IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

William R. Liss	**:**	**June 2001**
	:	**No. 2063**
v.	**:**	
	:	**Commerce Program**
Sheldon J. Liss, Liss Brothers, Inc., Liss Global, Inc., Jeffrey Waldman	**:**	**Control No. 062237**
	:	

OPINION

Introduction

Petitioner William Liss ("William") has filed a motion for the imposition of a receivership or a constructive trust on a corporation, Liss Global, that was incorporated by his brother Sheldon Liss ("Sheldon") on February 21, 2001. Sheldon is the sole shareholder of Liss Global. William's request for the imposition of a receivership on Liss Global is linked to the contentious liquidation of another corporation, Liss Brothers, Inc., in which William and his brother Sheldon were both 50 percent shareholders.

Liss Brothers was incorporated in September 1976. Initially, the brothers consulted with each other concerning the management of the company. Eventually, however, they engaged in prolonged negotiations concerning the buy-out of William's interests in Liss Brothers. Around 1997 William began to play an increasingly limited role in the work of the corporation, while continuing to enjoy a substantial salary and benefits.

After many prosperous years, Liss Brothers became encumbered by bank debts and other overhead. Although Sheldon attempted to secure additional financing, he was unable to do so. Liss Brothers was liquidated after a meeting of the shareholders on February 13, 2001 and after receiving notice by letter dated February 21, 2001 from Summit Bank that it was in default of its loan. Once it became clear that liquidation was imminent, the defendant through his counsel urged selection of

a third-party to oversee the process. Both brothers eventually agreed on a liquidator, who supervised, inter alia, the sale of the corporate assets of Liss Brothers.

William now claims that a constructive trust or receivership must be appointed as to Liss Global to protect his interests and those of the unsecured creditors of Liss Brothers. Numerous days of hearings were held on this motion. Testimony revealed the painful breakdown of a business and family relationship, suggesting how with closely-held corporations the "survival of the business association is perilously tied to the continuing vitality of intimate personal relationships."[1] Both brothers testified to a profound sadness at the liquidation of a company that they had devoted 27 years to building for themselves and their families. Yet their inability to agree on a buy-out contract and their company's severe economic problems led to the demise of Liss Brothers. For the reasons set forth below, plaintiff's request for imposition of a receivership or constructive trust on Liss Global is denied.

Findings of Fact

The Parties

1. Plaintiff William R. Liss ("William")[2] is a fifty percent shareholder as well as Vice President, Secretary and Treasurer of defendant Liss Brothers, Inc. 1/30/2002 N.T. at 13 (*William*); Amended Complaint¶ 1; Answer, ¶1; Plaintiff's Motion and Response thereto, ¶ 4.

2. Defendant Sheldon J. Liss ("Sheldon") is William's brother and the other fifty percent shareholder of defendant Liss Brothers, Inc. Sheldon is the President of Liss Brothers. 1/30/2002 N.T. at 13 (*William);* Amended Complaint ¶2; Answer ¶2; Plaintiff's Motion and Response thereto, ¶ 6.

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[1] Viener v. Jacobs, 2000 WL 33539470, 51 Pa. D. & C. 4th 260, *280 (Berks Cty. 2000), quoting Orchard v. Covelli, 590 F. Supp. 1548, 1550 (W.D. Pa. 1984), aff'd, 791 F.2d 916 (3d Cir. 1986).

[2] Testimony at the hearing will be identified as to the witness as "*William*" for William Liss or "*Sheldon"* for Sheldon Liss. Other witnesses will be identified by their surnames.

3. Sheldon and William were also fifty percent owners of a partnership, Sheldon J. Liss and William R. Liss (the "Partnership"), which engages in real estate transactions. 1/30/2002 N.T. at 44 (*William).* Until November 1, 2000, the partnership owned property located at 14501 Townsend Road where Liss Brothers conducted its business. The Partnership no longer conducts business. 1/30/2002 N.T. at 44, 47 (*William);* Amended Complaint ¶5; Answer, ¶5; Defendants' New Matter and Plaintiff's Response thereto ¶ 5; Plaintiff's Motion and Response thereto, ¶ 8.

4. Defendant Liss Global, Inc. ("Liss Global") is a corporation that was incorporated on February 21, 2001. Sheldon Liss is the founder and sole shareholder of Liss Global. He is also a director and officer of Liss Global. 1/31/2002 N.T. at 316 & 366 (*Sheldon);* Amended Complaint, ¶ 6; Answer ¶6; Plaintiff's Motion and Response thereto, ¶ 6.

5. Defendant Jeffrey Waldman ("Waldman") is employed by defendant Liss Global as Chief Financial Officer. He had also been Chief Financial Officer of Liss Brothers.1/30/2002 N.T. at 42-43; Amended Complaint, ¶ 8; Answer ¶¶ 8 & 15.

The Creation and History of Liss Brothers, Inc

6. Liss Brothers, Inc. was incorporated on September 23, 1976. Amended Complaint ¶ 12; Answer, ¶ 12. Its operations consisted of purchasing, importing, and selling general merchandise such as giftware, housewares, seasonal merchandise, hardware and novelties. Id. See 1/30/2002 N.T. at 12-13 (*William).*

7. In the 1980s, Liss Brothers acquired a catalog candle business under the fictitious name Robert Alan Candle Company through which it bought and sold candles. 1/30/2002 N.T. at 13 (*William);* Amended Complaint ¶ 13; Answer ¶ 13; Defendants' New Matter and Plaintiff's Response thereto ¶¶ 1-3.

8. The By-Laws of Liss Brothers provide:

   a. Art. III. Par. 7: "Special meetings of the shareholders may be called at any time by the President, or the Board of Directors, or shareholders entitled to cast at least one fifth of the votes which all shareholders are entitled to cast at the particular meeting."

   b. Art. III. Par. 9 :"Written notice of a special meeting of shareholders stating the time and place and object thereof, shall be given to each shareholder entitled to vote thereat at least three days before such meeting . . .."

   c. Art. IV. Par. 6: "Special meetings of the Board may be called by the President on 3 days' notice to each director, either personally or by mail or by telegram; special meetings shall be called by the President or Secretary in like manner and on like notice on the written request of a majority of the directors in office."

   d. Art. V. Par. 2: "The salaries of all officers and agents of the corporation shall be fixed by the Board of Directors."

   e. Art. V. Par. 5: "The Secretary shall attend all sessions of the Board and all meetings of the shareholders and act as clerk thereof, and record all the votes of the corporation and minutes of its transactions in the book to be kept for that purpose."

   See Ex. P-23.

9. At its peak, Liss Brothers employed over 100 people and occupied 400,000 feet of warehouse space with over $40,000,000 in revenue. 1/30/2002 N.T. at 16 (*William);* Defendants' New Matter and Plaintiff's Response thereto, ¶ 8.

10. William and Sheldon agree that initially after the incorporation of Liss Brothers, the brothers regularly consulted with each other on the management of Liss Brothers concerning such matters as salary increases and employment policies. Amended Complaint,¶ 18; Answer, ¶ 18.

11. Sheldon maintains that as President, he was charged with the management of Liss Brothers

but he regularly consulted with William until William refused to participate in the company's management and then began interfering with its operations. William contends that Sheldon had a long-term scheme to take over control of Liss Brothers. Amended Complaint, ¶ 18; Answer ¶ 18.

12. The parties agree that for many years William managed some of the internal affairs of Liss Brothers, especially real estate matters and the warehouse. Sheldon maintains that beginning around 1997 when Liss Brothers downsized its operations relating to close-out merchandise, "William began to voluntarily withdraw as an active employee." Amended Complaint, ¶ 19; Answer, ¶19. He nonetheless maintained the authority and powers as a director and shareholder. William, in contrast, maintains that his role in the company declined as "Sheldon began to implement his scheme to take over control" of Liss Brothers. Amended Complaint, ¶19; Answer ¶ 19; 1/30/2002 N.T. at 14-18 (*William)*.

13. In a March 9, 2000 Memorandum, Sheldon expressed dissatisfaction with William's "level of effort and productivity" as a 50% owner of Liss Brothers, Inc. This memorandum outlined certain responsibilities and requested that William work on a full-time basis "which means no less than 8:00 a.m. to 5:00 p.m. Monday through Friday." See Ex. D-1; 1/30/2002 N.T. at 150 (*William).*

14. During the period addressed by Sheldon's March 9th Memorandum, William concedes that he typically arrived at work around 8:30 or 9:00 a.m. and then left "11:30, 12:00, 12:30, 1:00, it would vary."After leaving, he went "sometimes" to the country club but "not usually" to make sales calls. 1/30/2002 N.T. at 154 (*William).* See also 1/30/2002 N.T. at 17 (*William*)(after the company downsized around 1997, William's hours were from 8:30 to 12:00 or 1).

15. Through December 31, 2000, Sheldon received a salary of $330,000 and William received $260,000. 1/30/2002 N.T. at 145 (*William*); 1/31/2002 N.T. at 230 (*Sheldon).* Liss Brothers

had a liberal expense reimbursement policy, which compensated some personal expenses of both William and Sheldon. 1/31/2002 N.T. at 242-43 & 396-97 (*Sheldon).* William testified that his total compensation package was approximately $400,000 when health benefits, car payments and restaurant expenses were included. William stated that prior to January 2001 his restaurant expenses were paid whether or not they related to business. 1/30/2002 N.T. at 145-46 (*William).*

16. Sheldon had his salary increased by Liss Brothers effective January 1, 2001 by approximately $40,000 with no increase for William.. 1/31/2002 N.T. at 230-234 (*Sheldon).*

17. No evidence was presented that Liss Brothers had long-term or exclusive agreements with any of its suppliers, vendors or customers, including Rite Aid. See Ex. P-28f (e-mail from Pudlin).

The Summit Bank Loan, The Sale of the 14501 Townsend Road Property and Investment of the Sale Proceeds Into Liss Brothers in November 2000

18. Liss Brothers maintained various financing packages with lenders because of the general nature of its business with its inventory requirements and marketing costs. Defendants' New Matter and Plaintiff's Response thereto, ¶ 9; 2/21/2002 N.T.at 200-03 (*Sheldon);* 1/31/2002 N.T. at 372 (*Sheldon*) *(*describing lending relations with PNC and Summit Bank).

19. Liss Brothers entered into a loan and security agreement ("Bank Agreement") with Summit Bank ("Summit") on March 3, 1999. 1/31/2002 N.T. at 372; 2/21/2002 N.T. at 201-02 (*Sheldon)*; Ex. D-6.

20. Summit issued the following three separate loans to Liss Brothers pursuant to the Bank Agreement:

    (1) a working capital line of credit totaling six million five hundred thousand dollars ($6,500,000);

(2) a letter of credit facility note totaling three million dollars ($3,000,000); and

(3) a term loan totaling four hundred seventy thousand one hundred dollars ($470,100).

The notes were secured by Liss Brothers, William and his wife, Sheldon and his wife as well as by the partnership with, inter alia, personal guarantees and mortgages against real property. Amended Complaint, ¶9; Answer, ¶ 9; Plaintiff's Motion and Response thereto, ¶ 9; Ex. P-1, Defendants' Admission 54.

21. Pursuant to the Bank Agreement, Summit held a mortgage on property located at 14501 Townsend Road, ("Townsend Road Property") Philadelphia. Amended Complaint, ¶ 23(b); Answer, ¶ 23(b). In the original loan documents, Summit required that the proceeds from a sale of the real estate be invested into Liss Brothers up to $3,000,000 or returned to the bank. Answer to Amended Complaint ¶ 27; 2/21/2002 N.T. at 193-97 (*Sheldon)*; 1/30/2002 N.T. 128, 48 (*William*); Ex. D-6, ¶ 5.6.

22. Liss Brothers experienced severe financial problems during its fourth quarter of 2000. Although in the first three quarters it made a profit of $400,000, it lost $700,000 in the fourth quarter. 1/31/2002 N.T. at 395 (*Sheldon*).

23. William, likewise, acknowledged that around November 2000 Liss Brothers was in "very deep debt." 1/30/2002 N.T. at 130 (*William*). Sheldon believed it was crucial to sell the Townsend Road property because vendors had to be paid and there were accounts past due. 2/21/2002 N. T. at 200 (*Sheldon).* William conceded that "Liss Brothers needed my portion of the money in order to maintain the company, go forward, and pay down the vendors." 1/30/2002 N.T. at 130-31 (*William*).

24. At the time when a purchaser for the Townsend Street Property had been found, William objected to putting his share of the proceeds back into the company and insisted on a Sales Proceeds Disposition Agreement. 2/21/2002 N.T. at 198 (*Sheldon*); 1/30/2002 N.T. at 47

(*William*).

25. William believed that Summit Bank would have permitted him to deposit his share of the net proceeds from the sale of the Townsend Road property into a separate account at Summit Bank under its control and as security for the outstanding notes. 1/30/2002 N.T. at 48-50, 128-29 (*William).*

26. William also conceded that under the Bank Agreement, Summit was entitled to require that proceeds from the sale of the Townsend Road property should be invested back into Liss Brothers to build up its assets. 1/30/2002 N.T. at 128, 48-50 (*William*).

