IN THE COURT OF CHANCERY OF THE STATE OF DELAM'ARE

IN AND FOR NEW CASTLE COUNTY

BERNARD B. FULK, III, Plaintiffs, v. WASHINGTON SERVICE ASSOCIATES, INC. and THE LAURENCE J. LONG FAMILY TRUST II, Defendants.	)))))))))))))	C.A. No. 17747-NC

OPINION

Date Submitted: May 10, 2002
Date Decided: June 2 1.2002

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JACOBS, VICE CHANCELLOR

Bernard B. Fulk, III ("Fulk"), who is a 50% shareholder of Washington Services, Inc. ("WSA" or the "Company"), brought this proceeding against WSA and its other 50% shareholder, Laurence J. Long, ("Long"), seeking the dissolution of WSA under 8 Del. C. § 273 and the appointment of a custodian under 8 *Del.* C. § 226. Thereafter, by agreement of the parties, the Laurence J. Long Family Trust II (the "Trust"), to which Mr. Long had later transferred his WSA stock, was substituted as a defendant for Long. A two day trial was held in February 200 1.

At post-trial oral argument, which took place in June, 2001, the Court determined to appoint a Receiver with custodial powers to conduct the sale of WSA. By Order dated June 20, 2001, the Court appointed Mr. Martin G. Mand as Receiver/Custodian (the "Custodian"). The Custodian was directed to formulate and execute a Plan of Sale that would maximize the value to the shareholders in a judicially ordered sale of WSA.

The Custodian interviewed the parties and other key WSA employees and witnesses, conducted a comprehensive review of WSA and its operations, and attempted (without success), to mediate the parties' dispute. On October 26, 2001, the Custodian issued his Report (the "Report") in which he recommended a comprehensive Plan of Sale of WSA that would

impose certain conditions which, the Custodian concluded, were essential to maximize value for both WSA shareholders.

Pending is a motion by Fulk, as plaintiff, to approve the Report of the Custodian. Long and the Trust,' through their original counsel of record, opposed the approval of the Report on various grounds. Thereafter, the Long interests obtained new counsel who interposed additional objections, which led to supplemental briefing that protracted the proceeding by several months. This is the Opinion of the Court addressing the merits of the Custodian's Report[2] and all objections to it. For the reasons next discussed, the Court concludes that the Report and the recommendations contained therein will be approved.

I. THE FACTS

What follows are the pertinent facts. Many facts are undisputed, but where there are disputes the facts are as found herein.

A. The Parties

WSA, a Delaware joint venture corporation that maintains its

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[1] Unless the context indicates otherwise, Mr. Long, the Trust and the Long children who are trustees of the Trust and/or employees of WSA are referred to collectively as "Long" or the "Long interests.*'

[2] After the Long interests advanced their "first round" of objections, the Custodian issued a Supplemental Report on December 13, 2001, in which he modified one of his recommendations. Except where otherwise noted, all references in this Opinion to the Custodian's "Report" include both the original and the Supplemental Report.

principal office in Washington, D.C., is in the business of reporting and analyzing various governmental policies and other information for institutional investors.[3] WSA has two 50% stockholders. The original shareholders were Messrs. Fulk and Long, but Long later transferred his 50% interest to the Trust. Since August 1992, Messrs. Fulk and Long have been the Company's two directors, with Long serving as WSA's President and Chief Executive Officer, and Fulk serving as WSA's Secretary and Treasurer.

Besides Messrs. Fulk and Long, the Company has eight employees. Two of those employees are Long's children, Timothy and Christopher. A third employee, Jeff Cahill, is the Company's bookkeeper, accountant, and financial advisor. Cahill is also a friend of the Long family and an adviser to Long in this litigation. At all relevant times Long has been in operational control of the business. The full-time employees of the business are loyal exclusively to Long—a fact whose relevance will soon appear.

WSA has consistently been profitable and has achieved attractive margins and a solid record of generating cash without incurring any debt.[4]

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[3] WSA was incorporated in Delaware in 1988 after Messrs. Long and Fulk purchased it from Legg Mason.

[4] WSA has not, however, delivered any sustainable growth in either revenue or net income during the five years preceding the Custodian's appointment.

During the last five years, Long received compensation equal to 60% of the Company's net income *(i.e.,* income after all expenses before any payments to stockholders). Fulk has received the remaining 40%.[5]

B. Background of The Dispute

During the late 1990s, the relationship between Messrs. Fulk and Long began to deteriorate. Although the precise reasons are not altogether clear, it appears that the parties' dispute originated in Long's belief that he and his sons had contributed a disproportionate share of the Company's value, in contrast to Fulk, whose contribution (in Long's estimation) was far less. Beginning in 1998, Long and Fulk had numerous discussions about either Long or the Company buying out Fulk's interest in WSA. The two founders, however, were unable to reach an agreement on the purchase price.

