



IN THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

FILED JUN 30 2009

OLIVER L. PHILLIPS

PLAINTIFF

VERSUS

CAUSE NO. 2007-0526

DONALD R. DEPRIEST, MCT INVESTORS, L.P., and MARITIME COMMUNICATIONS / LAND MOBILE, LLC

Chancery Clerk

DEFENDANTS

AND

DONALD R. DEPRIEST

COUNTER-PLAINTIFF

VERSUS

OLIVER L. PHILLIPS, HELEN J. PHILLIPS, his wife, and JOHN DOES 1-20

COUNTER-DEFENDANTS

2009-TS-1626

OPINION AND JUDGMENT

This cause was tried on May 4 through 8, 2009 in Columbus, Lowndes County, Mississippi. The Court after carefully considering the stipulations of the parties, the evidence introduced at trial, the testimony and the credibility of the witnesses, and the post-trial briefs, makes the following findings of fact and conclusions of law and enters this Opinion and Judgment.

- 1. This Court has jurisdiction of the parties and subject matter.

PROCEDURAL HISTORY

- 2. This case began in 2007 when Oliver Phillips ("Phillips") sued Donald R. DePriest ("DePriest") in Lowndes County Circuit Court. Phillips filed numerous lawsuits alleging causes of action for breach of promissory notes, assignments and option agreements. DePriest answered

and counterclaimed and about the same time, filed in this Court a Complaint to Stay Multiplicity of Suits at Law, to Provide an Accounting, and to Grant Equitable Relief. On September 12, 2007, DePriest moved for a Bill of Peace and other relief. On December 11, 2007, the Court denied DePriest's Motion for a Bill of Peace and sustained Phillips' Motion for Dismissal. DePriest later moved the circuit court to transfer the cases to this Court and on March 5, 2008, Circuit Judge Lee Howard ordered the cases transferred back to this Court.

3. On September 2, 2008, the Court consolidated all of Phillips' claims and dismissed certain circuit court actions because of duplicity. On September 10, 2008, the Court denied Phillips' Motion to Dismiss the DePriest Counterclaims.

THE CLAIMS

I. PHILLIPS' CLAIMS:

4. Phillips claims DePriest owes him \$9,390,472.00. Each of these claims will be discussed in detail within this Judgment. The claims are:

DESCRIPTION OF CLAIM	VALUE OF CLAIM
1. Stipulated Notes (plus Interest)	\$3,153,786.00 ¹
2. Promissory Note from 1996 Settlement	\$5,000,000.00
3. Phillips' Value of MCT of Russia Options	<u>\$3,119,897.00</u>
Subtotal: (The amount Phillips claims before credit for hypothecated shares.)	\$11,273,643.00
LESS: Credit for hypothecated shares of MCT Corporation – Phillips admits this credit is due.	<u>-\$1,883,211.00</u>
Net amount claimed by Phillips:	<u>\$9,390,472.00²</u>

¹ Phillips and DePriest agree to the amount, but DePriest denies that he owes Phillips because of his counterclaims against Phillips.

² This amount does not include attorneys' fees, which the parties stipulated should be resolved after this decision.

II. DEPRIEST'S COUNTERCLAIMS:

5. DePriest claims that Phillips either owes him \$4,729,425.00 or \$367,967.03.³ DePriest's counterclaims consist of Options 1 and 2 shown on Exhibit D-83. The difference in the two options is that Option 2 calculates the amount due DePriest if the Court finds that DePriest had no duty to pay Phillips the \$6,000,000.00 in payments made in 1986 and 1996. Option 1 calculates the amount due DePriest if the Court finds that DePriest had a duty to pay Phillips 10% of the Charisma proceeds DePriest received. If so, \$6,000,000.00 was an overpayment, and DePriest requests that a constructive trust be imposed on that overpayment.⁴ DePriest claims that he should be repaid the following:

OPTION 2

Paid to Phillips in 1986 (McCaw sale proceeds)	\$1,000,000.00
Paid to Phillips in 1996 (settlement of McCaw litigation proceeds)	\$5,000,000.00
Phillips' income from hypothecated MCT shares	<u>\$1,883,211.00</u>
Subtotal (the amount DePriest claims before set-off for the stipulated notes)	\$7,883,211.00
LESS: Stipulated Notes (plus interest)	<u>-\$3,153,786.00</u>
Net to DePriest (pursuant to Option 2)	\$4,729,425.00 ⁵

OPTION 1

Option 1 is the same as Option 2, except that in addition to giving Phillips a credit or set-off for the stipulated notes, it also gives him a credit for 10% of the Charisma proceeds received by DePriest.

³ DePriest has dismissed his counterclaim against Helen Phillips.

⁴ As stated below in Option 1, 10% of Charisma proceeds is \$4,363,458.00. Therefore, the overpayment is \$1,635,542.00, which is the difference between \$6,000,000.00 and \$4,363,458.00.

⁵ Plus prejudgment interest (Where there has been a breach of fiduciary duty, prejudgment interest is chargeable.)

Paid to Phillips in 1986 (McCaw sale proceeds)	\$1,000,000.00
Paid to Phillips in 1996 (settlement of McCaw litigation proceeds)	\$5,000,000.00
Phillips' income from hypothecated MCT shares	<u>\$1,883,211.00</u>
Subtotal (the amount DePriest claims before set-off for the stipulated notes)	\$7,883,211.00
LESS: Stipulated Notes (plus interest)	-\$3,153,786.00
10% of Charisma Proceeds	<u>-\$4,363,458.00</u>
Net to DePriest (pursuant to Option 1)	\$ 365,967.003

FACTUAL BACKGROUND

6. Prior to this lawsuit, Phillips and DePriest were long-time friends and business associates. They met in the late 1960's or early 1970's. DePriest was a partner in a specialty textile products company and Phillips was an accountant with T. E. Lott & Company ("T. E. Lott").

7. Until 1980, Phillips performed for DePriest the usual accounting services for an individual or corporation by preparing tax returns and financial statements. Later, for a number of reasons, Phillips began to help finance DePriest's many business transactions. Sometimes Phillips would negotiate loans in his own name for DePriest and other times, in DePriest's name and use DePriest's collateral.

8. In the 1970's, DePriest met Chuck Cooper ("Cooper"), who had been in the radio business for a number of years and who was interested in developing and owning radio stations in Northeast Mississippi. DePriest and Cooper formed a business relationship and purchased WKOR in Starkville, Mississippi. DePriest provided the capital and Cooper worked for a salary

and had an equity interest in the radio station. DePriest subsequently purchased a radio station in Meridian, Mississippi and Cooper was responsible for managing both of these stations.

9. Because of Cooper's heavy involvement in radio, he was invited by Bell Labs to attend a meeting where a new technology called New Domestic Public Cellular Radio (*now known as cell phone service*) was discussed.

10. DePriest, Cooper and Phillips ("the three") agreed that the cellular phone business showed promise and decided to pursue cellular phone licenses. The application for the initial markets was arduous, expensive and fast-moving. DePriest, Cooper and Phillips divided their roles in the application process. DePriest was responsible for and obtained the financing for the applications and subsequent difficult and expensive aspects of ultimately obtaining a license. Cooper provided technical support and engineering knowledge even though he was not an engineer. Phillips provided the accounting necessary for the applications. In this Court's mind, the biggest challenge for the three was obtaining the financing. DePriest accomplished the financing through interesting and innovative means, including investing a great amount of his own money. The three were able to complete applications for three of the largest markets in the United States in the first round of filings. The markets were Tampa, Miami and Houston. The three completed applications for 44 markets in the second and third round of filings in 1982 and 1983. Separate entities were used for the filings but after the application process, the individual interests were rolled over into one entity, Charisma Communications Corporation ("Charisma"). Charisma was incorporated on April 23, 1984.

11. In 1983, Cooper assigned his interest in any DePriest-related companies to DePriest for \$500,000.00 and his employment was terminated.

12. On April 13, 1984, the three signed Exhibit P-1, the "1984 Agreement". The Agreement says in part that it is a "joint venture, which joint venture consists primarily of license applications for and operation of **New Domestic Public Cellular Radio Stations, . . .**" (*emphasis added*). The parties were to have the following interest in this "joint venture":

Donald R. DePriest	65%
Charles B. Cooper	25%
Oliver L. Phillips, Jr.	10%

13. DePriest was to "carry under his ownership structure the amount and percentage of the ownership of Oliver L. Phillips, Jr."

14. Charisma was sold to McCaw Communications ("McCaw") for \$85,000,000.00 in 1986. The sale took place because of DePriest's negotiation skills. DePriest also negotiated a side agreement that provided if McCaw ever sold Charisma assets, Charisma shareholders would receive a percentage of the profit received.

15. DePriest received approximately \$26,000,000.00 from the sale of Charisma and on December 31, 1986, paid Phillips \$1,000,000.00.

16. DePriest contends that he paid Phillips \$1,000,000.00 for his friendship and work that he had done for various DePriest companies. Phillips says that the \$1,000,000.00 was a partial payment he was entitled to receive under the 10% ownership interest of the 1984 Joint Venture Agreement. Phillips testified that the balance owed him would be paid from his and DePriest's next business venture.

17. On May 1, 1990, DePriest assigned 70 MCT Investors, L.P. units to Phillips. Phillips says that this assignment was made to him to show what was owed him from the proceeds of the

Charisma sale. DePriest contends that the transfer was to strengthen Phillips' financial statement.

18. McCaw sold the Charisma assets and did not honor the side agreement with Charisma that it was to share profits with the former shareholders of Charisma. DePriest spearheaded a lawsuit on behalf of Charisma shareholders that he helped fund with his funds and the funds of others, and ultimately collected \$90,000,000.00 in 1996. DePriest personally received approximately \$28,000,000.00 from the McCaw lawsuit. DePriest paid some of his debts, including approximately \$2,000,000.00 in loans that Phillips had negotiated for the finance of the McCaw lawsuit.

19. Phillips and DePriest's relationship became confrontational when Phillips demanded his 10% share of the proceeds that DePriest received from the lawsuit.

20. On April 8, 1996, DePriest's executive assistant, Belinda Hudson, delivered a settlement letter from DePriest over DePriest's signature claiming that the 70 MCT Investors, L.P. units assigned to Phillips in 1990 fulfilled the only obligation he had to Phillips. *See DePriest Letter, Ex. P-6.* The letter offered Phillips \$7,000,000.00 for the MCT Investors, L.P. interest and to conclude their financial life together.

