

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES M. AUSTIN,	§
	§ No. 578, 2012
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Court of Chancery
	§ of the State of Delaware,
MICHAEL D. JUDY,	§ C.A. No. 4662
	§
Plaintiff Below-	§
Appellee.	§

Submitted: March 8, 2013

Decided: May 9, 2013

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices

ORDER

This 9th day of May 2013, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Charles Austin, filed this appeal *pro se* from the Court of Chancery's post-trial judgment dated September 26, 2012, which held, among other things, that Austin's attempt to issue himself 800,000 shares of stock in Preferred Communication Systems, Inc. (PCSI) was a self-interested transaction, the terms of which were not entirely fair to PCSI. After careful consideration, we find no merit to the issues Austin has raised on appeal. Accordingly, we affirm.

(2) Austin is a co-founder of PCSI, a Delaware corporation, and has been its sole director since January 1998. He is also PCSI's CEO and President. The

appellee, Michael Judy, is a record owner of shares of common and preferred stock in PCSI. PCSI owns numerous site-based Specialized Mobile Radio (SMR) licenses in the U.S. Virgin Islands and Puerto Rico. Through its wholly-owned subsidiary, Preferred Acquisitions, Inc. (PAI), PCSI owns thirty-eight 800 MHz SMR licenses along the east coast, the coast of California, as well as the U.S. Virgin Islands and Puerto Rico. Through the ownership of these licenses, PCSI is attempting to become a full service wireless telecommunications provider in key market areas in the U.S. and Puerto Rico.

(3) In 2009, Judy filed three separate actions in the Court of Chancery, which sought: (i) inspection of certain books and records of PCSI; (ii) to compel the holding of an annual meeting of PCSI's stockholders; and (iii) declaratory relief relating to the proper composition of PCSI's board of directors and Austin's authority to take action on PCSI's behalf. The third complaint also asserted a cause of action against Austin for breach of fiduciary duty, alleging that Austin's unilateral issuance of 800,000 shares of PCSI stock to himself was not entirely fair to PCSI. In September 2009, Judy moved for summary judgment on all of his claims except the breach of fiduciary duty claim. After a hearing, the Court of Chancery granted summary judgment, ordering the inspection of the books and records, ordering the annual meeting to go forward, and declaring that Austin

could not act on behalf of PCSI's board of directors until a full board was duly elected and installed at the annual meeting.

(4) Thereafter, in December 2011, the Court of Chancery held a multi-day trial on Judy's breach of fiduciary duty claim. The parties filed post-trial briefing, and the Court of Chancery held post-trial argument on June 13, 2012. The trial court rejected, as contrary to the weight of the evidence, Austin's claim that he and the other founders of PCSI has agreed in 1998 or 1999 to issue and split between themselves a total of 3,000,000 shares of stock.¹ The trial court further concluded that Austin's later attempt, which occurred well after 1999, to issue himself 800,000 shares of stock was a self-interested transaction that was not entirely fair to PCSI. That number of shares was grossly disproportionate to the services Austin provided to PCSI.² The shares were also invalid because Austin failed to cause PCSI to engage in the necessary corporate formalities. The trial court further concluded that Judy's claim was not barred by laches.

(5) Austin raises two issues in his opening brief on appeal. First, he contends that the Court of Chancery erred when it concluded that the founders of PCSI did not enter into an agreement in 1998 or 1999 to issue and divide between

¹ According to Austin, because the founders' agreement to issue 3,000,000 shares of stock to themselves was reached in 1998 or 1999, Judy had no standing to challenge the transaction because he was not a PCSI shareholder at that time.

² Based on the evidence, the Court of Chancery concluded that Austin was entitled to 12,500 shares as fair compensation for services rendered to PCSI.

themselves 3,000,000 shares of stock. Second, Austin argues that the Court of Chancery erred when it concluded that Judy's claim was not barred by laches. We review these arguments in order.

(6) Whether the founders of PCSI entered into an agreement in 1998 or 1999 that permitted Austin to receive 800,000 shares of PCSI stock turns on the Court of Chancery's factual findings, which are subject to the deferential "clearly erroneous" standard of review.³ This deferential standard applies not only to facts based upon credibility determinations but also to findings based upon documentary or other physical evidence or inferences from other facts.⁴

(7) In this case, notwithstanding Austin's testimony to the contrary, the trial court found no credible evidence that such an agreement ever existed. Austin presented no documentary evidence to prove the founders had such an agreement. Moreover, Austin previously had disputed that one of the founders was entitled to any stock at all. The existence of an agreement that all of the founders were to split 3,000,000 shares of stock was also belied by the fact that Austin was the only founder ever to have received any stock. Furthermore, the existence of such an agreement was contradicted by statements Austin had made in filings with the FCC in 2000, in correspondence between Austin and the family of one PCSI's principal

³ *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004).

⁴ *Id.*

financial backers in 2003, in correspondence between Austin and PCSI's legal counsel in 2005, and in statements made by PCSI to the FCC in 2007. Under these circumstances, we hold that the Court of Chancery's conclusion that no agreement existed in 1999 is not clearly erroneous.

(8) Austin's second argument on appeal is that the Court of Chancery erred when it held that Judy's claim that Austin breached his fiduciary duty was not barred by laches. Laches is an affirmative defense that the plaintiff unreasonably delayed in bringing suit after the plaintiff knew of an infringement of his rights, thereby resulting in material prejudice to the defendant.⁵ As an affirmative defense, the burden was on Austin to prove all of the elements of laches. In this case, Austin conceded during his testimony that he was uncertain about the date that his stock certificate was issued. The evidence reflected that Austin had backdated the key documents at issue in the case and, at different times, made varying representations regarding his ownership interest in PCSI. Given Austin's acts of active concealment concerning the transaction at issue, we find no error in the Court of Chancery's conclusion that Judy's claim was not barred by laches.

⁵ *United States Cellular Invest. Co. of Allentown v. Bell Atlantic Mobile Syst., Inc.*, 677 A.2d 497, 502 (Del. 1996).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice