PERFORMANCE UNDER THE PUT OPTION AGREEMENT IS EXCUSED BY THE DOCTRINE OF COMMERCIAL FRUSTRATION IN THAT GENUINE ISSUES OF MATERIAL FACT EXIST THAT PRECLUDE SUMMARY JUDGMENT IN WEINSTEIN'S FAVOR AND THE BANKRUPTCY COURT'S CANCELLATION AND EXTINGUISHMENT OF DTI'S STOCK DESTROYED THE OBJECT AND PURPOSE OF THE PUT OPTION.

Weinstein argues in Point V that the Court can entertain an appeal from the denial of a motion for summary judgment if the denial is "intertwined with the propriety of an appealable order granting summary judgment to another party." Sub.App.Br. at 35, citing Fischer v. City of Washington, 55 S.W.3d 372, 381 (Mo. App. 2001). KLTT's motion for summary judgment was not based on theories of commercial frustration or equity. These theories involve facts and legal theories that are not essential to the resolution of KLTT's motion for summary judgment. Therefore, the denial of Weinstein's motion for summary judgment on the grounds of commercial frustration and equity are not so intertwined with the trial court's order granting KLTT's motion for summary judgment as to justify review by this Court. For these reasons alone, Points VI and VII should be denied.

If the Court decides to entertain Weinstein's appeal, Weinstein's arguments fail because genuine issues of material fact exist that preclude summary judgment and Weinstein is not entitled to judgment as a matter of law. The trial court correctly found a genuine issue of material fact as to whether the bankruptcy of DTI and subsequent cancellation of stock was foreseeable at the time of contracting. Whether the supervening event is foreseeable at the time of contracting is a question of fact to be decided by the trier of fact. Chase Precast Corporation v. John J. Paonessa Company, Inc., 566 N.E.2d 603, 376 (Mass. 1991)(affirming trial court judgment excusing defendant from further performance under doctrine of commercial frustration when parties entered into a contract to provide concrete median barriers for construction project and subsequently the Department of Public Works entered into a settlement agreement with protesting citizen's group agreeing that no additional concrete median barriers would be installed on project). In Signature Pool & Court v. City of Manchester, 743 S.W.2d 538, 541 (Mo. App. E.D. 1987), this Court reversed the trial court's entry of summary judgment because genuine issues of material fact remained unresolved as to whether the supervening event for defendant's commercial frustration defense was foreseeable.

Contrary to Weinstein's arguments, the future bankruptcy of DTI and subsequent cancellation and extinguishment of its equity interests were not foreseeable by either party in December of 2000. "Courts consider the relation of the parties, the terms of the contract and the circumstances surrounding its formation in determining whether the supervening event was reasonably foreseeable." Howard v. Nicholson, 556 S.W.2d 477, 482 (Mo. App. E.D. 1977).

The following circumstances surrounded the formation of the Second Amended Agreement and Put Option. Prior to the transaction with Weinstein, KLTT and Weinstein each owned a fifty percent (50%) interest in DTI and each had equal representation on its Board of Directors. (L.F. 302) At the time the Second Amended Agreement was executed, Weinstein and KLTT had developed differences of opinion as to certain matters effecting the business and operation of the company, which led to a deadlocked board. (L.F. 302) The Second Amended Agreement provided that Weinstein would resign as President and CEO of DTI and KLTT gained the right to elect all but one of the members of the board of directors. (L.F. 302, 306) In addition to giving KLTT majority ownership in DTI and control of the company, the transaction eliminated the board deadlock, and allowed KLTT to hire a new CEO to replace Weinstein, all of which would permit the company to again focus on the implementation of its business plan.

As a condition to the Second Amended Agreement dated December 26, 2000, KLTT was required to purchase 50.1% of the aggregate principal amount of the 12 1/2% Series B Senior Discount Notes due in 2008. (L.F. 320) In February 2001, when the initial sale of stock closed and the Put Option was executed, KLTT made a $94,000,000 bridge loan to DTI for the purchase of these Senior Discount Notes, which significantly reduced DTI's debt load. (L.F. 630 at ¶5) Pursuant to a February 21, 2001 Credit Agreement, as amended, between Digital Teleport, Inc.[9] and KLTT, KLTT loaned Digital