21. Phillips declined DePriest's offer and Phillips and DePriest negotiated further. Phillips told DePriest he would settle for \$10,000,000.00. On April 15, 1996, Phillips went to DePriest's office, picked up a \$5,000,000.00 check and a \$5,000,000.00 promissory note, and executed a release. *See the Promissory Note, Ex. P-9.* The note also contained an assignment of the MCT Investors, L.P. units as security for the note and an original Certificate of Limited Partnership Interests was attached.

22. Even though their personal and business relationship had obviously deteriorated, DePriest continued to borrow large sums of money from Phillips. Through a series of transactions in 1997, DePriest borrowed over \$1,500,000.00 in unsecured loans from Phillips. The loans are shown in Exhibit P-11.

I. MCT INVESTORS OF RUSSIA, L.P. UNITS (“RUSSIAN UNITS”)

23. On April 1, 1998, DePriest gave Phillips an option for 367 units of MCT of Russia, L.P. (“Russian Units”). *See Ex. P-12*. One month later, he gave Phillips an option for an additional 100 units. *See Ex. P-13*. The options were originally to be exercised before December 31, 2000, but because DePriest had pledged the units, the option provided that Phillips could not exercise the option until DePriest had satisfied the bank note secured by the units. In handwriting, DePriest extended the options on several occasions with the last option deadline being December 31, 2006. On August 17, 2006, Phillips exercised the option by a certified letter from his attorney. *See Ex. P-23*. However, the MCT of Russia units had been converted to MCT Corp. stock in 2000 and the Russian Units had no value outside its value of converted stock.

II. THE FOUR STIPULATED PROMISSORY NOTES

24. From 2001 to 2004, DePriest borrowed heavily from Phillips to fund a number of his businesses. The parties have stipulated that the amount due on these series of notes is \$3,153,766.00.

FINDINGS OF FACT AND LEGAL CONCLUSIONS

25. The first issue this Court decides is Phillips’ claim for the \$5,000,000.00 note given to Phillips on April 15, 1996. The Court must discuss the 1984 Joint Venture Agreement because Phillips contends that agreement is his basis for the April 15, 1996 settlement and the resulting \$5,000,000.00 payment, \$5,000,000.00 note, its security and the release.

I. THE 1984 JOINT VENTURE AGREEMENT (“1984 AGREEMENT”)

26. Cooper and Phillips testified that the 1984 Agreement was to memorialize the ownership for their and DePriest’s work on the multiple applications for cellular licensing during 1982 and 1983 and the resulting business entities. DePriest did not recall this agreement, but said it is vague and ambiguous and there was no subsequent entity formed arising out of the Joint Venture Agreement.

27. The Court rejects DePriest’s argument and finds that the only joint business efforts the three had that supports the 1984 Joint Venture Agreement involve applications for cellular licenses for various entities and these entities ultimately became Charisma. The Court does not believe it to be coincidental that Charisma was formed ten (10) days after the Joint Venture Agreement was executed.

28. Even though making this finding, the Court does not believe that the interpretation and application of the terms of the Joint Venture Agreement are important because of the April 15, 1996 settlement between Phillips and DePriest.

II. THE APRIL 15, 1996 SETTLEMENT TERMS

29. On this issue, the parties asked the Court to decide whether the settlement reached on April 15, 1996 was for \$10,000,000.00 as Phillips contends or for \$5,000,000.00 as DePriest contends. The Court finds that the settlement was for \$10,000,000.00 and bases its findings on the following:

- DePriest offered Phillips \$7,000,000.00 in the form of a handwritten letter on April 8, 1996, to “finalize [the parties’] financial life together.” *Ex. P-6. T. T. Vol. 3, pp. 207-208.*⁶

⁶ Phillips had the Court Reporter provide a draft of the trial testimony. For reference purposes in this Opinion and Judgment, the draft trial transcript is referred to as *T. T. Vol. __, pp. ____*. This is a draft transcript and the page numbers may change if the Court Reporter prepares an official transcript later.

- Phillips rejected this offer of \$7,000,000.00 just one week prior to the consummation of the settlement. *T. T. Vol. 3, pp. 207-208.*
- Phillips demanded \$10,000,000.00 total for the 70 MCT Investors, L.P. units and his 10% share of the approximate \$28,000,000.00 in proceeds DePriest received from the McCaw litigation settlement. *T. T. Vol. 3, pp. 207-208.*
- On the day of the settlement, DePriest paid Phillips with a \$5,000,000.00 check. *Ex. P-7.*
- In addition to the \$5,000,000.00 check, Phillips received the original promissory note for \$5,000,000.00, and the original Certificate of Limited Partnership Interests for 70 units of MCT Investors, L.P. as security for the note. *Ex. P-9.*
- The assignment specifically conveyed to Phillips all of DePriest's right, title and interest in the 70 units.
- The due date on the promissory note was December 31, 1996, and Phillips' recourse in the event of default was to retain the security. *Ex. P-9.*
- Phillips executed a Release that released DePriest from any and all claims up to the date of the settlement. *Ex. P-8.*
- DePriest never asked for the original promissory note or the Certificate of Limited Partnership interest that Phillips received on the date of the settlement.
- DePriest never received a copy of the note marked "Satisfied" or "Paid in Full."
- Phillips continued to hold the Certificate of Limited Partnership Interests through the dissolution of MCT Investors, L.P. on December 31, 2007.