In 1998, a firm called IBC Group, plc. ("IBC") offered to acquire WSA for $16 million. IBC's proposal was agreeable to Fulk, but Long rejected it because he (Long) wanted to continue operating WSA and also wanted WSA to become a Long family-owned enterprise. Accordingly, Long proposed to buy Fulk's 50% interest for $5 million, net of all resulting taxes, to be paid out of WSA's future profits. That proposal went nowhere,

[5] In 2000, Long took out $994,000 from WSA, and Fulk took out $668,000.

however, because Long soon withdrew it at the behest of his children who were both employees of WSA and beneficiaries of the Trust. Long's children complained that $5 million was too much to pay Mr. Fulk who, they believed, had contributed very little to the value of the enterprise.[6]

Thereafter, Long told Fulk that he no longer wanted to remain in business with him. Long also informed Fulk that he was disappointed in Fulk's performance and that he intended to reduce his salary. From that point on, the parties' relationship deteriorated further and led ultimately to this Delaware proceeding, as well as litigation between the parties in Washington, D.C. What prompted this Delaware lawsuit was that beginning in the Spring of 2000 and continuing to the present, Long has objected to, and obstructed, every effort and proposal Fulk has made to assure that WSA would be sold at a fair market price. A recital of Long's conduct, which next follows, evidences a consistent pattern in that regard.

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[6] In his deposition taken in an action that Long filed in the District of Columbia, Long testified that "two of my children, the two youngest children, who work in the security business, came to me-and both of them have worked in the business with me-and said 'Dad, why are you doing this? This is entirely too much money to be giving to Mr. Fulk. Mr. Fulk has done very little to contribute to the value in the corporation." June 2, 2000 Deposition of Laurence J. Long, *Long* v. *Fulk,* D.C. Super. Ct., CA. 99-8974, at 111. Mr. Long has acknowledged that he desires to consolidate ownership of WSA in his family. *Id.* at 73.

C. **Long's Efforts To Frustrate A Sale Of WSA At A Fair Market Price**

In the Spring of 2000, Fulk contacted several investment bankers with a view towards retaining one of them to locate a buyer for WSA. Those bankers later met with Long, who told them that he and WSA's other employees intended to form their own company to compete with WSA immediately after WSA was sold. Believing that Long's announced plan would likely chill any bids for the Company at a fair market price, the bankers quickly lost interest in being retained.

There has also been a second obstacle to a sale of the Company (to Fulk or to an outside third party) at a fair market price-Long and the employees loyal to him are the sole repositories of the technical knowledge about WSA's computers and their information processing software programs. That technical software information is not documented in any manual, booklet, file or other record maintained by the Company. The information is critical to any prospective buyer, because it is essential to WSA's operations. Were Long and the current key employees to compete with WSA post-sale, that would leave any purchaser of WSA at an enormous disadvantage, because the absence of technical computer software information would. severely disrupt the continuity of WSA's operations. That disadvantage would cause a potential purchaser to decide either not to

acquire WSA at all, or to acquire it at a significant discount from fair market value.

Mindful of this problem, in 2000 and 2001, Fulk advanced several proposals in an effort to secure the continuity of operations post-sale. Fulk proposed hiring additional computer personnel not aligned with the Longs, or, alternatively, retaining the services of a computer consulting firm to determine the nature of WSA's critical software and then reducing that information to "operating manual" form that would be accessible to any purchaser of WSA. Long, as the Company's CEO, unilaterally rejected Fulk's proposals. Moreover, during the trial both Long and the Trust opposed the retention of a computer consulting firm, which up to that point had been the cornerstone of Fulk's proposed Plan of Dissolution.

In December 2000, Long learned that Informa Financial Information, Inc. ("Informa"), a firm that had acquired IBC, was interested in possibly renewing IBC's offer to purchase WSA.[7] At Mr. Long's instruction, Jeff Cahill, WSA's accountant, called Informa's CEO and told him that all of WSA's employees would leave WSA if the Company were sold to Informa. Not surprisingly, Infonna made no offer to acquire WSA.

[7] IBC's 1998 offer was for $16 million.

In a further effort to resolve the dispute, the Court, at the conclusion of the trial, proposed that the parties consider having the Company valued by a financial expert, based upon the assumption that the existing key computer personnel would remain with the Company after the sale. After the Company was valued, Messrs. Long and Fulk would be allowed to bid for it, with the expert's valuation being the floor price. Long rejected that proposal, asserting that he would not bid unless the valuation were based on the assumption that after that sale, Long and his son, Timothy Long, would leave WSA and set up a competing business.’

After his appointment, the Custodian also attempted, without success, to mediate the parties' dispute. During the mediation the Trust, represented by Christopher Long, offered to pay $1.5 million for Fulk's 50% interest in WSA, subject to certain terms and conditions. Fulk offered to purchase the Trust's 50% interest for $2.3 million, also subject to certain terms and conditions. When asked to explain why the Trust's offering price was less than Fulk's, Christopher Long responded that the Trust did not wish to pay for his father's past (and presumably future) contributions to WSA's business. The Custodian disagreed with this reasoning, stating in his Report that "Chris Long's father's very significant contributions to WSA ***are now***

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[8] Def. Post-Hearing Brief at 40.

part of the business and owned by both stockholders—just as all the proprietary technology was part of the business and owned by both stockholders." [9]

The foregoing background, plus the other knowledge he developed while familiarizing himself with this case, prompted the Custodian to observe that:

> [r]easonable people, of course, can have different opinions as to the value of a given asset. In this particular case, Long's competitive threat, and the potential loss of other key employees (Cahill; Tim Long; Richard Dann and Chris Dann), as well as the technology documentation issue, all exasperate [exacerbate] what would normally be a simple difference of viewpoints. It is clear to the Custodian that it will be very difficult for any outside third-party to "get its arms around" the value of WSA, and, thus, may decline to participate in a bidding process."

