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

IN RE: SILVER LEAF, L.L.C.,	)	
a Delaware Limited Liability Company	)	C.A. No. 20611

MEMORANDUM OPINION AND ORDER

Submitted: June 20, 2005
Decided: August 18, 2005

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LAMB, Vice Chancellor.

I.

In 2001, the plaintiff and the defendants agreed to form an LLC in order to take advantage of an opportunity to market a new vending machine that is supposed to dispense freshly cooked French fries. In connection with the formation of the LLC, the parties signed a stock purchase agreement and a sales and marketing agreement with the company that owns the manufacturing rights to the vending machines. Soon thereafter, the relationship between the companies deteriorated and the company holding the manufacturing rights terminated the sales and marketing agreement over a dispute related to the stock purchase agreement.

The plaintiff now petitions the court to dissolve the LLC because the members are deadlocked, each side having 50% ownership and the operating agreement requiring majority vote for critical actions. The defendants counterclaim that the plaintiff is in default of its LLC obligations and not allowed to vote its units because of breach of contract, breach of fiduciary duty, and tortious interference, all relating to the terminated sales and marketing agreement.

After trial, the court concludes that the LLC should be dissolved. Not only are the members deadlocked and the LLC's business purpose moot, but it appears as if the LLC, from the outset, was formed as part of a scheme to deceive innocent investors. Thus, the court will not appoint any receiver and no one will be allowed to pursue litigation on behalf of the LLC without this court's approval.

II.

A. The History Of The French Fry Vending Machine

Since much of this litigation focuses on the potential success of marketing the French fry vending machine, the court begins with a short history of the product's beginnings.

In 1994, Edward Kelly, the owner of Mega Products Corporation, a machine design subcontractor, was invited to evaluate a new vending machine that dispensed French fries. When he asked to see the machine, the company informed Kelly that it was not currently working. Kelly testified at trial that "from an engineering standpoint, [not working] is a very bad sign."[1] But he agreed that once the machine was working, he would evaluate it.

"[A]fter several weeks of effort, [the company] finally got th[e] machine to belch out the most disgusting potato product that [Kelly] had ever seen."[2] As he testified at trial, Kelly would not eat it. Additionally, Kelly found the machine slow and unsanitary. For these reasons, Kelly told the company to abandon the idea. When the board of directors read Kelly's evaluation they were furious. But they felt that Kelly could design a better machine and hired him to do so.

[1] Tr. at 5.

[2] *Id.* at 4-11.

Kelly became CEO and president of the company, which would later be known as Tasty Fries, Inc., a Nevada corporation with its principal place of business in Pennsylvania.[3] As Kelly stated at trial, he went to work for Tasty Fries because he "had never seen a product that [he] thought was more exciting than th[e] French fry vending machine."[4] He was excited because he thought the market for the machines would be "endless."[5]

In 1996, Kelly patented a vending machine to prepare, cook, and dispense French fries. One of Kelly's improvements over the previous vending machine was to make a tastier French fry. More than one witness testified at trial about the tastiness of the dispensed French fry.[6] Soon after he patented the vending machine, Kelly assigned his patent rights to Premier Design, Ltd., but granted Tasty Fries the exclusive manufacturing rights.

Notwithstanding Kelly's optimistic views of the French fry vending machine market, Tasty Fries has been hampered by one significant problem: it has not been able to manufacture an operable machine.[7] Although Tasty Fries has published

[3] Tasty Fries and Kelly are not parties to this litigation, but Tasty Fries is paying the legal fees for the plaintiff and counterclaim defendant through the issuance of stock to their counsel.

[4] *Id.* at 10-11.

[5] *Id.* at 11.

[6] *See, e.g.*, Tr. at 321 (David Morey, president of a brand-building consultancy that worked with Silver Leaf, testifying that he tasted the fries and liked the fries); Tr. at 353 (David Romanoff, a defendant, testifying that he "was impressed with the taste of [Tasty Fries's] French fries").

[7] After trial, Tasty Fries allegedly installed its first vending machine in Bellevue Hospital.

positive press releases for years,[8] a significant number of them appear to have been overly optimistic, if not outright misleading. For example, on June 24, 2002, Tasty Fries announced "its plan to install six of its newest generation French fry vending machines with one of the largest vending service companies in the New York metropolitan area."[9] In October 2002, Tasty Fries announced "it will expand the initial installation sites for its patented French fry vending machines to include Philadelphia, PA."[10] As Kelly stated in the October 2002 press release, he expected that Tasty Fries's "installation schedule [would] commence within the next several weeks."[11] In a subsequent press release from April 2003, Kelly announced that Tasty Fries "intend[ed] to install [vending] machines in Pennsylvania, New York, Texas and California."[12] Then, on June 18, 2003, Tasty

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Tasty Fries Machine Completes Test Cycle, at http://www.tastyfries.com/tasttfries_news.htm#20050602 (June 2, 2005).

[8] *See, e.g., Tasty Fries French Fry Vending Machines In Production, at* http://www.tastyfries.com/tasttfries_news.htm#20040831 (Aug. 31, 2004); *Tasty Fries, Inc. Delivers French Fry Vending Machines to Classic Vending, Inc., at* http://www.tastyfries.com/tasttfries_news.htm#20040621 (June 21, 2004); *Tasty Fries Brings French Fry Vending Machines To Market, at* http://www.tastyfries.com/tasttfries_news.htm#20030618 (June 18, 2003).

[9] *Tasty Fries Vending Machines to Debut in New York and Retains 3rd Millennium Management for Investor and Public Relations Services, at* http://www.tastyfries.com/tasttfries_news.htm#20020624 (June 24, 2002).

[10] *Tasty Fries To Install French Fry Vending Machines In The Philadelphia, PA Area, at* http://www.tastyfries.com/tasttfries_news.htm#20021001 (Oct. 1, 2002).

[11] *Id.*

[12] *Tasty Fries, Inc. Contracts With Syllogistix Integration, Inc. and Incorporates Siemens Hardware*, available at http://www.tastyfries.com/tasttfries_news.htm#20030415.

Fries announced that it would bring "its automatic French Fry Vending Machine to the commercial market place on Wednesday, June 25, 2003."[13] None of these predicted installations came to fruition.

