NO. 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
21st Judicial Circuit
The Honorable Carolyn Whittington, Judge

SUBSTITUTE BRIEF OF APPELLANT RICHARD D. WEINSTEIN

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JURISDICTIONAL STATEMENT

This is an appeal of the trial court's grant of summary judgment in favor of Respondent KLT Telecom, Inc.'s ("KLTT"), and the denial of Appellant Richard D. Weinstein's ('Weinstein") motion for summary judgment. In an Order dated May 16, 2006, the Court of Appeals affirmed the trial court's judgment pursuant to Rule 84.16(b). Weinstein moved for rehearing, or, in the alternative, transfer to this Court on or about May 31, 2006. In an order dated June 20, 2006, Weinstein's motion was denied. Weinstein then filed an Application for Transfer to the Missouri Supreme, which this Court granted on August 22, 2006.

STATEMENT OF FACTS

This appeal arises out of a Remaining Shares Put Option Agreement (the "Put Option Agreement") between Weinstein and KLTT. Weinstein is the former majority shareholder, President, Chief Executive Officer, Secretary and Chairman of the Board of Directors of DTI, Holdings, Inc. ("DTI"). (L.F. 272; L.F. 500). KLTT is a wholly owned subsidiary of KLT, Inc., which is in turn a wholly-owned subsidiary of Great Plains Energy, Inc. ("GPE"). (L.F. 272; L.F. 500).

The Parties' Agreements

On December 26, 2000, KLTT and Weinstein executed an agreement, titled the Second Amended and Restated Agreement ("Second Amended Agreement"), under which Weinstein agreed to sell over twenty million of his shares in DTI to KLTT. (L.F. 272; L.F. 500). Pursuant to and in connection with the Second Amended Agreement, Weinstein and KLTT entered into the Put Option Agreement on February 8, 2001. Under this agreement, KLTT agreed to purchase Weinstein's remaining shares in DTI if Weinstein chose to exercise his option between September 1, 2003 and August 1, 2005. (L.F. 413-17).

The Put Option Agreement operated as follows: At the execution of the Second Amended Agreement, Weinstein was to transfer a stock certificate evidencing his remaining shares in DTI to an escrow agent appointed by the parties pursuant to a Stock Escrow Agreement. When and if Weinstein exercised his put rights, Weinstein would be entitled to a minimum "aggregate floor" value of $15 million from KLTT.

In December of 2000, and upon execution of the Second Amended Agreement, Weinstein deposited a stock certificate evidencing his remaining shares in DTI with the agreed-upon escrow agent. (L.F. 753). Around the time of the deposit, an accounting firm retained by KLTT valued DTI at between $300 million to $500 million. (L.F. 500).

The Bankruptcy of DTI

Before the parties executed the Second Amended Agreement, KLTT and Weinstein each owned a fifty percent interest in DTI, and each had equal representation on its Board of Directors. (L.F. 503). After execution, however, KLTT gained control of DTI. The Second Amended Agreement gave KLTT both majority ownership of DTI and the right to elect all but one of the members of the Board of Directors. (L.F. 503-04).

KLTT knew that DTI was in dire financial condition at the time the Second Amended Agreement was executed. At the deposition of David Henricksen, KLTT's Rule 57.03(b)(4) corporate representative, KLTT admitted that it was fully aware that the financial future of DTI was in jeopardy before it executed the Second Amended Agreement and the Put Option Agreement. (L.F. 290). KLTT also produced numerous documents which discuss DTI's financial instability and specifically address the possibility of a DTI bankruptcy. (L.F. 432-52).

Under KLTT's control, DTI continued to deteriorate financially. Less than one year after KLTT took majority ownership and control of DTI, the KLTT-controlled DTI Board of Directors created a special committee to investigate the possibility of placing DTI in bankruptcy. (L.F. 753). The special committee recommended to the DTI Board of Directors that DTI initiate bankruptcy proceedings. (L.F. 753).

On December 28, 2001, the DTI Board of Directors voted unanimously to accept the recommendation of the special committee and authorized the filing of a petition for bankruptcy. (L.F. 753). On December 31, 2001, DTI filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the Eastern District of Missouri. (L.F. 753).

DTI did not emerge from bankruptcy. Pursuant to the terms of the DTI First Amended and Restated Joint Plan Under Chapter 11 of the United States Bankruptcy Code, approved by the Bankruptcy Court for the Eastern District of Missouri on June 11, 2003, all equity interests in DTI were cancelled and extinguished. (L.F. 754).

KLTT's Refusal to Pay the

Agreed-Upon $15 Million Floor Value of the Put Option

On September 2, 2003, Weinstein exercised his option in accordance with the terms of the Put Option Agreement. (L.F. 274; L.F. 502). In his notice of exercise, Weinstein waived any requirement that KLTT appraise the remaining shares of DTI, and instead elected to receive the aggregate floor value of $15 million. (L.F. 274; L.F. 502). On

September 16, 2003, KLTT advised Weinstein and the escrow agent that it believed that it had no obligation to purchase Weinstein's remaining DTI shares or to pay the $15 million floor price under either the terms of the Put Option Agreement or the Second Amended Agreement. (L.F. 274; L.F. 502).

On September 19, 2003, Weinstein filed the instant suit for breach of contract, seeking recovery of the $15 million floor value as provided under the Put Option Agreement, plus statutory interest that had accrued since KLTT's refusal to pay the agreed upon floor value. (L.F. 9-11). In its First Amended Answer, KLTT asserted numerous affirmative defenses to Weinstein's breach of contract claim, all of which were premised on the December 2001 bankruptcy of DTI. (L.F. 25).

On December 6, 2004, Weinstein moved for summary judgment on his breach of contract claim. (L.F. 253-56). In its opposition to Weinstein's motion, KLTT argued under a variety of legal theories that the December 2001 bankruptcy of DTI negated its obligations under the Put Option Agreement. In addition, KLTT argued that its affirmative defense of commercial frustration precluded summary judgment because there was a genuine issue of material fact as to the foreseeability of the DTI bankruptcy. (L.F. 500-37).

On February 18, 2005, KLTT filed its own motion for summary judgment. In its motion, KLTT claimed that it was entitled to summary judgment because: (1) Weinstein failed to satisfy a condition precedent to KLTT's performance under the Put Option Agreement because the bankruptcy court extinguished all equity interests in DTI; (2) there was a failure of consideration for KLTT's obligations under the Put Option Agreement because Weinstein's equity interests no longer exist due to the DTI bankruptcy; (3) Weinstein's breach of contract claim was barred by the terms of the bankruptcy court's order; and (4) Weinstein's claim was barred by section 1.3 of the Second Amended Agreement because Weinstein "sold or disposed" of his shares through the DTI bankruptcy. (L.F. 751-57).