27. To protect his interests and make sure that Sheldon "would not steal the money" that was going back into the company, William entered into the Sales Proceeds Disposition Agreement "so that when we did sell the property, instead me of putting the money in an account with Summit Bank, I gave it to the company and in exchange he told me that certain things would or would not happen based on my cooperation at that time." 1/30/2002 N.T. at 47-48 (*William*); see also id. at 128-30. Simultaneously with the sale of the Townsend Road property, William and Sheldon entered into a "Sales Proceeds Disposition Agreement" on November 1, 2000. 1/30/2002 N.T. at 47 (*William*); 2/21/2002 N.T. at 198-99 (*Sheldon*); Ex. P-4.

28. In November 2000, the Partnership sold the Townsend Road property. The proceeds from that sale in the amount of two million eight hundred and sixty six thousand four hundred and fifty six ($2,866,456) were invested by William and Sheldon into Liss Brothers as a capital contribution. Plaintiff's Motion and Response thereto, ¶21; 1/30/2002 N.T. at 63-64 (*William);* Ex. P-5.

29. William conceded that by " me putting this money into the company and my brother putting his money into the company, the company was able to pay the vendors that we owed a lot of

money to and the company was able to continue on." 1/30/2002 at 63 (*William*). William's attorney, Stephen Foxman ("Foxman"), acknowledged that William and Sheldon made equal capital contributions to the company pursuant to their Bank Agreement. 5/9/2002 N.T. at 107, 109-112 (*Foxman*)(referencing Ex. D-6).

30. Liss Brothers continued to operate out of the Townsend Road Property after its sale pursuant to a lease with the new owner. Under this lease, Liss Brothers occupied substantially less space than it had prior to the sale of the property. The lease did not permit Liss Brothers to occupy the space that had formerly been occupied as William's office. Defendants' New Matter and Plaintiff's Response, ¶¶ 32-34. After November 1, 2000, William still had an office to use "because the person that bought the property who was upstairs was not moving into that office until January or February. So I was able to use that; but my brother did not make space for me in the new company." 1/30/2002 N.T. at 65-66 (*William).*

31. During the period between May and December 2000, there was $188,027 charged to Sheldon's corporate account. See Exs. P-6 through P-13. Sheldon admitted to charging personal expenses to the corporate credit account,[3] clarified that some were charged by other employees of Liss Brothers,[4] some were business expenses or reimbursed expenses,[5] but he was often unclear as to the exact nature of a charge.[6] Among the charges admitted to by Sheldon were a family vacation trip to Florida, personal restaurant meals and a weekend trip to New Orleans to visit his son in college. 1/31/2002 N.T. at 218-19; 221-22; 240-41 (*Sheldon*). During that same period, charges totaling $25,751 were listed for William. Exs. P-6 through P-13.

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[3] See 1/31/2002 N.T. at 218-19, 228, 240-41, 256 (*Sheldon*).

[4] See 1/31/2002 N.T. at 227 & 243 (*Sheldon*).

[5] 1/31/2002 N.T. at 243-44 (*Sheldon).*

[6] See e.g., 1/31/2002 N.T. at 218-19, 221-22, 257, 227, 262-64 (*Sheldon).*

32. In 1998, William borrowed money from Liss Brothers to pay for gambling debts. He also conceded that his corporate credit card had been canceled because he had charged personal airplane tickets to the company. Sheldon criticized these actions in an e-mail as improper and detrimental to the company's interests. 1/30/2002 N.T. at 167-69 (*William);* D-25 (e-mail from Sheldon dated December 16, 1998).

33. Sheldon increased his own salary by 12% effective January 1, 2001. He stated that he did not give William a raise then because "he didn't work at the company." 1/31/2002 N.T. at 234, 230 (*Sheldon*).

34. Sheldon acknowledged that there was a culture within the company that began when the company was doing well in the late 1980's that permitted certain liberties as to charges. He decided to put a stop to these practices effective January 2001. 1/31/2002 N.T. at 233-34, 242-43, 246 (*Sheldon*).

35. Sheldon therefore proposed a change in the company's expense reimbursement policy under which a clear business purpose had to be presented for an expenditure as a prerequisite for reimbursement. 1/31/2002 N.T. at 396-97 (*Sheldon*).

36. After January 1, 2002, William's salary remained the same but he no longer received the same compensation for expenses. His corporate and gas credit cards were canceled. 1/30/2002 N.T. at 67 (*William).* No evidence was presented by plaintiff concerning Sheldon's expense charges after December 2000. See Exs. P-6 through P-19 (corporate account invoices from May through December 2000).

Efforts to Buy Out the Interests of William Liss in Liss Brothers, Inc.

37. Since 1998, Sheldon and William actively discussed a buy-out of William's interest in Liss Brothers. 1/30/2002 N.T. at 17-19 (*William).*

38. According to Sheldon, beginning around May 1997 William did not participate actively in the company's operations but instead spent most of his time trying to sell or lease the Townsend Road property, trading stocks on his computer, or doing transactions for Liss Realty, a company William started in 1998 that was owned 100% by William and was distinct from Liss Brothers. 1/31/2002 N.T. at 410- 412 (*Sheldon*).

39. On May 31, 2000 William and Sheldon signed a Letter of Intent ("Letter of Intent"), which was hand written by Sheldon. The parties dispute whether this was a binding contract. Amended Complaint, ¶ 29-31; Answer ¶ 29-31 & 34(a); Plaintiff's Motion and Response thereto, ¶ 10. See Ex. P-3.

40. The Letter of Intent was "between Sheldon Liss and William Liss regarding Sheldon purchasing William's 50% share of Liss Brothers." Ex. P-3. The price set forth was $3,200,000 with $1,000,000 at settlement and $2,200,000 paid equally over 11 years beginning January 1, 2001. Ex. P-3. The Letter concluded:

> *This agreement is subject to the preparation of an agreed final agreement of sale. Ex. P-3.

41. This court concluded that the Letter of Intent did not constitute a binding contract for Sheldon to pay William $3,200,000 for his interests in Liss Brothers because the letter explicitly stated that "this agreement is subject to the preparation of an agreed final agreement of sale." Liss v. Liss, 2002 WL 576510 at * 13 (Phila. Com. Pleas 2002).
See Ex. P-3.

42. Sheldon testified that around November 2000, he told William that Liss Brothers was not doing well financially, and as a consequence, they had to think in different terms about the buyout deal. 1/31/2002 N.T. at 214, 311 (*Sheldon*).

The February 13, 2001 Meeting

43. Sheldon and his attorney, David Pudlin, called for a meeting on February 13, 2001 at the office of William's attorney, Stephen Foxman. 1/30/2002 N.T. at 82 (*William*); 1/31/2002 N.T. at 346 (*Sheldon*).

44. According to Pudlin, the purpose of the meeting was to inform William about the financial status of the company and especially about relations with the bank. 2/21/2002 N.T. at 139 (*Pudlin).*

45. Stephen Foxman, as counsel for William, assumed that the meeting was another attempt to resolve the impasse between the brothers. 5/9/2002 N.T. at 6 (*Foxman)*.

46. No formal notice of this meeting was sent out by the secretary, William. But, according to Sheldon, William had never sent out any formal notice for a meeting in 27 years nor had he prepared minutes in their entire years of doing business. 1/31/2002 N.T. at 348 (*Sheldon*). Pudlin testified that in the two year period he had been doing legal work for Liss Brothers, William had never signed corporate minutes. 2/21/2002 N.T. at 140-42 (*Pudlin*).

47. Minutes of the meeting were prepared by David Pudlin, but they were never sent to William. 2/21/2002 N.T. at 26-27 *(Pudli*n). According to Pudlin, the minutes were never shown to Summit Bank but were merely placed in the file. 2/21/2002 N.T. at 103 (*Pudlin)*. See Ex. P-24.

48. According to Foxman and Pudlin, Sheldon opened the February 13th meeting by discussing the poor financial status of Liss Brothers. He noted that the bank loan was coming due on February 28 and that would be the end of the company. 2/21/2002 N.T. at 113-*14 (Pudlin*); 5/9/2002 N.T. at 11, 13-14 (*Foxman*).

49. At the meeting, Sheldon noted that Summit Bank desired to terminate its lending relationship with Liss Brothers as of December 31, 2000, but it agreed to maintain its credit for an

additional two months until February 28, 2001 at the request of Sheldon and David Waldman. 2/21/2002 N.T. at 113 (*Pudlin).*

50. William was aware that Summit Bank wanted Liss Brothers to find a new lender. 1/30/2002 N.T. at 104 (*William).* He realized that February 28, 2001 or March 1, 2001 was a deadline for Summit's continued relationship with Liss Brothers. 1/30/2002 at 123-24 (*William*).

51. At the meeting, Sheldon proposed two scenarios to William that, in his opinion, would allow Liss Brothers to continue its operations:

> (1) Sheldon offered to buy out William's interest in Liss Brothers for $3,000,000 to be paid out over a ten year period; or
>
> (2) The parties could maintain the status quo, with William continuing to receive his salary and Sheldon keeping his raise.

Defendants' New Matter and Plaintiff's Answer thereto, ¶ 50; 1/30/2002 N.T. at 106-09, 112, 82-87 (*William*); 1/31/2002 N.T. at 394-98 (*Sheldon*); 5/9/2002 N.T. at 11-13 (*Foxman)* (according to Foxman, the proposal was presented by Pudlin).

52. William stated that when confronted with Sheldon's proposal at the meeting, "[h]e mentioned the fact that we could liquidate. I mentioned the fact that we could liquidate. On my point of view, it was just a threat." 1/30/2002 N.T. at 87 (*William*). See also 1/30/2002 N.T. at 112; 116-17; 200 (*William*).

53. Sheldon stated that when confronted with the two proposals, William rejected both and said he would rather liquidate the company. 1/31/2002 N.T. at 361 (*Sheldon*). David Pudlin likewise testified that "Billy not only rejected those proposals, but he said that he would rather liquidate the company than accept those proposals." 2/21/2002 N.T. at 110 (*Pudlin*).

54. Foxman testified that William would accept the proposal to maintain the status quo but without a raise for Sheldon. According to Foxman, neither William nor he agreed to liquidate

the company. 5/9/2002 N.T. at 16 (*Foxman*). Foxman did concede that William stated he wanted to sell his interests at a fair price or otherwise there was no alternative to liquidation. 5/9/2002 N.T. at 120 (*Foxman*).

55. Pudlin testified that at the meeting, he and Foxman discussed the need for a liquidation plan to present to the bank so that Liss Brothers could control the liquidation rather than the bank. He said that they also discussed the need for an outside liquidator. 2/21/2002 N.T. at 116 (*Pudlin).*

56. William conceded that he was told at this meeting by Sheldon's attorney, David Pudlin, that if the company liquidated either brother would be free to deal with former customers and vendors of Liss Brothers. 1/30/2002 N.T. at 114-116 (*William*). See also 1/31/2002 N.T. at 363-64 (*Sheldon*).

57. After the February 13th meeting, Sheldon began to put together a liquidation plan for Liss Brothers that had to be completed prior to the meeting with Summit Bank on February 27. 1/31/2002 N.T. at 317-18, 324-25 (*Sheldon*). See Ex. P-21.

58. Foxman stated that he had several telephone conversations and e-mail exchanges with Pudlin after the February 13th meeting during which Pudlin would bring up liquidation and discuss the choice of a liquidator. Foxman stated that he did not think that liquidation would occur at that point but he did not know what actions the bank might take regarding its loan. 5/9/2002 N.T. at 19-20 (*Foxman*).

59. On February 19, 2001, Pudlin sent an e-mail to Foxman which began by stating "As you and I discussed, now that Billy and Shelly have agreed to liquidate and dissolve the company, it is important that the process be moved along quickly because our lending facility with Summit Bank is expiring on 2/28/01."Ex. P-28(a)(e-mail). Foxman concedes that he received the e-mail. 5/9/2002 N.T. at 73-74 (*Foxman*). Although Foxman admitted that he understood the

e-mail as referring to a liquidation, he did not respond to it or indicate that William opposed liquidation. Id. at 74-76 (*Foxman*).

60. By letter dated February 21, 2001 from Summit to Liss Brothers, the bank gave "notice to you that an Event of Default currently exists under the Loan Agreement as a result of Borrower's failure to comply with certain of the financial covenants set forth therein." The letter indicated that copies were sent to both Sheldon and William. Ex. D-70.

61. Pudlin sent another e-mail to Foxman on February 27, 2001 about the letter of default from Summit Bank and Sheldon's meeting with Summit Bank officials on that day. Pudlin informed Foxman that:

> At that meeting, Shelly gave an update to Summit, which necessarily included the agreement of Billy and Shelly to liquidate the company. In anticipation of Summit's calling of the loan, Shelly had prepared a plan of orderly liquidation, and he presented it to Summit today.
> Ex. P-28b.

Pudlin also noted that Shelly presented the idea of having a third party liquidator and referenced a company "whose brochure I had delivered to you 2/21/01." Ex. P-28b. Foxman conceded that he received that brochure/resume. 5/9/2002 N.T. at 78 (*Foxman*); Ex. D-16.

62. On February 28, 2001, Foxman admits he sent the following e-mail to Pudlin:

> I will try to find out Billy's position on that -- I had sent him the brochure that you mailed to me and he called to discuss it but we have not had a chance to consider potential other liquidators who may have experience in this particular line of business (i.e. the Liss Bros. business).
>
> I am wondering whether it makes the most sense to liquidate under the gun from Summit, or to attempt to line up a new lender in the interim, so that the liquidation process can be conducted in a way that will bring the highest return to Billy and Shelly.
>
> Assuming liquidation, now or in the future, what is Shelly going to do? Obviously, certain "assets" of the Company will benefit him if he is intending to go into the same business, and it would be a matter of some concern to Billy to understand Shelly's plans, and how he would compensate the Company for taking over continuing contracts, equipment, space, etc. I think we need some ground rules in this area to make Billy comfortable with proceeding with the liquidation on an

agreed basis, without appointment of an outside liquidator. Ex. P-28e; 5/9/2002 N.T. at 90-92 (*Foxman*)(emphasis added).