The Long interests' course of conduct (and the conduct of the employees loyal to them) after the Custodian's appointment, further illuminates the Custodian's "exasperat[ion]." On August 10, 2001, the Custodian received an unsolicited letter, signed by four WSA employees, stating in what amounted to an ultimatum, the only terms on which those employees would cooperate with the Custodian's efforts to secure

[9] Custodian's Report at 16 (emphasis added).

continuity. The employees demanded an additional bonus in return for their cooperation. They also asserted that "[w]e have agreed that we will not offer such continuity assurances on an individual basis."[11] The Custodian believes (as does the Court) that this unsolicited letter was "a direct result of the Custodian's conversation with Long and Chris Long on August 8, 2001 regarding the draft terms and conditions of a buy-out agreement [that] the Custodian [had] proposed on that date."[12]

On August 13, 2001, the Custodian received a second unsolicited letter, this time from Long. Several days earlier, Long learned that the Custodian had decided to hire a computer documentation expert. In his August 13, 200 1 letter, Long asked the Custodian to postpone hiring that expert, warning that "[a] number of the key employees have informed me that they will refuse to cooperate in this [computer] documentation effort and will leave the firm rather than do it."[13]

In his Report, the Custodian concluded that Long's actions (including his threats) while still the CEO of WSA, to leave and compete with the company, created a potential conflict of interest:

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[10] *Id.*

[11] Custodian's Report, Ex. 2.

[12] Custodian's Report at 6.

[13] Id; Custodian's Report, Ex. 3.

> In view of Long's stated intent to leave WSA and to compete with WSA if the Trust does not acquire Fulk's interest in WSA, and [in view of] the stated intent of several key people to join Long in competition with WSA, there is, at least, the appearance of a potential conflict of interest with Long's fiduciary responsibilities as a director and officer of WSA. . . . Plainly, however, Long is in a position to take actions that would lower the value of WSA-rather than maximize it-in the event of a sale to anyone other than the Trust.[14]

The Custodian also expressed his "disappoint[ment] that Long, as the CEO, despite his leadership abilities, has not been able to convince WSA's technology employees to be more cooperative with the sale process for the benefit of all stockholders."[15]

The competitive threat posed by Long and the key WSA employees also prompted the Custodian to express the following concerns:

> The Custodian is concerned about the impact on WSA's value by Long's competitive threat and the probability that many, if not all, key employees will leave with Long if he sets up a competing business. The Custodian also is concerned because he understands that Long has long-time personal relationships with many of WSA's largest clients. These issues will, no doubt, scare off most, if not all, potential third-party buyers and further create the need for any potential buyer to fill key positions, including the CEO, with qualified people. In other words, such a buyer not only has

[14] Custodian's Report at 9.

[15] Id. at 14.

to compete with a very competent competitor, but has lost for some period of time, at least, the personnel resources to compete. This makes it likely that there will be few outside buyers, if any, and, thus, lowers the value of WSA.

However, the threats would seem to work to the benefit of the Trust if it is the buyer in two ways: (1) the Trust does not need to be concerned with these competitive threats, as Long and key employees will not only not leave WSA and compete, but they and the clients will remain and WSA will be able to operate "without missing a beat," and ([2]) the Trust would be able to acquire a "going concern" without having to pay a "going concern" value.

This situation provides the Trust with a "negotiating advantage."[16]

D. The Custodian's Proposed Plan Of Sale And The Objections To It

1. <u>The Custodian's Recommendations</u>

These problems and his discussions with outside professional advisers led the Custodian to conclude, in his business judgment, that a sale to an outside third party would be unlikely and, moreover, that any bids by outsiders would probably be less than what either of the current stockholders would be willing to pay. Accordingly, the Custodian concluded that value

[16] Custodian's Report at 11-12.

would be maximized in a sale of WSA to either of the two stockholders, but not in a public auction.

The Custodian therefore recommended that the Court order a purchase/sale process involving only the two stockholders, Fulk and Long, by one of three methods. Under "Method One," one of the two stockholders (the "offeror" stockholder) would offer to purchase or sell his (or its) interest for a stated price. The other ("offeree") stockholder would then decide whether to buy or sell his (or its) interest at the price established by the offeror stockholder. The Custodian recommended Method One as his preferred approach, with the Trust being the offeror-stockholder and Fulk being the offeree, who would have the option to buy or sell at the price established by the Trust.[17]

Although both sides agree that this proposed Plan of Sale will most likely maximize value, each side has raised certain objections, and has

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[17] Under "Method Two," each stockholder would submit to the Custodian a single price at which the stockholder would be willing either to buy or sell his (or its) interest. The stockholder submitting the lower price would then decide whether to buy at the higher price, or to sell its interest at the higher price submitted by the other stockholder.

Under "Method Three," both stockholders would bid to purchase one share of WSA's authorized, but unissued, stock. The higher bidder would purchase the one share, which would give that stockholder majority voting control, and the minority stockholder would have whatever rights are permitted under the law. Because both sides agree that the Custodian's proposed Plan of Sale (Method One) is the approach that most likely will maximize value for both shareholders, it is unnecessary to (and the Court does not) address Methods Two or Three.

proposed certain modifications, to this proposal that the other side opposes. Because those objections frame the issues that must be resolved in this Opinion, it is helpful to describe those controverted features of the proposed Plan of Sale.