On April 27, 2005, five days before the trial of this matter was scheduled to commence, the trial court entered an Order and Judgment, summarily denying Weinstein's motion for summary judgment and entering summary judgment in favor of KLTT. (L. F. 1132). The trial court did not articulate a basis for its decision.

Weinstein appealed the decision to the Court of Appeals, Eastern District of Missouri. In an Order dated May 16, 2006, the Court of Appeals affirmed the trial court's judgment pursuant to Rule 84.16(b) (the "Opinion"). In its Opinion, the Court held that consideration for KLTT's obligation to pay the $15 million floor value of the put option had failed because, at the time of Weinstein's exercise of the option, "he had nothing of value to offer KLTT in exchange for its promise to pay him $15,000,000."

Weinstein moved for rehearing, or, in the alternative, transfer to this Court on or about May 31, 2006. In an order dated June 20, 2006, Weinstein's motion was denied. Weinstein then filed an Application for Transfer to the Missouri Supreme, which this Court granted on August 22, 2006.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, AND THE COURT OF APPEALS ERRED IN AFFIRMING THESE JUDGMENTS, BECAUSE THERE HAS BEEN NO FAILURE OF CONSIDERATION FOR KLTT'S CONTRACTUAL OBLIGATIONS, IN THAT WEINSTEIN TRANSFERRED OVER 20 MILLION SHARES OF STOCK IN DTI IN EXCHANGE FOR KLTT'S OBLIGATIONS UNDER THE PUT OPTION AGREEMENT.

Union Pac. R. Co. v. KC Transit Co., 401 S.W.2d 528 (Mo. App. 1966)

In re Air Vermont, Inc., 44 B.R. 440 (Bankr. D. Vt. 1984)

Polinsky v. Vaughan, 268 Cal.App.2d 183 (Cal. App. 1968)

II. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN PERFORMED AND SATISFIED ALL CONDITIONS PRECEDENT UNDER THE TERMS OF THE PARTIES' AGREEMENT, IN THAT WEINSTEIN DELIVERED TO THE ESCROW AGENT A STOCK CERTIFICATE REPRESENTING HIS REMAINING SHARES IN DTI IN ACCORDANCE WITH THE PUT OPTION AGREEMENT, AND EXERCISED HIS PUT OPTION RIGHTS IN THE TIME AND MANNER REQUIRED UNDER THE PUT OPTION AGREEMENT.

Brewer v. Devore, 960 S.W.2d 519 (Mo. App. 1998)

Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. 1997)

Chehral v. St. John's Mercy Medical Ctr., 958 S.W.2d 36 (Mo. App. 1997)

III. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY THE TERMS OF THE BANKRUPTCY PLAN, IN THAT THE BANKRUPTCY COURT DID NOT DISCHARGE KLTT'S CONTRACTUAL OBLIGATIONS TO WEINSTEIN UNDER THE PUT OPTION AGREEMENT.

Johnson v. Home State Bank, 501 U.S. 78 (1991)

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995)

Matter of Zale Corp., 62 F.3d 746 (5th Cir. 1995)

IV. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY SECTION 1.3(C) OF THE SECOND AMENDED AGREEMENT, IN THAT WEINSTEIN DID NOT SELL OR DISPOSE OF HIS REMAINING SHARES IN DTI BY VOTING TO PLACE DTI IN BANKRUPTCY.

Graham v. Goodman, 850 S.W.2d 351 (Mo. banc 1993)

Pratt v. Seventy-One Hawthorne Place Associates, L.P., 106 S.W.3d 608 (Mo. App. 2003)

V. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN IS ENTITLED TO PAYMENT OF THE $15 MILLION FLOOR VALUE UNDER THE TERMS OF THE PUT OPTION AGREEMENT, IN THAT THE PUT OPTION AGREEMENT WAS A VALID AND ENFORCEABLE CONTRACT SUPPORTED BY CONSIDERATION, WEINSTEIN FULFILLED ALL CONDITIONS PRECEDENT TO KLTT'S PERFORMANCE, AND KLTT'S AFFIRMATIVE DEFENSES FAIL AS A MATTER OF LAW.

Greenberg v. Morris, 436 S.W.2d 734 (Mo. 1968)

VI. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE KLTT'S CONTRACTUAL OBLIGATIONS UNDER THE PUT OPTION AGREEMENT ARE NOT EXCUSED BY THE DOCTRINE OF COMMERCIAL FRUSTRATION, IN THAT THE UNDISPUTED EVIDENCE SHOWS THAT, AT THE TIME THE PUT OPTION AGREEMENT WAS ENTERED INTO, THE BANKRUPTCY OF DTI WAS FORESEEABLE.

Adbar, L.C. v. New Beginnings C-Star, 103 S.W.3d 799 (Mo. App. 2003)

Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575 (Mo. App. 2000)

Stein v. Bruce, 366 S.W.2d 732 (Mo. App. 1963)

VII. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY PRINCIPLES OF EQUITY, IN THAT EQUITY WILL NOT

RELIEVE A PARTY OF CONTRACTUAL OBLIGATIONS SIMPLY BECAUSE THE CONTRACT PROVED NOT TO BE FINANCIALLY BENEFICIAL.

Vondera v. Chapman, 180 S.W.2d 704 (Mo. 1944)

Williams v. Walls, 964 S.W.2d 839 (Mo. App. 1998)

STANDARD OF REVIEW

An order granting or denying summary judgment is reviewed *de novo*. The propriety of summary judgment is purely an issue of law, and an appellate court need not defer to the trial court's order. ITT Commercial Fin. Corp. v. Mid-America Marine Supply, 854 S.W.2d 371, 376 (Mo. banc 1993); see also Mobley v. Baker, 72 S.W.3d 251, 256 (Mo. App. W.D. 2002).

Under firmly-established Missouri law, summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Mo. R. Civ. P. 74.04(c)(3). Summary judgment is not precluded if the facts alleged to be in dispute are merely different opinions of the parties concerning the legal effect of documents determining their respective rights. Blankenship v. Better Business Bureau, 782 S.W.2d 131, 132 (Mo. App. 1989). Indeed, "the construction and interpretation of a written contract is a matter of law, not fact." Park Lane Medical Ctr. of Kansas City, Inc. v. Blue Cross/Blue Shield of Kansas City, 809 S.W.2d 721, 725 (Mo. App. 1991) (emphasis added).

ARGUMENT

This appeal raises two main issues: (1) what is the consideration for a put option agreement; and (2) when should this consideration be measured?