Despite its ongoing representations to the public that a commercial rollout was just around the corner, Tasty Fries was unable to place a vending machine in the marketplace before trial in March 2005. At the time of trial, there was only one prototype machine and Tasty Fries was unable to move it from the corporate headquarters.[14] Soon after the trial, however, Tasty Fries allegedly installed one vending machine at Bellevue Hospital in New York City.[15]

Although Kelly initially described an inoperable machine as a bad sign, he and Tasty Fries have managed to stay in business for years without operable machines. Moreover, despite never having sold a vending machine and never

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[13] *Tasty Fries Brings French Fry Vending Machines To Market, at* http://www.tastyfries.com/tasttfries_news.htm#20030618 (June 18, 2003).

[14] The fact that Tasty Fries did not have a working machine that could leave its headquarters made it miss a prime marketing opportunity in March 2002. After a positive article in *The New York Post*, Tasty Fries was invited to appear on *Good Morning America*, with Diane Sawyer conducting the interview. But since Tasty Fries did not have an operable machine that could produce the French fries on camera, it could not accept the invitation. Although one of the defendants blamed the arm of the machine that delivered the fries to the customer, he also acknowledged that Kelly was afraid that the prototype had too many failures and could embarrass them all in front of millions of people. Tr. at 505.

[15] *Tasty Fries Machine Completes Test Cycle, at* http://www.tastyfries.com/tasttfries_news.htm#20050602 (June 2, 2005). In response to the court's May 24, 2005 request for supplemental information, the defendants stated that the prototype machine had been moved from Bellevue to a gas station near the plaintiff's sole stockholder's home. Letter from Charles J. Brown, III, Esquire (June 20, 2005). Tasty Fries does not appear to have published a press release on this recent development, either on its website or on other financial news websites.

having generated a penny in operating revenue,[16] Tasty Fries routinely issues stock.[17] Tasty Fries's continuing ability to issue stock is astounding given the fact that it has raised and spent over $40 million since its inception, spending almost $8 million in research and development costs and over $25 million in selling, administrative, and general expenses.[18]

Although Tasty Fries is arguably a start-up company and, as a start-up, it could reasonably be expected to incur substantial expense with little or no revenue, the facts here indicate that Tasty Fries is little more than a vehicle to raise money from gullible investors, quite possibly in violation of various federal and state laws. On three separate occasions, November 23, 2003, October 13, 2004 and January 13, 2005, Tasty Fries filed a certificate of amendment with the Nevada Secretary of State to increase its authorized stock. "On each certificate, [Kelly] certified that shareholders holding a majority of the shares issued and outstanding voted in favor of the amendment."[19] Kelly's certifications later proved untrue due to a miscalculation about the voting power of certain stockholders. This news

[16] Form 10-QSB for the quarter ended Oct. 31, 2004, filed with the SEC Dec. 15, 2004.

[17] *Id.* Tasty Fries issued 490,345 shares on December 29, 2004; 200,000 shares on July 20, 2004; 89,767 shares on June 30, 2004; 850,000 shares on May 3, 2004; and 900,000 shares on August 8, 2003. Form S-8 filed with the SEC Dec. 29, 2004; Form S-8 filed with the SEC July 20, 2004; Form S-8 filed with the SEC June 30, 2004; Form S-8 filed with the SEC May 3, 2004; Form S-8 filed with the SEC August 8, 2003. Tasty Fries currently trades under the symbol TFRY.PK.

[18] Form 10-QSB for the quarter ended Oct. 31, 2004, filed with the SEC Dec. 15, 2004.

[19] Form 8-K filed with SEC April 12, 2005.

became public information when Tasty Fries filed an 8-K with the SEC on April 12, 2005.

The result of the ineffective certifications is that Tasty Fries has issued over 78,000,000 shares of stock in excess of the 50,000,000 shares authorized by its articles of incorporation.[20] As Tasty Fries admits, those unauthorized shares are void pursuant to Nevada corporate law.[21] Notably, Tasty Fries has not posted facts about the void status of the majority of the stock on its website, which contains extensive investor information, including at least one other SEC filing.[22]

The court now turns to the parties in this litigation who seek to profit from their relationship to Tasty Fries.

B. The Parties

The plaintiff is USIS International Corporation, an Illinois corporation with its principal place of business in New York. Mark Lavi, the counterclaim defendant, is the sole shareholder of USIS. Lavi has been a consultant and an agent for Tasty Fries since 1996.

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[20] *Id.*

[21] *Id.*

[22] *See, e.g., Tasty Fries, Inc. Files Amendment to 10QSB,* http://www.tastyfries.com/tasttfries_news.htm#20031013 (Oct. 13, 2003).

The defendants are Silver Leaf, LLC, Syndi Romanoff ("Syndi"),[23] David Romanoff ("Romanoff"), and Yehuda Segal. Silver Leaf is a Delaware limited liability company that was formed to market vending machines manufactured by Tasty Fries.

C. The Formation Of Silver Leaf

Lavi raised over $6 million in capital investment for Tasty Fries. As part of his effort to find more financing in the spring of 2001, Lavi introduced Segal to Tasty Fries. Soon thereafter, Segal introduced Romanoff to Tasty Fries and Lavi. Segal and Romanoff were both enthusiastic about Tasty Fries's prospects and all three (Lavi, Segal, and Romanoff) agreed to form Silver Leaf for the purpose of pursuing a sales and marketing agreement with Tasty Fries. In connection with the sales and marketing agreement, the three planned to have Romanoff make (or cause someone else to make) a financial investment in Tasty Fries through a stock purchase agreement.

The initial draft operating agreement of Silver Leaf dated April 10, 2001 shows the ownership interest of Silver Leaf divided as follows: Syndi had 45%, Segal had 30%, and Lavi had 25%.[24] A subsequent draft, dated July 21, 2001, of

[23] Syndi Romanoff is David Romanoff's wife. She signed for his interests in Silver Leaf because of concerns about his past liabilities related to other business ventures. Tr. at 363.

[24] JTX 7 Ex. A. Both Romanoff and Segal testified that Lavi originally had a 10% interest, but they were unable to produce a document reflecting that figure.

the operating agreement for Silver Leaf shows the following ownership interests: Syndi had 40%, Segal had 22.5%, and USIS had 37.5%.[25] The final version of the operating agreement executed in December 2001 or January 2002 (but no later than January 9, 2002) ("Operating Agreement") shows these ownership interests: Syndi had 30%, Segal had 20%, and USIS had 50%.[26] All parties agree that the final version represents the correct ownership structure of Silver Leaf.[27]

The fluctuating ownership interests in Silver Leaf relate to the protracted negotiations with Tasty Fries over the sales and marketing agreement ("SMA") of its vending machines. Specifically, Kelly had concerns about the involvement of Romanoff and Segal in Silver Leaf. As Kelly testified, he did not want to sign the SMA with Silver Leaf if Silver Leaf was majority-controlled by two investors whom he had only recently met.[28]

[25] JTX 27 Ex. A. Additionally, the exhibit reflects that nearly half of USIS's voting rights (15% of USIS's 37.5% interest) would be held irrevocably by Romanoff.