2. The Parties' Objections

Most stridently controverted is the Custodian's proposal that "[t]he seller, and persons aligned with the seller, should be enjoined from taking certain actions inimical to the best interests of WSA and the buyer, and which would, in any event, constitute a breach of fiduciary duty to WSA and the buyer if undertaken." In particular, the Custodian proposes that if the Trust is the purchaser, then Fulk, any of his family members, and any entities in which he has a significant financial interest, would be enjoined for 180 days following the Closing Date, from (i) soliciting any current employee of WSA, and (ii) soliciting any current client of WSA or any past client of WSA who has paid any invoice to WSA during the year prior to the Closing Date.

Similarly, if Fulk is the purchaser, then the Trust, Long, any of Long's family members and any entity in which Long or the Trust has a significant financial interest would be enjoined for 180 days following the Closing date from (i) soliciting any current employee of WSA, and (ii) soliciting any

current client of WSA or any past client of WSA who has paid any invoice to WSA during the year prior to the Closing Date.

In addition, irrespective of who winds up as the purchaser, all directors, officers, employees and agents of WSA would be enjoined from (i) removing and/or retaining any copies of WSA's proprietary information and/or corporate assets, including but not limited to WSA's files, documents, programs, systems and customer lists; and from (ii) utilizing WSA's proprietary information and other corporate assets for the benefit of anyone other than WSA.[18]

Long endorses the Custodian's Plan except for its injunctive provisions. Long's former counsel advanced a host of objections, and his new counsel then advanced additional objections, to those provisions. Fulk supports the Custodian's proposed Plan for the sale of WSA, including its injunctive provisions, which he contends are entirely appropriate and fall within the scope of this Court's powers under 8 *Del.* C. § 273. Fulk claims, however, that the Custodian must impose further additional "closing conditions."[19]

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[18] These proposed restraints are collectively referred to as the "injunctive provisions."

[19] Both Long and the Custodian agree in principle to the need for closing conditions, but not to all of the specific conditions Fulk proposes. Because the Custodian is willing to negotiate closing conditions with both sides, and requests that the Court grant him the authority (after consulting with the parties) to establish closing terms and conditions, the

II. ANALYSIS OF THE OBJECTIONS TO THE CUSTODIAN'S PLAN TO MAXIMIZE VALUE IN A SALE OF WSA UNDER *8 DEL. C.* § *273*

A. The Issues In Perspective And The Contentions

1. The Perspective

The parties' contentions and the issues that flow from them are best understood when viewed in context. Accordingly, that context is first summarized.

The core of the problem is that although WSA is a joint venture corporation with two 50% stockholders, WSA's owners never agreed to an "exit strategy" to recover the value of their investment in the event the joint venture was terminated. In many ventures of this kind the governing

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Court will not address the merits of the proposed closing conditions in this Opinion. It will, however, authorize the Custodian to approve any agreement of purchase or sale reached by the parties, including any conditions of closing.

Both Long and Fulk ask that the Custodian's proposed Plan be modified to require that the promissory note given by the purchaser be collateralized. Thereafter, new counsel for Long took the inconsistent position that the underlying requirement of a promissory note is an unreasonable condition altogether. In response, the Custodian agreed to modify his proposed Plan to require that the purchaser pledge 100% of the shares of WSA as collateral for the promissory note. This requirement would prohibit the purchaser from selling WSA after the purchase, unless the promissory note were paid in full or acceptable alternative collateral were provided. That requirement would also deter any purchaser from devaluing WSA (whose stock is the collateral) by competing with it. Because this proposed modification of the Custodian's Plan is reasonable, the Court approves it.

instruments create an exit strategy, which typically takes the form of a "buy out" by one stockholder of the other's interest. In some cases the buy out price is either an agreed-upon dollar amount, a formula by which the price can be calculated, or a procedure or process by which the buy out price can be determined (for example, arbitration). Unfortunately, in this case, when WSA was formed its governing instruments did not set forth an agreed buy out price, formula or process. Moreover, the stockholders were unable to reach agreement on that critical issue. In those circumstances the only alternative was to resort to the "default rules" afforded by the pertinent Delaware statutory and case law. This proceeding under 8 *Del. C.* §§ *226* and 273 was the result.

Originally, Fulk, as plaintiff, advocated that the Court should approve a plan that involved selling the Company's assets (as distinguished from its stock) to a third party.[20] The stumbling block was (and still is) that no third party will pay a fair market price for WSA, absent assurances of immediate access to the proprietary computer software that is so integral to the business being acquired. Unfortunately, no such assurances could be given, because no documentation exists that would enable an acquiror of WSA,

[20] Specifically, WSA's business, including its proprietary computer software and its existing arrangements with clients.

immediately upon taking control, to operate the computer software. Under Long's management, no such documentation was ever created. Instead, the technical "know how" relating to that computer software was allowed to remain in the "heads" of WSA's key employees, including Long, who is unwilling for WSA to pay to solve the documentation problem that occurred on his watch. If Long and the key employees form their own competing company post-sale as they have threatened to do, that would enable them to divert WSA's critical proprietary software to themselves, leaving any buyer of WSA in the position of acquiring a business without the computer software information that is needed for its operation.

To solve this problem, Fulk urged the Court to appoint, at the Company's expense, an independent computer consulting firm (specifically, Marasco-Newton) to document all of WSA's proprietary software. The Long interests opposed that request, claiming that as a business matter the cost of the documentation would exceed any benefit.