30. In the assignment attached to the note, DePriest transferred all of his right, title and interest in the 70 units to Phillips. This transfer of ownership to Phillips secured DePriest's payment of the note because DePriest was not personally liable for the note. The promissory note was signed on April 15, 1996, and due on December 31, 1996. DePriest said he wrote the

\$5,000,000.00 check to satisfy and pay the note in full. DePriest did not adequately explain why he let Phillips leave with the original note and the underlying security other than he “trusted him,” and “wasn’t worried about it because he had a release.” This Court is not persuaded that after confrontational settlement negotiations, DePriest, a seasoned businessman with an extensive background in financial transactions, would allow Phillips to keep a \$5,000,000.00 promissory note and an assignment transferring ownership of 70 MCT Investors, L.P. units, if DePriest’s \$5,000,000.00 check paid the note.

31. Moreover, DePriest’s recollection and testimony about what happened on April 15, 1996, are unclear and inconsistent.⁷ To the contrary, Phillips provided consistent, specific details of the settlement that was reached that day.⁸ Therefore, the Court finds that the settlement reached on April 15, 1996, was for \$10,000,000.00.

⁷ For example, in response to direct questions from the Court, DePriest testified:

THE COURT:	You met with Mr. Phillips about April 15, 1996, right?
MR. DEPRIEST:	Yes, sir.
THE COURT:	You gave him the \$5 million check?
MR. DEPRIEST:	Yes, sir.
THE COURT:	It was negotiated?
MR. DEPRIEST:	Yeah.
THE COURT:	He signed the release?
MR. DEPRIEST:	Yes, sir.
THE COURT:	Alright, explain to me about the - - did you ever deliver him the note that was dated April 15 and that’s part of Exhibit P-9?
MR. DEPRIEST:	I either delivered that to him earlier or he picked it up and left with it.
THE COURT:	Okay. You mean earlier that morning on the 15th?
MR. DEPRIEST:	Yes, sir.

T. T. Vol. 3, pp. 75-76. (emphasis added)

⁸ Mr. Phillips testified that he had a specific recollection of the events as they took place on April 15, 1996:

Q.	Do you have specific recollection of the details of that day?
A.	I know exactly what happened that day.
Q.	Well, I want you to tell the Court exactly what went down on the 15 th regarding how you ended up with the original promissory note.

32. The \$5,000,000.00 promissory note in question contains specific language limiting Phillips' recourse.

The condition of this obligation is that it shall be without recourse or personal liability of the undersigned maker except to the extent of the security which is 70 Limited Partnership Units of MCT Investors, L.P.

Ex. P-9.

33. There was no personal liability for DePriest upon his default in payment. The specific language of the assignment transferring all of DePriest's "right, title and interest in and to that certain certificate representing 70 units of MCT Investors, L.P." and the delivery of the Certificate of Limited Partnership Interests, confirmed the transfer of ownership in the 70 units to Phillips. As a result, there was no action to be taken by Phillips against DePriest upon DePriest's default on payment of the note other than to maintain ownership and possession of the 70 MCT Investors, L.P. units. Consistent with these terms, Phillips continued to hold and still held the original Certificate of Limited Partnership Interests to the 70 MCT Investors, L.P. units through its dissolution on December 31, 2007. Pursuant to the specific terms of the certification of title to the 70 MCT Investors units, upon dissolution DePriest was to tender to Phillips all of the proceeds and distributions he received from the units.

-
- A. Mr. DePriest called me and said the documents were ready. I went over to his office. He met me at the door. Said, I've got them upstairs. We went upstairs. The documents were laying on the table. I sat down. He asked me to sign the release. I did read the documents. He pushed the release over to me. I signed it. Pushed it back to him. He gave me the check, the signed notes, and the certificates.
- A. And I told him I wanted a copy of the Release, so we walked downstairs. He made a copy of the Release and handed it to me, and I walked out with the original documents.

T.T. Vol. 5, pp. 52-53. (emphasis added)

34. Notwithstanding the dissolution of MCT Investors, L.P. on December 31, 2007, none of the proceeds from the 70 units Phillips held were paid to Phillips. The proof is that DePriest kept all the distributions and proceeds from the 70 units. At trial, consistent with the parties' \$10,000,000.00 settlement, Phillips demanded \$5,000,000.00 for the debt evidenced by the promissory note and secured by the 70 units.⁹ This Court agrees. Phillips is entitled to \$5,000,000.00 from DePriest for value DePriest received from the 70 MCT Investors, L.P. units held by Phillips as security for the note.

III. OPTION FOR 467 MCT OF RUSSIA UNITS

35. By January 1997, DePriest became dependent on Phillips to provide him with loans to continue funding and operating various business interests. By January 1998, Phillips had loaned DePriest over \$1,500,000.00. *Ex. P-11*. In April 1998, DePriest gave Phillips an Option for 367 MCT of Russia, L.P. units followed by an additional 100 units in May of 1998. *Ex. P-12, P-13*.