Under firmly-established Missouri law, consideration for a contract must be assessed at the time when the contract is entered into. See, e.g., Union Pac., 401 S.W.2d at 536. It is equally well-settled that diminished value – and even a complete of lack of value – cannot result in a failure of consideration. See, e.g., id. ("If promisor gets what he bargained for, there is no failure of consideration although what he receives become less valuable or of no value at all.") (emphasis added); Vorchetto, 14 S.W.2d at 686 ("[I]t is well settled that because one suffers a disappointment in his bargain a failure of consideration does not arise. . . ."); Doss, 901 S.W.2d at 220 ("[T]he law does not concern itself with the adequacy of the consideration.").

The trial court ignored both these fundamental precepts of contract law by granting summary judgment in KLTT's favor. Thereafter, in its Opinion, the Court of Appeals viewed consideration for the put option KLTT granted to Weinstein as the shares that were to be transferred upon exercise of the put option, rather than the value of the shares that were transferred in consideration of the option itself. Purporting to rely on "basic concepts of contract law," the Court of Appeals then held that the value of these shares must be measured, not at the time that the Put Option Agreement was executed, but at the time the put option was exercised by Weinstein.

The holding by the Court of Appeals conflicts with and misapplies basic principles of contract law recognized in Union Pacific, Vorchetto and Doss. Contrary to the teachings of these cases, as well as scores of other Missouri cases recognizing that consideration for contractual obligations must be assessed at the time the contract is entered into, the Court of Appeals measured the value of that consideration when Weinstein exercised his put option rather than when he entered into the Put Option Agreement.

KLTT may be facing a significant loss as a result of Weinstein's exercise of his put option, but that is the risk that KLTT took. "The policy of the law is to let parties weigh the benefits pro and con and leave them free to make whatever contract between themselves that they please." Bydalek v. Brines, 947 S.W.2d 135, 143 (Mo. App. 1997). Under the contract at issue in this case, KLTT promised to pay Weinstein a minimum of $15 million when he exercised his put right. KLTT should be held to this promise.

For the reasons stated below, the trial court erred in denying Weinstein's motion for summary judgment and entering judgment in favor of KLTT, and the Court of Appeals erred in affirming that judgment.

I. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, AND THE COURT OF APPEALS ERRED IN AFFIRMING THESE JUDGMENTS, BECAUSE THERE HAS BEEN NO FAILURE OF CONSIDERATION FOR KLTT'S CONTRACTUAL OBLIGATIONS, IN THAT WEINSTEIN TRANSFERRED OVER 20 MILLION SHARES OF STOCK IN DTI IN EXCHANGE FOR KLTT'S OBLIGATIONS UNDER THE PUT OPTION AGREEMENT.

In its suggestions in opposition to Weinstein's motion for summary judgment, its memorandum in support of its own motion, and before the Court of Appeals, KLTT argued that it was excused from performance under the Put Option Agreement because there is no consideration supporting KLTT's obligations under the Put Option Agreement due to the bankruptcy of DTI.

The trial court and the Court of Appeals erred in accepting KLTT's argument. Under firmly established Missouri law, consideration must be assessed at the time the parties enter into the contract. See, e.g., Union Pac. R. Co. v. KC Transit Co., 401

S.W.2d 528, 536 (Mo. App.1966). Whether the party receiving the consideration ultimately realized little or no economic benefit is immaterial. Diminished value – and even a complete of lack of value – does not result in a failure of consideration. See, e.g., Id. ("If promisor gets what he bargained for, there is no failure of consideration although what he receives become less valuable or of no value at all.") (emphasis added); Vorchetto v. Sappenfield, 14 S.W.2d 685, 686 (Mo. App. 1929) ("[I]t is well settled that because one suffers a disappointment in his bargain a failure of consideration does not arise. . . .").

The rule is no different when applied to an option agreement. See 12A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5575 ("The adequacy of consideration is to be determined with reference to the date of the option rather than the date of its exercise."); In re Air Vermont, Inc., 44 B.R. 440, 443 (Bankr. D.Vt. 1984) ("[T]o determine whether an option to purchase is for nominal consideration, the option price should be compared with the fair market value of the subject matter, not as of the time the option is to be exercised, but as of the formation of the agreement."); Polinsky v. Vaughan, 268 Cal.App.2d 183, 194 (Cal. App. 1968) ("In case of the exercise of an option, the value at the time the option was given is considered the measure of the adequacy of the consideration.").

The Put Option Agreement was supported by sufficient consideration – namely the transfer of more than 20 million shares of stock in DTI pursuant to the Second Amended

Agreement.[1] Furthermore, at the time the parties entered into the Put Option Agreement, and at the time Weinstein transferred his stock certificate to the escrow agent, his remaining shares in DTI existed and had value. In fact, around the time of the parties entered into the Second Amended Agreement and the Put Option Agreement, DTI was valued between $300 to $500 million by an accounting firm retained by KLTT. (L.F. 500). (Weinstein's remaining shares represented approximately 1/3 of the total shares in DTI.) Because consideration is measured at the time of the agreement, the consideration was adequate. See, e.g., Union Pac., 401 S.W.2d at 536; Air Vermont, 44 B.R. at 443; Polinsky, 268 Cal.App.2d at 194.

Risk is part-and-parcel of an option contract. Gambling on the value of stock at a later date gives option agreements value. At the time the option agreement here was executed, both parties assumed risk and either could have come out ahead. If Weinstein's remaining shares in DTI had risen in value while DTI was under KLTT's control, he could have sold his shares on the open market for more than $15 million. Or, if Weinstein had believed his shares would continue to increase in value, he could have held on to them, exercised his option at any time during the two-year window provided under the Put Option Agreement, and received the appraisal value of the shares as provided under the Put Option Agreement. Finally, he could have allowed the option to expire, waiting to see whether

[1] In fact, the Second Amended Agreement specifically provides that KLTT will grant a put option to Weinstein in exchange for the covenants and undertakings contained in the agreement. (L.F. 302).

KLTT would exercise its call option and force him to sell his shares at the appraised price. If, on the other hand, Weinstein's remaining shares decreased in value, or even ceased to have any value at all, Weinstein could recover, at a minimum, $15 million. When the parties entered into the Put Option Agreement, no one was sure how DTI's fortunes would turn, or who would come out ahead under the parties' agreements. The only thing that was certain was that Weinstein would get a minimum of $15 million if he exercised his option in the time and manner dictated by the parties' agreement.

To allow an optionor to escape obligation under an option contract when the return on its risk is poor, or, even negative, renders option agreements worthless. An option based on consideration is not a meaningless promise, but is a binding contract within the traditional and accepted sense. It is "abundantly settled" that the optionee may enforce it. See, e.g., WILLISTON ON CONTRACTS § 67.83 and cases cited therein. Weinstein should not be deprived of the benefit of his bargain simply because KLTT has now decided that it struck a bad deal. There has been no "failure of consideration," and no justification for KLTT's failure to abide by its contractual obligations. The trial court erred.

