IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

MERCHANTWIRED, LLC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 02C-08-244 FSS
	)	
TRANSACTION NETWORK SERVICES, INC.,	)	
	)	
	)	
Defendant.	)	

Submitted: September 24, 2004
Decided: February 28, 2005

MEMORANDUM OPINION

Upon Defendant's Motion for Summary Judgment - - ***DENIED***

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SILVERMAN, J.

This is a breach of contract case concerning two, telecommunication companies. Basically, Defendant, Transaction Network Services, Inc., agreed to buy MerchantWired from MerchantWired's founders, the "Sellers." TNS, however, refused to close, blaming MerchantWired's failure to meet several pre-closing conditions. After limited discovery, TNS has moved for summary judgment. It contends that MerchantWired indisputably could not meet at least two of the conditions, and that justified TNS's backing-out of the deal.

The first pre-closing condition relied on by TNS required the parties to sign an "Investors Rights Agreement." TNS argues that TNS's lending syndicate would not approve it. MerchantWired's position essentially is that regardless of what TNS's lenders thought about the "Investors Rights Agreement," the parties to it had approved it and MerchantWired was prepared to sign it. MerchantWired also accuses TNS of having invited its lenders' disapproval in order to sabotage the deal and push MerchantWired over the brink.

The second pre-closing condition relied on by TNS is more complicated and substantive. For reasons explained below, TNS flatly refused to buy if MerchantWired was processing credit card transactions. MerchantWired had to get out of that business before TNS would close. Although MerchantWired quickly signed a deal to sell its credit card operation, it would have required MerchantWired

to process credit card transactions for a month, or so, after closing. TNS now maintains that if MerchantWired had to process credit card transactions after TNS took it over, that was enough to justify TNS's refusing to go through with the deal. MerchantWired takes the position that its need to process credit card transactions for a "brief transition period" was not enough for TNS to end their deal. In fact, MerchantWired claims that TNS agreed to the transition period, which, according to MerchantWired, was in TNS's best interest.

I.

For the most part, the court will present the facts as they are needed. After limited discovery, discussed below in section II, the parties jointly produced a Statement of Material Facts, designating whether a given fact is disputed or undisputed. Both sides also submitted extensive supporting affidavits. They also lodged the pertinent depositions and exhibits. Those materials present the complete factual record.

Generally, it is agreed that in 1999, six national shopping mall developers founded MerchantWired to provide broadband services over a high-speed network for shopping mall tenants, including several national chain stores. MerchantWired also provided credit card authorization services to a single customer, Trans World Entertainment Corporation. MerchantWired's relationship with TWE

is vitally important to TNS's Section 6.23 claim, discussed below in section IV B.

It is tacitly conceded that by the Fall 2001, MerchantWired was in dire straights and it was discussing "a strategic transaction with potential partners." MerchantWired also began discussions with TNS, leading to their signing the Purchase Agreement at this proceeding's core. TNS is a major provider of data communication services for business applications, such as credit card, debit card and ATM transactions.

It also seems tacitly conceded that TNS had trepidation about buying MerchantWired. Accordingly, Article VI of the Purchase Agreement, signed by TNS, MerchantWired and MerchantWired's founders and effective April 15, 2002, included twenty-four conditions that MerchantWired would have to meet before TNS invested millions in it.

The Purchase Agreement set the outside date for closing as May 31, 2002. The closing date is important because MerchantWired had to meet all twenty-four closing conditions during the six weeks between the Purchase Agreement's effective date and closing. MerchantWired will not concede that it could not meet the conditions, including Section 6.23 at issue here, on or before the closing date. MerchantWired alleges that it could meet Section 6.23 and TNS agreed to push back the closing for a reasonable time. MerchantWired insists that it surely would have

met the conditions, given an extra month until the end of June, or later. Instead of waiting, TNS backed-out of the deal on June 3, 2002. That forced MerchantWired to shut down and precipitated this litigation.

II.

The case's procedural history represents an unusual example of an attempt at case management gone awry. MerchantWired filed suit on August 26, 2002. TNS moved to dismiss and on February 24, 2003, the court heard oral argument. The court granted the motion, in part, but gave MerchantWired leave to amend, which it did on August 28, 2003. That precipitated TNS's second motion to dismiss. The court denied the second motion, but then it got creative.

As discussed throughout here, the case preliminarily turns on the contract's twenty-four closing conditions. TNS has been emphatic that apart from anything it allegedly did or did not do, MerchantWired could not meet several of the conditions. In other words, according to TNS, the deal failed because TNS was going under of its own accord and the closing conditions simply were more than TNS could handle.