36. DePriest testified that the reason he gave Phillips the Option was to "bolster his financial statement." *T. T. Vol. 3, pp. 94, 102*. The Court rejects this testimony because Phillips' 1998 financial statement showed his net worth to be approximately \$12,000,000.00 without the Option. *Ex. P-24*. Moreover, DePriest confirmed that he intended to honor the Option from the beginning. He testified as follows:

- Q. You'll have to help me with that again. Is it your testimony that it was never intended, then, for you to actually grant this option to Mr. Phillips?
- A. No, he could have exercised this on a timely basis, and that would have been that.
- Q. And he would have received what the document says?
- A. Yes.

T. T. Vol. 4, pp. 33. (emphasis added)

⁹ The parties agree that DePriest received well in excess of \$5,000,000.00 from the 70 MCT Investors, L.P. units.

Q. But at the time you granted those options to Mr. Phillips, you were certainly willing to comply with the terms of the option agreement, were you not?

A. Yes, sir.

T. T. Vol. 4, p. 31. (emphasis added)

37. The original deadline for Phillips to exercise the option was December 31, 2000. However, DePriest agreed to extend the deadline. This was the first of a series of extensions that ultimately extended the deadline for Phillips to exercise his Option until December 31, 2006. *Ex. P-14, P-14A.* The undisputed testimony in this case was that DePriest knowingly and willingly agreed to extend the deadline.¹⁰

38. Prior to the established deadline of December 31, 2006, in August 2006 Phillips exercised his option by having his attorney send DePriest a certified letter notifying DePriest of his exercise of the Option, and enclosing the consideration identified on the face of the Option.¹¹ *Ex. P-23.* However, DePriest did not honor the option, because he believed that Phillips

¹⁰ DePriest testified:

Q. Okay. You didn't have a problem extending the deadline to exercise those options?

A. No, I didn't.

Q. And you agreed to extend the deadline, the final deadline, until December 31, 2006, didn't you?

A. That's the writing "2006" and the initials are in my writing.

T. T. Vol. 4, pp. 30-31.

¹¹

Q. Mr. DePriest, was it your testimony yesterday that Mr. Phillips did not timely attempt to exercise those Options?

A. Yes, sir. That's correct.

Q. Okay. He attempted to exercise those Options prior to December 31, 2006, did he not?

A. I think so. I think I have heard that, maybe even seen the letter from Mr. Barnes pertaining to that. I think that was during 2006.

T. T. Vol. 4, p. 31.

exercised the option too late and because MCT of Russia, L.P. had already been distributed as MCT Corp. stock sometime in 2001.¹²

39. In *Busching v. Griffin*, 542 So. 2d 860, 864, 1989 Miss. LEXIS 5 (Miss. 1989), the Mississippi Supreme Court held that written notice to the seller of intent of the option holder to exercise an option has the effect of an acceptance, converting the option into an enforceable, bilateral contract. *Id.* at 864-65. In *Duke v. Whatley*, 580 So. 2d 1267, 1991 Miss. LEXIS 305 (Miss. 1991), the Mississippi Supreme Court, in distinguishing between an option and a right of first refusal contract, held:

In the case of an option, . . . the option-giver has no choice but to sell when the option is accepted according to its terms. What is usually provided is that there will be an expression of acceptance communicated to the option-giver, or that payment according to the terms of the option will be made within the time limit. Thus, an option is an offer made irrevocable by contract. . . .

The option gives a clear right to the option-holder, regardless of the wishes of the option-giver

Id. at 1272 (citing *Williston on Contracts*, § 1441A (*Jaeger*, 3d ed. 1968)).

What is important is that contractually the grantor of the option must “not repudiate or make performance impossible or more difficult by conveying the [property] to a third person.

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Q. Okay. And, in fact, the sole basis that you didn't grant Mr. Phillips or give Mr. Phillips the benefit or proceeds of those options when he attempted to exercise them was your belief that his attempt was untimely; is that correct?

A. Well, it was untimely.

* * * * *

Q. Okay. So the sole basis, then, the reason that it wasn't paid or that he hasn't received the benefit of this is because, in your opinion, his attempt to exercise this Option was untimely?

A. Right.

T. T. Vol. 4, pp. 31-32, 33.

These rights are enforceable by all the usual judicial remedies,” including damages and specific performance.

McCorkle v. Loumiss Timber Co., 760 So. 2d 845, 851, 2000 Miss. App. LEXIS 258 (Miss. Ct. App. 2000) (citing Eric Mills Holmes (ED), *Corbin on Contracts*, 591-92 § 11.16 (1996)) (emphasis added). Phillips created a bilateral contract when he exercised the option prior to the agreed upon deadline of December 31, 2006, and his rights are enforceable against DePriest through the judicial remedy of damages representing the value DePriest received for the property that was the subject of the Option.

40. Contrary to DePriest’s testimony that he intended to honor the Option, at trial he said that there was no consideration for the Option or the extensions of the exercise deadline. However, “[c]onsideration is sufficient if there is **any benefit to the promisor or any loss, detriment, or inconvenience to the promisee.**” *Iuka Guar. Bank v. Beard*, 658 So. 2d 1367, 1372, 1995 Miss. LEXIS 334 (citing *Jim Murphy and Associates, Inc. v. Le Bleu*, 511 So. 2d 886, 891, 1987 Miss. LEXIS 2609 (Miss. 1987)). (emphasis added). Finally, lack of consideration cannot bar the enforcement of an agreement where promissory estoppel is appropriate. *Thompson v. First Am. Nat’l Bank*, 2009 Miss. App. LEXIS 214 (Miss. Ct. App. April 21, 2009) (citing *C. E. Frazier Constr. Co. v. Campbell Roofing & Metal Works, Inc.*, 373 So. 2d 1036, 1038, 1979 Miss. LEXIS 2315 (Miss. 1979)).