Likewise, the Court of Appeals, which rested its holding on "basic concepts of contract law," is in fact wholly incompatible with the very concepts to which it professes to adhere. To arrive at its decision in this case, the Court of Appeals first assessed the consideration for the Put Option Agreement, but not, as basic principles of contract law dictate, at the time the agreement was entered into. Instead, the Court of Appeals looked at the consideration as it existed at the time of Weinstein's exercise of the option. After noting that the consideration had no value at the time of Weinstein exercise of the option due to the bankruptcy of DTI, the Court of Appeals concluded, in violation of the well-established rule prohibiting courts from assessing the adequacy of consideration, that KLTT was excused from its obligations under the Put Option Agreement due to a failure of consideration.

To justify its diversion from the firmly-established rule that consideration must be assessed at the time the contract is executed, the Court of Appeals rationalized that consideration for an option contract must be assessed at the time the option is exercised because, upon exercise, a unilateral option agreement ripens into a bilateral contract. This distinction, however, does not justify the Court of Appeal's wholesale disregard for black-letter law. As with all other contracts, the consideration for obligations imposed by an option agreement must be assessed at the time the contract is entered into – not at the time the option is exercised. See 12A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5575; Air Vermont, 44 B.R. at 443; Polinsky v. Vaughan, 268 Cal.App.2d 183, 194 (Cal. App. 1968). The reason for the rule is simple: An option is, by its very nature, premised on the notion of risk. See, e.g., Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 491 (7th Cir. 2001) ("Put options are strategic hedges designed to protect against a general risk of declining . . . prices."). Any other rule would essentially take the risk out of the equation.

The idea that consideration must be assessed at the time of the exercise of an option, and that obligations under an option can be avoided if the bargained for consideration turns out to be valueless, is not only contrary to the "basic concepts of contract law" which the Court of Appeals purported to apply in this case, it is inimical to the very nature of an option. An option is a risk-shifting device. As the court explained in Market Street Ltd. Partners v. Englander Capital Corp.,1993 WL 212817, *1 (S.D.N.Y. 1993):

> A put option is like an insurance policy in that it establishes a floor at which the holder will be able to sell the underlying security; if the security's price drops below the option's stated exercise price, the holder will be able to invoke the option and sell the security at that higher exercise price. On the other side, the option writer takes on the downside risk in exchange for the price of the option. If the price of the security falls precipitously, the writer may incur a significant loss when the option is exercised.

By focusing on the consideration as it existed at the time of exercise of the option, the Court of Appeals wholly overlooked not only the clear allocation of risk under the parties' agreements as well as the consideration that passed to KLTT at the time the Put Option Agreement was executed, but also 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. Under Missouri law, consideration for a contract must be assessed at the time the parties' entered into the agreement. See, e.g., Union Pac., 401 S.W.2d at 536. The fact that the party receiving the consideration ultimately realized little or no economic benefit is immaterial. "[T]he law does not concern itself with the adequacy of the consideration." Doss, 901 S.W.2d at 220. Diminished value of the consideration – and even a complete of lack of value – does not result in a failure of consideration. See, e.g., See, e.g., Union Pac., 401 S.W.2d at 536 ("If promisor gets what he bargained for, there is no failure of consideration although what he receives become less valuable or of no value at all.") (emphasis added); Vorchetto, 14 S.W.2d at 686 ("[I]t is well settled that because one suffers a disappointment in his bargain a failure of consideration does not arise. . . .").

In consideration for the initial transfer of approximately 20 million shares of stock in DTI, KLTT, among other things, promised to pay Weinstein $15 million if and when Weinstein exercised his put rights. An option based on consideration is not a meaningless promise, but is a binding contract within the traditional and accepted sense. It is "abundantly settled" that the optionee may enforce it. See, e.g., WILLISTON ON CONTRACTS § 67.83 and cases cited therein. Here, in exchange for KLTT's promise to pay Weinstein the $15 million floor value of the shares, Weinstein gave over 20 million shares of DTI to KLTT. Furthermore, at the time the parties entered into the Put Option Agreement, and at the time Weinstein transferred his stock certificate to the escrow agent, his remaining shares in DTI existed and had value. Under these facts, and under well-settled principles of contract law, there has been no "failure of consideration," and no justification for KLTT's failure to abide by its contractual obligations. See, e.g., Union Pac., 401 S.W.2d at 536; Air Vermont, 44 B.R. at 443; Polinsky, 268 Cal.App.2d at 194; See also WILLISTON ON CONTRACTS § 7:21 ("[T]ransferring worthless corporate stock will serve as consideration so long as it is clear that there is no fraud or other impropriety involved in the transaction and so long as it can be said that the promisor was in fact bargaining for what he received."); Malloy v. Short, 1991 WL 86205 (Conn. Super. May 9, 1991) (though stock may have been worthless when stock purchase agreement was entered into and note supporting the sale of the stock came due, there was sufficient consideration for the note where maker was aware of the corporation's financial condition when he entered into the agreement); Napoli v. Cavalier, 163 A.2d 824, 825 (D.C. App. 1960) (where buyer of 51% of stock in corporation also owned remaining 49% and was active in the corporate business, buyer would not be heard to complain that alleged insolvency of corporation and worthlessness of stock caused a lack of consideration for the note which the buyer gave in consideration for the stock transfer).

II. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN PERFORMED AND SATISFIED ALL CONDITIONS PRECEDENT UNDER THE TERMS OF THE PARTIES' AGREEMENT, IN THAT WEINSTEIN DELIVERED TO THE ESCROW AGENT A STOCK CERTIFICATE REPRESENTING HIS REMAINING SHARES IN DTI IN ACCORDANCE WITH THE PUT OPTION AGREEMENT, AND EXERCISED HIS PUT OPTION RIGHTS IN THE TIME AND MANNER REQUIRED UNDER THE PUT OPTION AGREEMENT.

In its suggestions in opposition to Weinstein's motion for summary judgment, and its memorandum in support of its motion, KLTT argued that it has no obligation to pay Weinstein the $15 million floor value for his put option because the common stock in DTI holdings was cancelled and extinguished during the DTI bankruptcy proceedings. As KLTT argued in its suggestions in opposition to Weinstein's motion for summary judgment, and its memorandum in support of its own motion, "[i]n order for KLTT to be required to pay

Weinstein under the Put Option Agreement . . . Weinstein must have common stock to sell to KLTT." (L.F. 515-16; L.F. 760).