[26] JTX 8 Ex. A. In this exhibit, USIS did not give Romanoff or anyone else a share in its voting rights.

[27] PTO at 3.

[28] Tr. at 57 ("Kelly: [Lavi] had to receive 50 percent, or I would have never signed the deal."); JTX 164 at 56 ("Kelly: We only signed the deal because [Lavi] had 50 percent to protect us."); *Id*. at 56-57 ("Kelly: The only way we signed the deal is that [Romanoff] didn't have control. He can't have control, we don't trust him. We don't trust him.").

Due to these concerns, Kelly and Tasty Fries insisted that Silver Leaf put two fail-safes in place. First, Kelly required that USIS (Lavi)[29] have a 50% interest in Silver Leaf before signing the SMA. Second, Kelly required that the SMA have a non-suit clause.[30]

The first fail-safe, Lavi's 50% ownership interest, was intended to act as a veto power against Romanoff and Segal. Pursuant to Section 5.02 of the Operating Agreement, only a majority in interest could take certain important actions on behalf of Silver Leaf. The Section 5.02 states as follows:

> The express written consent of at least a majority in interest of the Members (based upon such Members' Units) not in default of any of such Member's obligations hereunder shall be required to do any of the following:
>
> (a) dissolve the LLC;
> (b) amend this agreement;
> (c) admit any other Member to the LLC;
> (d) subject to Section 9.03 and Section 9.04, consent to the Transfer of an LLC Interest;
> (e) sell, assign, or otherwise Transfer, dispose of or lease any of the assets of the LLC, other than in the ordinary course of the LLC's business;

[29] USIS owns the 50% interest in Silver Leaf and Lavi is the sole shareholder of USIS. Thus, all actions taken on behalf of USIS are taken by Lavi. At times, the court refers to them interchangeably for ease of reading.

[30] The non-suit clause is Section 19.6 of the SMA, which states in relevant part as follows: "Notwithstanding anything contained in this agreement to the contrary, neither party hereto shall be liable hereunder to the other for any damages whatsoever or howsoever designated, whether compensatory, direct, indirect, special, incidental, or consequential including without limitation loss of profits or prospective profit by Silver Leaf or Tasty Fries (collectively, 'disclaimed damages'), whether arising out of or alleged to have arisen out of breach of this agreement and each party hereby further waives the right to sue or arbitrate or otherwise seek formal resolution of any and all disputes arising out of or relating to this agreement." JTX 67.

(f) make any assignment for the benefit of creditors or confess any judgment against the LLC;
(g) borrow money;
(h) enter into any contracts;
(i) hire full-time employees;
(j) appoint officers of the LLC;
(k) determine the compensation of the Manager of the LLC;
(l) purchase real property;
(m) enter into any transaction involving an amount in excess of TEN THOUSAND DOLLARS ($10,000.00); and
(n) any other action not described in this Section 5.02 which requires the affirmative vote or consent of the Members set forth in this Agreement.[31]

Given the language of Section 5.02, Kelly understood Lavi's 50% ownership interest as preventing Romanoff and Segal from making key business decisions without Lavi. Kelly required Lavi to have 50% ownership because he had known Lavi for years and Lavi had raised money for Tasty Fries in the past.[32] Moreover, it appears as if Kelly not only required Silver Leaf to alter its operating agreement, but also withheld his approval of the SMA until Lavi received 50% of Silver Leaf.

[31] JTX 8.

[32] Another equally reasonable explanation is that Kelly had a financial interest in Lavi's stake in Silver Leaf. During a conversation that Kelly and Lavi had with Segal, Lavi continually referred to USIS's 50% ownership in Silver Leaf as belonging to both of them. *See, e.g.*, JTX 164 at 51 ("Lavi: [W]e have the majority 50 percent."); *Id.* at 65 ("Lavi: Imagine if [Romanoff] was a majority holder when he do [sic] to me and Mr. Kelly. We wouldn't survive the day."). At other times, though, Kelly stated that Lavi owned 50% of Silver Leaf. *See, e.g.*, JTX 164 at 4 ("Kelly: Levi [sic] is the biggest shareholder in Silver Lease [sic]"); *Id.* at 14 ("Kelly: [Y]ou're never going to remove Levi [sic] as a 50 percent owner."). Additionally, Lavi stated at trial that he would use his 50% ownership of Silver Leaf to protect Kelly and Tasty Fries. Tr. at 176 (responding to the question of why Lavi did not allow Romanoff and Segal to sue Tasty Fries for breach of contract). Regardless of who actually owned Lavi's 50% in Silver Leaf, it is clear from the record that Lavi and Kelly formed one side of the dispute and Romanoff and Segal formed the other side.

Romanoff testified that he agreed to give Lavi a 50% interest in Silver Leaf only to make sure that Tasty Fries signed the SMA. Once the SMA was signed, Romanoff intended to dilute Lavi to less than 50%, assuring himself and Segal control of Silver Leaf and thus control over the worldwide marketing of Tasty Fries's vending machines. His testimony is as follows:

> Q: The reason you gave – the reason you agreed to Mr. Lavi having 50 percent of Silver Leaf was because you were concerned that if you didn't agree to it, the risk that Tasty Fries would not sign a deal was great. Correct?
> A: I believe I testified that I – gave a chance that it would upset the apple cart. It would upset the deal, yes. He possibly could lose the deal for me, for Silver Leaf.
> Q: And so in order to eliminate that risk, or at least reduce it, you agreed to give him fifty percent?
> A: That's correct.
> Q: And you did it so that you could get to sign the deal with Tasty Fries?
> A: That's correct.
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> * * *
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> Q: Now at the time you agreed to Mr. Lavi having 50 percent of Silver Leaf, it was your intention that at some point in the future you would be able to get some of that interest back; correct?
> A: It was my intent to try to persuade at a future date, USIS to take a dilution of their shares, yes.[33]

Soon after Silver Leaf was formed, Syndi, the initial Manager of Silver Leaf, designated Romanoff as Manager.[34] This right was expressly given to her pursuant to the Operating Agreement. Section 4.01, states, in relevant part, "Syndi [], or her

[33] Tr. at 445-46.

[34] Tr. at 414.

designee, shall be and hereby accepts such designation, as the 'Manager' of the LLC."