41. This Court finds that loaning DePriest over \$1,500,000.00 from January of 1997 through January of 1998 was an inconvenience to Phillips, and a benefit to DePriest. Extending the deadline for DePriest to honor the Option was also a benefit to DePriest and an inconvenience to Phillips, as there was clearly no benefit to Phillips in delaying the payment of the Option six (6) years. Accordingly, there was sufficient consideration both for the Option and the deadline extensions.

42. The Mississippi Supreme Court has addressed the circumstances when it is appropriate to invoke promissory estoppel, stating:

An estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice.

Id. (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 48 (1996)). DePriest made written promises to Phillips through the Option itself, and further promised Phillips by the extensions that Phillips could exercise the Options any time prior to December 31, 2006. Phillips relied on the Option and on the deadline extensions, and exercised the Options prior to the December 31, 2006, deadline. To prevent Phillips from receiving the value of his Option when he clearly exercised it within the deadline promised by DePriest would be unjust to Phillips.

43. DePriest said he intended for Phillips to receive the benefit of the Option. He voluntarily extended the deadline with full knowledge that MCT of Russia, L.P. had been distributed as MCT Corp. stock in 2001. By voluntarily extending the deadline, DePriest waived his right to an untimeliness defense. DePriest received all the value for the units before the Option expired. Phillips exercised his Option in a timely manner, and DePriest is liable to Phillips for the value he received for the optioned “property.” The fact that MCT of Russia, L.P. units were distributed in 2001 as MCT Corp. stock only means that specific performance in the form of delivery of 467 MCT of Russia, L.P. units to Phillips cannot be accomplished. However, as specified in *McCorkle*, Phillips’ rights are enforceable by the judicial remedy of damages.

44. The value of the 467 MCT of Russia, L.P. units is calculated by both Phillips and DePriest’s expert forensic accountant, Stephanie Smith (“Smith”). These values were determined by using a conversion rate for which MCT of Russia, L.P. units were converted to

MCT Corp. shares of stock. The parties' only dispute over the value of the 467 MCT of Russia units involves the applicable conversion rate.

45. As support for his calculations, Phillips used a conversion rate of 345.1 shares of MCT Corp. stock per unit of MCT of Russia, L.P. based on the conversion rate found in an Ernst and Young audited financial report for an unrelated company known as BioVentures, Inc. *Ex. P-15*. This report showed that BioVentures, Inc. had purchased MCT of Russia, L.P. units in September of 1998, only five months after Phillips had acquired his option from DePriest. The conversion rate for these units that were purchased in September of 1998 was 345.1 shares of MCT Corp. per unit of MCT of Russia, L.P.

46. Ms. Smith used a conversion rate of 319.958 based on the average number of shares of MCT Corp. stock that Phillips had received in 2001 for three (3) separate purchases of MCT of Russia, L.P. units in his 401k retirement account. Phillips says that his interest in MCT stock is \$3,119,897.00. Smith contends the value is \$2,862,655.00.

47. The Court finds Ms. Smith's method of determining the value of the units more persuasive. Even though the first option was given in April of 1998, it is clear that the option could not have been immediately exercised until DePriest's obligation to First Union Bank was satisfied. The Court, therefore, finds that Phillips is entitled to \$2,862,655.00 on this claim.

48. This Court further finds that Phillips received 88,585 shares of MCT Corp. stock from DePriest in unrelated transactions as collateral for two (2) bank loans, and that DePriest is entitled to a credit for the value of these shares. The value of these shares is \$1,883,211.00. The Court, therefore, finds that on Phillips' claim for 467 MCT of Russia, L.P. units, Phillips is entitled to \$2,862,655.00, less \$1,883,211.00, for a total of \$979,444.00.

IV. FOUR STIPULATED PROMISSORY NOTES

49. Phillips' remaining substantive claims in the lawsuit involve four (4) promissory notes. Prior to trial, the parties agreed and stipulated to the validity of these notes, and to the total amount of principal and interest due and owing as of December 31, 2008, in the amount of \$3,153,786.

V. DEPRIEST'S COUNTERCLAIMS

50. Prior to trial, DePriest dismissed his claim for civil conspiracy against the Phillips, leaving only his claims for an accounting and for set-offs/damages. Smith reviewed documents produced in discovery. The "damage" claims that DePriest asserted at trial were for the \$1,000,000.00 he paid Phillips in 1986, the \$5,000,000.00 he paid Phillips in 1996 and the \$1,883,211.00 hypothecated MCT shares. DePriest said at trial that he wants this Court to set aside the 1996 settlement.¹³

51. DePriest also seeks reimbursement of the \$5,000,000.00 he paid Phillips in 1996, and/or its application as a "credit" or "set-off" against the promissory notes entered into years later. This Court has already found that a settlement occurred on April 15, 1996, and that this payment was part of the settlement. DePriest now believes that he should not have made the

¹³ DePriest testified:

- Q. Okay. So, Mr. DePriest, you're really not asking the Court for a set-off or a credit. You are asking the Court to go back and set aside a settlement that you reached in 1996, are you not?
- A. I am asking for the \$5 million, you know, if it's characterized as a settlement, you know, whatever the legal impact of that is. But nonetheless, I am asking for that as a set-off.
- Q. Well, "settlement," that's the term your attorney used with you yesterday, isn't it?
- A. If Mr. Taylor used that term, the answer is yes.