TNS's position seemed reasonable and potentially dispositive. So, the court challenged TNS to choose two or three closing conditions MerchantWired failed to meet, for no reason attributable to TNS. The court's thinking, of course, was

that if TNS could make its case, that would save time and money on futile litigation. The court has used this approach successfully before.[1]

TNS accepted the challenge and the parties began limited discovery last February. Then, TNS moved for summary judgment under Superior Court Civil Rule 56 and the parties filed a round of briefs in June – July. Finally, the court held argument on September 23, 2004.

III.

The standard of review here is uncontroversial. TNS is asking for summary judgment. So, the court must rely on the undisputed facts or, where the facts are disputed, the court must view the evidence in the reasonable light most favorable to MerchantWired.[2] From the beginning, TNS has boldly assured the court that TNS could shoulder this heavy burden.

The parties took discovery on three closing conditions, but TNS is pursuing only two of them here: Sections 6.14 and 6.23. The former, basically, required that the parties had to sign a specific, attached "Investors Rights Agreement" before closing. The latter condition concerned TNS's firm demand, for its business

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[1] *Sills v. Smith & Wesson Corp.*, Del. Super., C.A. No. 99C-09-283, Silverman, J. (Dec. 1, 2000)(Letter Op. And ORDER).

[2] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

reasons, that MerchantWired had to jettison its credit card processing business before closing.

IV.

A. TNS's Section 6.14 Claim

Section 6.14 of the Purchase Agreement reads:

> *Investors Rights Agreement.* At the closing, the parties hereto shall have executed that certain Investors Rights Agreement attached as Exhibit D hereto (the "Investors Rights Agreement").

The Purchase Agreement's first paragraph provides:

> THIS PURCHASE AGREEMENT . . .is by and among (i) Transaction Network Services, Inc., . . . (the "Purchaser"); (ii) MerchantWired, LLC, . . . (the "Company); and (iii) the persons listed on Exhibit A to this Agreement (the "Sellers").

The "Sellers" who are party to the Purchase Agreement are also all the "Sellers" who are party to the "Investors Rights Agreement." None of TNS's bankers was a "Seller," or a party to the "Investors Rights Agreement." The "Sellers" named in the Purchase Agreement and the "Investors Rights Agreement" are MerchantWired's six founders. (There is an additional seller who signed the Purchase Agreement, MS Management, Inc., but that only relates to a non-competition clause, which is immaterial here.)

In short, therefore, to meet the closing condition the parties to the Purchase Agreement, but no one else, also had to sign the "Investors Rights Agreement." All the parties to the Purchase Agreement signed it. None of them signed the "Investors Rights Agreement," although it was attached as an exhibit to the Purchase Agreement they signed. The Purchase Agreement nowhere explains whether or on what basis any party to the Purchase Agreement could later refuse to sign the "Investors Rights Agreement."

MerchantWired's argument about Section 6.14 is simple and persuasive, for present purposes. Section 6.14 merely requires the parties to the Purchase Agreement to sign the "Investors Rights Agreement" before or at the deal's closing. Meanwhile, the "Investors Rights Agreement" was attached to the Purchase Agreement and all the parties to both agreements signed the Purchase Agreement. Accordingly, as a matter of law and fact, Section 6.14 was satisfied by the Purchase Agreement's execution.[3]

TNS relies on the fact that an express condition of the Purchase Agreement specifically requires that the "Investors Rights Agreement" must be signed and it was not signed. In effect, TNS views each agreement's signing as a

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[3] RICHARD A. LORD, 11 WILLISTON § 30.25 (4th ed. 1999) ("Generally, all writings which are part of the same transaction are interpreted together.")

separate event, with independent significance.

TNS, however, seemingly appreciates that there is a potential hole in its position. It apprehends a need to show how a party to the "Investors Rights Agreement" had reason for not signing it and, therefore, TNS's reason for backing-out under Section 6.14 was substantive rather than mere pretext. Accordingly, TNS explains that Deutsche Bank was acting as "administrative agent for [TNS's and the 'Sellers'] lending syndicate" and it was responsible for reviewing the transaction's documents and submitting them to the lenders. The bank, however, was dissatisfied with the "Investors Rights Agreement." TNS concludes, therefore, that without the bank's blessing, which it would not give, TNS and the "Sellers" would never have signed the "Investors Rights Agreement." Thus, Section 6.14 indisputably was unfulfilled.