By granting KLTT's motion for summary judgment, in reliance on a non-existent contractual provision requiring that Weinstein "have common stock to sell to KLTT" when he exercised his put option, the trial court improperly rewrote the parties' agreement. See, e.g., Brewer v. Devore, 960 S.W.2d 519, 522 (Mo. App. 1998) ("This court cannot make a contract for the parties they did not make or impose upon them obligations not assumed in the contract."); Grantham v. Rockhurst University, 563 S.W.2d 147, 152 (Mo. App. 1978) ("To sustain this contention it would be necessary for the court to rewrite the contract, which we cannot do."); Servco Equipment Co. v. C. M. Lingle Co., 487 S.W.2d 869, 871 (Mo. App. 1972) ("Conditions precedent are not a favorite of the law and will not be read into a contract by implication."). It is a fundamental principle of contract law that courts must enforce an agreement pursuant to the clear terms of the contract. See, e.g., Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. 1997) ("It is a well-established principle of contract construction that, when a contract is clear, the court is bound to enforce the terms as written"); Chehval v. St. John's Mercy Medical Ctr., 958 S.W.2d 36, 39 (Mo. App. 1997) ("Where a contract uses plain and unequivocal language, it will be enforced as written."); Lake Cable, Inc. v. Trittler, 914 S.W.2d 431, 435-36 (Mo. App. 1996). Here, the express terms of the Put Option Agreement, the Second Amended Agreement, and the Stock Escrow Agreement impose no requirement that Weinstein own common stock in DTI at the time of the exercise of his option.

The trial court's holding is based on a fundamental misunderstanding of the parties' obligations under the series of contracts that govern the parties' rights and duties under the Put Option Agreement. This is how the agreements, which KLTT and its attorneys negotiated and executed, work:

- Pursuant to section 1.5 of the Second Amended Agreement, section 4 of the Put Option Agreement, and section 1 of the Stock Escrow Agreement, Weinstein was obligated to deliver and deposit with the escrow agent a stock certificate evidencing his remaining shares in DTI, together with a duly endorsed stock power on the closing date of the parties' agreement. (L.F. 305; L.F. 414-15; L.F. 419).
- Pursuant to section 1.1 of the Put Option Agreement, Weinstein was granted the right to exercise his put option at any time between September 1, 2003 and August 31, 2005. (L.F. 413).
- To exercise the put option, Weinstein was required to deliver to the escrow agent a duly executed written notice of exercise and the Put Option Agreement. (L.F. 413-14).
- Upon Weinstein's exercise of the put option, KLTT was obligated to pay Weinstein a minimum of $15 million in accordance with section 1.3 of the Second Amended Agreement. (L.F. 303-04).
- Upon receipt of the notice of exercise and Put Option Agreement, the escrow agent was required to deliver the stock certificate and stock power

to KLTT (both of which had been in the escrow agent's possession since the closing date). (L.F. 419-20).

Under the explicit terms of the parties' agreements, there are just two conditions precedent to KLTT's performance. First, Weinstein must deliver a stock certificate representing his remaining shares in DTI to the escrow agent at the time of the close of the transaction in December 2001. ((L.F. 305; L.F. 414-15; L.F. 419). Second, Weinstein must exercise his put rights, at any time between September 1, 2003 and August 1, 2005, in accordance with the Put Option Agreement by delivering to the escrow agent a duly executed written notice and the Put Option Agreement. (L.F. 414). Nowhere do the agreements provide that "[i]n order for KLTT to be required to pay Weinstein under the Put Option Agreement . . . Weinstein must have common stock to sell to KLTT." (L.F. 515-16; L.F. 760). Weinstein owned the remaining shares in DTI, and these shares had value and existed, at the time Weinstein put the stock certificate in escrow. This is all the Put Option Agreement required.

The Put Option Agreement was negotiated by two sophisticated parties, well-versed in the negotiation of complex business mergers and the steps needed to protect their own interests. KLTT could have negotiated an agreement that addressed the very real (and known) possibility that the escrow agent would be holding little more than a piece of paper when Weinstein exercised his option. It did not. Instead, KLTT agreed to a floor value for the put option of $15 million – applicable without regard for the value or even the existence of the DTI stock. In doing so, KLTT assumed the risk that, at the time of the exercise of the option, Weinstein's shares would have decreased in value, or even been cancelled and extinguished in bankruptcy.[2] Parties to a contract, especially sophisticated parties who have bargained at arms-length, are bound by the terms of their

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[2] KLTT publicly acknowledged this risk to Weinstein. In reports filed with the Securities and Exchange Commission after the bankruptcy, GPE and its wholly owned subsidiary, KCP&L, continued to acknowledge KLTT's obligation to pay Weinstein the aggregate exercise price of $15 million. For example, in a GPE and KCP&L's Form 10-K filed with the Securities and Exchange Commission for the fiscal year ended December 31, 2002, GPE and KCP&L described the parties' rights and obligations under the Put Option Agreement as follows:

> The put option allows Weinstein to sell his remaining shares to KLT Telecom during the period beginning September 1, 2003, and ending August 31, 2005. The put option provides for an aggregate exercise price for these remaining shares equal to their fair market value, with an aggregate floor amount of 15 million dollars.

(L.F. 459; see also L.F. 464).

In keeping with its continued acknowledgement of liability, KLTT has reserved the $15 million floor value of the Weinstein's put option on its financial books and records at all times since the December 2001 bankruptcy of DTI. (L.F. 469). At no time after the 2001 bankruptcy has the $15 million accrual been reversed. (L.F. 469).

KLTT's public admissions and its accounting treatment of the $15 million liability to Weinstein beg the question: if there was indeed a requirement under the parties' contract. This is true even if the terms seem to operate unfairly, or cause the contract to not be financially beneficial to one of the parties. See, e.g., Vondera v. Chapman, 180 S.W.2d 704, 705 (Mo. 1944).

In this case, KLTT bargained for a representation and warranty from Weinstein that he would hold "good, valid and marketable title" to the remaining shares in DTI for only one year after January 25, 2001 – the closing date of the purchase and sale of the initial shares.[3] (L.F. 310; 317). KLTT could have bargained for a longer representation and warranty period from Weinstein, but it did not. Indeed, 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, but it did not. Instead, under the express terms of the parties' agreement itself, it is clear that the risk

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agreement that Weinstein "have common stock to sell to KLTT," why did KLTT continue, after the bankruptcy court's extinguishment and cancellation of all equity interests in DTI, to acknowledge its obligation to pay Weinstein a minimum of $15 million under the Put Option Agreement? The answer is simple: there is no such provision.