63. Foxman stated that as late as this February 28 e-mail, which was 15 days after the February 13th meeting, he had never told Pudlin, Sheldon or Summit Bank that William was opposed to liquidation despite the e-mails from Pudlin. 5/9/2002 N.T. at 92 (*Foxman*).

64. On February 28, 2001, Pudlin sent Foxman another e-mail requesting a final decision on a liquidator. Pudlin responded to Foxman's reference to "new purchases" by stating that there would be none since the company was liquidating. He informed Foxman that Liss Brothers had no continuing contracts with customers other than Rite Aid which had the right to terminate on 30 days notice for any reason. Ex. P-28f.

65. William stated that he was not notified about Sheldon's visit to Summit Bank of February 26, 2002 (sic) to inform it about the plan to liquidate Liss Brothers. 1/30/2002 N.T. at 89-90.

66. On March 1, 2001, Foxman sent Pudlin an e-mail in which he stated that William did not want to go through with the liquidation of Liss Brothers "unless and until he has full information regarding Shelly's plans and arrangements regarding assets of the company."Ex. P-28c. Foxman conceded that this was the first time he had written Pudlin that William opposed liquidation. 5/9/2002 N.T. at 104-05 (*Foxman*)

67. One day later, Foxman sent an e-mail to Pudlin which stated that "I am at a loss to understand how a meeting at which Shelly and Billy exchanged proposals with each other has been turned into a purported agreement to liquidate the Company." Ex.P-28(d); 2/21/2002 N.T. at 82 (*Pudlin*). From the date of this March 2, 2002 e-mail, Pudlin realized that liquidation was a contentious matter. 2/21/2002 N.T. at 83 (*Pudlin*).

68. According to Sheldon, he did not learn that William opposed liquidation until after the meeting with Summit Bank and around March 1. At that point, William did not suggest any

options to liquidation but expected Sheldon to come up with solutions. 2/21/2002 N.T.at 207-09, 218-20 (*Sheldon*).

69. Sheldon expressed surprise to William that he had not been contacted earlier, especially since their attorneys had been discussing liquidation. Sheldon, nonetheless, told William that he would contact the bank, but when he did Sheldon was told that it was too late and "as far as we're concerned you guys are out of here in 90 days and that's it." 1/31/2002 N.T. at 381-83 (*Sheldon).*

70. Foxman also contacted the bank at this point and was told there was no way to go back. 5/9/2002 N.T. at 44 (*Foxman*).

71. Counsel for William and Sheldon discussed potential liquidators and the parties agreed on the selection of Robert Wheeler as liquidator. Defendants' New Matter and Plaintiff's Answer, ¶ 63.

72. Robert Wheeler met with William and Sheldon in early March 2001, at which point William agreed to Wheeler serving as the liquidator. 7/23/2002 N.T. at 89 (*Wheeler*).

73. Wheeler stated that Sheldon assisted in the liquidation process by meeting with customers and assisting in collection matters. Sheldon was available "full-time" and "Shelly's efforts almost doubled what would be expected in a liquidation." William, in contrast, offered no assistance. 7/23/2002 N.T. at 92-94 (*Wheeler)*. William's "concern was with a continuation of his salary and a payment of a loan that was a personal, the proceeds of which he had put into the company." Id. at 90.

74. According to Wheeler, due to Sheldon's efforts, the company's assets were liquidated at 73% of cost which is a very good return since a 43% rate is more typical. 7/23/2002 N.T. at 93 (*Wheeler*).

75. Sheldon purchased assets from Liss Brothers such as computers and furniture. The price, however, was set by an outside auctioneer and then the price was adjusted up. William was kept informed of this process. 7/23/2002 N.T. at 94-95 (*Wheeler*).

76. Wheeler in his 23 years of experience with liquidations was unaware of "one situation where anybody paid one penny for goodwill, a name or a customer list when a company was in liquidation." 7/23/2002 N.T. at 96 (*Wheeler).*

77. As a result of the liquidation, the bank was paid but the 1.5 million in unsecured debt was not. 7/23/2002 N.T. at 122-23 (*Wheeler*).

78. According to Sheldon, in May 2001 William refused to cooperate with Summit Bank regarding liquidation documentation. Consequently, a hearing was held and the bank assumed control of the liquidation. 2/21/2002 N.T. at 191 (*Sheldon*).

Creation of Liss Global

79. On February 21, 2001, Sheldon incorporated Liss Global. Defendants' New Matter and Plaintiff's Answer, ¶ 69; 1/31/2002 N.T. at 319 (*Sheldon*). Sheldon testified that he began planning for the creation of this new company after the February 13 meeting. 1/31/2002 N.T. at 319 (*Sheldon*).

80. William is not an employee, director or shareholder of Liss Global. Defendants' New Matter and Plaintiff's Answer thereto, ¶ 72.

81. Sheldon maintains that while Liss Global's operations are similar to those of Liss Brothers there are significant differences: Liss Global does not warehouse significant amounts of product and consequently occupies less space; its credit package is significantly lower than that of Liss Brothers. William, in contrast, denies that these two companies are significantly

different. Defendants' New Matter and Plaintiff's Response thereto, ¶73.

82. Approximately one-third of the business income for Liss Brothers in 2000 came from dealings with Rite Aid. 1/31/2002 N.T. at 332-33 (*Sheldon*). No evidence was presented to contradict defendants' assertion that Liss Brothers had no continuing contracts with customers and that the Rite Aid contract gave it the right to terminate at any time for any reason on 30 days notice. Ex. P-28(f).

83. Deposition testimony of Rite Aid employees presented by plaintiff indicated that they had had no relationship whatsoever with William; instead, their contacts were with Sheldon or other Liss Brother employees. See Ex. P-2A (Depo. of Steven Moss at 6 stating "absolutely no working relationship with Billy at all"); Ex. P-2B (Depo. of Steve Koch at 6 stating that he did not know Billy); Ex. P-2C (Deposition of Bryan Shirtliff at 6 & 18 stating that he did not know William but Sheldon offered particular expertise).

84. Liss Global has between 21 to 23 employees and, according to Sheldon, it is on good terms with the banks. 2/21/2002 N.T. at 216 (*Sheldon)*. Plaintiff presented no evidence to the contrary.

Procedural History

85. William Liss filed a complaint against Sheldon in June 2001, and thereafter filed an Amended Complaint asserting the following claims: Breach of Fiduciary Duty(I); Breach of Written or Oral Contract to Purchase William Liss' Interest in Defendant Liss Brothers (II); Breach of Duty to Negotiate in Good Faith Pursuant to the Letter of Intent (III); Promissory Estoppel (IV); Conversion (V); Fraud (VI); Intentional Misrepresentation (VII); Appointment of a Custodian/Receiver(VIII); Appointment of a Constructive Trust (IX); Claim against Jeffrey Waldman as Co-conspirator (X)..

86. Defendants filed preliminary objections to this Amended Complaint, which were granted in part and overruled in part. This court dismissed Counts II and III of the Amended Complaint with a detailed analysis because William failed to plead an enforceable agreement based on the attached May 31, 2000 Letter of Intent. Liss v. Liss, 2002 WL 576510 at *11-14 (Phila. Com. Pleas 2002). See Ex. P-3. It concluded that the bare allegations in Count VIII for the appointment of a receiver survived the demurrer. Id. at *14.

87. Plaintiff also filed a Motion for the Appointment of a Receiver and Imposition of a Constructive Trust as to defendant Liss Global, Inc. A series of hearings were held on this Motion beginning January 30, 2002 through July 23, 2002. Thereafter, the parties submitted supplemental briefs and proposed findings of fact and law.

Legal Analysis

I. William Liss Has Not Satisfied the Criteria for Imposition of a Receivership on Liss Global

A. Requirements for Imposition of a Receivership

The appointment of a receiver is a harsh remedy that is typically imposed only as a last resort. Mayhue v. Mayhue, 336 Pa. Super. 188, *193, 485 A.2d 494, *497 (1984). As the Pennsylvania Supreme Court has observed, "[t]here is nothing . . . which affects a corporation with such serious consequences" since "the appointment is a distress signal, and is immediately followed by lowering of financial credit and a general readjustment." McDougal v. Huntingdon & Broad Top Mountain Railroad & Coal Co., 294 Pa. 108, 117, 143 A. 574, *577-78 (1928). Especially for a solvent corporation, the appointment of a receiver can cause stigma to the ongoing business. Hankin v. Hankin, 507 Pa. 603, 612-13, 493 A.2d 675, 679 (1985). Under Pennsylvania law, a receivership is imposed on a solvent corporation as a drastic remedy that should be granted when the following criteria are met:

> (a) only when the right to a receivership is clear, and
> (b) irreparable damage will in all probability result unless a receiver is

> appointed, and
> (c) a receivership will not substantially injure or interfere with the rights of creditors and stockholders, and
> (d) greater damage will result if a receiver is not appointed than if one is appointed.
> Tate v. Philadelphia Transportation Co., 410 Pa. 490, *500, 190 A.2d 316, *321 (1963).

The Pennsylvania Supreme Court has also cautioned that "a receiver will not be appointed unless it appears that the appointment is necessary to save the property from injury or threatened loss or dissipation." Credit Alliance Corp. v. Philadelphia Minit-Man Car Wash Corp., 450 Pa. 367, 372, 301 A.2d 816, 818-19 (1973). A receivership is not imposed merely because one party has a claim against another. DeAngelis v. Commonwealth Title Ins. Co., 467 Pa. 410, *414, 358 A.2d 53, *55 (1976)(court erred in appointing a receiver on petition on non-lien holding judgment creditors). In addition, courts require that "a receiver will be appointed only in aid of some recognized, presently existing right, and no appointment will be made in a case where receivership is the sole remedy" sought. Tate, 410 Pa.. at * 500, 190 A.2d at *321. See also Northampton National Bank v. Piscanio, 475 Pa. 57, 62, 379 A.2d 870, 872 (1977).

1. On the Record Presented, Petitioner Failed to Establish His Interest in Liss Global

As a threshold matter, therefore, William must establish a "presently existing right" in Liss Global to justify the imposition of a receivership upon it. William has conceded that he is not a shareholder of Liss Global. See Amended Complaint, ¶ 6 and Motion, ¶ 6 (stating that Sheldon is the sole shareholder of Liss Global). He contributed no capital to Liss Global nor does he assert any judgment against it. Nonetheless, William argues that a receiver should be imposed on Liss Global under Pa. Rule of Civil Procedure 1533[7] and 15 Pa.C.S.A ¶ 1767.[8]

Pennsylvania Rule of Civil Procedure 1533 provides for the appointment of a receiver when "required by the exigencies of the case." Pa.R.C.P. 1533. Section 1767, in contrast, is more narrowly

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[7] Plaintiff's Motion, Wherefore Clause.

[8] See Plaintiff's 9/30/2002 Proposed Findings of Law, ¶ 1(invoking 15 Pa.C.S.A. §1767).

defined to be invoked by "shareholders" since it provides:

> § 1767. Appointment of custodian of corporation on deadlock or other cause
>
> (a) **General rule** - Except as provided in subsection (b) upon application of any shareholder, the court may appoint one or more persons to be custodians of and for any business corporation when it is made to appear that:
> (2) in the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more to the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees. . .
> 15 Pa.C.S.A § 1767 (emphasis added).

On its face, section 1767 can be invoked only by a shareholder of a corporation who seeks the appointment of a receiver on his or her corporation.[9] It would therefore be inapplicable to Liss Global, since only Sheldon –and not William – is a shareholder of that corporation. Moreover, the acts by Sheldon that William focuses on as the basis for the imposition of a receivership on Liss Global relate primarily to Sheldon's actions as a shareholder of Liss Brothers. William, for instance, states that a receiver should be appointed on Liss Global because Sheldon breached his fiduciary duties towards William as a 50% shareholder of Liss Brothers due to the following actions when Sheldon:

a. exercised total control over defendant Liss Brothers and freezing William out of the day to day operations of defendant Liss Brothers by eliminating William's office and computer access;

b. terminated William's corporate benefits (and ultimately his salary when defendant Sheldon liquidated defendant Liss Brothers);

c. granted himself an annual salary increase of $40,000 from $330,000 per year to $370,000 per year;

d. charged $188,027.00 to defendant Sheldon's corporate credit card from May 2000 until December 2000 which included extravagant charges for personal expenses;

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[9] See Liss v. Liss, 2002 WL 576510 at n. 4 (Phila. Com. Pleas 2002)(noting that § 1767 does not apply as to Liss Global "because William does not legally have shares in Liss Global which is wholly-owned by Sheldon"). This court noted, however, that Pa.R.C.P. 1533 was more properly invoked because William's claim is general and equitable in nature. Id.

e. prepared a liquidation plan for defendant Liss Brothers;

f. presented the liquidation plan of defendant Liss Brothers to Summit Bank; and

g. caused the transfer of the entire business of defendant Liss Brothers to defendant Liss Global for non consideration.