MerchantWired challenges TNS in several ways. First, although MerchantWired concedes that the bank had rejected the "Investors Rights Agreement" initially, MerchantWired claims that it had met and satisfied the bank's concerns, or MerchantWired and the bank were on the verge of agreement. Alternatively, TNS promised in the Purchase Agreement to make good faith efforts to obtain TNS's lenders' approval. But, says MerchantWired, TNS used its influence with the bank to interfere with MerchantWired's obtaining lender approval. Those

allegations and counter-allegations make summary judgment problematic.

More importantly, TNS seems to be equating TNS's lenders' approval with TNS's and the "Sellers's" signing the "Investors Rights Agreement." As the Statement of Material Facts and the Purchase Agreement reflect, MerchantWired was required to turn over control to TNS at closing. TNS, however, was not required to make its entire capital contribution at closing. Thus, the "Sellers" would have to wait for their money. The "Investors Rights Agreement," on its face, was intended to protect the "Sellers" until they were fully paid. Among other rights extended to the "Sellers" in the "Investors Rights Agreement," TNS and the soon to be acquired MerchantWired granted the "Sellers" a security interest in TNS's prospective interest in MerchantWired. In other words, if TNS refused to sign the "Investors Rights Agreement" because TNS's lenders objected to it, or otherwise, how is that a problem as long as the " Sellers" still wanted to go forward? How can TNS blame its decision not to sign the "Investors Rights Agreement" on MerchantWired or the "Sellers"?

Moreover, as MerchantWired points out, the bank was a party to neither the Purchase Agreement nor the "Investors Rights Agreement." TNS's lenders' approval is addressed in the Purchase Agreement's Section 6.18. Thus, TNS and the "Sellers" cannot justify backing out based on their indirect concern about the bank's approval.

So far, the parties have not taken discovery on Section 6.18. And so far, its actual applicability is unclear. Section 6.18 relates to a credit agreement between TNS and its lenders. For now, the court assumes that if Deutsche Bank and TNS's other lenders disliked the "Investors Rights Agreement," they had recourse to deny approval under Section 6.18. Moreover, considering how the Purchase Agreement was structured in general, and how Section 6.14 was drafted in particular, it does not appear that Section 6.14 was contingent on its face or indirectly on any of TNS's lender's approval.

At best, Section 6.14 is ambiguous. As mentioned, the "Investors Rights Agreement" was attached to it when TNS and the other parties signed the Purchase Agreement. If the parties took exception to the "Investors Rights Agreement," why did they sign the Purchase Agreement with it attached? And if their signing the "Investors Rights Agreement" was dependant on anyone else's approval, including the lenders' and their administrative agent's, why is that not mentioned in Section 6.14? If Section 6.14 was the vehicle for Deutsche Bank to indirectly scotch the deal, that has to be read into the clause.

When a contract refers to another instrument, the two are usually

interpreted together as the parties' agreement.[4] The Purchase Agreement referred to the "Investors Rights Agreement" here, and thus constructively becomes part of the Purchase Agreement and the two form a single instrument. In order for the annexed or separate instrument to be incorporated by reference, the annexed or separate document must exist when the incorporating document is executed, and the annexed or separate document must be reasonably identified.[5] That is the case here.

It also must be clear that MerchantWired and TNS had knowledge of the "Investors Rights Agreement" and assented to the incorporated terms.[6] If an incorporated term is to be decided upon by one party in the future, there must be an ascertainable standard set forth in the agreement that can provide a substitute for the necessary knowledge and assent.[7]

Both MerchantWired and TNS had knowledge of the Investor's Rights Agreement and 6.14. It appears that both parties assented to the closing condition

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[4] *Lipson v. Anesthesia Services, P.A.*, 790 A.2d 1261 (Del. Super. Ct. 2001).

[5] *Skouras v. Admiralty Enterprises, Inc.*, 386 A.2d 674 (Del. Ch. 1978); *State ex rel. Hirst v. Black*, 83 A.2d 678 (Del. Super. Ct. 1951).

[6] *Lamb v. Emhart Corporation, B & D Inc.*, 47 F.3d 551, 558 (2d Cir. 1995)("In order to uphold the validity of terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.").

[7] WILLISTON, at § 30:25.

6.14. Finally, TNS promised to use its best efforts to gain lender approval and execute the Investor's Rights Agreement; this provides an ascertainable standard guiding TNS. Thus, regardless of the bank's position, there seems to be no reason to hold that any party to the Purchase Agreement failed to agree to the "Investors Rights Agreement."