The result was a two-day trial on whether the Court should order software documentation. The evidence presented at that trial led the Court to conclude that the larger question—how best to maximize value for the shareholders in a sale of the Company-involved several alternatives, of

which creating software documentation was only one. Deciding which alternative was the best would require weighing several complex business considerations-a task that a person with a business background could perform far more competently than this Court. Accordingly, the Court appointed the Receiver/Custodian, who recommended that WSA be sold to one of its shareholders on terms that include the injunctive provisions at issue in this proceeding.

Although in form those injunctive provisions would apply to whichever of the two stockholders ends up as the seller, in substance and in practical terms the injunction would benefit only Fulk, but would afford no significant benefit to Long. As the buyer, Long would receive little benefit from the injunction because the Long interests already have operational control of the Company, including its customer relationships and its computer software, and there is no evidence that after the sale Fulk is yearning to form a company to compete with a Long-owned WSA. But, if Fulk were the buyer, he would be significantly and adversely affected, unless the injunctive provisions were imposed, because after the sale the Long interests will form a company to compete against a Fulk-owned WSA. In that endeavor, Long would have a competitive advantage, because the Long interests already have both exclusive access to and control of

customer-specific information, and exclusive knowledge of WSA's computer software. By preventing the Long interests from soliciting WSA's customers and from using that confidential proprietary information for six months after the sale, the Plan's injunctive terms would remove that competitive advantage, and to that extent would adversely affect Long.

But upon further reflection, it is clear that the injunctive provisions would adversely affect Long *only* if Long has been unwilling to pay a fair price for Fulk's interest in the Company. The reason is not complex. Under the Custodian's Plan of Sale, if Long offers a fair price for Fulk's 50% interest, then Fulk will sell to Long; if, however, Long is unwilling to offer a fair price, then Fulk will not sell but would become the buyer. Thus, to avoid the adverse impact of the proposed injunctive terms, all Long need do is offer a fair price that Fulk is willing to accept.

In short, the entire thrust of the proposed injunctive provisions is to induce Long-who desires to be the sole owner of the Company-to pay a fair price for the 50% equity interest owned by Fulk. But, paying a price that is acceptable to Fulk is something that Long is unwilling to do and has mightily resisted doing all along. Long's strategy has been to block Fulk from having any legal or practical alternatives, so that Fulk would have only one choice: accept whatever price for his ownership interest-however

inadequate--that Long is willing to pay. Consistent with that strategy, Long has opposed the injunctive provisions by unleashing a torrent of hypertechnical arguments. Those arguments have not the slightest equity. Indeed, they are designed to persuade me that as a legal matter, the Court of Chancery has no alternative other than to reject the Plan's injunctive provisions that would prevent Long from acquiring 100% ownership of WSA as a going concern without having to pay going concern value.

The context having been described, the Court next summarizes, and then addresses, Long's contentions.

2. The Contentions And The Issues

Despite their multitude, Long's arguments are reducible to three sets of contentions. The first is that under Section 273 this Court lacks any power to order a sale of one 50% stockholder's interest in the corporation to the other 50% owner (as the Custodian here proposes), unless both shareholders agree to all the terms of that sale. Long argues that because the corporation's two stockholders are unable to agree upon the terms, the statute precludes any remedy other than a court-ordered dissolution and winding up of the corporation, in which the stockholders would have no right to have the corporation sold as a going concern.

Long's second group of arguments boils down to the position that even if the Court is empowered to order a sale of one 50% stockholder's interest to the other under terms not agreed to by both, Section 273 deprives the Court of the power to order the kind of injunctive restraints being proposed here. That is so, Long contends, for three reasons: (i) a Section 273 proceeding is *in rem* and by its very nature bars the grant of an injunctive restraint that would operate *in personam* against persons who are not parties before the Court *(i.e.,* the Longs and WSA's other employees); (ii) whatever power this Court may have under Section 273 to maximize value is subordinate to, and superseded by, a former corporate fiduciary's legal entitlement to compete, or to use confidential corporate information, where the fiduciary is no longer a corporate employee and the corporate employer will be dissolved; and (iii) Long and his employees cannot be restrained from soliciting WSA's current (or former) customers or from using WSA's proprietary software as part of a dissolution sale, because neither the identity of those customers nor the software constitutes a legally protectible trade secret.

Long's third contention is that even if the Court is legally empowered to direct a sale of one 50% owner's shares to the other on the terms the

Custodian is proposing, the proposed injunctive conditions must be rejected because they are not reasonable.

These colliding sets of contentions generate the following issues that this Court must decide. The first is structural: is this Court empowered under Section 273 to approve a Plan that involves a sale by one 50% shareholder of his stock interest to the other, on terms that are not mutually agreed to? Embedded in and pivotal to that question is a predicate issue, namely, if both shareholders cannot agree on the terms of a stock sale, is the Court statutorily required to order a liquidation of the corporation's assets on terms likely to yield a price below the corporation's going concern value? As discussed below, I conclude that nothing in Section 273 requires the Court to order such a sale on such terms, or prevents the Court from approving a sale of one 50% owner's interest to the other where the stockholders cannot agree on all the transaction conditions.