3 Under section 3.6 of the Second Amended Agreement, Weinstein warranted that he would have "good, valid and marketable title" to the remaining shares in DTI. (L.F. 310). However, under section 6.2 of the Second Amended Agreement, this warranty was valid for only one year from the closing date of the purchase and sale of the initial shares. (L.F. 317).

that the remaining shares would diminish in value – or even cease to exist at all – was on KLTT in September of 2003 when Weinstein exercised his put option rights.

Under the clear terms of the Put Option Agreement, Weinstein is entitled to payment of the $15 million floor value – without regard for the value or even the existence of the DTI stock. The trial court erred. See Brewer, 960 S.W.2d at 522.

III. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY THE TERMS OF THE BANKRUPTCY PLAN, IN THAT THE BANKRUPTCY COURT DID NOT DISCHARGE KLTT'S CONTRACTUAL OBLIGATIONS TO WEINSTEIN UNDER THE PUT OPTION AGREEMENT.

As its next defense, KLTT portrayed Weinstein's breach of contract action against KLTT as "an inappropriate collateral attack on the Bankruptcy Court's Order," and argues that Weinstein is estopped from challenging the bankruptcy court's confirmation of the DTI bankruptcy plan. (L.F. 530; L.F. 769). Relatedly, KLTT argued that "Weinstein has waived his rights to recover under the Put Option Agreement by failing to object to the bankruptcy plan before it was approved and made a final judgment of the bankruptcy court and by failing to appeal the final judgment of the bankruptcy court." (L.F. 534).

These arguments constitute a fundamental misstatement of the nature of the dispute before this Court. This is a breach of contract action against KLTT. This is not a breach of contract action against DTI. Weinstein is not asking to restore his equity interests in DTI. He seeks to enforce the terms of an option granted by KLTT, under which KLTT promised to pay Weinstein a minimum of $15 million when he exercised his option. The bankruptcy court did not (and could not) extinguish KLTT's obligation to abide by its contractual obligations. See, e.g., Johnson v. Home State Bank, 501 U.S. 78, 82 (1991) ("[A] discharge extinguishes only 'the personal liability of the debtor.'"); In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir.1995), cert. denied, 517 U.S. 1243 (1996) ("This court has repeatedly held without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors."); Matter of Zale Corp., 62 F.3d 746, 760 (5th Cir.1995) (stating that section 524 prohibits the discharge of debts of nondebtors). The bankruptcy court is prohibited from discharging KLTT's debts because KLTT was a non-debtor in the DTI bankruptcy.

To reiterate: Weinstein's claim is for breach of contract against KLTT. The trial court erred in holding that Weinstein's claim was barred by the bankruptcy court's order.

IV. THE TRIAL COURT ERRED IN GRANTING KLTT'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY SECTION 1.3(C) OF THE SECOND AMENDED AGREEMENT, IN THAT WEINSTEIN DID NOT SELL OR DISPOSE OF HIS REMAINING SHARES IN DTI BY VOTING TO PLACE DTI IN BANKRUPTCY.

As its next defense, KLTT argues that it has no obligation to pay Weinstein because section 1.3(c) of the Second Amended Agreement provides that if Weinstein has "sold or disposed" of any of his remaining shares in DTI, the $15 million floor value for the shares will be reduced proportionately. (L.F. 303-04) (emphasis added). KLTT argued that it is relieved of its contractual obligations because, by participating in the decision to place DTI in bankruptcy as a member of the DTI Board of Directors, Weinstein "sold or disposed" of his remaining shares in DTI.

Section 1.3(c) provides as follows:

> Notwithstanding the appraisal process described above, the Remaining Shares Put Exercise Price shall have an aggregate floor amount ("Floor Value") equal to the sum of (i) $15,000,000 . . . provided, however, 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. 304) (emphasis in original).

The Court should apply to Weinstein the standard that KLTT applies to itself. See, e.g., Graham v. Goodman, 850 S.W.2d 351, 355 (Mo. banc 1993) (terms in contract may be interpreted in light of contracting parties' own interpretation of the contract); Pratt v. Seventy-One Hawthorne Place Associates, L.P., 106 S.W.3d 608, 614 (Mo. App. 2003) (where term of contract is undefined, court can interpret term in accordance with parties' interpretation). By participating in the decision to place DTI in bankruptcy, Weinstein neither "sold" nor "disposed" of his remaining shares in DTI. As KLTT itself explained:

> It was not the act of filing for bankruptcy that cancelled and extinguished Weinstein's equity interest in DTI Holdings. It was the order of the bankruptcy court in confirming the bankruptcy plan, after providing proper notice and a hearing, that cancelled and extinguished Weinstein's common stock in DTI Holdings. The bankruptcy court's Order eliminated Weinstein's equity interests in DTI Holdings, not the filing of a voluntary petition in bankruptcy. . . . Thus, even though KLTT's officers serving on the DTI Holdings' board of directors voted in favor of DTI Holdings filing a voluntary bankruptcy petition, this action did not cancel or extinguish Weinstein's equity interest in DTI Holdings.

(L.F. 766) (emphasis added).

Under KLTT's own arguments, Weinstein could not have "sold or disposed" of his DTI stock by participating in the decision to place DTI in bankruptcy. In fact, KLTT – which held majority control of the DTI board – repeatedly eschewed any responsibility for the very same decision in its summary judgment papers. To disassociate itself from the decision to place DTI in bankruptcy, KLTT described the DTI bankruptcy as follows:

> The special committee investigated the possibility of bankruptcy at the unanimous direction of the Board. 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 Holdings to file for

bankruptcy protection. . . . KLTT did not cause Weinstein's failure or inability to deliver actual shares of common stock.

(L.F. 763).

If KLTT, which held majority control of the DTI Board, did not cause "Weinstein's failure or inability to deliver actual shares of common stock," Weinstein surely did not. The trial court erred in denying Weinstein's motion for summary judgment, and entering summary judgment in favor of KLTT.

V. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN IS ENTITLED TO PAYMENT OF THE $15 MILLION FLOOR VALUE UNDER THE TERMS OF THE PUT OPTION AGREEMENT, IN THAT THE PUT OPTION AGREEMENT WAS A VALID AND ENFORCEABLE CONTRACT SUPPORTED BY CONSIDERATION, WEINSTEIN FULFILLED ALL CONDITIONS PRECEDENT TO KLTT'S PERFORMANCE, AND KLTT'S AFFIRMATIVE DEFENSES FAIL AS A MATTER OF LAW.