If the parties' signing the "Investors Rights Agreement" was meant to be an added act of approval dependant on the bank's consent, or otherwise, TNS can still try and develop that. Of course, by the same token, MerchantWired can pursue its claim that but for TNS's bad faith, the bank would have come around. Meanwhile, MerchantWired has a better case for forcing TNS to sign the "Investors Rights Agreement." And inversely, TNS has a weaker case for backing out of the Purchase Agreement merely because the parties who signed it did not also sign the attached "Investors Rights Agreement" at the same time.

B. TNS's Section 6.23 Claim.

Section 6.23 of the Purchase Agreement reads:

> *Credit Bard Business.* Prior to the Closing Date, the Company shall have: (a) transferred, to a person that is not directly or indirectly owned by the Company, all of the assets of the Company and its Subsidiaries which are used solely in connection with the Company' s or the Subsidiaries' credit card processing business; and (b) assigned to such transferee, and such transferee shall have

> assumed, all of the liabilities, duties and obligations of the Company and its Subsidiaries which have arisen or been generated, or will arise or be generated, by such credit card processing business.

In short, Section 6.23 required MerchantWired to divorce itself from credit card processing before the deal with TNS could close.

As mentioned briefly above, TNS has customers who process credit card transactions. MerchantWired handled credit card transactions for Trans World Entertainment, which operates a chain of retail stores under another name, selling music CD's, DVD's, and the like. If TNS had acquired MerchantWired and its credit card processing business, TNS would have been in the awkward position of competing with its customers. That, TNS told MerchantWired's executives, was unacceptable. MerchantWired would have to sell its credit card processing business before TNS could take charge. Thus, TNS's concern about not competing with its customers generated Section 6.23.

At its core, the controversy over Section 6.23 centers on the deal's May 31, 2002 closing date. TNS insists that the closing deadline and Section 6.23 were inviolable. If that is so, TNS is entitled judgment. MerchantWired acknowledges the concern that necessitated Section 6.23. And MerchantWired concedes that the earliest it could have satisfied Section 6.23 was " during the first

week of June 2002."

The parties agree that MerchantWired had a buyer for its credit card operation. But, MerchantWired and the buyer needed a " brief transition period" to work out the technical details and obtain the complicated, bank clearances necessary when one business takes over another' s on-going credit card transaction processing operation. The Statement of Material Facts and the parties submissions detail the several steps MerchantWired had to take in order to completely get rid of its credit card operation in the six weeks between the Purchase Agreement' s signing and the anticipated closing. The details are unimportant, except they lend weight to testimony MerchantWired presents to the effect that it acted promptly and in good faith, and that transitions often follow sales of credit card processing operations, such as the one here.

Meanwhile, the court rejects MerchantWired' s argument that it could have fulfilled Section 6.23, as written, at closing. The court will accept for present purposes that the credit card operation' s buyer, SPC, would have closed with MerchantWired. Nevertheless, MerchantWired admits that even after closing with SPC, MerchantWired' s credit card business would have continued running under MerchantWired' s auspices, using its facilities for a transition period. That simply

was not what Section 6.23 contemplated. Moreover, MerchantWired cannot rely on substantial performance, good faith or industry customs and practices to excuse its failure to meet Section 6.23, as written.[8]

Section 6.23 plainly required MerchantWired to transfer its credit card processing business before the closing date. The Purchase Agreement shows no tolerance for a transitional period after the closing, brief or otherwise. Even in the light most favorable to MerchantWired, it appears that MerchantWired missed the closing deadline on Section 6.23.

The only way MerchantWired can go forward is if it establishes that TNS extended the closing deadline and TNS temporarily waived Section 6.23. The Purchase Agreement expressly contemplates waivers and extensions. Its Section 12.14 provides:

> *Waiver*. At any time, any party hereto may (a) extend the time for the performance of any of

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[8] *McGough v. Broadwing Communications, Inc.*, 177 F.Supp.2d 289, 298 (D.N.J. 2001)("Where a party's promise is expressly made dependent on the existence of a stated condition, unless 'waived, excused or prevented by the other party' such a condition must generally be 'literally met or exactly fulfilled' before any binding contractual liability can arise."); *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415 (N.Y. 1995); *Ram Development Corp. v. Siuslaw Enterprises, Inc.*, 580 P.2d 552, 555 (Or. 1978); WILLISTON at §§ 38:6 and 38:7; RESTATEMENT (SECOND) OF CONTRACTS § 237 (2002).

> the obligations or other acts of the other parties hereto, (b) waive any inaccuracies in the representations and warranties of the other parties contained herein or in any document delivered pursuant hereto and (c) waive compliance by the other parties with any of the agreements or conditions contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the party or parties to be bound thereby.