The second issue is whether this Court is legally precluded from approving a Plan of Sale that includes the specific injunctive restraints proposed here. That issue breaks down to three subsidiary questions. The first is whether the *in* rem character of a Section 273 proceeding deprives the Court of power to impose injunctive restraints that would operate *in personam* against persons who are not formal parties to this proceeding. The

second is if the Court has such power, does the right of former corporate fiduciaries to compete against, or to use confidential corporation belonging to, the corporation when the former fiduciary is no longer an employee, supersede or override this Court's power to maximize the corporation's value in a sale under Section 273? The third subsidiary question is whether even if the fiduciary's right to compete does not have that overriding effect, the Plan's injunctive provisions are nonetheless legally proscribed because the identity of WSA's current or former customers, and WSA's computer software, are not trade secrets. As discussed below, I conclude that these objections lack merit and that this Court is fully empowered to approve a Plan of Sale that contains the injunctive provisions the Custodian is proposing here.

The third and final issue is whether, even if the Court is empowered to impose the injunctive and other conditions of the proposed Plan of Sale, those controverted conditions are reasonable. For the reasons discussed below, I conclude that they are.

B. The Structural Issue

Long first contends that Section 273 prohibits a court-ordered sale of the ownership interest of one 50% shareholder to the other, where the two owners do not agree on all of the post-sale terms being proposed. Long

argues that as a purely structural matter Section 273 proscribes such a sale, because the statute provides that "if no such plan [to discontinue the joint venture and to dispose of the assets used in such venture] shall be agreed upon by both stockholders, " the petition must state that the petitioner desires that "the corporation be dissolved."[21] Long also points to statutory language which provides that unless both stockholders, within three months of the filing of the petition, file a certificate stating that they have agreed on a plan, "the Court of Chancery may dissolve such corporation and may by appointment of 1 or more trustees or receivers . . . administer and wind up its affairs."[22]

From this language Long argues that in these circumstances, (i) the Court's power under Section 273 is limited to dissolving the corporation and appointing a trustee or receiver; and (ii) the power of the trustee or receiver is limited to selling the corporation's assets (as distinguished from selling the stock interest of one stockholder to the other); and (iii) because the corporation will be discontinued, Section 273 does not require that the sale capture the corporation's "going concern" value. For the reasons next discussed, these arguments have no merit.

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[21] **8** *Del. C.* § **273(a).**

[22] **8** *Del. C.* § *273(b).*

First, Long's argument finds no support in Section 273. Long's position presupposes that absent a plan that is agreed to by all the corporation's stockholders, the statute *mandates* that the corporation be dissolved and that its assets be sold, either as a collective or on a piecemeal basis, but not configured as an ongoing business at going concern value. The problem is that no such mandate appears from even a cursory reading of Section 273.

The statute does not *require* the Court to dissolve the corporation. Rather, Section 273 provides that the Court "*may* dissolve such corporation and *may* by appointment of 1 or more trustees or receivers. . . . administer and wind up its affairs."[23] Nothing in the statute requires that process to be contorted into a procedural straightjacket that limits the Court to only one structure for discontinuing a joint venture in the absence of an agreed-upon plan. To the contrary, the statute permits the Court flexibility in deciding how the joint venture should be discontinued. As this Court held in *In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc.:*

> [I]n matters brought under the provisions of Section 273, . . . the Court is not powerless to take positive action because the statute specifically provides that in the even certain contingencies do not take place "* * * the Court of Chancery may

[23] Id. (emphasis added).

> dissolve such corporation and may * * * administer and wind up its affairs." The Legislature's use of the word "may" was not intended to be granted automatically upon the filing of a petition for dissolution but rather that the granting of such forrn of relief is discretionary.[24]

The suggestion is also fully consistent with, and underscored by, 8 *Del. C.* § 283, which provides that:

> The Court of Chancery shall have jurisdiction of any application prescribed in this subchapter and of all questions arising in the proceedings thereon, ***and may make such orders and decrees*** and issue injunctions therein ***as justice and equity shall require.***[25]

Second, nowhere does the statute require that a sale under Section 273 must take the forrn of a piecemeal sale of the corporation's assets. Although Section 273 permits such a sale, its language is equally consistent with a court-ordered sale of the entire business to a third party as a going concern. In different circumstances that latter approach would be an appropriate way to discontinue WSA. . Regrettably, however, Long's conduct has been calculated to-and most likely would-prevent any sale on terms that could

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[24] 386 A.2d 1162, 1166 (Del. Ch. 1978) (internal citations omitted).

[25] 8 *Del.* C. § 283 (emphasis added). Section 283, by its terms, governs any application prescribed "in this subchapter"(referring to Subchapter X), which comprises Sections 271 through 285, inclusive. Therefore, Subchapter X applies to proceedings brought under Section 273.

generate a fair market price (going concern value) for WSA. Long's conduct has led the Custodian to conclude (and this Court to find) that in these unique circumstances the only persons who would pay a fair market price are the two 50% owners, and that the best way to achieve that value is to require that one 50% owner buy out the other's interest. That structure is the economic equivalent of a sale of the entire business in an auction in which the two 50% owners are the only bidders. Because the statute empowers the Court to order such a sale, surely it would also empower the Court to order a transaction that is its economic equivalent, differing only in form.