The validity of KLTT's commercial frustration and equity defenses may arise on any remand. They have been fully briefed by the parties. In addition, issues raised in KLTT's motion for summary judgment are identical to those raised in Weinstein's motion. An appellate court may entertain an appeal of the denial of a motion for summary judgment where the denial is "intertwined with the propriety of an appealable order granting summary judgment to another party." Fischer v. City of Washington, 55 S.W.3d 372, 381 (Mo. App. 2001). In addition, an appellate court may consider the denial of a motion for summary judgment as a matter of "judicial efficiency and economy" if "a question of law is almost certain to arise on retrial and has been fully briefed by the parties." SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP, 128 S.W.3d 534, 537 (Mo. App. 2003). Accordingly, Weinstein respectfully requests that this Court consider not only the propriety of the trial court's entry of summary judgment in favor of KLTT, but also the propriety of the trial court's denial of Weinstein's motion for summary judgment.

The issues are whether the Put Option Agreement was supported by consideration, whether Weinstein fulfilled all conditions precedent, and whether KLTT's defenses fail as a matter of law. Consideration, which is a basic element of a valid contract, is simply something of value that moves from one party to the other. See Sumners v. Service Vending Co., Inc., 102 S.W.3d 37, 41 (Mo. App. 2003). In Greenberg v. Morris, 436 S.W.2d 734, 738 (Mo. 1968), consideration was defined as:

> [A] benefit to the party promising, or a loss or detriment to the party to whom the promise is made. Benefit, as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled, and detriment means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise.

There is no dispute that the Put Option Agreement was supported by consideration; namely, the transfer of over 20 million shares in DTI.

As for conditions precedent, Weinstein is entitled to the $15 million floor value of the put option if (1) delivered a stock certificate representing his remaining shares in DTI to the escrow agent at the close of the Second Amended Agreement; and (2) exercised his put rights in accordance within the time and manner provided under the agreement. There is no dispute that Weinstein fulfilled both these conditions precedent. (L.F. 502).

The escrow agent currently holds Weinstein's stock certificate, which Weinstein transferred to the escrow agent at the close of the Second Amended Agreement, and which represented common stock in DTI at the time of the transfer. In addition, the escrow agent has received a notice of exercise from Weinstein which fully complies with both the Put Option Agreement. Weinstein has fully performed all contractual obligations, and all "conditions precedent" to KLTT's performance. Given these undisputed facts, Weinstein is entitled to summary judgment.

Finally, all of KLTT's affirmative defenses to Weinstein's breach of contract action fail as a matter of law. As discussed above, in Points I through IV, KLTT's arguments that (1) Weinstein failed to satisfy a condition precedent to KLTT's performance, (2) there was a failure of consideration for KLTT's future performance obligations under the Put Option Agreement; (3) Weinstein's claim is barred by the terms of the bankruptcy court's order, and (4) Weinstein's claim is barred by section 1.3(c) of the Second Amended Agreement, cannot negate KLTT's contractual obligations.

In addition, Weinstein's motion for summary judgment addressed two additional defenses that KLTT raised in its First Amended Answer, but did not raise in its motion for summary judgment. For the reasons stated below, in Points VI and VII, these defenses fail as well, and Weinstein is entitled to judgment as a matter of law.

VI. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT BECAUSE KLTT'S CONTRACTUAL OBLIGATIONS UNDER THE PUT OPTION AGREEMENT ARE NOT EXCUSED BY THE DOCTRINE OF COMMERCIAL FRUSTRATION, IN THAT THE BANKRUPTCY OF DTI WAS FORESEEABLE AT THE TIME THE PUT OPTION AGREEMENT WAS ENTERED INTO AND THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING THE FORESEEABILITY OF THE DTI BANKRUPTCY

In its suggestions in opposition to Weinstein's motion for summary judgment, KLTT invoked the doctrine of commercial frustration, alleging that Weinstein's claim is barred because "the purpose of the transaction has been frustrated by the commercial collapse of DTI Holdings and the resulting Chapter 11 bankruptcy, dissolution of the company, and cancellation and extinguishment of the equity interest therein." (L.F. 523-28). KLTT further alleged that there was a genuine issue of material fact as to the foreseeability of the DTI bankruptcy which precluded summary judgment in Weinstein's favor. (L.F. 523-28).

The doctrine of commercial frustration excuses parties to a contract from further performance if the occurrence of an event, not foreseen by the parties and not caused by or under the control of either party, destroys or nearly destroys the value of the performance. Adbar, L.C. v. New Beginnings C-Star, 103 S.W.3d 799, 801 (Mo. App.

2003). "The application of the doctrine of commercial frustration, is a question of law, to be determined by the court from the facts of the case." Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 166 (S.D. 1987); see also Peoplesoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp.2d 1116, 1119 (N. D. Cal. 2002).

The commercial frustration doctrine has no relevance to the instant dispute. Under firmly-established Missouri law, the doctrine does not apply when the event creating the hardship was reasonably foreseeable and could have been addressed in the contract. See, e.g., Adbar, 103 S.W.3d at 801 ("If . . . the event was reasonably foreseeable, then the parties should have provided for its occurrence in the contract."); Stein v. Bruce, 366 S.W.2d 732 (Mo. App. 1963) ("In case a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide for the contingency in his contract."). "The foreseeability of the frustrating circumstance and the ability of defendant to overcome it are questions of law to be resolved by the court." Northern Illinois Gas Co. v. Energy Cooperative, Inc., 461 N.E.2d 1049, 1059 (Ill. 1984).

Here, the DTI bankruptcy was, by KLTT's own admissions, "reasonably foreseeable." At its deposition, KLTT not only admitted that it was fully aware that the financial future of DTI was in jeopardy before it executed the Put Option Agreement, KLTT also produced numerous internal documents which discuss DTI's financial instability and specifically address the possibility of a DTI bankruptcy. (L.F. 290; L.F. 432-52).

KLTT nonetheless told the trial court that there was a genuine issue of material fact as to the foreseeability of the DTI bankruptcy. (L.F. 528). If the trial court accepted

KLTT's argument, the trial court erred. KLTT's claim that it did not foresee a DTI bankruptcy when it entered into the Put Option Agreement is directly refuted by undeniable documentary evidence demonstrating KLTT's knowledge and awareness of DTI's financial instability when the agreement was executed. (L.F. 290; L.F. 432-52). As such, it cannot create a "genuine" issue of material fact precluding summary judgment. See, e.g., ITT, 854 S.W.2d at 378 ("A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous. Where the 'genuine issues' raised by the non-movant are merely argumentative, imaginary or frivolous, summary judgment is proper."); American Nat. Bank v. Richoz, 545 N.E.2d 550, 554 (Ill. App. 1989) (where "the record demonstrates that the frustrating event of which defendants complain was reasonably foreseeable" summary judgment in plaintiff's favor was proper).