[9] Digital Teleport, Inc. is a wholly-owned subsidiary of DTI Holdings, Inc. Digital Teleport, Inc. provided technologically advanced, high bandwidth fiber optic

Teleport, Inc. $39,000,000. (L.F. 630 at ¶ 5) On July 26, 2001, KLTT loaned Digital Teleport, Inc. an additional $5,500,000. (L.F. 630 at ¶ 5) Finally, pursuant to a September 25, 2001 Credit Agreement between Digital Teleport, Inc. and KLTT, KLTT loaned Digital Teleport, Inc. $2,500,000 through December 11, 2001. (L.F. 630 at ¶ 5)

Weinstein testified about the steps taken by KLTT immediately after entering into the Second Amended Agreement: With the execution of the Second Amended and Restated Agreement in December of 2000, KLTT pledged to loan more than $40 million to DTI Holdings to start the company moving again, Cisco Systems Capital ("Cisco") committed to provide electronic gear for the company to light its dark fiber network, and KLTT helped DTI substantially reduce its debt burden by funding a $95 million tender offer to the bondholders. (L.F. 639-642) Weinstein admits that "[a]t the time of the transaction, DTI was valued at between $300 and $500 million . . . ." (L.F. 272-273 at ¶3) Weinstein testified that in November of 2000, he believed his fifty percent interest in the company was worth $145 million and that the value of the company could be resurrected. (L.F. 635)

---

communications services. DTI Holdings, Inc. was a holding company that conducted no operation activities. Substantially all of the value of DTI Holdings was derived from its ownership of Digital Teleport, Inc. Digital Teleport, Inc. also filed a voluntary petition in bankruptcy on December 31, 2001 and was included in the bankruptcy plan and confirmation order with DTI Holdings, Inc. (L.F. 630 at ¶6)

KLTT testified that with the knowledge that the events described above were going to occur, bankruptcy was not foreseeable when the transaction with Weinstein was entered into:

> Q (Mr. Mallin): Was there a reason why KLT Telcom Inc. chose not to include language in the remaining shares put option agreement to deal with the situation of what would happen to the put option agreement in case DTI Holdings sought bankruptcy protection?
>
> A (Mr. Henriksen): No. KLTT's thinking at the time was that, if the transactions that were contemplated were in fact consummated, i.e. the purchase of the initial shares, the gaining of control, of voting control, the elimination of the deadlocked board, the resignation of Mr. Weinstein, the focus on a – a clear strategy, the restructuring of the capital side of the business, that KLT Telecom did not foresee bankruptcy, if those things – if KLT Telecom was successful in making those things happen.

(L.F. 546 at p. 136)[10] With the execution of the Second Amended Agreement and the completion of the events described above, it was reasonable to believe that this $300 to $500 million company would thrive and increase in value.[11]

[10] As demonstrated by the testimony set forth above, KLTT did not testify in any deposition that "it was fully aware that the financial failure of DTI was in jeopardy before it executed the Put Option" as Weinstein fallaciously suggests. See Sub.App.Br. at 39.

Weinstein attempts to convince this Court that KLTT should have foreseen the bankruptcy of DTI in December of 2000. Sub.App.Br. at 39-41. Weinstein had been the President and CEO of the company for years and was a sophisticated businessman. Yet he took no steps to protect his interest in the event of a bankruptcy (such as inclusion of a provision in the Put Option Agreement dealing such an eventuality). The inescapable conclusion is that Weinstein himself did not foresee the future bankruptcy of DTI at the time he entered into the Second Amended Agreement and KLTT granted him the Put Option.

Weinstein's motion for summary judgment also fails because Weinstein is not entitled to judgment as a matter of law. Under the doctrine of commercial frustration, "if the happening of an event not foreseen by the parties and not caused by or under the

---

[11] Weinstein relies upon two KLTT internal documents for the proposition that KLTT had knowledge of DTI's financial instability and the possibility of bankruptcy when entering into the transaction with Weinstein. See Sub.App.Br. at 39, citing L.F. 290, 432-52. These documents predate the occurrence of the events set forth above. These documents reflect what would happen to DTI if the Weinstein transaction was not completed and KLTT did not gain control of DTI, remove Weinstein as CEO, invest substantial capital into DTI, and help DTI reduce its debt. With the execution of the Second Amended Agreement and the granting of the Put Option, KLTT completed the actions set forth above. The documents relied upon by Weinstein do not address the financial status of DTI after KLTT and DTI took all of these actions.

control of either party has destroyed or nearly destroyed either the value of the performance or the object or purpose of the contract, then the parties are excused from further performance." Howard, 556 S.W.2d at 481-82. The doctrine of commercial frustration grew out of the demands of the commercial world to excuse performance in cases of extreme hardship. Id. at 483. "[I]n cases of commercial frustration performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration." Id. at 482 (internal citations omitted). Public policy "requires the law to be flexible and equitable in situations where unexpected contingencies operate to make performance valueless and the allocation of contractual risks capricious or fortuitous." Id. at 483.