A source of some dispute in this matter is the possible conflict between Section 5.02's list of actions requiring majority in interest membership approval and the description of the Manager's powers found in Section 4.01 of the Operating Agreement. Although Section 4.01 states that "[t]he Manager will take under advisement reasonable suggestions from USIS," the Operating Agreement broadly authorizes the Manager to run the operation of the LLC. As Section 4.01 further states, the Manager "shall have the authority to do all things, without the specific consent of the Members, that such Manager determines, in such Manager's sole discretion, to be in furtherance of the purpose of the LLC."

During the time the parties were negotiating the details of the Operating Agreement, they were also meeting to finalize the business plan of Silver Leaf. The critical meeting occurred in the summer of 2001 in Teaneck, New Jersey.[35] All parties were present at that meeting.[36] Kelly also attended, as well as third party marketers and finance people.[37] At the meeting, Kelly spoke to the group about Tasty Fries and the history of the French fry vending machine.[38] In addition,

[35] *Id.* at 42.
[36] *Id.* at 43.
[37] *Id.*
[38] *Id.*

the group discussed Silver Leaf's plan to use the NEWCO model to market the vending machines.[39] The NEWCO model involved selling exclusive geographic territories to distributors, who would then sell the vending machines within their territories.[40] Under the NEWCO model, which was the only business plan developed by parties, Silver Leaf would sell territories, not vending machines.

D. The Stock Purchase Agreement

During the time that the parties were negotiating the Operating Agreement of Silver Leaf and the SMA, they were also negotiating the stock purchase agreement with Tasty Fries and Kelly. Indeed, the timing of the agreements leads the court to conclude that the three agreements were linked. Of particular note is the fact that Kelly did not sign the SMA until after the stock purchase agreement's terms were finalized, as evidenced by a letter from Romanoff to Lavi on January 9, 2002.[41]

[39] Kelly and Lavi dispute the account that the group discussed the NEWCO model. Tr. at 45-46; Tr. at 187-88. Their testimony is clearly refuted by the photographic evidence that shows them standing in front of whiteboards bearing the word "NEWCO" among other aspects of the business plan. JTX 199.

[40] Tr. at 355.

[41] JTX 63.

The final term sheet, titled "Terms [sic] sheet – Tasty Fries-Silver Leaf," is dated January 8, 2002.[42] The material terms listed in that document are reflected in the January 9, 2002 letter from Romanoff to Lavi, which Lavi signed on January 10.[43] The term sheet's financing breaks down as follows. The first tranche is $225,000 in return for 1,500,000 "free trading shares"[44] or $.15 per share. The second tranche is $300,000 in return for 3,000,000 shares or $.10 per share. The third tranche is $475,000 in return for 3,750,000 shares or $.20 per share and is listed as "payable within 30 days."[45] The fourth tranche is in return for $875,000 and is labeled an option. The fifth tranche, also labeled an option, is in return for $2 million. The first four tranches have the initials "DR" next to them, presumably an indication for David Romanoff, while the final tranche has an indication of "SL/Partners," presumably an indication for Silver Leaf and its partners.

Although the order of the first two tranches was later reversed, there is no dispute that those tranches were paid. On January 16, 2002, USIS received $300,000 in trust for Tasty Fries, which it transferred to Tasty Fries upon the issuance of 3,000,000 shares. On January 24, 2002, USIS received $225,000 in

[42] JTX 62.
[43] JTX 63.
[44] JTX 62.
[45] *Id.*

trust for Tasty Fries, the balance of which it transferred to Tasty Fries upon the issuance of 1,500,000 shares, after certain substantial deductions.[46]

The unusual aspect of the first two tranches is that despite the initials "DR" on the term sheet, Romanoff did not pay for and did not receive the shares. Instead, the parties agree that Romanoff only arranged to obtain the required money from a third party. Romanoff's January 9, 2002 letter implies that he would be providing the financing, but he never explicitly states that the monies are coming from him.

The first two tranches were actually funded by Dr. Leon Pirak, who appears to have no other connection to either Tasty Fries or Silver Leaf before 2002.[47] In a secret agreement dated January 11, 2002, Romanoff and Pirak agree that Pirak will fund the $300,000 tranche. The agreement further states that, in exchange for his money, Pirak will receive the corresponding 3,000,000 shares listed on the term sheet. Unlike the term sheet, however, the confidential agreement describes the shares as restricted Rule 144 shares, i.e. untradeable for one year.[48] The agreement also specifies that Romanoff and Pirak will split any profits from the sale of the shares 30% (Romanoff) and 70% (Pirak).

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[46] *See* n.57, *infra.*

[47] In February 2002, Tasty Fries hired Pirak as a flavor consultant at $250 per hour. JTX 233.

[48] JTX 64.

Another unusual aspect of Pirak's funding is the fact that Tasty Fries issued the initial 3,000,000 shares to Syndi, not Pirak. Romanoff claims that issuing the shares to Syndi was merely an administrative matter because Pirak had not set up an LLC to hold the shares. Lavi paints a different picture, claiming that Romanoff wanted the shares issued to Syndi in order to hide the fact that Romanoff was not funding the stock purchase agreement. Regardless of what the real reason is, the shares from the first tranche were issued to Syndi. The shares were then transferred to Pirak for no consideration. This transfer became the subject of a later claim against Pirak under the Securities Act of 1933 in the United States District Court for the District of New Jersey. After an extensive discussion, the District Court concluded that this transfer did not violate the federal securities law.[49] The District Court subsequently granted summary judgment to Pirak and dismissed him as a defendant in that litigation.[50]

[49] *Tasty Fries, Inc. v. Romanoff*, C.A. No. 02-5005(JWB), at 14 (D.N.J. June 13, 2003). Pirak argued that (i) "the issuance of the Securities in Syndi Romanoff's name was in error, and that a re-issuance of the Securities in [Pirak's] name [did] not constitute a prohibited 'resale' under 17 C.F.R. § 230.144 ('Rule 144')" or (ii) "even if the transfer of the Securities from Syndi Romanoff to Pirak is deemed a resale, this transfer is a 'private exempt transaction' that is permissible under a so-called Section 4(1)½ Exemption." *Id.* at 3.

[50] *Id.* at 14 (finding that the transfer between Syndi and Pirak was valid under the Section 4(1)½ Exemption because "it was a private transfer, a purely ministerial act, and not a disguised public distribution").

Pirak also made the payment of the $225,000 tranche.[51] This time, however, the shares of Tasty Fries were issued directly to him.