Plaintiff's 9/30/2002 Proposed Findings of Fact and Conclusions of Law, II, ¶1.

Significantly, all of these allegedly oppressive acts by Sheldon relate to Liss Brothers except for the averrals in paragraph (g) that Sheldon caused the transfer of the entire business of Liss Brothers to Liss Global for no consideration. William cites a number of cases to support his claim that a receiver must be appointed under section 1767 or Rule 1533 to oversee Sheldon's operation of Liss Global: Mayhue v. Mayhue, 336 Pa. Super. 188, 485 A.2d 494 (1984); Leech v. Leech, 2000 Pa. Super. 334, 762 A.2d 718 (2000); Arc Manufacturing Co., Inc. v. Konrad, 321 Pa. Super. 72, 467 A.2d 1133 (1983); and Viener v. Jacobs, 61 Pa.D. & C. 4th 260 (Berks Cty. 2000).[10]

These cases are inapposite, however, because in each the plaintiff had a direct interest in the corporation or legal entity over which a receivership was requested. In Leech v. Leech, for instance, a receivership was imposed on a closely-held corporation at the request of one of its 50% shareholders under 20 Pa.C.S.A. § 1767 due to the oppressive acts of the other 50% shareholder.[11] Hence, Leech might be invoked for the imposition of a receivership on Liss Brothers, but it does not apply in the instant case where a nonshareholder is seeking a receivership on Liss Global.

Likewise, in the case of Arc Manufacturing Co., Inc. v. Konrad, a receivership was imposed

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[10] See Plaintiff's 9/30/2002 Proposed Findings of Fact and Conclusions of Law, II, ¶ 1. See, also Plaintiff's 10/7/2002 Memorandum at 14.

[11] Leech, 762 A.2d at 718. The receivership in Leech was imposed pursuant to 15 Pa.C.S.A § 1767 on Leech Tool & Die, Inc. which was a closely owned corporation with two 50% shareholders who were brothers pursuant to a petition by one of the shareholders. Leech Tool & Die, Inc. had entered into an agreement with Leech Industries, Inc. which was incorporated for the purpose of ultimately becoming the operating company for the Leech Tool & Die, Inc. The receivership over Leech Tool & Die, Inc.was sought after one of its 50% shareholders left the employ of Leech Industries, Inc. which resulted in the other shareholder of Leech Tool & Die, Inc. depriving him of certain corporate benefits, information and responsibilities. The key fact, however, is that the receivership was sought by a shareholder of the company at issue.

on a corporation at the request of one of its three shareholders during the pendency of litigation over his removal as president of the corporation. The Superior Court approved the appointment of this receiver as an attempt to "preserve a business which somehow prospered despite the conflicts among its owner/operators." Arc Manufacturing, 321 Pa. Super. at *82, 467 A.2d at *1138. In the present case, in contrast, William does not seek a receivership to preserve the corporation that he owned with Sheldon. Rather, he seeks to impose it on a corporation with only Sheldon as its shareholder.[12]

The other appellate case cited by William, Mayhue v. Mayhue, is inapposite since it deals with the appointment of a receiver to prevent the fraudulent misappropriation of marital property under the Divorce Code, 23 P.S. § 403 & 401. Mayhue, 336 Pa. Super. at 191, 485 A.2d at 495. In concluding that a receivership was properly imposed on defendant husband's company after he allegedly diverted funds from a company that he had operated with his former wife, the Mayhue court observed:

> Here, however, the receiver has not been appointed to protect the rights of an ordinary creditor but, rather, has been appointed to protect the interests of a spouse in marital property. We cannot conceive of a clearer factual situation justifying injunctive relief and the appointment of a trustee in receivership. The appellant has appropriated marital property and has been held in contempt several times for refusing to comply with court orders. His conduct has demonstrated that his clear purpose was to dispose of or hide such property in which his wife might have a marital interest. Mrs. Mayhue's need for injunctive relief was clear, immediate and necessary in order to prevent greater injury.
> Mayhue, 336 Pa. Super. at 194, 485 A.2d at *497(emphasis added).

Mayhue is thus distinguishable not only because it involves a receivership imposed under the divorce code to protect marital property but because one of the parties had been found by a court to have misappropriated property. Although William has broadly alleged that Sheldon engaged in a scheme to trick and defraud William by transferring William's interests in Liss Brothers to Liss

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[12] Similarly, the fourth case cited by William, Viener v. Jacobs, 51 Pa. D.& C. 4th 260 (Berks Cty. 2000) involved a minority shareholder's request, inter alia, for a receivership on the two corporations in which he was a shareholder. The plaintiff abandoned this request after the corporations entered into bankruptcy. Id., at *284 & *286.

Global,[13] for the reasons set forth below the record presented by William does not support a claim that a receivership must be appointed over Liss Global to prevent the misappropriation of his interests without consideration.[14]

2. On the Present Record, Petitioner Failed to Establish That His Right to a Receivership Is Clear Based on Sheldon's Alleged Wrongdoing in the Liquidation of Liss Brothers

A central theme of William's request for the imposition of a receivership on Liss Global is that Sheldon engaged in an intricate scheme to bring about the improper liquidation of Liss Brothers, Inc. and deprive William of his interests in that company by creating Liss Global.[15] William, in essence, argues that Sheldon "stole" Liss Brothers and that, as a consequence, William has an interest in Liss Global. Alternatively, William suggests that a receiver be imposed under Pa.R.C.P. 1533.

The present record, however, does not support William's theory. Even assuming that William could establish the requisite interest in Liss Global to invoke section 1767 or Rule 1533,[16] the record and arguments presented fail to establish that Sheldon "acted illegally, oppressively or fraudulently" toward William. See, e.g., 15 Pa.C.S.A. § 1767(a)(2). Oppression, for instance, has been defined as "unjust or cruel exercise of authority or power." Leech v. Leech, 762 A.2d at* 720.

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[13] See, e.g., Amended Complaint, ¶ 32; Plaintiff's 1/28/2001 Motion at 5; Plaintiff's 10/7/2002 Memorandum at 13 ("Sheldon robbed the company of its business").

[14] In a prior opinion focusing on preliminary objections to Count VIII of the Amended Complaint seeking the appointment of a receiver for Liss Global, this court concluded that the allegations of oppression were sufficient to survive a demurrer. Liss v. Liss, 2002 WL 576510, at (Phila.Ct. Common Pleas 2002). The present motion seeking the appointment of a receiver has been supplemented with a factual record consisting of hearing testimony and relevant documents. The present factual record upon analysis does not support the imposition of a receivership on Liss Global.

[15] See, e.g., Plaintiff's 6/28/2001 Memorandum at 5-6; Amended Complaint, ¶ 32.

[16] In analyzing the imposition of a receiver under Pa.R.C.P. 1533, the Court in Northampton v. Piscanio, 475 Pa. 57, *62, 379 A.2d 870, 872 (1977) emphasized that receivers are "appointed only in aid of some recognized, presently existing legal right... ."

In analyzing whether William is entitled to a receiver for Liss Global, each element of Sheldon's "scheme" as set forth by William will be analyzed. Although much of the record presented by William deals with actions involving Liss Brothers, it is important to keep constantly in mind that William seeks a receivership as to Liss Global. Significantly, at the insistence of Sheldon, a third-party liquidator was chosen by both shareholders to oversee the dissolution of Liss Brothers, thereby undermining the argument that Sheldon "stole" the business. For this reason, plaintiff's invocation of Hankin v. Hankin, 507 Pa. 603, 493 A.2d 675 (1985) is particularly inapposite. In Hankin, the court concluded that a partnership's liquidation was unduly delayed because the trial court had agreed to the appointment of two of the partners as liquidators. Thereafter, they delayed the sale of assets due to their own interests in them. In the instant case, in contrast, it was defendant Sheldon who urged the selection of a third-party liquidator for Liss Brothers, thereby avoiding the conflict of interest issues in Hankin.

a. The Allegations Concerning Sheldon's Breach the Alleged Buy-Out Agreement Set Forth in the May 31, 2000 Letter of Intent Have Been Previously Dismissed

William argues that one of the key events in Sheldon's scheme "to steal the business from William" involves a May 31, 2000 Letter of Intent between Sheldon and William. See Ex. P-3. According to William, the first such event occurred in May 2000, when "Defendant Sheldon agreed to pay William $3,200,000 for his fifty percent interest in defendant Liss Brothers, Inc subject to entering into a formal agreement and defendant Sheldon handwrote and signed a Letter of Intent."[17]

The legal implications of this Letter of Intent were previously addressed at length by this court in response to defendant's preliminary objection. Because the Letter of Intent contained language that "this agreement is subject to the preparation of an agreed final agreement of sale,"[18] this court concluded that it did not constitute a binding agreement to purchase William's interest in Liss

[17] Plaintiff's 9/30/2002 Memorandum at 3. See also Amended Complaint, ¶ 32.

[18] See Ex. P-3.

Brothers.[19] The rationale and precedent cited in support of this conclusion as set forth in detail in Liss v. Liss, 2002 WL 576510 at *11-14 are explicitly incorporated into this opinion. Curiously, plaintiff has neither acknowledged that ruling nor attempted to show either why it was in error or is distinguishable.

Nonetheless, for the reasons set forth in this court's previous opinion, Sheldon's alleged failure to pay William $3,200,000 for his interests in Liss Brothers pursuant to this letter does not constitute evidence of wrongdoing by Sheldon that would support imposition of a constructive trust on Liss Global.

b. William's Deposit of Proceeds from the Sale of the Townsend Road Property Back into Liss Brothers and the Sales Proceeds Disposition Agreement

The next event in Sheldon's alleged scheme to defraud William was that he induced William to deposit his proceeds from the sale of the business real estate, the Townsend Road property, which amounted to $1,433,228, into defendant Liss Brothers by signing a Sales Proceeds Disposition Agreement.[20] According to William with the Sales Proceeds Disposition Agreement, Sheldon thereby promised William that he would

> (a) complete the buyout of William's fifty (50%) percent interest in defendant Liss Brothers for $3,200,00.00;
> (b) continue William's salary and benefits according to the terms of the Sales Proceeds Disposition Agreement;
> (c) continue to make payments on William's personal loan to PNC bank, which had a balance of $370,000.00; and
> (d) repay to William the $1,433,228.00 sales proceeds he deposited into defendant Liss Brothers.[21]

William has conceded, however, that Summit Bank held a mortgage on the Townsend Road Property and in its original loan documents, Summit required that the proceeds from a sale of the real

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[19] Liss v. Liss, 2002 WL 576510 at *14. As a result of this ruling Count II of the Amended Complaint was dismissed.

[20] Plaintiff's 9/30/2002 Memorandum at 3.

[21] Plaintiff's 9/30/2002 Memorandum at 4.

estate be invested into Liss Brothers up to $3,000,000 or returned to the bank.[22] Sheldon testified that the fourth quarter of 2000 had been very difficult for Liss Brothers since it lost $700,000.[23] William likewise acknowledged that around November 2000, Liss Brothers was in "very deep debt." 1/30/2002 N.T. at 130 (*William*). Moreover, not only William, but also Sheldon, invested his proceeds from the real estate sale back into Liss Brothers as a capital contribution.[24]

William concedes that this infusion of capital allowed the company to pay its debts:

> Well, by me putting this money into the company and my brother putting his money into the company, the company was able to pay the vendors that we owed a lot of money to and the company was able to continue on. 1/30/2002 N.T. at 63 (*William).*

Nonetheless, despite the legal requirement and practical necessities for investing the real estate sale proceeds back into Liss Brothers, William required Sheldon to enter into the Sales Proceeds Disposition Agreement as precondition for his cooperation. 1/30/2002 N.T. at 48 (*William*); 2/21/2002 N.T. at 198-99 (*Sheldon*). This agreement provided, inter alia, that William would continue to receive his salary as well as reimbursements for his expenses.[25] William also maintains that under the Sales Proceeds Disposition Agreement, Sheldon promised to repay him for the net proceeds of the real estate sale (i.e. the $1,433,228.00) as well as for his share 50% ownership interest in Liss Brothers at $3,2000,000; William does not, however, cite a specific provision of that agreement but instead relies on his own testimony.[26]

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[22] 1/30/2002 N.T. at 48, 128 (*William*). See also Finding of Fact, ¶ 21; 2/21/2002 N.T. at 193-97 (*Sheldon)*; Ex. D-6, ¶ 5.6.

[23] 1/31/2002 N.T. at 395 (*Sheldon*). During the first three quarters, the company had made a profit of $400,000. Id.