Faced with indisputable evidence that it was aware of and had considered the possibility of a DTI bankruptcy before the Put Option Agreement was entered into, KLTT merely pointed to actions it took to resurrect DTI's financial standing after it acquired a majority interest, and claimed that it genuinely believed that once it took the helm, DTI's fortunes would turn and bankruptcy would no longer be a possibility. (L.F. 527). But any actions KLTT took after it entered into the Put Option Agreement (especially in light of the fact that these actions were intended to avoid a DTI bankruptcy and restore its financial stability) cannot be evidence that the bankruptcy was not foreseeable at the time the parties entered into the Put Option Agreement. Instead, they simply serve to highlight KLTT's knowledge that the future of DTI was at risk. Furthermore, KLTT's purported belief that DTI would rebound under KLTT's control does not establish that a DTI bankruptcy was not "reasonably foreseeable." The relevant question is not whether the party seeking to invoke the commercial frustration doctrine in fact anticipated the "event creating the hardship." The question is whether it should have. See, e.g., Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575, 577-78 (Mo. App. 2000) ("If the event was reasonably foreseeable, however, the parties should have provided for its occurrence in the contract and the absence of such provision indicates an assumption of the risk by the promisor."); Adbar, 103 S.W.3d at 801-02. KLTT not only could have reasonably foreseen the DTI bankruptcy, it was actually aware of the risk and assumed that very risk.

Disregarding its own admissions that it knew of and had specifically considered the risk of a DTI bankruptcy before entering into the Put Option Agreement, KLTT relied on Howard v. Nicholson, 556 S.W.2d 477 (Mo. App. 1977), in its opposition papers as support for the proposition that the "future bankruptcy of a particular corporation is not foreseeable." (L.F. 528). Howard, however, does not stand for such a broad and untenable proposition. In Howard, the parties entered into a contract to construct a building for use as a bridal shop. Sometime thereafter, the prospective tenant declared bankruptcy. Finding that the tenant's bankruptcy was not a foreseeable event that would preclude application of the doctrine of commercial frustration, the court stated:

> 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. The bankruptcy of Honey's was a fortuitous and unexpected supervening event over which no party had control.

Id. at 483.

Howard does not render the DTI bankruptcy a "fortuitous and unexpected supervening event." The fact that the parties in Howard did not foresee the bankruptcy of a prospective tenant certainly does not mean that the bankruptcy of DTI – a company experiencing known financial difficulties – was not "reasonably foreseeable." To determine whether a supervening event was "reasonably foreseeable," the court must consider "the relation of the parties, the terms of the contract, and the circumstances surrounding the formation of the contract." Werner, 10 S.W.3d at 577. In this case, the relation of the parties and the circumstances surrounding the formation of the Put Option Agreement leave no doubt that a DTI bankruptcy was "within the contemplation" of KLTT at the time of contracting. KLTT's own admissions show that it was fully aware of the risk of a DTI bankruptcy when it entered into the Put Option Agreement. (L.F. 290; L.F. 432-52). Unlike the bankruptcy at issue in Howard, the DTI bankruptcy was neither "fortuitous" nor "unexpected."

Missouri courts have repeatedly recognized that the doctrine of commercial frustration should be "limited in application so as to preserve the certainty of contracts." See, e.g, Adbar, 103 S.W.3d at 801; Werner, 10 S.W.3d at 578; Shop 'N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851, 863 (Mo. App. 1996); Conlon Group, Inc. v. City of St. Louis, 980 S.W.2d 37, 40 (Mo. App. 1998); In re Liquidation of Prof. Med. Ins.

Co., 88 S.W.3d 471, 478 (Mo. App. 2002). This case does not present the type of extraordinary circumstances that warrant application of the doctrine. KLTT is a sophisticated business entity. It was unquestionably aware of the risk that DTI would go bankrupt and its stock would be rendered worthless. Having failed to address this recognized risk in the parties' contract, KLTT cannot rely on the doctrine of commercial frustration to escape its contractual obligations. See, e.g., Adbar, 103 S.W.3d at 801; Conlon Group, 980 S.W.2d at 40 (Mo. App. 1998). See also Bruce, 366 S.W.2d at 732 ("In case a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide for the contingency in his contract."). The trial court erred in allowing KLTT to avoid its obligations to Weinstein, and denying Weinstein's motion for summary judgment.

VII. THE TRIAL COURT ERRED IN DENYING WEINSTEIN'S MOTION FOR SUMMARY JUDGMENT, BECAUSE WEINSTEIN'S CLAIM IS NOT BARRED BY PRINCIPLES OF EQUITY, IN THAT EQUITY WILL NOT RELIEVE A PARTY OF CONTRACTUAL OBLIGATIONS SIMPLY BECAUSE THE CONTRACT PROVED NOT TO BE FINANCIALLY BENEFICIAL.

As its final defense, KLTT invokes "general principles of equity" and argues that because "KLTT has lost over $158 million that it invested and loaned to DTI Holdings, Inc. and Digital Teleport, Inc. since December of 2000, whereas Weinstein has received $32 million for his initial shares in DTI Holdings, Inc.," Weinstein's claim should be barred. (L.F. 535).

However sympathetic the Court may be to KLTT's plea, the Court should follow the law. In retrospect, KLTT may have been mistaken in its business decision, but its mistake cannot excuse its contractual obligations. See, e.g., Vondera, 180 S.W.2d at 705 (Mo. 1944); Williams v. Walls, 964 S.W.2d 839, 850 (Mo. App. 1998). Under the terms of the parties' agreement, KLTT promised – without qualification – to pay Weinstein a minimum of $15 million when he exercised his put option. It is the policy of the law to encourage freedom of contract. To excuse KLTT from this contractual obligation would establish a harmful precedent as to contracts. "Sophisticated parties have freedom of contract – even to make a bad bargain." Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc., 59 S.W.3d 505, 508 (Mo. banc 2001). The terms of the contract are clear, so this Court may not rewrite them.

<u>CONCLUSION</u>

For the foregoing reasons, Weinstein respectfully requests that the trial court's entry of summary judgment in favor of KLTT be reversed, and summary judgment be entered in Weinstein's favor.

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CERTIFICATION

I certify that this brief complies with the limitations contained in Rule 84.06 (b) and Rule 55.03. This brief contains 10, 540 words. I further certify that the floppy disk provided to the Court has been scanned for viruses and is virus-free pursuant to Rule 84.06 (g).

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I hereby certify that two copies of the foregoing brief, along with a floppy disk (scanned for viruses pursuant to Rule 84.06 (g)) was sent by First Class U.S. Mail, postage pre-paid on this __ day of September, 2006 to the individuals named below:

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NO. 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
21st Judicial Circuit
The Honorable Carolyn Whittington, Judge

APPENDIX TO SUBSTITUTE BRIEF OF APPELLANT RICHARD D. WEINSTEIN

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