Third, no cited Delaware case directly or inferentially prohibits this Court from ordering a discontinuation of a joint venture on the terms the Custodian is proposing. Indeed, the case law supports Fulk's and the Custodian's position. The objective of a Section 273 proceeding is to achieve "justice and equity."[26] Consistent with that objective, in a Section 273 proceeding "a court of equity is duty-bound to protect the interests of stockholders when they are threatened and to enforce the duties of fiduciaries in situations in which allegations of wrongdoing are made."[27] As

[26] *8 Del. C.* § *283.*

[27] *In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc., 386* A.2d at 1167.

joint venturers Long and Fulk owe to each other fiduciary duties of utmost good faith, fairness and honesty.[28] Further, as WSA directors Long and Fulk each owe fiduciary duties to the other in his capacity as a stockholder. Those fiduciary duties include the obligation to maximize value for all shareholders in a sale of the enterprise.[29]

Those fiduciary duties do not vanish because the procedural context happens to arise under Section 273. Those duties, moreover, are enforceable by appropriate injunctive or other equitable processes.[30] The authorities uniformly repudiate Long's argument that this Court is stripped of any power to order a sale of WSA's business on terms that will enable WSA's shareholders to realize its going concern value.

c. **The Injunction-Related Issues**

Long next advances three arguments why this Court is legally barred from approving a Plan of Sale that includes the injunctive restraints being proposed here. Those arguments, in my view, have no merit either.

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[28] *Dionisi v. DiCampli*, Del. Ch., Consol. C.A. No. 9425, Steele, V.C., mem. op. at 18 (June 28, 1995), *amended by* 1996 WL 39680 (Del. Ch.).

[29] *Paramount Communications, Inc. v. QVC Network, Inc., 637* A. 2d 34, 44 (Del. 1994); *Odyssey Partners, L.P. v. Fleming Cos., Inc., 735* A.2d 386,416 (Del. Ch. 1999).

[30] *8 Del. C. § 283; E. I. DuPont de Nemours & Co. v. Am. Potash & Chemical Corp., 200* A.2d 428,432 (Del. Ch. 1964).

Long first argues that because a Section 273 proceeding is *in rem*, the Court lacks the power to impose injunctive restraints that would operate *in personam* against persons who are not formal parties to this proceeding, specifically, the Long family members and the WSA employees who are loyal to them. This argument fails because Section 283 empowers the Court to issue "such . . . injunctions . . . as justice and equity shall require," and because Court of Chancery Rule 65(d) provides that an injunction "shall be binding . . . only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert with them who receive actual notice of the order by personal service or otherwise."

Thus, Long and members of his family who are WSA officers, employees or agents, and the non-Long family employees of WSA who receive the prescribed notice, will all be bound by any injunction directed against the current parties (WSA, Fulk and the Trust). To avoid any further issue as to whether any of those persons would be bound by an order awarding the injunctive relief at issue in this case, the plaintiff is granted

leave to join any or all of those persons as additional parties to this proceeding.[31]

Long next argues that even if this Court is empowered to order a sale of the corporation under terms that would maximize its value, in this particular case that power is subordinate to, and superseded by, the right of former corporate fiduciaries to compete against (or to use confidential information belonging to) a corporation that will be dissolved and will no longer exist. The argument is flawed in several respects. It rests on the premise that WSA will be dissolved and will cease doing business, but in fact that is not inevitable. Here, the interest of one of the two co-owners of WSA would be sold to the other owner who, as the buyer, would be free to continue operating that business in which WSA would continue as an ongoing entity.

Long's argument also unfairly distorts the commonly understood meaning of the term "compete." The cases that recognize the right of a fiduciary to compete against a former corporate employer involve circumstances where the fiduciary has placed himself at risk by first

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[31] Both Rule 65 and the plaintiffs ability to join Long and his family members and other allies at WSA as parties for the limited purpose of granting complete relief, afford a complete answer to Long's assertion that the injunction provisions of the Plan of Sale would violate the Long's (and his allies') due process rights.

resigning his employment, and then competing against the former employer without the financial security of his (former) compensation. This case bears no resemblance to that paradigm.

Here, the Longs do *not* intend to put themselves at risk by first (i) leaving their employ at WSA and abjuring their corporate compensation, (ii) abandoning their strategy of obstructing all efforts to locate buyers willing to pay fair market value for the Company, (iii) remaining content to accept Long's 50% share of the purchase price, and *then* (iv) competing with WSA, which would operate as an intact, fully operational competitor. Rather, when the Long interests speak of being free to "compete," what they have in mind is continuing to receive their sizeable incomes as WSA employees, continuing to scare away competitive bidders, and continuing to impede any efforts to secure the continuity of WSA's operations by documenting the computer software (a *sine qua non* for any buyer except the Longs). In this manner-and at no financial risk to themselves-the Long interests would thereby appropriate Fulk's share of WSA's going concern value, by depriving Fulk of any alternative except to sell his 50% share of WSA to Long at whatever artificially low price Long chooses to offer.

Long cites no case, nor has any authority otherwise been brought to this Court's attention, that validates "competition" by a fiduciary under these "heads I win; tails I win" rules. In truth, Long's "right to compete" argument is a rhetorical smokescreen, designed to divert attention from the real issue. That issue is whether Long's *threat* to compete while remaining an employee with fiduciary obligations to WSA and to Fulk, affords Long a legally valid basis to block off all potentially interested bidders except himself, to avoid paying Fulk the value that a genuine bidding contest, not constrained by Long's threatened breaches of duty, would obligate him to pay. The answer to that question is clearly no.

Section 273 creates a substantive right, in each 50% stockholder, "to have his investment protected from depletion or loss due to a deadlock between the two fifty-percent stockholders and a resulting paralysis in the corporation's ability to conduct business and fulfill the purpose for which it was created."[32] This Court has "the equity power to grant the appropriate relief necessary to protect [a 50% stockholder's] investment in the assets of [the corporation] from depletion."[33] That includes the general equity power

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[32] *In re English Seafood (USA), Inc., 743* F. Supp. 281,288 (D. Del. 1990).