[24] Plaintiff's Motion and Response thereto, ¶ 21; 1/30/2002 N.T. at 63-64 (*William).*

[25] Ex. P-4, ¶¶ 4 & 5; 1/30/2002 N.T. at 145-47 & 175-76 (*William).*

[26] See Plaintiff's 9/30/2002 Proposed Findings of Fact, ¶ 41(b) stating that the Sales Proceeds Disposition Agreement "b. promised to repay to William, William's share of the net proceeds from the sale of the Townsend Road property which was deposited with defendant Liss Brothers in the amount of One Million Four Hundred Thirty Three Thousand Two Hundred Twenty Eight dollars ($1,433,228.00) Dollars." Rather than the Sales Proceeds Disposition Agreement, however, William

In any event, the implication of the Sales Proceeds Agreement for this court is the opposite of that intended by William. Rather than signifying a wrongdoing by Sheldon, it suggests that William was milking Liss Brothers for all that he could get. Rather than helping his brother solve their company's financial problems by satisfying the legal requirements established by Summit Bank, William adopted an obstructionist stance. He forced Sheldon to enter into an agreement as a precondition for depositing his share of the Townsend Property sales proceeds back into the company. Moreover, he maintains that Sheldon promised to repay this legal obligation back to him. Whether or not such a legal obligation exists remains to be determined. For the purposes of the motion to impose a receivership on Liss Global, however, the issues and evidence pertaining to the Sales Proceeds Agreement provides no basis for imposing such a drastic measure on Liss Global.

c. William Failed to Provide Evidence that the Elimination of Certain Corporate Benefits Constituted Oppressive Action by Sheldon

After the closing on the Townsend Road property, William asserts that he was effectively frozen out of Liss Brothers when Sheldon eliminated William's office, revoked his access to the computer system and virtually eliminated the payment of William's corporate benefits.[27] William also asserts that Sheldon between May 2000 and December 20, 2000 had charged extravagant personal expenses to the corporate credit card for such things as expensive restaurants, family vacations, theater and train tickets totaling $188,027.00.[28] William's corporate charges for that period totaled $25,751.[29]

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cites his own testimony or "TR, WL, January 30, 2002, pages 62-63." Id. Similarly, in paragraph 41(c) of his Proposed Findings of Fact, William asserts that with the Sales Proceeds Disposition Agreement, Sheldon "promised to finalize the purchase of William's fifty percent(50%) ownership interest in Liss Brothers for Three Million Two Hundred Thousand ($3,200,000) Dollars." Once again, however, William cites not to the Agreement, but to his own testimony: "TR, WL, January 30, 2002, pages 54, 56, 60, 70 and 80." Id.

[27] Plaintiff's 9/30/2002 Memorandum at 4.

[28] Plaintiff's 9/30/2002 Memorandum at 2.

[29] See Exs. P-6 through P-13.

In fact, Sheldon was questioned extensively concerning personal charges to the corporate account. He admitted to many of them, [30]clarified that some were charged by other employees of Liss Brothers[31] some were business expenses or some were reimbursed,[32] and was often unclear as to the exact nature of a particular charge.[33] He explained that there had been a culture at Liss Brothers that had permitted such charges but that he finally decided to put a stop to this both for himself and for his brother as economic conditions became difficult for the company.[34] In response to these problems, Sheldon instituted a new reimbursement policy effective January 1, 2001 "that would affect all the employees of the corporation, including myself and Billy and everybody else." 1/21/2002 N.T. at 397 (*Sheldon*). Under this new policy, "essentially there had to be a business purpose that was being reimbursed for." Id.

Consequently, William's assertion that the imposition of a policy restricting personal charges to the company account after January 1, 2002 was part of a scheme that should be a grounds for imposing a receivership on Liss Global is unconvincing. He presents no evidence that the expense reimbursement policy was applied differently to William and Sheldon after the new policy was instituted in January 2001 to deal with the company's financial problems. Corporate credit card records were offered by plaintiff, for example, only for the periods from May 2000 to a closing date of December 20, 2000.[35]

There was also testimony that Sheldon was not the only shareholder to benefit from the generous expense reimbursement policy of Liss Brothers prior to January 2001. William testified that while his salary was approximately $260,000 a year, his total compensation package was nearly

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[30] See 1/31/2002 N.T. at 218-19, 228, 240, 256, 261 (*Sheldon).*

[31] 1/31/2002 N.T. at 227 & 243 (*Sheldon*).

[32] 1/31/2002 N.T. at 243-44 (*Sheldon).*

[33] See 1/31/2002 N.T. at 218-19, 221-22, 256-57, 262-64 (*Sheldon).*

[34] 1/31/2002 N.T. at 233-34 (*Sheldon*).

[35] See Exs. P-6 through P-13 (corporate credit card invoices) and Exs. P-14 through P-19 (discrete invoices). Likewise, Sheldon was cross examined as to these charges for that period. See 1/31/2002 N.T. at 215-229, 236-299 (*Sheldon).*

$400,000 when health benefits, car payments and restaurant expenses were included. Moreover, William noted that his restaurant expenses were reimbursed whether or not they related to business.[36] William also conceded that in 1998 he had borrowed money from Liss Brothers to pay gambling debts and that he had charged personal airline tickets to the company.[37] Defendants presented an e-mail dated December 16, 1998 in which Sheldon wrote to "Billy" that "it has come to my attention that you have made an unauthorized cash withdrawal in the amount of $9,000 dollars. You told our cfo that you desperately needed money to pay gambling debts to people who were not forgiving." After warning William not to put the company at risk, Sheldon objected that William had made credit card charges unrelated to business for a trip to St. Maarten. Ex. D-25. Both brothers, it thus appears, took advantage of the company's liberal reimbursement policy. Apparently, it was only Sheldon who saw the need to curtail it in January 1, 2001 as Liss Brothers fought for its economic survival. The restrictions on William's expense reimbursements at that point do not constitute shareholder oppression or grounds for imposing a receivership on Liss Global.

Moreover, plaintiff's claims that Sheldon deprived him of an office and computer access were not developed with evidence except unclear testimony by William. The defendants attribute the loss of William's office to the sale of the Townsend Road property in November 2000. Under the new lease, Liss Brothers no longer had access to the area that had been William's office. The plaintiff did not disagree with this point. See Defendants' New Matter and Response thereto, ¶ 32-34. In his testimony, William stated that after November 1, 2000 he "still had an office to use, because the person that bought the property who was upstairs was not moving into that office until January or February. So I was able to use that; but my brother did not make space for me in the new company." 1/30/2002 N.T. at 65-66 (*William).* Sheldon's failure to provide William office space in Liss Global would not constitute an oppressive act in the context of Liss Brothers. Alternatively, it would not be a grounds for imposing a constructive trust on Liss Global since William was not a shareholder of that corporation.

As for William's complaint that he was denied computer access, he concedes that computer

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[36] 1/30/2002 N.T. at 145-47 & 175-76 *(William)*.

[37] 1/30/2002 N.T. at 165-69 (*William).*

access was restored to him after intervention by his attorney and did not elaborate on this issue with additional evidence. Defendants' New Matter and Response thereto, ¶ 16.

d. On the Evidence Presented, After the Shareholders Were Unable to Reach an Agreement for Buying Out William's Interests at the February 13th Meeting, They Agreed to Liquidate the Company and Liss Brothers Was Liquidated Upon Default of the Summit Bank Loan and the Lack of Additional Financing

William finally asserts that a February 13, 2001 meeting was the ultimate "set up" for "Sheldon's ultimate theft of the business." Plaintiff's 9/30/2002 Memorandum at 5. This meeting was attended by both Sheldon and William as well as by their respective attorneys, David Pudlin and Stephen Foxman. Although defendants maintain that William preferred to liquidate Liss Brothers rather than cooperate with Sheldon's efforts to find financing for the company,[38] William contends that he did not agree to liquidate Liss Brothers.[39] Moreover, he claims that the meeting of February 13, 2001 was invalid under Pennsylvania Business Law, 15 Pa.C.S.A. §§ 1703(B) & 1704 and the By-laws of Liss Brothers due to Sheldon's failure to provide written notice that it was a special meeting called to liquidate the company.[40] A review of the record as well as relevant statutory provisions and precedent, however, offers no support for William's contentions.

It is undisputed that Sheldon and his attorney, David Pudlin, called for the February 13th meeting which was held at Foxman's office.[41] According to Pudlin, its purpose was to inform William about the financial status of the company and especially about relations with the bank.[42] Stephen Foxman assumed it was another attempt to resolve the impasse between the brothers.[43] There was thus no evidence presented that the meeting was called for the special purpose of liquidating Liss

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[38] Defendants' 9/30/2002 Proposed Findings of Fact, ¶¶ 41-43.

[39] Plaintiff's 9/30/2002 Proposed Findings of Fact, ¶ 58.

[40] Plaintiff's 10/7/2002 Memorandum at 3-4 and n.2 & 3.

[41] 1/30/2002 N.T. at 82 (*William)*; 1/31/2002 N.T. at 346 (*Sheldon).*

[42] 2/21/2002 N.T. at 139 (*Pudlin).*

[43] 5/9/2002 N.T. at 6 (*Foxman*).

Brothers. No formal notice was sent out for the meeting,[44] but according to Sheldon, William, though secretary of Liss Brothers, had never sent any formal notice for a corporate meeting in 27 years nor had he prepared minutes throughout their entire business relationship.[45]

Sheldon thus opened the meeting by discussing the poor financial status of Liss Brothers. He noted that the Summit bank loan was coming due on February 28 and that would be the end of the company.[46] William testified that he was aware that Summit Bank wanted Liss Brothers to find a new lender and that February 28, 2001 or March 1, 2001 was a deadline for Summit's continued relationship with Liss Brothers.[47] William and Sheldon agree that at this meeting Sheldon presented the following two options to William:

> (1) Sheldon offered to buy out William's interest in Liss Brothers for $3,000,000 to be paid out over a ten year period; or
>
> (2) The parties could maintain the status quo, with William continuing to receive his salary.[48]

According to William both of these options were unacceptable. The option to buy out his interests in Liss Brothers by paying him $3,000,000 over the course of ten years was unacceptable because it was unsecured and it was $2,000,000 less than the amount William believed Sheldon had promised him only 3 months earlier. In November 2000, William asserts, Sheldon had offered to pay him the following: (1) $3,200,000 for his one-half interest in Liss Brothers with a payment of $1,000,000 at closing and the balance in equal payments over the course of ten years, with a security interest granted by Liss Brothers; (2) $1,433,228.00 as repayment for William's investment of his

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[44] 2/21/2002 N.T. at 138 (*Pudlin).*

[45] 1/31/2002 N.T. at 348 (*Sheldon).* Pudlin likewise testified that in the two year period he had been doing legal work for Liss Brothers, William had never signed corporate minutes. 2/21/2002 N.T. at 140-42 (*Pudlin).*

[46] 2/21/2002 N.T. at 113-14 (*Pudlin*); 5/9/2002 N.T. at 11, 13-14 (*Foxman).*

[47] 1/30/2002 N.T. at 104, 123-24 (*William*).

[48] 1/30/2002 N.T. at 106-09, 112, 82-87 (*William*); 1/31/2002 N.T. 394-98 (*Sheldon*) 5/9/2002 N.T. at 11-13 (*Foxman)* (according to Foxman, the proposal was presented by Pudlin). See also Defendants' New Matter and Plaintiff's Answer thereto, ¶ 50.

proceeds from the sale of the Townsend Road property; and (3) $370,000 as the balance of William's PNC loan that the company had been paying. The option to maintain the status quo by continuing to pay William his $260,000 salary was unacceptable because Sheldon would keep the "unauthorized" raise of $40,000 that he had given himself in January 2001.[49]

William's precise response to this offer–and whether he agreed to the liquidation of Liss Brothers– is obviously a key issue. Three of those attending the meeting–William, Sheldon, and Pudlin–agree that William brought up liquidation of the company at that meeting. William testified that when confronted with Sheldon's proposal at the meeting, "[h]e mentioned the fact that we could liquidate. I mentioned the fact that we could liquidate. On my point of view, it was just a threat."[50] Sheldon likewise testified that when confronted with the two proposals, William rejected them both and said he would rather liquidate the company. 1/31/2002 N.T. at 361 (*Sheldon*). Pudlin confirmed this recollection, observing that "Billy not only rejected those proposals, but he said he would rather liquidate the company than accept those proposals."[51]

The February 13th meeting was followed by a series of crucial e-mails between the brothers' attorneys as well as by critical correspondence from Summit Bank that undercuts William's claim that Liss Brothers was "stolen" from him. On February 19, 2001, Pudlin by e-mail wrote Foxman:

> As you and I discussed, <u>now that Billy and Shelly have agreed to liquidate and dissolve the company, it is important that the process be moved along quickly because our lending facility with Summit Bank is expiring on 2/28/01.</u> Obviously, the more quickly we can show Summit that we have a game plan for an orderly liquidation, the

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[49] Plaintiff's 9/30/2002 Memorandum at 5-6.

[50] 1/30/2002 N.T. at 87 (*William).* <u>See also</u> 1/30/2002 N.T. at 112 (Q:"I didn't ask you that. Did you mention the word "liquidate?" A: yes")(*William*); 1/30/2002 N.T. at 116-117 ("I remember mentioning liquidation. It was part of a threat to try to get –")(*William);* 1/30/2002 N.T. at 200(Q: I'm asking you now about February 13th. You did it on that occasion, didn't you? A: <u>We discussed liquidation on that day.</u>")(*William)*(emphasis added)..

[51] 2/21/2002 N.T. at 110 (*Pudlin*). Foxman testified that William would have accepted the proposal to maintain the status quo so long as Sheldon did not get to keep his raise. In contrast to the other participants at the meeting, Foxman stated that neither he nor William agreed to liquidate the company. 5/9/2002 N.T. at 13, 16 (*Foxman*). Foxman did concede, however, that William stated he wanted to sell his interests at a fair market price or otherwise there was no alternative to liquidation. 5/9/2002 N.T. at 120 (*Foxman*).

> more likely it is that Summit will not move into a panic mode and remove all control from us and the more likely there will be something left over for Billy and Shelly after the creditors are satisfied. Ex. P-28a (emphasis added).