In Howard, plaintiff entered into a contract with defendant whereby plaintiff was to construct a building, by May 1, 1970, in accordance with certain plans and specifications provided by the tenant. Id. at 478. The tenant signed a lease providing that the premises were to be used as a bridal salon for 20 years and the building was designed for that particular use. Id. Plaintiff began demolition work and completed some electrical and sewer work on the property. On December 16, 1969, the tenant filed a Chapter 11 petition in bankruptcy. Id. at 478-79. On March 10, 1970, defendant cancelled the construction contract with plaintiff. Id. at 479. Plaintiff sued defendant for breach of contract and sought recovery of lost profits. Id. at 478. The Court found that the proposed building could have been built, but that the building had been specifically designed for use as a bridal salon by the tenant and that it was not suited for other uses,

therefore, the value of the building as such was destroyed by the supervening circumstances of the bankruptcy of the tenant. Id. at 483. The bankruptcy of the tenant rendered performance under the contract meaningless. Liquidation of Professional Medical Insurance Company v. Lakin, 88 S.W.3d 471, 480 (Mo. App. W.D. 2002) (distinguishes Howard and supports its holding). The Court found that the bankruptcy of the tenant was not foreseeable:

> While the possibility of bankruptcy of businesses in general is a foreseeable and all-too-frequent occurrence, the future bankruptcy of a particular company, the continuing existence of which was essential to complete the entire transaction, was not reasonably within the contemplation of the parties at the time of contracting such that the parties would have made provision for such an event.

Howard, 556 S.W.2d at 483. Because of the tenant's bankruptcy, the Court excused defendant from any further performance under the construction contract based on the doctrine of commercial frustration. Id. at 484; see also Willhite v. Masters, 965 S.W.2d 406, 410 (Mo. App. S.D. 1998)(court excused defendant from its agreement to provide electricity to a building when the building burned down and was not rebuilt on the basis of impossibility, but relies on Howard and the doctrine of commercial frustration as a parallel analysis).

This case is very similar to Howard. The bankruptcy of DTI and the subsequent cancellation and extinguishment of all equity interests in the company resulted in a total destruction of the value and purpose or object of the transaction. See Howard, 556

S.W.2d at 483. The object of the Put Option is the purchase/sale of the remaining common stock in DTI. When the Bankruptcy Court confirmed the Chapter 11 plan for DTI, it cancelled and extinguished all of the equity interests in DTI. (L.F. 1005 at 1, 943 at §5.9.3, 940 at §3.9.3, 931 at §1.3, 935 at §1.50) Thus, there is no common stock remaining in DTI to be sold or purchased under the Put Option. While it is true that Weinstein can still deliver a "stock certificate" to KLTT that at one time represented an equity interest in DTI, the bankruptcy of DTI strips that piece of paper of any representational character and renders performance under the Put Option impossible. See Lakin, 88 S.W.3d at 480.

The supervening events, the bankruptcy of DTI and the subsequent cancellation and extinguishment of the equity interests therein, were not caused by either party. A special committee, consisting of an independent board member, investigated the possibility of bankruptcy at the unanimous direction of the Board. (L.F. 912-913) The special committee employed independent attorneys and investment advisors to consider whether bankruptcy was the appropriate thing to do and ultimately recommended to the Board that it was in the best interests of DTI to file for bankruptcy protection. (L.F. 914) The DTI board of directors unanimously voted in favor of placing DTI into bankruptcy after the special committee researched and recommended that DTI file for bankruptcy protection. (L.F. 914-916) A Plan approved by the DTI Board, with Weinstein participating, was filed with the Court. (L.F. 916-917) After appropriate notice was given and a hearing was held, the Bankruptcy Court confirmed and approved the Plan. (L.F. 999,1000 at ¶C, 1005 at ¶1, 1009) Finally, the Bankruptcy Court's confirmation of

the Plan caused the equity interests in DTI to be cancelled and extinguished. (L.F. 943, 940 at §3.93, 931 at §1.3, 935 at §1.5)

Because the foreseeability of the bankruptcy of DTI presents a genuine issue of material fact and Weinstein is not entitled to judgment as a matter of law, denial of Weinstein's motion for summary judgment was appropriate.