Therefore, MerchantWired's claim initially turns on whether it can demonstrate that TNS signed a written instrument extending the deadline for MerchantWired to sell its credit card transaction processing operation. Failing that, MerchantWired must show that TNS by its conduct agreed to extend the closing and accept the necessary transition.

TNS never signed a formal extension of the closing deadline or a waiver of Section 6.13. In fact, on June 3, 2002, almost immediately after the closing deadline elapsed, TNS formally terminated the Purchase Agreement. Nevertheless, MerchantWired contends that by its conduct, TNS tacitly agreed to extend the closing and allow MerchantWired to process credit card transactions for a short while after the closing.[9]

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[9] *Pepsi-Cola Bottling Co. Of Asbury Pk. v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. (continued...)

MerchantWired offers potentially persuasive evidence that the parties were willing to modify the Purchase Agreement orally. It claims that TNS' s representatives and management orally agreed to push back the closing until at least the week following the original closing date. And for present purposes, TNS concedes that it agreed to delay the closing until June 3 or 4.

Furthermore, MerchantWired relies heavily on the fact that as its deal with SPC developed, MerchantWired sent the paperwork to TNS for review and comment. Most importantly, on May 14 MerchantWired transmitted to TNS a draft Asset Purchase Agreement, which referred to the Transitional Services Agreement. The transitional agreement clearly provided that SPC would rely on the relationship between MerchantWired and the Bank of America, which sponsored MerchantWired' s credit card transaction processing, until as late as June 30, 2002.

Therefore, MerchantWired can show conclusively, for now, that TNS was aware of the transition period. Nevertheless, through its counsel and other representatives, TNS commented on the APA and the TSA, section by section. As

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[9](...continued)
1972)(holding "a written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement ... the parties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit. They may, by their conduct, substitute a new oral contract without a formal abrogation of the written contract").

TNS observes in its Reply Memorandum, TNS told MerchantWired " that the draft TSA contained significant problems." Even so, no one protested the possible transition period. MerchantWired sees TNS' s silence about the transition period as more than mere inaction. Moreover, MerchantWired argues that even in its final termination letter, TNS did not rely on Section 6.23. TNS replies that its letter implicitly relied on Section 6.23.

Furthermore, MerchantWired points out that the parties were bound to work in good faith toward closing, and TNS, " as a veteran of the credit card industry," had to have known the steps that were necessary to transfer a credit card transaction processing business and how long that was likely to take. It also had to have known when it signed the Purchase Agreement that transition periods were common in the industry. Thus, even from the outset, TNS probably anticipated what eventually happened.

And finally, MerchantWired argues that its business with TWE was profitable. Even after SCI took over TWE' s credit card transactions, MerchantWired could make money for TNS by handling TWE' s other data communication needs. So, TNS had reason to be accommodating. As much as TNS probably did not want to compete with its customers at all, MerchantWired' s points

may explain TNS' s silence about Section 6.23.

Finally, the court appreciates TNS' s claim that even if TNS agreed to extend the closing deadline and allow MerchantWired to keep processing TWE' s credit card transactions, through SPC, until the end of June, Merchantwired could not have met that deadline. MerchantWired needed until late July to close the SPC deal. The facts on which TNS relies may support its overall position. But if the jury believes that TNS was amenable to a transition period, it might also conclude that the difference between a June 30 and a late July closing was also unimportant to TNS.

The court understands that MerchantWired' s amendment-by-conduct argument is tenuous. It relies too heavily on negative inferences and not enough on affirmative acts by TNS. Furthermore, if TNS meant to scuttle MerchantWired, which is a feature of MerchantWired' s Section 6.14 argument, why would TNS have waived Section 6.23 for a minute? MerchantWired appears to be arguing merely to suit its purposes.

Nonetheless, the court is unwilling to grant summary judgment to TNS on 6.23 by itself. From the outset, TNS has insisted that it was beyond cavil that MerchantWired could not meet the pre-closing conditions. TNS painted a vivid

picture of MerchantWired's calamitous circumstances. MerchantWired's failings were allegedly manifest. Now, it seems that MerchantWired did more work and was nearer to closing when TNS pulled the plug. The court will allow the case to go forward, although it will shepherd the remaining discovery closely. Soon it will hold a scheduling conference and it will craft a trial schedule that will partly make up for lost time.

V.

For the foregoing reasons, TNS's motion for summary judgment based on the Purchase Agreement's Sections 6.14 and 6.23 is ***DENIED***.

IT IS SO ORDERED.

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Judge

oc: Prothonotary (Civil Division)