Pudlin then suggested potential candidates as liquidators. This e-mail is significant for at least two reasons: it states in blunt, unequivocal terms Pudlin's impression that the brothers had agreed to liquidate their company; moreover, it suggests that the attorneys had been carrying on discussions about the liquidation of Liss Brothers. Foxman subsequently testified that he understood that this e-mail referred to a liquidation. Foxman conceded that he did not respond to it to object that William opposed liquidation. In fact, not until March 1 did Foxman specifically object to this conclusion that the brothers had agreed to liquidate their company.[52]

Another crucial document is a letter dated February 21, 2001 from Summit Bank to Liss Brothers, Inc. which stated:

> This letter is to serve as notice to you that an Event of Default currently exists under the Loan Agreement as a result of the Borrower's failure to comply with certain of the financial covenants set forth therein. This letter shall further serve as notice to you that on March 1, 2001 (the **"Termination Date"**), the outstanding principal balance of the Working Capital Line, the Letter Credit Facility, the Term Loan, all accrued and unpaid thereon and all other sums due in connection therewith and all other Bank Indebtedness are due and payable in full upon further notice or demand.
>
> Effective as of the Termination Date, in addition to all bank indebtedness being due and payable in full, no further advances shall be made under the Working Capital Line or the Letter of Credit Facility. Therefore, Borrower shall be required to directly reimburse Bank for any draws made on or after the Termination Date under any letters of credit issued under the Loan Agreement. No advances will be made by the Bank under any of the Loans to fund such reimbursement obligations of Borrower. Ex. D-70.

Pudlin subsequently sent an e-mail to Foxman dated February 27, 2001 noting that this notice of default had been expected since "the extension of credit was expiring on 2/28/01" Ex. P-28b. Pudlin then informed Foxman that in response to this notice and the credit deadline, Sheldon met with lending officers of Summit that day:

> At the meeting, Shelly gave an update to Summit, which necessarily included the

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[52] 5/9/2002 N.T. at 73-76 (*Foxman).*

> agreement of Billy and Shelly to liquidate the company. In anticipation of Summit's calling of the loan, Shelly had prepared a plan of orderly liquidation, and he presented it to Summit today. The Summit people responded that the liquidation plan makes sense, and they would run it by their workout people and get back tomorrow. Shelly also presented the idea of having a third party come in to oversee the liquidation, and he mentioned Bob Starr at Penn Hudson (the company whose brochure I hand delivered to you on 2/21/2001).
> Ex. P-28b (emphasis added).

This e-mail is noteworthy in several regards: first, it clearly informs Foxman of the meeting Sheldon had with Summit officials to discuss the liquidation of Liss Brothers; it also informed him that Sheldon had prepared a liquidation plan. Most significantly, it expressed Sheldon's desire to have a third party oversee the liquidation of the brothers' company. Such an intent for third-party oversight of the liquidation process is clearly incompatible with William's assertion that Sheldon was attempting to steal Liss Brothers and its assets.

Foxman replied to this e-mail with a calm, matter-of-fact e-mail dated February 28, 2001 that began by stating:

> I will try to find out Billy's position on that – I had sent him the brochure that you mailed to me and he called me to discuss it, but we have not had a chance to consider potential other liquidators, who may have experience in this particular line of business (i.e. the Liss Bros. business).
>
> I am wondering if it makes the most sense to liquidate under the gun from Summit, or to attempt to line up a new lender in the interim, so that the liquidation activities can be conducted in a way that will bring the highest return for Billy and Shelly. I am concerned that with Summit overseeing the liquidation, there will be pressure to speed up the sale of inventory and shut down new purchases to the detriment of the company and the owners. Have you given any thought to stretching out the liquidation, or bridging it financially, so as to maximize the return?
> Ex. P-28e (emphasis added).

With its cool response to the liquidation option outlined by Pudlin, this e-mail by Foxman is remarkable for its admission that Foxman not only discussed liquidators with William but he had sent to William the brochure for a potential liquidator that Pudlin had forwarded to them. This clearly suggests that the parties had been discussing liquidation after the February 13th meeting of all

shareholders. There was no outraged response in Foxman's e-mail to Sheldon's meeting with Summit nor was there any demand to call a halt to the liquidation process. Instead, Foxman was prepared to analyze calmly the best liquidation options for his client.

It was not until March 1, 2001 that Foxman responded negatively to Pudlin's e-mails concerning the liquidation of Liss Brothers. Even that e-mail suggests that at least at some point, William had agreed to liquidate the company:

> I (Foxman) have spoken to Billy, and he is unwilling to confirm that he will agree to a liquidation, unless and until he has full information regarding Shelly's plans and arrangements regarding assets of the company.
>
> Shelly indicated that he did not see a reason to seek new financing for the Company if Billy wanted to seek a court liquidation of the Company's assets. Billy stated that he wanted to sell his interest to Shelly at a fair price, or otherwise he saw no alternative to liquidation if the Bank would not continue to finance the company.
>
> Ex. P-28c (emphasis added).

The first two paragraphs of this e-mail from Foxman clearly support the defendants' position that William had threatened the liquidation of the company if Sheldon did not agree to purchase William's interest in Liss Brothers at a price William deemed fair. Although William now objects that Sheldon met with the Summit Bank officials on February 28 without first notifying William, the record suggests that William had never taken an active role in obtaining bank financing for the company but had instead relied on Sheldon's efforts.[53] Moreover, on March 1, 2001 when William objected to the liquidation in a telephone conversation William's response to Sheldon's query as to what should be done about the bank was: "Well, you're closer to the situation. You figure it out."[54] Sheldon did call the bank, but he was told that it was too late.[55]

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[53] See,e.g., 1/30/2002 N.T. at 41-42 (*William*)(acknowledging the Sheldon and Jeff Waldman sought additional financing for Liss Brothers in the summer of 2000 after being informed that Summit no longer desired to extend its financing). Sheldon testified that he and Jeff Waldman attempted to get financing for Liss Brothers from GE Capital in the months prior to the February 13th meeting. 1/31/2002 N.T. at 386-87 (*Sheldon*).

[54] 1/31/2002 N.T. at 382 (*Sheldon*).

[55] 1/31/2002 N.T. at 382-83 (*Sheldon*).

William also asserts that the February 13th meeting was invalid because the notice required under the company by laws and the Pennsylvania Business Corporation Law, 15 Pa.C.S.A. §§ 1703 & 1704 for special meetings was not provided.[56] As plaintiff suggests, 15 Pa.C.S.A. § 1703 does require written notice to the Board of Directors of a special meeting:

> **(b) Notice -** Regular meetings of the board of directors may be held upon such notice, if any, as the bylaws may prescribe. Unless otherwise provided in the bylaws, written notice of every special meeting of the board of directors shall be given to each director at least five days before the day named for the meeting. Neither the business to be transacted at , nor the purpose of, any regular or special meeting of the board need to be specified in the notice of the meeting. 15 Pa.C.S.A. § 1703 (b).

Likewise, Section 1704 provides:

> **(b) Notice.** – Written notice of every meeting of the shareholders shall be given by, or at the direction of, the secretary or other authorized person to each shareholder of record entitled to vote at the meeting at least:
>
> (1) ten days prior to the day named for a meeting that will consider a fundamental change under Chapter 19 (relating to fundamental changes); or
> (2) five days prior to the day named for the meeting in any other case.
> 15 Pa.C.S.A.§ 1704(b).

The Bylaws of Liss Brothers also require written notice of special meetings:

> Written notice of a special meeting of shareholders stating the time and place and object thereof, shall be given to each shareholder entitled to vote thereat at least three days before such meeting, unless a greater period of notice is required by statute in a particular case.
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> Article III, paragraph 9, By-Laws of Liss Brothers, Inc., Ex. "A" to Plaintiff's 9/28/01 Motion.

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[56] Plaintiff's 10/7/2002 Memorandum at 4.

Statutory Provisions for Waiver of Notice Defects by Attendance at Meeting

There is, however, another relevant statutory section that William fails to cite. Section 1705, for example, provides that actual attendance at a meeting constitutes waiver of any defect in notice unless the person attends to object:

> **Waiver by attendance -** Attendance of a person at any meeting shall constitute a waiver of notice of the meeting except where a person attends for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting was not lawfully called or convened.
> 15 Pa.C.S.A. § 1705(b).

There is no dispute that both shareholders and their attorneys attended the February 13th meeting. Hence, under section 1705(b) any objections by William as to notice for that meeting would be waived by his attendance.

Pennsylvania Precedent Recognizing Waiver of Notice Defects by Attendance

Moreover, the Pennsylvania Supreme Court has also held that invalid notice provisions may be waived by attendance at a meeting. In Baldwin v. Rose Tree Fox Hunting Club, 451 Pa. 538, 304 A.2d 505 (1973), the Court concluded that the chancellor erred in invalidating resolutions enacted at a meeting of shareholders due to failure to comply with the notice requirements of the bylaws. The Baldwin court concluded that "even assuming, arguendo, that notice was insufficient, the notice provision in the by-laws was waived by attendance at the special meeting."[57] The general rule concerning notice of special meetings was outlined in the subsequent case of Stone v. American Lacquer Solvents, Co., 463 Pa. 417, 345 A.2d 174 (1975). In Stone, the Pennsylvania Supreme Court noted that for "special meetings of the board of directors of a corporation, the general rule in Pennsylvania is that such a meeting held without notice to some or any of the directors and in their absence is illegal, and action taken at such a meeting, although by a majority of the directors, is

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[57] 451 Pa. at 543, 304 A.2d at 508. In reaching this conclusion, the court cited a statutory provision of the Nonprofit Corporation Law, 15 P.S. § 7010, no longer in effect, but very similar to section 1705 in recognizing waiver of notice defects by attendance at a meeting. See 451 Pa. at 543, 304 A.2d at 508.

invalid absent ratification or estoppel."[58] The court recognized that there were certain exceptions to the notice rules such as attendance, ratification or estoppel.[59] On the facts before it, however, the Stone Court concluded that the special meeting of the board of directors had enacted an invalid resolution where one of the board members neither attended nor was notified of the special meeting. In so doing, the court emphasized the "salutary rule that all directors receive notice of special meetings:"

> The rationale is that 'each member of a corporate body has the right of consultation with the others, and has the right to be heard upon all questions considered, and it is presumed that if the absent members had been present they might have convinced the majority of the unwisdom of their proposed action and thus have produced a different result.'
> Stone, 463 Pa. at 424, 345 A.2d at 178.

In the instant case, it is undisputed that both of the 50 percent shareholders attended the February 13th meeting. The salutary purpose behind the notice requirement was thus effected. See also McCay v. Luzerne & Carbon County Motor Transit Co., 125 Pa. Super. at 222, 189 A. at 774 ("[i]f the directors attend, there is a surrender of the right to object to defects in the manner of service or the substance of notice").

Contrary Custom or Practice for Notice of Meetings

A customary or common practice of a corporation may also be considered when defects in formal rules of notice are asserted. The Pennsylvania Superior Court has concluded that the rules relating to notice of special corporate board meetings might be overcome "by proof of contrary custom or usage of acting on the part of the directors." McCay v. Luzerne & Carbon County Motor

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[58] Stone, 463 Pa. at 422, 345 A.d. at 177 (citing Library Hall Co. v. Pittsburgh Assn., 173 Pa. 30, 33 A. 744 (1896); Pike County v. Rowland, 94 Pa. 238 (1880)(emphasis added).

[59] The Stone court specifically suggests that actual notice would render a Board meeting valid despite the requirement of written notice in the bylaws: "However, despite the foregoing provision of Section 4 of the By-Laws of American, if each and every member of the Board of Directors had actual notice of the time and place of the meeting beforehand, the meeting of the Board of March 11, 1968 would be legal and binding, even though written notice had not been given." Stone, 463 Pa. at n.2, 345 A.2d at n.2 (citing In re Redstone Township School Dist., 284 Pa. 325, 131 A.226 (1925)(emphasis added).

Transit Co., 125 Pa. Super. at 222, 189 A. at 774 (citing 2 Thompson on Corp. § 1244; In Re Redstone Tp. School Dist., 284 Pa. 325, 131 A.226). This principle would be applicable in the instant case. Sheldon testified that William, though Secretary of Liss Brothers, never issued formal notices of meetings in their 27 years of business nor had he kept formal minutes of corporate meetings. See Finding of Fact, ¶ 46**.**

Corporate Acquiescence in Actions taken at a Meeting

Pennsylvania courts have also concluded that a corporation may acquiesce by its actions to board resolutions that were not properly enacted. Baldwin, 451 Pa. at n.3, 304 A.2d at n. 3. In the instant case, up until March 1, 2001, William acquiesced to the plan to liquidate Liss Brothers by not objecting to it despite the discussions between Pudlin and his attorney, Foxman. See McCay, 125 Pa. Super. at 223, 189 A. at 774 ("it is well established that the proceedings of directors at an illegal or irregular meeting may be ratified at a subsequent legal meeting, or by the corporation's adopting the acts of its representative").