Although the parties did not explore the details of what happened to the shares transferred to Pirak, such as when he sold them and what price he received, Romanoff's testimony made it clear that Pirak was able to recoup the $525,000 that he paid to Tasty Fries. When asked about Pirak's position in Tasty Fries, Romanoff answered that "[m]y understanding was, from a conversation I had with him – was that he made up his investment by selling the shares."[52] While Romanoff did not provide the details of Pirak's sales, his testimony permits the reasonable inference that Pirak made a profit by selling the first two tranches on the open market and that Romanoff knew he made a profit. Obviously, Romanoff would want to know how well Pirak did so that he (Romanoff) could get his cut of the profits pursuant to their secret agreement.

E. The Dispute

On January 22, 2002, shortly after working out the details of the stock purchase agreement, Romanoff, signing for Silver Leaf, and Kelly, signing for Tasty Fries, executed the SMA.[53] Although Kelly still had concerns whether

[51] PTO at 5.
[52] Tr. at 438.
[53] JTX 67.

Romanoff would pay the money pursuant to the stock purchase agreement, he agreed to the SMA because it had the non-suit clause. That clause functioned as a protection for Tasty Fries in case Romanoff was unable or unwilling to fund any of the first three tranches of the stock purchase agreement.

On February 23, 2002, Romanoff, again signing for Silver Leaf, and Kelly, again signing for Tasty Fries, executed a purchase order for 10,000 vending machines.[54] The machines were assigned a cost of $10,000 each, making the total purchase price of the order an astonishing $100 million. Tasty Fries published a press release on February 26, 2002 touting the deal as "a gigantic step in Tasty Fries' efforts to dominate this part of the fast food vending industry."[55]

On March 4, 2002, Tasty Fries sent a letter to Romanoff related to the third investment tranche, which was overdue.[56] In that letter, Tasty Fries stated that it issued and enclosed 500,000 "free trading" shares for Pirak and his wife. Also in that letter, Tasty Fries requested that Romanoff wire $475,000 directly to Tasty Fries.

At trial, there was no testimony why the third tranche operated differently than the first two tranches. In the first two tranches, Pirak paid the money to USIS

[54] JTX 88.
[55] JTX 156.
[56] JTX 92.

in trust for Tasty Fries, then Tasty Fries issued the required shares, and then USIS transferred the money to Tasty Fries.[57] In this third tranche, Tasty Fries issued the stock before it or USIS received the money. As Tasty Fries would later say, it issued the stock for the third tranche at Romanoff's request and upon Romanoff's word.[58] But there is no explanation why Tasty Fries agreed to such a request.

When Romanoff did not remit the payment for the third tranche, Tasty Fries sent a very harshly worded letter on March 13, 2002 to him demanding the return of stock issued to both Lavi and Syndi.[59] The letter also states that because of Romanoff's actions, Tasty Fries would be forced to seek financing from other

[57] The evidence shows that less than half of the money from the first two tranches actually went to the business of Tasty Fries. The breakdown of the use of Pirak's $525,000 is detailed in the stock purchase term sheet and related letter from Romanoff. JTX63; JTX64. $150,000 was earmarked to settle a previous litigation with a vending company, $84,000 was earmarked to pay Tasty Fries's payroll taxes, $10,000 was set aside for legal fees, $40,000 was to be paid to two supply companies, and $30,000 was designated as Segal's commission. JTX64. The $30,000 commission for Segal was 10% of the $300,000 tranche, so presumably Segal also got paid 10% of the other tranche, or $22,500. These "commissions" were paid pursuant to previous arrangements with Tasty Fries. For example, in a February 27, 2001 letter from Kelly, Tasty Fries agreed to pay Segal (i) a 10% commission in U.S. currency for all money raised; (ii) a 10% commission in restricted stock for all financing arranged; and (iii) a 7% commission in restricted stock for all confirmed sales of Tasty Fries stock sold through Segal. JTX 4. Additionally, Segal was splitting his "commission" with Romanoff. Tr. at 159. The end result, as stated by Romanoff in his January 9, 2001 letter, is that only "if there is any remaining balance of [Pirak's] Funds following making of all of the above payments [would] the balance of the Funds [] be delivered to Tasty Fries." JTX 63.

[58] JTX 94.

[59] *Id.*

sources. Kelly followed up with another letter on March 21, 2002 to Segal in which he states that Romanoff owes Tasty Fries $475,000.[60]

After Kelly's March 21 letter, lawyers began to get involved in the dispute.[61] Fred D. Zemel, a lawyer with Goodwin Proctor and a relative of Romanoff, sent a letter on March 22 to Lavi, telling him that Romanoff did not authorize a meeting that Lavi had held with representatives of Coca Cola to discuss Tasty Fries's vending machines.[62] Zemel asserted that Lavi's actions in setting up such a meeting contravened Silver Leaf's Operating Agreement. In response, Myles J. Tralins, Tasty Fries's lawyer, sent Zemel a letter on March 26 in which he discusses Silver Leaf's "substantial internal disputes among its shareholders which is [sic] affecting its contractual obligations to Tasty Fries."[63]

In the midst of all the squabbling among the Silver Leaf members, its Manager, and Tasty Fries, the SEC sent a letter on March 27, 2002 to Tasty Fries concerning the SMA and the recent developments and disputes between the parties.[64] The SEC requested copies of the purchase order agreement between

[60] JTX 98. Additionally, Kelly states that Romanoff owes Tasty Fries an additional $875,000, presumably for the fourth tranche, even though the term sheet describes that tranche as an option. *Id.*

[61] The lawyers discussed herein were involved in the deal earlier, but the parties appear to have communicated directly with each other until the dispute about the third tranche.

[62] JTX 100.

[63] JTX 104.

[64] JTX 106.

Tasty Fries and Silver Leaf, as well as all other agreements between them. The SEC also sought documents concerning the $100 million valuation of the purchase order, and the number and locations of existing French fry machines. Kelly testified at trial that Tasty Fries complied with the SEC's request, sent lawyers to meet with the SEC, and that the SEC's investigation ultimately ceased.[65]

On April 1, 2002, Kelly sent a letter to Silver Leaf stating that 10 vending machines would be ready for delivery on April 22, 2002.[66] The delivery of 10 machines corresponds to a timeline agreed to by Kelly and Romanoff on February 19, 2002.[67] In the second part of the letter, Kelly asks for a *$100 million* "irrevocable letter of credit or other bank financing guarantee" to support Tasty Fries's ramping up for the full-scale production of the entire purchase order.[68] The letter of credit does not appear to have been previously negotiated by the parties or even mentioned as a requirement for the delivery of the vending machines.[69] Kelly gave Silver Leaf three days, until April 4, to obtain the requested letter of credit.