[33] *Id.*

to enjoin threatened breaches of fiduciary duty,[34] and the specific equity power, conferred by Section 273, "to protect the interests of stockholders when they are threatened, and to enforce the duties of fiduciaries in which allegations of wrongdoing are made."[35]

Accordingly, I find no merit in Long's contention that Long's "right to compete" trumps this Court's inherent equity power, and its statutory power under Section 273, to order the sale of a business upon terms that would prevent a breach of fiduciary duty consisting of improperly diverting the economic interest of one of the firm's 50% owners to the other.

Third, Long argues that the provisions in the proposed Plan of Sale that would enjoin Long (or Fulk) from soliciting WSA's current or former customers or from using WSA's computer software for 180 days after the

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[34] *E. I. DuPont de Nemours & Co. v. Am. Potash & Chemical Corp., 200* A.2d 428,432 (Del. Ch. 1964); *accord, Wilmont Homes, Inc. v. Weiler, 202* A.2d 576, 580 (Del. 1964).

[35] *In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc., 386* A.2d at 1166. The fiduciary analysis employed here is consistent with the result reached in cases decided in other jurisdictions, which recognize that the sale of a going concern business necessarily includes the goodwill or going concern value of the business. To protect the buyer of such a business, those courts have enjoined the seller of the business from soliciting the customers of the business being sold, or from competing with that business, in order to protect the business's going concern value. In granting that relief, some cases have implied a nonsolicitation or noncompetition agreement in order to protect the buyer's goodwill interest. *See, e.g., Mohawk Maint. Co. v. Kessler,* 419 N.E.2d 324, 330 (N.Y. 1981); *Tobin v. Cody,* 180 N.E.2d *652,656 (Mass.* 1962); *Certified Pest Control, Inc. v. Kuiper,* 294 N.E.2d 548, 550-51 (Mass. App. 1973); *Worgess Agency, Inc. v. Lane, 239* N.W.2d 417,422 (Mich. App. 1976). This Court reaches the same result here on fiduciary duty and statutory grounds, without expressing any view about the merits of the implied contract rationale adopted in the non-Delaware authorities cited above.

sale, are improper because the customers' identity and the computer software are not trade secrets. The short answer is that it does not matter whether the customers or computer software are "trade secrets" under the Delaware Uniform Trade Secrets Act,[36] because in all events that information is proprietary, ***i.e.,*** the property of WSA. As such, that property cannot be used by a fiduciary to WSA's detriment without the Company's permission. Neither Fulk nor Long has any individual property right to the Company's proprietary assets. Accordingly, this Court is fully empowered to protect those assets against expropriation in a sale of the Company as a going concern under Section 273.[37]

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[36] ***6 Del. C.*** **§** ***2001-2009.***

[37] Although I do not decide the trade secret issue, if the Court were required to decide whether the customer-related information and the computer software information were trade secrets under the Trade-Secrets Act, it would likely so hold. The computer software clearly satisfies the criteria for a protected trade secret under that Act, 6 ***Del. C.*** § **2001(4),** with the result that were Fulk to acquire WSA, the Longs would not be entitled to use their knowledge of WSA's proprietary computer systems to engage in a competing business. With respect to the customer information, Long protests that the ***identity*** of WSA's customers is not a trade secret, since that information is well-known and no effort was made to keep it a secret. That may be so, but the argument ignores the other customer-related information that is secret and that, if disclosed, would be harmful to WSA, namely, the specific services provided to the customers, the customers' specific requirements, and the pricing associated with those services. Long's failure to address those categories of customer-related information in any reasoned way tacitly concedes that that information constitutes a trade secret.

D. The Reasonableness of The Injunctive Terms

The final set of issues involves Long's challenge to the reasonableness of two specific terms of the proposed Plan of Sale. Long argues that it is unreasonable to prevent him from competing against an entity (WSA) that will have no ongoing business and will be dissolved. That argument merely restates, in a different form, contentions that have already been made and rejected. The short answer is that WSA will not necessarily be dissolved, but will be sold as a going concern with its ongoing business intact. Accordingly, this argument fails for want of a valid premise.

Long's remaining contention is that it is unreasonable to require the selling stockholder to accept the promissory note of the buyer as consideration, because that would force one stockholder to become a creditor of the other in circumstances where it is in the best interest of everyone to sever all their relationships after the sale. But, I do not understand that Long, if he becomes the buyer, would be categorically required to deliver a note to Fulk, as the seller. Nothing in the Plan precludes an all-cash transaction, particularly if the buyer has the needed funds or is able to borrow them from a commercial lender. If Long wishes to pay cash for Fulk's 50% interest, he is free to do so. The use of a note to

enable a sale on a deferred payment basis appears intended as an alternative financing option in circumstances that would create minimal risk to the seller, since the note would be accompanied by a guarantee executed by the purchaser's family, and would also be secured by a pledge of 100% of the shares of WSA as collateral.

Accordingly, I am unable to conclude that the promissory note feature of the proposed Plan of Sale, in these circumstances, is unreasonable.

IV. CONCLUSION

For the foregoing reasons, the Court overrules the objections to the Custodian's proposed Plan of Sale. The parties shall confer upon, and submit for entry by this Court, an appropriate form of implementing Order.