VII. THE TRIAL COURT DID NOT ERR IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE WEINSTEIN'S CLAIM IS BARRED BY PRINCIPLES OF EQUITY IN THAT IT IS WHOLLY INEQUITABLE TO REQUIRE KLTT TO PAY $15 MILLION FOR STOCK THAT DOES NOT EXIST.

Weinstein's Point VII is not a proper issue for appeal because the denial of a motion for summary judgment is not a final judgment and, therefore, is not an appealable order. Boliver Insulation Company, 166 S.W.3d at 614; Leiser, 59 S.W.3d at 605; Hill, 53 S.W.3d at 140-41; Strain-Japan R-16 School District, 51 S.W.3d at 919. However, should this Court review Point VII, Weinstein's claim is barred because in the Second Amended Agreement, general principles of equity and applicable bankruptcy limit the enforceability of the Put Option. Section 4.3 of the Second Amended and Restated Agreement states:

> Upon occurrence of the Effective Date, this Agreement will be, and the Remaining Shares Put Option will (upon the granting thereof) be, enforceable against KLT in accordance with its terms, except to the extent

> that enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or similar laws affecting the enforceability of creditors' rights generally or general principles of equity, regardless to (sic) whether enforceability is considered in a proceeding in equity or at law.

(L.F. 313)(emphasis added) The application of bankruptcy to Weinstein's claim has been discussed in Points I through IV above. When the equities are balanced in this case, KLTT has clearly suffered the loss. KLTT has lost over $158 million that it invested in and loaned to DTI, Inc. and Digital Teleport, Inc. since December of 2000, whereas Weinstein has received $32 million for his initial shares in DTI, Inc. (L.F. 630, 793) Pursuant to the Second Amended Agreement and general principles of equity, Weinstein's claim should be barred because it is wholly unfair to require KLTT to pay for an equity interest in a company that does not exist. Likewise, it is inequitable to enforce this agreement and require KLTT to pay Weinstein $15 million for stock that does not exist. General principles of equity preclude summary judgment for Weinstein in this case.

CONCLUSION

To be entitled to summary judgment, KLTT need only establish the facts necessary to support one of its properly-pleaded affirmative defenses. ITT Commercial Fin. Corp., 854 S.W.2d at 381. As both parties admit, there is no genuine dispute as to the existence of each fact necessary to support five of KLTT's affirmative defenses. Because Weinstein has no stock to sell, KLTT is not obligated to purchase. Weinstein

cannot establish that KLTT breached the contract. Therefore, KLTT is entitled to judgment as a matter of law. There was no error by the trial court or the Court of Appeals. See Boliver Insulation Company, 166 S.W.3d at 614 ("Summary judgment is to be sustained on appeal on any theory that supports the judgment that was granted.").

Respectfully submitted,

Kent Sullivan MO # 46573
Erin N. Schmidt MO # 49237
STINSON MORRISON HECKER LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
(816) 842-8600
FAX: (816) 691-3495

Gretchen Garrison MO # 33963
STINSON MORRISON HECKER LLP
100 S. 4th Street, Suite 700
St. Louis, MO 63102
(314) 259-4500
FAX: (314) 259-4599

Attorneys for Respondent KLT Telecom Inc.

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Erin Schmidt, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The Brief was completed using Microsoft Word, in Times New Roman, size 13-point font. Excluding the cover page, the signature block and the Certificate of Compliance and Service, the brief contains 13,569 words, which does not exceed the 27,900 words allowed for Respondent's brief.

2. Pursuant to Rule 84.06(g), the floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses and is virus free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed and emailed on October 2, 2006 to:

Kenneth J. Mallin
Edward L. Dowd, Jr.
Kimberly A. Mohr
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102

Attorneys for Appellant Richard D. Weinstein

_____

Erin Schmidt
Attorney for Respondent

APPENDIX