[65] Tr. at 80.
[66] JTX 108.
[67] JTX 87.
[68] JTX 108.
[69] In a letter dated May 6, 2002, Kelly acknowledges that the letter of credit was not discussed before Tasty Fries agreed to the purchase order. JTX 157. But Kelly downplays the importance of the letter of credit, calling it a "simple request." *Id.*

Zemel responded to Kelly on April 2, 2002, calling the request for a $100 million letter of credit "preposterous."[70] Lavi then wrote to Zemel on April 10, 2002 stating that Zemel's "persistent meddling and tortious interference" astonished him.[71] In the April 10 letter, Lavi asserts (i) that Zemel is Romanoff's personal lawyer, not Silver Leaf's, and (ii) that Lavi appointed himself Manager of Silver Leaf. On April 19, 2002, purporting to act as Manager of Silver Leaf, Lavi wrote Kelly and told him that Silver Leaf would not be able to provide the required $100 million letter of credit and therefore the SMA should be terminated.[72] On May 10, 2002, Kelly sent a fax to all three members of Silver Leaf terminating the SMA.[73]

This brief synopsis of the dispute between the parties only scratches the surface. This litigation has been highly contentious and has even included secretly taped telephone conversations.[74] Most of the taped telephone conversations are expletive-laden rantings, in which the parties call each other cheats, liars, and losers.[75] These sentiments were also communicated through letters and emails.[76]

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[70] JTX 110 at 2.
[71] JTX 115.
[72] JTX 138.
[73] JTX 161.
[74] *See, e.g.*, JTX 163; JTX 164.
[75] *See, e.g.*, JTX 164 at 39 ("Kelly: [Romanoff] is a scoundrel, he is a thief, a self-serving individual.").
[76] In a March 26, 2002 letter to Kelly, Lavi discusses the "unnecessary war on Tasty Fries," mentioning "a double agent," "threats," and "blackmail." JTX 103.

For a dispute that involved only four individuals (Lavi, Kelly, Segal, and Romanoff), there has been an enormous amount of paper generated to convey what are unmistakably hard feelings of a deal gone awry. Although the parties spent an inordinate amount of time covering these topics at trial, the court does not find the parties' personal animosity pertinent to the legal issues. Therefore, the court declines to detail any further the personal issues between the parties.

F. Procedure

On April 30, 2002, the defendants in this case filed an action in the Superior Court of New Jersey against USIS and Lavi.[77] The complaint consists of the following counts: (i) tortious interference with contract and prospective economic damage; and (ii) breach of contract. On May 3, 2002, the Superior Court entered a Consent Order that states, among other things, that Romanoff is and has been at all times, the lawful and authorized Manager of Silver Leaf. As part of the Consent Order, Lavi was forced to send letters to Tasty Fries and other companies affirming Romanoff's position as Manager of Silver Leaf and retracting any of his (Lavi's) statements to the contrary.

On May 10, 2002, the day that Tasty Fries acted to terminate the SMA, Silver Leaf obtained an *ex parte* temporary restraining order from the Superior Court of New Jersey stopping the termination. Tasty Fries then removed the case

[77] JTX 153.

to the District Court in New Jersey. Relying on the non-suit clause, Section 19.6 of the SMA, the District Court denied Silver Leaf's motion. Under the SMA, the District Court found Silver Leaf waived "the right to sue or arbitrate or otherwise seek formal resolution of any and all disputes arising out of or relating to [the Agreement]."[78] Silver Leaf appealed the case to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's ruling.[79]

In August 2003, the defendants filed another action against USIS and Lavi in New Jersey Superior Court, alleging that Lavi conspired with Kelly to terminate the SMA and misappropriate Silver Leaf's exclusive license with Tasty Fries. Then, in October 2003, the plaintiff filed a petition in this court for the judicial dissolution of Silver Leaf pursuant to 6 *Del. C.* § 18-802. After Lavi represented to the Superior Court that Delaware has exclusive jurisdiction over the disputes between the members of Silver Leaf, the Superior Court granted the plaintiff's motion to dismiss the New Jersey litigation. However, the District Court action by Silver Leaf against Lavi and USIS for tortious interference with prospective business advantage is stayed, not dismissed, leaving unresolved a potential claim for bad faith based on Tasty Fries's acts, such as the "$100 million irrevocable

[78] JTX 212 at 4-5.

[79] *Silver Leaf, LLC v. Tasty Fries, Inc.*, 51 Fed. Appx. 366, 372 (3d Cir. 2002).

letter of credit demand and [Tasty Fries's] subsequent refusal to discuss the dispute in contravention of the [SMA]."[80]

The defendants here then filed counterclaims against not only against USIS, but also against Lavi, who argued lack of personal jurisdiction. In a June 2004 opinion, this court found that Lavi's argument lacked merit and that the defendants could prosecute their claims against him in Delaware.[81]

Currently before this court are the plaintiff's request to dissolve Silver Leaf and the defendants' claims that USIS and Lavi breached their contractual and fiduciary duties, as well as tortiously interfered with the SMA. Trial was held the week of March 14, 2005. This is the court's post-trial opinion.

III.

A. The Dissolution Of Silver Leaf

The judicial dissolution statute for LLCs, 6 *Del. C.* § 18-802, states as follows: "On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company

[80] JTX 212 at 13.

[81] *In re Silver Leaf, L.L.C.*, 2004 Del. Ch. LEXIS 93 (Del. Ch. June 29, 2004).

agreement." Without much case law applying this statute,[82] the court looks by analogy to the dissolution statute for limited partnerships, 6 *Del. C.* § 17-802, which contains essentially the same wording as the LLC statute.[83]

"The test of Section 17-802 is whether it is 'reasonably practicable' to carry on the business of a limited partnership, and not whether it is impossible."[84] "In evaluating whether to dissolve a partnership pursuant to § 17-802, courts must determine the business of the partnership and the general partner's ability to achieve that purpose in conformity with the partnership agreement."[85] For example, in *PC Tower*, the court found that uncontradicted evidence of a heavily leveraged purchase of a property, the depressed real estate market, and property

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[82] The court finds only one opinion that offers an in-depth discussion of the application of the LLC judicial dissolution statute, *Haley v. Talcott*, 864 A.2d 86, 97 (Del. Ch. 2004). *Haley* concerned an LLC with two owners, each with 50% ownership. In that case, the court looked to the joint venture dissolution statute, 8 *Del. C.* § 273, which is limited to situations where there are "only 2 stockholders each of whom own 50% of the stock." Unlike in *Haley*, Section 273 does not provide a useful analogy here, since there are three members of the LLC. Moreover, the LLC at issue in *Haley* was a viable business, whereas here Silver Leaf's business was dependent on the SMA, which has been terminated.