The February 13th Meeting Was Not Invalid Due to Improper Notice

Consequently, either because of the attendance of both 50% shareholders, the informal customs of Liss Brothers towards notice of meetings, or corporate acquiescence up until March 1st, the February 13th meeting was not invalid for failure to give written notice. 15 Pa.C.S.A. § 1705(b); Stone v. American Lacquer Solvents, 463 Pa. at 422 & n.2, 345 A.2d at 177 & n.2; Baldwin v. Rose Tree Fox Hunting Club, 451 Pa. at 543 & n.3, 304 A.2d at 508 & n.3; McCay v. Luzerne & Carbon County Motor Transit Co., 125 Pa. Super. at 221-23, 189 A. at 774. Moreover, as the Superior Court held in the ancient case of Schmitt v. Burns, Fleming & Co., 1917 WL 3399 (Pa. Super. 1917), parol evidence is admissible to explain what occurred at a corporate meeting in the absence of formal minutes. Accord McCay, 125 Pa. Super. at 222, 189 A. at 774 ("corporate action may be proved by parol evidence where no formal resolutions appear in the minutes").

As a practical matter, however, the February 13th meeting is less significant as a cause of the liquidation of Liss Brothers than its dire financial straits. The present record is replete with uncontradicted testimony that the company had experienced a disastrous fourth quarter in 2000 and

that its loan with Summit Bank was due to expire by March 2001. Although William argues that liquidation was invalid under 15 Pa.C.S.A. § 1974(a) because the Pennsylvania Business Corporation Law requires the adoption of a resolution by a majority of the shareholders before dissolution of the corporation,[60] that section on its face refers to a "voluntary dissolution."[61] In the instant case, in contrast, the corporation, as William emphasizes, was not formally dissolved. Rather it failed financially.

e. William Failed to Establish that Sheldon Wrongfully Acquired Liss Brothers or Its Assets Without Adequate Consideration

Despite his broad allegation that Sheldon "stole" Liss Brothers and its assets, William failed to present specific evidence of tangible Liss Brothers assets that were acquired by Liss Global for less than fair value. The testimony of the liquidator, Robert Wheeler, was most relevant to this issue. By March 2001, Sheldon and William agreed that Robert Wheeler would serve as the liquidator for Liss Brothers. 7/23/2002 N.T. at 89 (*Wheeler*). Significantly, the evidence suggests that it was Sheldon who pushed for the selection of a third party liquidator to oversee the distribution of assets. See Exs. P-28a (2/19/2001 e-mail from Pudlin); P-28b (2/27/2001 e-mail from Pudlin).

The only evidence of record as to the transfer of tangible assets from Liss Brothers to Liss Global is testimony by Wheeler. He testified that Sheldon purchased assets from Liss Brothers such as computers and furniture. The price for these tangible assets was set by an outside auctioneer and then that price was adjusted up at William's request. 7/23/2002 N.T. at 95 (*Wheeler*). Wheeler also testified that Sheldon played an active role in the liquidation process by meeting with customers and assisting in collection matters. William, in contrast, did not cooperate although he insisted on the continuation of his salary and payment of his bank loan. 7/23/2002 N.T. at 90-93(*Wheeler*).

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[60] Plaintiff's 9/30/2002 Memorandum at 6 n.3.

[61] 15 Pa.C.S.A. § 1974 specifically addresses voluntary dissolution and winding up of a corporation. It provides as a general rule: "The resolution shall be adopted upon receiving the affirmative vote of a majority of the votes cast by all shareholders of the business corporation entitled to vote thereon and, if any class of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class."

According to Wheeler, due to Sheldon's efforts, the company's assets were liquidated at 77% of cost which was a very good return compared to the more typical 40% rate. 7/23/2002 N.T. at 93 (*Wheeler*).

Moreover, William has failed to establish damages due to the liquidation of undefined "intangible" assets of Liss Brothers. Under Pennsylvania law, for instance, clients who are free to seek goods or services from other sources are not considered assets of a corporation. See, e.g., Krosnar v. Schmidt Krosnar McNaughton Garrett, Co., 282 Pa. Super. 526, 540-41, 423 A.2d 370, 377 (1980)(reviewing a court's decision concerning the distribution of corporate assets upon the dissolution of a professional accounting corporation).In the instant case, William presented no evidence that Liss Brothers clients had been bound to it by long term contracts. Moreover, in cases involving equitable distribution, valuation of such an intangible asset as good will hinges on whether it is tied to the talents or skills of certain individuals, and is thus not distributable, or whether it is attributable to the business itself and is therefore distributable. Butler v. Butler, 541 Pa. 364, 378, 663 A.2d 148, 155 (1995). The only evidence presented in this case as to the value of the customer lists or good will of Liss Brother was the testimony of Wheeler:

> As I said before, I've been in the business for 23 years. I've been involved in a lot of liquidations. I have been involved in one situation where anybody paid one penny for goodwill, a name, or a customer list when a company was in liquidation. 7/23/2002 N.T. at 96 (W*heeler*).

3. William Failed to Establish the Requisite Irreparable Harm for the Establishment of Receivership

The second requirement for the appointment of a receivership is that "irreparable damage will in all probability result unless a receiver is appointed." Tate v. Philadelphia Transportation, Co., 410 Pa. at 500, 190 A.2d at 321. An injury is considered irreparable "if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." Summit Towne Centre v. Shoe Show of Rocky Mount, 2001 WL 1298870 at *3, 786 A.2d 240, 244 (Pa. Super. 2002)(irreparable harm as a prerequisite for a preliminary injunction). More concretely, irreparable harm cannot be compensated with monetary damages. Cosner v. United Penn Bank, 358 Pa. Super. 484, 492, 517 A.2d 1337, 1341 (1986)(homeowners established irreparable harm where their houses

were uninhabitable without the use of water well and septic tank). In a commercial context, loss of a business opportunity or market advantage can also be considered irreparable harm. Santoro v. Morse, 781 A.2d 1220, 1228 (Pa. Super. 2001).

In the present case, William failed to present any evidence whatsoever concerning the management of Liss Global by Sheldon or any possible harm to him due to any alleged mismanagement of Liss Global. As the Pennsylvania Supreme Court observed in Credit Alliance Corp. v. Philadelphia Minit-Man Car Wash Corp., 450 Pa. 367, 372, 301 A.2d 816, 818-19 (1973), "a receiver will not be appointed unless it appears that the appointment is necessary to save the property from injury or threatened loss or dissipation." In seeking to impose a receiver on Liss Global, William is seeking relief against the wrong entity. If he believes that the liquidation of Liss Brothers was improper, the practical remedy is against Liss Brothers, not Liss Global.

To the extent that William has identified the damage to him caused by the liquidation of Liss Brothers, he outlined particular sums of lost money:

. Salary and benefits

. Payment of William's ownership interest in defendant Liss Brothers ($ 3,2000,000.);

. Repayment of William's proceeds from the sale of the Townsend Road property ($l,433,228);

. Repayment of William's PNC loan ($370,00); and

. Payment of Defendant Liss Brothers Lease ($450,000).

Plaintiff's 9/30/2002 Memorandum at 7-8.

Since these damages have been reduced to monetary values, they would not constitute "harm that cannot be compensated with money damages." Cosner v. United Penn Bank, 358 Pa. Super. at 492, 517 A.2d at 1341. William therefore has not satisfied this second element for a receivership.

Finally, as to the general claim that Sheldon "stole" the Liss Brothers business, there was no impediment to either brother pursuing the same type of business with the demise of Liss Brothers. As defendants' note, plaintiff cites no restrictive covenants that might have precluded such endeavors.

4. The Rights of Creditors and Shareholders Would Be Interfered With By the Imposition of a Receiver on Liss Global

A third requirement for the imposition of a receivership is that "a receivership will not

substantially injure or interfere with the rights of creditors or stockholders." Tate, 410 Pa. at 500, 190 A.2d at 321. William introduced no evidence as to the effect that imposition of a receivership on Liss Global would have on its creditors and sole Shareholder, Sheldon. As the Pennsylvania Supreme Court has observed, there "is nothing that affects a corporation with such serious consequences as does the appointment of a receiver; it is a severe, and may be termed an heroic, remedy, and the conditions that call it into action should be such as would, if persisted in, ordinarily be fatal to corporate life." McDougal., 294 Pa. at 117, 143 A. at 576-78. The stigma of a receivership on Liss Global would have a negative impact on Sheldon, who has invested thousands of dollars into it. As defendants emphasize, the impact of a receivership would be particularly harsh on a new company that needs to develop a reputation.

5. The Balance of Harms Weighs Against the Imposition of a Receivership on Liss Global

The final element in evaluating the need for appointment of a receiver is to balance whether "greater damage will result if a receiver is not appointed than if one is appointed." Tate, 410 Pa. at 500, 190 A.2d at 321. William failed to present any benefit that the imposition of a receiver would have for Liss Global. He has not shown, for example, any need to protect its property from injury, loss or dissipation. Credit Alliance Corp. v. Philadelphia Minit Man Car Wash, 450 Pa. at 372, 301 A.2d at 818-19. According to defendants, Liss Global is a successful corporation with good relations with banks. 2/21/2002 N.T. at 216. Although William has alleged that he was harmed by the liquidation of Liss Brothers and the formation of Liss Global, there has been a third party liquidator to oversee the disposition of the assets of Liss Brother. For these reasons, the balance of interests weighs against the imposition of a receiver on Liss Global.

II. William Liss Has Not Satisfied the Requirements for Imposition of a Constructive Trust on Liss Global

William also requests that a Constructive Trust be imposed on Liss Global. Under Pennsylvania law, a constructive trust may be imposed if a transferee conveys property to another due to fraud, duress, undue influence, mistake or abuse of a confidential relationship in conjunction with

a promise to hold the property in trust and reliance thereon. Kohr v. Kohr, 271 Pa. Super. 321, 328, 413 A.2d 687, 690 (1979). A constructive trust may also be imposed where "a person holding title to property is subject to an equitable duty to convey it to another on the grounds that he would be unjustly enriched if he were permitted to retain it." Id., 271 Pa. Super. at 329, 413 A.2d at 691. In deciding whether to impose a constructive trust, a central focus is on unjust enrichment:

> Generally, an equitable duty to convey property arises only in the presence of fraud, duress, undue influence, mistake or abuse of a confidential relationship. There is, however, no rigid standard for determining whether the facts of a particular case require a court of equity to impose a constructive trust; the test is merely whether unjust enrichment can be avoided. Koffman v. Smith, 453 Pa. Super. 15, 32, 682 A.2d 1282, 1291 (1996)(citations omitted)(emphasis added).

The person seeking imposition of a constructive trust bears a heavy burden of proof: "the evidence must be 'clear, direct, precise and convincing.'" Roberson v. Davis, 397 Pa. Super. 292, 296, 580 A.2d 39, 41 (1990). See also Hercules v. Jones, 415 Pa. Super. 449, 458, 609 A.2d 837, 841 (1992)("[o]ne who seeks the imposition of a constructive trust must do so by clear, direct, precise and convincing evidence"). On the present record, William has failed to show that Sheldon was unjustly enriched by the assets of Liss Brothers. The third party liquidator, Robert Wheeler, testified that Sheldon purchased tangible assets of Liss Brothers in arms-length manner at prices set by an outside auctioneer. 7/23/2002 N.T. at 94-95 (*Wheeler)*.

William argues, in contrast, that Sheldon's actions caused William to suffer (1) the loss of the buyout of his interest in Liss Brothers for $3,200,000; (2) the loss of reimbursement of the proceeds from the sale of the Townsend Road property and the PNC loan; (3) the loss of his 50% interest in defendant Liss Brothers; (4) the loss of a family business to pass on to his children; (5) and the financial stability he has enjoyed in the past as a fifty (50%) percent shareholder in defendant Liss Brothers "and the financial ability William thought he would have based upon the buyout of his ownership interest in defendant Liss Brothers." Plaintiff's 9/30/2002 Memorandum at 31.

On closer scrutiny, these alleged losses are likewise without evidentiary support that establishes unjust enrichment by Sheldon. As this court previously ruled, the alleged buyout agreement based on the May 2000 Letter of Intent was not a binding contract since it specifically stated that "this agreement is subject to the preparation of an agreed final agreement of sale." See Liss

v. Liss, 2002 WL 576510 at *14. Sheldon testified that as Liss Brothers experienced economic difficulty in November or early December 2000, he could no longer afford or offer the buy out deal they had previously discussed. 1/31/2002 N.T. at 214, 311 (*Sheldon).* Similarly, William has so far failed to produce any evidence of an agreement that Sheldon would compensate him for the reimbursement of his proceeds from the sale of the Townsend Road property, which had been required by an agreement with Summit Bank.[62] As for the final three claimed losses, William failed to present evidence that these losses did not flow, as Sheldon argues, from the economic demise of Liss Brothers due to its debt and overhead rather than as unjust enrichment for Sheldon.

The cases that William invokes to establish his claim for a constructive trust over Liss Global are not only inapposite but they illustrate the defects of the evidence presented by William. Although William cites Santoro v. Morse, 2001 Pa. Super. 223, 781 A.2d 1220 (2001), its facts are distinguishable due to the precise evidence of misappropriation of corporate assets.[63] In Santoro, the plaintiff Santoro was a 50% shareholder with defendant Morse of a company CTI that supplied new and refurbished cable television equipment to wireless and cable television companies throughout the United States. Defendant Morse created another corporation CTII, then subsequently CTINY, while CTI was still in existence. In obtaining a constructive trust over CTINY, the plaintiff presented highly specific evidence of how the defendant diverted assets of CTI to a new corporation that he formed (i.e. first CTII and then CTINY) to the detriment of Santoro as a 50% shareholder of CTI. Plaintiff demonstrated that defendant Morse had entered into a contract to purchase the assets of Converter Parts Incorporated for the benefit of a proposed new company, CTII. Under this agreement, however it was CTI, and not the new company, that was responsible for paying $473,2000 to purchase Converter Parts. Moreover, the agreement required CTI --- not defendant's new company-- to incur penalties of 2% interest on any late payments and CTI was obligated to rent Converter Parts' New York facility for 5 years at $500 a month. Uncontradicted evidence was presented that $50,000 drawn on CTI checks was used for the down payment to purchase Converter

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[62] See Plaintiff's Proposed Findings of Fact, ¶ 41(b)(citing only to William's testimony to support claim that the Sales Proceeds Disposition Agreement provides that William will be repaid for his deposit of the $1,433,228 back into Liss Brothers).