T. T. Vol. 4, p. 37.

settlement with Phillips in 1996 regarding potential claims from the 1984 Joint Venture Agreement. DePriest says that the 1984 agreement was invalid and that Phillips was due nothing under the agreement.

52. The Mississippi Supreme Court addressed a similar situation in *Creely v. Hosemann*, 910 So. 2d 512, 2005 Miss. LEXIS 92 (Miss. 2005). In that case, in response to Creely's request to set aside a settlement because "Hosemann's contract was unenforceable, . . . and Hosemann gave up nothing by settling the litigation," the Mississippi Supreme Court stated:

This theory, if valid, would lead to the inescapable conclusion that virtually every settlement could be set aside for lack of consideration. Lawsuits usually involve one party who is right and one who is wrong. It is not the potential recovery in the lawsuit that provides consideration in a settlement, but rather the right to pursue the recovery.

Id. at 516. In this case, Phillips gave up his right to pursue his claims against DePriest under the 1984 Joint Venture Agreement in exchange for payment by DePriest. "This abandonment of the right to pursue a claim provides the necessary consideration" from Phillips. *Id.* In exchange, DePriest purchased his right to be free from the claims. Accordingly, DePriest's request that this Court now set aside this settlement and allow him to use his payments as credits or set-offs against subsequent debt admittedly owed to Phillips is denied for two reasons.

53. First, this Court acknowledges the general premise that a compromise or settlement reached by way of mediation or otherwise is favored in Mississippi. See *Chantey Music Publ., Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1055, 2005 Miss. LEXIS 788 (Miss. 2005). "Moreover, the law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the agreement which the parties have made, absent any fraud, mistake, or overreaching." *Id.* at 1055, (citing *Hastings v. Guillot*, 825 So. 2d 20, 24 (Miss. 2002)). Mississippi applies contract law analysis to settlement agreements, and this is true of any type of negotiated settlement.

“Settlement agreements are contracts made by the parties, upon consideration acceptable to each of them, and the law will enforce them.” *Chantey*, 915 So. 2d at 1056. **Courts will not rewrite them to satisfy the desires of either party.** *Id.* (citing *Travelers Indem. Co. v. Chappell*, 246 So. 2d 498, 510 (Miss. 1971)). (emphasis added)

54. There is no proof that Phillips exercised control over DePriest or perpetrated fraud that resulted in the 1996 settlement between the parties. DePriest disputed the claims Phillips made, but settlements are reached as a result of disputes. DePriest acknowledged that the settlement resulted from a series of meetings and negotiations over time, and that he had access to counsel should he have desired assistance. For these reasons, the Court will not set aside or re-write the 1996 settlement agreement reached between Phillips and DePriest, and DePriest is not entitled to apply his settlement payments to subsequent, unrelated debt.

55. Second, DePriest testified that as early as 1997 or 1998 he believed that he had wrongfully paid Phillips \$5,000,000.00, yet he waited until this litigation before making his claim. *T. T. Vol. 6, pp. 36-37*. Mississippi applies contract law analysis to settlements. See *Id.* at 1056 (citing *Newell v. Hinton*, 556 So. 2d 1037, 1042, 1990 Miss. LEXIS 31 (Miss. 1990)). The Mississippi Supreme Court has previously stated that since there is no specific statute of limitations for claims on contracts, the general statute § 15-1-49 therefore applies. *Lloyd v. Gibbes*, 910 So. 2d 587, 591, 2005 Miss. App. LEXIS 146 (Miss. Ct. App. 2005). Consistent with Mississippi law, this Court treats the parties’ 1996 settlement agreement as a contract between the parties, and the applicable three-year statute of limitations applies to DePriest’s claims to set it aside. Therefore, in addition to this Court’s finding that the substance of DePriest’s claim for the \$5,000,000.00 is without merit, this claim is also barred by the applicable three-year statute of limitations.

VI. OTHER ISSUES ADDRESSED AT TRIAL

A. PROFESSIONAL RULES OF ACCOUNTING

56. Over objection from Phillips, there was testimony from Smith and former partners of Phillips regarding alleged violations of ethical rules of accounting by Phillips. However, DePriest's Counterclaim contains no identifiable claim for damages arising from Phillips' alleged misconduct.

57. Phillips' former partners at T. E. Lott testified that they were not aware of any specific violations committed by Phillips. Smith testified that DePriest did not suffer any damages as a result of any alleged misconduct by Phillips relating to any ethical rules of accounting.¹⁴ Therefore, this Court finds these issues and the testimony regarding them to be irrelevant in this case.