[83] 6 *Del. C.* § 17-802 ("On application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.").

[84] MARTIN I. LUBAROFF & PAUL M. ALTMAN, DELAWARE LIMITED PARTNERSHIPS § 8.2 at 8-12 (2004 Supp.) (citing *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, 1989 Del. Ch. LEXIS 72 (Del. Ch. June 8, 1989)).

[85] *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, 1996 Del. Ch. LEXIS 116, *15-*16 (Del. Ch. Sept. 3, 1996), *aff'd*, 1997 Del. LEXIS 58 (Del. Feb. 11, 1997) (citing *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1993 Del. Ch. LEXIS 154 (Del. Ch. July 28, 1993) and *PC Tower*, 1989 Del. Ch. LEXIS 72).

debt far in excess of value all contributed to the partnership's inability to carry on its business as a profitable investment in a reasonably practicable manner.[86]

The threshold matter is whether Silver Leaf can, pursuant to its Operating Agreement, take the actions necessary to continue functioning as a business. In this case, Silver Leaf's contending interests are split 50:50. On one side are USIS and Lavi. On the other side are Syndi, Segal, and Romanoff. As two years of litigation and more than three days of trial have shown, the two sides cannot agree on how to run Silver Leaf. Moreover, the Operating Agreement, which mandates an agreement by the majority in interest in order to effectuate important actions for Silver Leaf, provides no mechanism to break the impasse between the parties.

The defendants argue that USIS and Lavi cannot vote USIS's 50% interest in Silver Leaf because they are in "default" of the Operating Agreement. The usual meaning of default in similar agreements is related to some form of financial obligation.[87] In this case, however, the defendants use the term "default" to mean a breach of contract or fiduciary duty. They quote Section 5.02 of the Operating Agreement, which purportedly allows only members "not in default of [their]

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[86] *PC Tower*, 1989 Del. Ch. LEXIS 72, at *16-*17.

[87] *See, e.g., Checker Motors Corp. v. Executive Life Ins. Co.*, 1992 Del. LEXIS 337, at *3 (Del. Sept. 4, 1992) ("The [limited partnership agreement] also defines certain events as 'Events of Default,' which include the 'bankruptcy, insolvency, receivership, liquidation, dissolution or legal incapacity of the Limited Partner.'"). *See also* BLACK'S LAW DICTIONARY (7th ed. 1999) (defining default as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due").

obligations" to vote their interests. But the Operating Agreement does not define "default" and nowhere do the defendants point to any financial obligation that Lavi failed to perform. Instead, they characterize as "defaults" Lavi's actions, such as meeting with the representatives of Coca-Cola, holding himself out as Manager, and other acts done by him in response to positions taken by Romanoff.

The defendants' argument falls short for two reasons. First, it is clear that Lavi and USIS have a 50% ownership in Silver Leaf. Although Romanoff may have intended to dilute Lavi's interest once the SMA was signed with Tasty Fries, he does not contend that he had the right to dilute Lavi's shares or that Lavi even agreed to dilute his interest. Thus, it is uncontested that Lavi and USIS own 50% of Silver Leaf.

Second, the record is replete with evidence that Romanoff himself engaged in conduct (all attributable to Syndi's ownership interest) that was also, arguably, in breach of the Operating Agreement. For example, without approval of the members, Romanoff caused Silver Leaf to borrow $100,000 from Pirak and to "lend" $30,000 of that amount to Segal. Both of those transactions (and several others in excess of $10,000 each) arguably violated Section 5.02 of the Operating Agreement. More important, Romanoff defaulted on the obligation to meet the third tranche of the stock purchase agreement and attempted, in evident bad faith, to force the dilution of USIS's membership interest as the price for such

performance. In the circumstances, the court refuses to construe or apply Section 5.02 to limit the voting rights of any Silver Leaf members. Thus, there clearly is an impasse that prevents the effective management of the LLC.

The court next looks to the business of Silver Leaf. Silver Leaf was formed for the specific purpose of marketing the vending machines of Tasty Fries. Neither party offered any evidence that Silver Leaf had another business purpose. Thus, at the time the dispute between the parties began, the only asset of Silver Leaf was the SMA, which Tasty Fries executed in consideration for the stock purchase agreement.[88]

Now, the SMA is no longer an asset of Silver Leaf because Tasty Fries terminated that contract. Although Silver Leaf sought an injunction to prevent the termination of that contract, both the District Court in New Jersey and the Third Circuit found that Section 19.6, the non-suit provision, precluded Silver Leaf's litigation against Tasty Fries. Clearly, the business of marketing Tasty Fries's machines no longer exists for Silver Leaf. What remains from the relationship

[88] Other possible assets of Silver Leaf are the "loans" that it made to the parties, which were salaries in disguise, as the following transcript excerpt from Romanoff's testimony on pages 407 and 408 shows.

Q: You also at one point arranged for loans to Yehuda Segal?

A: I did. I extended, through [Silver Leaf], more than one – several – I think two or three, perhaps, loans to Jerry Segal. Jerry Segal had been expecting, as we all had been expecting, for [Silver Leaf] to start paying salaries, contractual salaries. Since that didn't take place and he had been working full time for [Silver Leaf], I thought it was appropriate to do that.

between Tasty Fries and Silver Leaf are possible choses in action, i.e. a claim against Tasty Fries for breach of the SMA, and against USIS and Lavi for tortious interference with contract and prospective economic damage. The ability to prosecute those claims does not depend on the continued existence of the LLC, but could, at least in theory, be managed by a court appointed receiver.

Given its ownership structure and Operating Agreement, Silver Leaf is no longer able to carry on its business in a reasonably practicable manner. The vote of the members is deadlocked and the Operating Agreement provides no means around the deadlock. Moreover, Silver Leaf has no business to operate. Therefore, upon application of a member, USIS, the court dissolves Silver Leaf.

B. Remaining Issues

The remaining issues are (i) counterclaims against Lavi and USIS for breach of the Operating Agreement, breach of fiduciary duty, and tortious interference with contract and prospective economic damage; and (ii) the somewhat related question of whether the court should appoint a receiver to marshal Silver Leaf's assets.[89]

[89] It is unclear from their briefing how the parties expect to wind up the affairs of Silver Leaf.