[63] Plaintiff's 9/30/2002 Memorandum at 28-29.

Parts, Inc. Id., 781 A.2d at *1225- 27.

Plaintiff also presented uncontradicted evidence that the defendant had CTI purchase 50,000 converters from Jerrold Communications by increasing CTI's line of credit to $3.5 million which was personally guaranteed by the plaintiff and his wife. It was CTINY, however, that received the benefit of $5,000,000 in revenue from the sale of these converters with a net profit of approximately $1,480,000. None of this profit was attributed to CTI. Defendant Morse in 1997 received $1.2 million in compensation from CTINY and $764,905 from CTI. Id., *1227.

Based on this evidence, the trial court concluded that a custodian should not be appointed. It decided instead to impose a constructive trust upon CTINY to protect the assets of CTI pending the outcome of litigation. Id., 781 A.2d at 1231. The Superior Court affirmed this conclusion, with the following explanation:

> In light of the evidence suggesting that the assets and opportunities of CTI had been wrongfully diverted to benefit CTINY and Mr. Morse, the trial court in the exercise of its broad equity powers could properly order the temporary imposition of a constructive trust so as to preserve the assets of CTI pending trial. Id., 781 A.2d at 1231.

There is thus a striking contrast between the uncontradicted evidence of overreaching and conversion of corporate assets in Santoro and the lack of this kind of evidence in the instant case. In fact, the only evidence as to the transfer of assets from Liss Brothers to Liss Global came through the testimony of the third party liquidator Robert Wheeler, presented by the defendants. His uncontradicted testimony was that any tangible assets purchased by Liss Global was through arms' length transactions and for fair consideration. 7/23/2002 N.T. at 94- 95 (*Wheeler*). He also testified that in his 23 years of experience, he was unaware of any price being paid for such intangible assets as goodwill or customer lists. 7/23/2002 N.T. at 96 (*Wheeler*). This testimony was uncontradicted by evidence from plaintiff.

The one specific asset that plaintiff does isolate relates to commissions from Rite Aid of $550,000 that allegedly were due from a trip Sheldon made to Hong Kong and Taiwan in January 2001. 1/30/2002 N.T. at 95-98 (*William*). At the hearing, William stated that "I know that $550,000 disappeared from commissions that Liss Brothers was supposed to receive and they never found that money. " 1/30/2002 N.T. at 97 (*William).* Yet William fails to present any documentary support

whatsoever for this averral.[64] Moreover, plaintiff did not present any evidence of a contract between Liss Brothers and Rite Aid as to a business relationship for a specific period of time. Plaintiff did, however, present evidence through depositions of Rite Aid employees, that the sole contact between Rite Aid and Liss Brothers was through Sheldon or other employees [65]-- but not William, thereby framing the unexplored issue as to whether any goodwill would be accountable to Sheldon or the company for purposes of distribution. See, e.g., Butler v. Butler, 541 Pa. at 378, 663 A.2d at 155 (previously discussed in Section I,A,2,e). For all of these reasons, Santoro is distinguishable, though it does illustrate the standard of proof necessary for imposition of a constructive trust.

Another case invoked by plaintiff, Mogilyansky v. Sych, 2001 WL 1807820 was improperly characterized as "imposing a constructive trust." See Plaintiff's 9/30/2003 Memorandum at 30. In Mogilyansky, this court merely concluded that the allegations set forth in a complaint seeking a constructive trust could withstand a motion for judgment on the pleadings. In the instant case, in contrast, this court is faced with a record and evidence that does not meet the standard for imposing a constructive trust upon Liss Global. The facts alleged in the Mogilyansky complaint, moreover, were clearly distinguishable from the actual record presented in the instant case.[66]

For these reasons, therefore, William Liss has failed to show that a constructive trust should be imposed on Liss Global.

Conclusions of Law

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[64] 1/30/2002 N.T. at 97 (*William*). Plaintiff also raises this point in his Proposed Statement of Facts in paragraphs 51 and 101. The backup support, however, is the testimony of William (i.e. 1/30/2002 N.T. at 97) previously cited and testimony by Sheldon that Rite Aid continued its business with Liss Global after the liquidation of Liss Brothers. See 1/31/2002 N.T. at 340-341 (*Sheldon*), cited by Plaintiff's Proposed Statement of Facts, ¶ 101. The only financial documentation plaintiff offers is that the cost of the trip was charged to Liss Brothers. Plaintiff's Proposed Finding of Fact, ¶ 101, citing D-69.

[65] See Exs. P-2A, P-2B & 2C and Finding of Fact, ¶ 83.

[66] The plaintiff in Mogilyansky entered into a partnership with defendant to publish a newspaper and share in the profits. His complaint alleged that he provided a benefit to the newspaper by supplying equipment and business expertise, that the defendant fraudulently took control of the newspaper and its assets without compensation to the plaintiff. Mogilyansky, 2001 WL at *3.

Request for a Receivership over Liss Global

1. The appointment of a receiver is a harsh remedy that is typically imposed only as a remedy last resort. Mayhue v. Mayhue, 336 Pa. Super. 188, *193, 485 A.2d 494, *497 (1984).

2. Under Pennsylvania law, a receivership is imposed on a solvent corporation as a drastic remedy that should be imposed "(a) only when the right to a receivership is clear, and (b) irreparable damage will in all probability result unless a receiver is appointed, and (c) a receivership will not substantially injure or interfere with the rights of creditors and stockholders, and (d) greater damage will result if a receiver is not appointed than if one is appointed." Tate v. Philadelphia Transportation Co., 410 Pa. 490, *500, 190 A.2d 316, *321 (1963).

3. Courts require that "a receiver will be appointed only in aid of some recognized presently existing right, and no appointment will be made in a case where a receivership is the sole remedy sought." Tate, 410 Pa. at *500, 190 A.2d at *321. See also Northampton National Bank v. Piscanio, 475 Pa. 57, 62, 379 A.2d 870, 872 (1977); McDougal v. Huntingdon & Broad Top Mountain R.R. & Coal Co., 294 Pa. 108, 117, 143 A.574, 578 (1928).

4. A receiver is imposed when necessary to protect property from injury, loss or dissipation. Credit Alliance Corp., v. Philadelphia Minit-Man Car Wash, 450 Pa. 367, 371, 301 A.2d 816, 819 (1973). But a receiver is not imposed merely because one party has a claim against another. DeAngelis v. Commonwealth Title Ins. Co., 467 Pa. 410, *414, 358 A.2d 53, *55 (1976)(count erred in appointing a receiver on petition of a nonlien holding judgment creditor).

5. On the record presented, plaintiff William Liss failed to establish his interest in Liss Global for the imposition of a receivership on it. He conceded that he is not a shareholder of Liss Global. See Amended Complaint, ¶ 6 and Motion, ¶ 6. He contributed no capital to it nor does he assert a judgment against Liss Global.

6. William failed to establish that a receiver should be appointed on Liss Global pursuant to 15 Pa.C.S.A. § 1767 because that section applies specifically to shareholders of the corporation at issue since it provides: "Except as provided in subsection (b) upon application of any shareholder, the court may appoint one or more persons to be custodians of and for any business corporation. . ." 15 Pa.C.S.A. § 1767(a).

7 Even if 15 Pa.C.S.A. § 1767 could be invoked as to Liss Global, William failed to establish with adequate proof that the other 50% shareholder and president of Liss Brothers, Sheldon Liss, acted "illegally, oppressively or fraudulently" toward the plaintiff by stealing "Liss Brothers." Section 1767 requires a showing "in the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees. . . . 15 Pa.C.S.A. § 1767(a)(2).

8. William's argument that Sheldon wrongfully failed to buy out his interests in Liss Brothers for $3,200,000 as set forth in a Letter of Intent in May 31, 2000 (Ex. P-3) is unsupported by the record since this court previously ruled that this Letter was not a binding contract. Liss v. Liss, 2002 WL 576510, *14 (Phila. Com. Pleas 2002).

9. William's deposit of the proceeds from the sale of the Townsend Road Property back into Less Brothers in November 2000 cannot serve as evidence of Sheldon's wrongdoing since it was a legal requirement pursuant to a contract with Summit Bank. Moreover, Sheldon likewise deposited his proceeds back into Liss Brothers.

10. William failed to produce evidence that the policy of discontinuing the reimbursement of certain personal expenses was oppressive action by Sheldon where he failed to show that the new policy was applied only to William or that it was not justified by the economic distress of Liss Brothers. The evidence presented by plaintiff as to charges to the corporate account

unrelated to business purposes spanned the period of May through December 2000 only. Moreover, plaintiff failed to establish that this conduct as to Liss Brothers should be a basis for imposing a constructive trust as to Liss Global.

11. Although William did establish that Sheldon unilaterally raised his own salary, this, alone, would not justify the imposition of a constructive trust on Liss Global.

12. The evidence presented in terms of testimony and e-mails indicates that after William and Sheldon were unable to agree on terms for buying out William's interest in Liss Brothers, they agreed to liquidate Liss Brothers due to its severe financial straits and the impending default of the Summit Bank loan. Neither shareholder was able to come up with an alternative means for financing Liss Brothers, which was liquidated due to its financial problems.

13. The notice requirements for the February 13th meeting pursuant to 15 Pa.C.S.A. §§ 1703 & 1704 and the ByLaws of Liss Brothers were waived because all of the shareholders attended that meeting and for 27 years the shareholders had followed informal corporate procedures rather than the notice requirements of their by-laws. 15 Pa.C.S.A. § 1705(b); Stone v. American Lacquer Solvents, 463 Pa. 417, n.2, 424, 345 A.2d 174, n.2, 178 (1975); Baldwin v. Rose Tree Fox Hunting Club, 451 Pa. 538, 543, n.3, 304 A.2d 505, 508, n.3 (1973); McCay v. Luzerne & Carbon County Motor Transit Co., 125 Pa. Super. 217, 222-24, 189 A. 772, 774-75 (1937).

14. William has failed to establish that the assets of Liss Brothers were wrongfully appropriated by Sheldon where evidence and testimony established:

(1) that it was Sheldon who sought the selection of a third-party to oversee distribution of the assets of Liss Brothers as it was liquidated;

(2) the liquidator testified that Liss Brother assets acquired by Sheldon were purchased through arms' length transactions at fair market value;

(3) the liquidator testified that such intangible assets as customer lists or good will

do not receive compensation and William presented no evidence to the contrary. See Krosnar v. Schmidt Krosnar McNaughton Garrett, Co., 282 Pa. Super. 526, 540-41, 423 A.2d 370, 377 (1980)(clients who are free to seek other professional assistance "are not subject control" and "cannot be treated as assets of the corporation"); Butler v. Butler, 541 Pa. 364, 378, 663 A.2d 148, 155 (1995)("goodwill value which is intrinsically tied to the attributes and/or skills of certain individuals is not subject to equitable distribution because the value thereof does not survive the dissociation of those individuals from the business").

15. William failed to establish the requisite irreparable harm for the appointment of a receiver for Liss Global. Tate v. Philadelphia Transportation, 410 Pa. at 500, 190 A.2d at 321.

16. Establishment of a receivership over Liss Global would substantially injure the rights of the shareholder and there was no evidence presented that it would benefit any creditors.

17. The balance of harms weighs against the imposition of a receiver on Liss Global.

Request for a Constructive Trust over Liss Global

18. Under Pennsylvania law, a constructive trust may be imposed if property is conveyed through fraud, duress, undue influence, mistake or abuse of a confidential relationship in conjunction with a promise to hold the property in trust and reliance thereon. A constructive trust may also be imposed where "a person holding title to property is subject to an equitable duty to convey it to another on the grounds that he would be unjustly enriched if he were permitted to retain it." Kohr v. Kohr, 271 Pa. Super. 321, 328-39, 413 A.2d 687, 690-91 (1979).

19. In deciding whether to impose a constructive trust, the central focus is on avoiding unjust enrichment. Koffman v. Smith, 453 Pa. Super. 15, 32, 682 A.2d 1282, 1291 (1996).

20. The person seeking imposition of a constructive trust bears a heavy burden of proof: "the evidence must be 'clear, direct, precise and convincing.'" Roberson v. Davis, 397 Pa. Super. 292, 296, 580 A.2d 39, 41 (1990). See also Hercules v. Jones, 415 Pa. Super. 449, 458, 609 A.2d 837, 841 (1992)("[o]ne who seeks the imposition of a constructive trust must do so by clear, direct, precise and convincing evidence").

21. William failed to meet this burden of proof to establish that Sheldon was unjustly enriched by the liquidation of Liss Brothers or that a constructive trust should be imposed on Liss Global.

By the Court:

Date: January 29, 2003

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John W. Herron, J.