B. BREACH OF FIDUCIARY RELATIONSHIP

58. DePriest asks for an accounting in his Counterclaim and states as a defense that he and Phillips had a confidential relationship that was breached by DePriest. He says this entitles him to an accounting and a defense to the claims made by Phillips. The Court has carefully considered all of DePriest's proposed Findings of Fact and Conclusions of Law, particularly, the areas dealing with whether Phillips and DePriest had a confidential relationship, and, if so,

¹⁴ Ms. Smith testified:

- Q. Okay. Did you hear their testimony that the Rules of Independence for Accountants are for purposes of protecting third parties?
- A. Yes.
- Q. Is that an accurate statement? Do you agree with their testimony?
- A. Yes I do.
- Q. Now Ms. Smith, there is no evidence that has been presented in this trial and you are not aware of any third parties that were damaged by Mr. Phillips' alleged breach of these duties, are you?
- A. No, I am not aware of any.

whether Phillips abused that relationship. Under Mississippi law a fiduciary relationship occurs when:

(1) the activities of the parties go beyond their operating on their own behalf, and the activities are for the benefit of both; (2) where the parties have a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

Robley v. Blue Cross/Blue Shield, 935 So. 2d 990, 995, 2006 Miss. LEXIS 407 (Miss. 2006).

59. The Court will now address these *Robley* factors.

ANALYSIS OF THE ROBLEY FACTORS:

➤ ***Whether the activities of Phillips and DePriest went beyond their operating on their own behalf and were for the benefit of both:***

60. The Court only needs to look at Exhibit P-4 to find that DePriest met this element of proof for a confidential fiduciary relationship. When Phillips, Cooper and DePriest spent time all over the United States pursuing the cellular licenses, that pursuit was on behalf of all of the parties. There are many other facts in this case that need not be recited here that show that at least Phillips and DePriest were working for their common good.

➤ ***Whether Phillips and DePriest had a Common Interest and Profit from the Activities of the Other:***

61. Again, this record is replete with proof of this element. In 1986, DePriest paid Phillips \$1,000,000.00 from the McCaw settlement. DePriest was paid \$28,000,000.00.

➤ ***Whether the Parties Reposed Trust in One Another:***

62. The answer to this question is an obvious, "Yes". Phillips and DePriest were close friends for nearly 40 years. Phillips performed tax and accounting work for DePriest personally and for many of DePriest's businesses. Phillips had DePriest's power of attorney and

financial records. Phillips and DePriest swapped monies and assets back and forth, most of the time with a handshake.

➤ *Whether Phillips Had Dominion and/or Control over DePriest:*

63. DePriest did not and could not prove this element. DePriest is a sophisticated businessman. Many of the documents between Phillips, DePriest and others in this lawsuit were drafted by DePriest. He had access to the finest lawyers in the United States. Early on, he had the vision to recognize how important the cellular telephone business would become. He was appointed by his peers as a chairman of a settlement committee to negotiate a settlement with "The Grand Alliance" on behalf of all other cellular telephone license applicants throughout the country in the mid-1980's. He negotiated the side agreement with McCaw that resulted in \$90,000,000.00 for the shareholders of Charisma Communications.

64. In conclusion to this claim of DePriest, the Court finds that there was no confidential relationship between Phillips and DePriest but if it were, Phillips did not breach that relationship. If there had been a confidential relationship and it was breached by Phillips, according to Stephanie Smith, DePriest had no damages as a result. DePriest's claims for an accounting or establishment of a constructive trust are denied.

CONCLUSION

65. Consistent with the Court's findings herein, Phillips is hereby awarded:

1. \$5,000,000 for the 70 MCT Investors, L.P. units held by Phillips constituting the remainder of the 1996 settlement;
2. \$979,444.00 for the value of the Option for the 467 MCT Russia, L.P. units;
and
3. \$3,153,786 representing the stipulated balance owed on the four (4) promissory notes;
4. for a total award of \$9,133,230.00.

66. Counsel are commended for the professionalism shown to the Court and each other and for their skilled advocacy on behalf of their respective clients.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

- 1) Oliver L. Phillips recover from Donald R. DePriest \$9,133,230.00, interest at the legal rate, and all costs of this proceeding for which let appropriate process issue.
- 2) The Counterclaims of Donald R. DePriest are dismissed with prejudice.
- 3) Even though the issue of attorney fees remains, the Court directs that this is a Final Judgment and pursuant to Miss. R. Civ. P. 54(b), there is no just reason to delay the entry of this Judgment and directs the Clerk to enter it.

Pursuant with Miss. R. Civ. P. 5, a copy of this Order is being transmitted to counsel for the parties via electronic means and they are requested to allow an electronic acknowledgment to be sent back to the Court evidencing receipt. The receipt will be attached to this Order when filed with the Clerk and will relieve the Clerk from any duty to mail a copy of this Judgment to all counsel of record after same is filed.

SO ORDERED, ADJUDGED AND DECREED on this the 30th day of June, 2009.


KENNETH M. BURNS, CHANCELLOR

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STATE OF MISSISSIPPI, COUNTY OF LOWNDES

I, Lisa Younger Neese, Clerk of the Chancery Court in and for said County and State hereby certify that the foregoing contains a whole, true and correct copy of Opinion And Judgment as the same appears on file in my office, at Columbus, Mississippi.

Witness my hand and official Seal,

this the 6th day of October A.D., 2009



Lisa Younger Neese

Clerk of the Chancery Court of Lowndes County, Mississippi

By Lisa Younger Neese D.C.