Having heard the testimony and considered the evidence, the court concludes that all of the remaining claims in this case, and any other claim that Silver Leaf might possess arising out of or relating to the performance of the SMA, are barred by the doctrine of unclean hands. "[H]e who comes into equity must come with clean hands."[90] "When one [who] files a bill of complaint seeking to set the judicial machinery in operation and to obtain some remedy has violated conscience or good faith or other equitable principles in his conduct, then the doors of the court of equity should be shut against him."[91] In such cases, "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."[92]

"[T]he unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case."[93] "In effect, the Court refuses to consider requests for equitable relief in

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[90] *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947). *See also Keystone Driller Co. v. Gen.l Excavator Co.*, 290 U.S. 240, 244 (1933) ("It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands.").

[91] *Bodley*, 59 A.2d at 469.

[92] *Keystone Driller*, 290 U.S. at 245.

[93] *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 Del. Ch. LEXIS 242, at *138 (Del. Ch. Aug. 5, 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (citing *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998)).

circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[94]

Both parties argue that the other's claims should be barred by the doctrine of unclean hands. The defendants argue that the plaintiff's petition for dissolution was wrongful and a breach of the SMA. In response, the plaintiff claims that Romanoff misled Lavi by executing the Operating Agreement even though Romanoff intended to later reduce Lavi's stake in Silver Leaf. Both parties argue that the other's acts rise to the level of unclean hands.

The court finds that the defendants' remaining claims are barred by the doctrine of unclean hands. The court also finds that any request by Lavi to be appointed receiver of Silver Leaf is barred by the doctrine of unclean hands.[95] Thus, the court will grant the parties no remedy beyond the dissolution of Silver Leaf.

Both parties litigate this action as if there were no underlying problem. But there is an enormous underlying problem: all of the evidence indicates that Tasty Fries is simply a penny stock fraud. Its only product is a French fry vending

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[94] *Nakahara*, 718 A.2d at 522.

[95] While the dissolution of Silver Leaf under Section 18-802 is a statutory action, the appointment of a receiver is an equitable remedy. *Lut Hin Cheung v. Ren Meng Yang*, 1998 Del. Ch. LEXIS 229, at *18 (Del. Ch. 1998) (discussing the equitable relief of appointing a receiver in cases involving the dissolution of a partnership). Therefore, the court can rely on the unclean hands doctrine in determining who, if anyone, should be appointed receiver of Silver Leaf.

machine patented more than 10 years ago that has never been brought to market. Tasty Fries's failure to produce a commercially viable vending machine, and, relatedly, generate any revenue,[96] did not prevent it from issuing over 128,000,000 shares of common stock, more than half of which were issued in violation of state law, making them void. Moreover, all of the void shares were issued during or after November 2001, which means that all of the shares issued in connection with the Silver Leaf deal are void.

Although not a party to the litigation here, Tasty Fries is a crucial factor in the remedies that both parties seek from the court. In their papers, both parties facially seek remedies, the practical effect of which would be to grant one side or the other the ability to resume marketing Tasty Fries's vending machines. If the plaintiff were to wind up the LLC, presumably it would attempt to sign a new marketing agreement with Tasty Fries. If the defendants were to prevent the dissolution of the LLC, presumably they would file another lawsuit in an effort to claim damages in connection with the termination of the SMA.

Furthermore, Tasty Fries and Kelly have engaged in a pattern of conduct that includes publicly disseminating misleading information in an effort to support its stock issuances. Much of the information that Tasty Fries puts out in its press releases is later shown to be false, a pattern that supports the conclusion that Tasty

[96] Form 10-QSB for the quarter ended Oct. 31, 2004, filed with the SEC Dec. 15, 2004.

Fries knows the information is false when published.[97] For example, on March 15, 2005, Kelly testified that Tasty Fries has "never actually built machines, with the exception of the ten that are presently in production in Scotts Valley, California."[98] This testimony is in direct contradiction to public documents filed with the SEC on December 15, 2004, in which Tasty Fries declared that it "is presently assembling an initial quantity of 250 french fry vending machines at Lintelle Engineering, Inc. located in Scotts Valley, California."[99] This testimony from Kelly is evidence that Tasty Fries is just maintaining the charade of manufacturing French fry vending machines so that it can raise more money.

In addition, the very business model that the parties relied on in projecting vast amounts of shareholder wealth[100] was based on the concept of selling geographic territories to other people so that the other people could sell the vending machines.[101] Thus, the members of Silver Leaf never had any intention of actually selling any machines. Their business plan was based on the concept of acquiring an exclusive license from Tasty Fries and then selling sublicenses under

[97] There is also evidence that Romanoff was also involved in the creation of and the editing of the press release touting the $100 million deal. Tr. at 78.
[98] Tr. at 11.
[99] Form 10-QSB for the quarter ended Oct. 31, 2004, filed with the SEC Dec. 15, 2004.
[100] JTX 253 (projecting that a shareholder with 10,000,000 shares of Tasty Fries would be worth $1 billion).
[101] Tr. at 355.

what they termed the "NEWCO" model for cash.[102] This plan is just one more piece of evidence that the members of Silver Leaf knew full well that Tasty Fries would not deliver the promised vending machines.[103] Indeed, Tasty Fries had previously executed a similar marketing plan, but, not unsurprisingly, it was forced to buy back the territories when the distributors realized that it could not deliver the actual vending machines.[104]

The court finds that all testimony regarding Tasty Fries's possible production of a commercially viable French fry vending machine is not credible. Even though the parties are adversaries in this litigation, they share a common interest in pretending that Tasty Fries is a legitimate company. If the parties were to admit that Tasty Fries is not a legitimate company, their admissions would fatally undermine their arguments. Without a legitimate vending machine business, the entire deal between Silver Leaf and Tasty Fries was predicated on raising money through stock issued in violation of state and federal securities laws. Thus, all parties complicitly turn a blind eye to the fact that Tasty Fries is a sham meant to defraud investors.

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[102] *Id.*

[103] In fact, Kelly called the NEWCO model a "get-rich-quick scheme." Tr. at 46. As Kelly pointed out, selling distributorships makes a lot of sense for a company that cannot produce a machine, because the company would receive the money regardless of whether a machine was delivered. *Id*. at 46-47.

[104] *Id*. at 48-49.

After reviewing all of the evidence, the court is led inexorably to a conclusion that Tasty Fries is in the business of issuing stock and not making vending machines. Therefore, neither party is entitled to the remedies that they seek. Instead, the court fashions a remedy that serves the interest of justice by putting an end to this dispute once and for all. For that reason, neither party will be appointed receiver of Silver Leaf.

V.

For the foregoing reasons, Silver Leaf LLC is dissolved. IT IS SO ORDERED.