IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
SUMMIT METALS, INC.,	)	
	)	Case No. 98-2870
Debtor.	)	
	)	
SUMMIT METALS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No. 00-387 (KAJ)
RICHARD E. GRAY, et al.,	)	
	)	
Defendants.	)	
	)	

POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Mr. Richard Gray, P. O. Box 182, Keene, New York 12942; Defendant *pro se*.

August 6, 2004
Wilmington, Delaware

JORDAN, District Judge

I. Introduction

This case began as an adversary proceeding in the United States Bankruptcy Court for the District of Delaware. On October 29, 1999, the Official Committee of Unsecured Creditors (the "Committee") filed a complaint on behalf of the plaintiff, Summit Metals Inc. ("Summit" or the "Company"), to recover property from Richard E. Gray ("Gray"), Summit's controlling shareholder and sole director, and from Gray's affiliated companies (the "Gray Entities").[1] In April of 2000, the case was transferred to this Court. (D.I. 1.)

The amended complaint alleges that Gray, acting as a director and controlling shareholder of Summit, breached his fiduciary duty to Summit and to its predecessor corporation, The Chariot Group, Inc. ("Chariot"), and to Chariot's predecessor corporation, Sandusky Plastics, Inc. ("Sandusky Plastics"), by engaging in unfair and

[1]B.F. Rich Co., Inc. ("B.F. Rich"), Chariot Holdings Ltd. ("Chariot Holdings"; n/k/a CHH Holdings, Ltd.), Chariot Plastics, Inc. ("Chariot Plastics"), Chariot Investors, Inc., Chariot Management, Inc. ("Chariot Management"), CSC Recovery Corporation, ("CSC Recovery"), Hallowell Industries, Inc. ("Hallowell"), Harcar, Inc. ("Harcar"), Jenkins Acquisition, Inc. ("Jenkins Acquisition"), Jenkins Realty, Inc. ("Jenkins Realty"), Jenkins Management, Inc. ("Jenkins Management"), Jenkins Manufacturing, Inc. ("Jenkins"), Rich Realty Inc. ("Rich Realty"), Rivco Inc. ("Rivco"; n/k/a Riverside Millwork Co., Inc.), Rivco Acquisition Corporation, Inc. ("Rivco Acquisition"), Rivco Realty, Inc. ("Rivco Realty"), Rivco Management, Inc. ("Rivco Management"), and VDC Recovery Corporation ("VDC Recovery Corp."; n/k/a RAC Investors).

Defendant B.F. Rich has been dismissed as a defendant in this case. (D.I. 191.) Summit acknowledged at trial that it has not sought any relief from defendant Rich Realty because "there's nothing that indicates ... [that] Mr. Richard Gray owns an interest in Rich Realty. ... Based on that, we are willing to go forward and stipulate that [Rich Realty Inc.] be removed." (January 13, 2004 Trial Transcript ["Trial Tran."] at 74-75.)

fraudulent self-dealing transactions that enriched both Gray and the Gray Entities at the expense of the Company. Specifically, the complaint alleges that Gray:

> (i) looted Chariot by causing it to pay more than $7.7 million in fraudulent "management fees" and "consulting fees" to various companies Gray owns and controls, in exchange for no services;
>
> (ii) caused Chariot to sell the controlling stock interest Chariot held in Energy Saving Products, Inc. ("ESP") to defendant Harcar, Inc., another company Gray owns and controls, in exchange for a worthless unsecured promissory note issued by a shell corporation;
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> (iii) usurped corporate opportunities belonging to Summit by acquiring, for himself, ownership in defendants Rivco and Jenkins, two companies that were in the same line of business as Summit, with funds belonging to Summit; and
>
> (iv) misappropriated $1.6 million that Sandusky Plastics had entrusted to him for the payment of federal income taxes, and instead filed fraudulent consolidated tax returns that ultimately resulted in the entry of a judgment, in favor of the Internal Revenue Service ("IRS"), against Summit in excess of $9 million.

(D.I. 211 at 2-3; D.I. 189.)

Summit seeks the following equitable relief in this action: (a) an order rescinding the purported sale of ESP and directing Gray and the Gray Entities to transfer all shares of ESP stock they own or control to Summit;[2] (b) an order imposing a constructive trust

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[2]On August 20, 2003, I entered a Default Judgment and Order against Harcar, the entity which purports to own ESP, for failing to retain counsel. (D.I. 181.) The Order directs Harcar to transfer the stock it owns in ESP to Summit. (*Id.*) According to Summit, Harcar has not yet complied with this Order. (D.I. 211 at 32.) It is not clear why, in light of ESP's bankruptcy and liquidation, Summit is interested in ESP stock. *See infra* n. 59.

Default judgments were also entered against Chariot Holdings, Chariot Plastics, Chariot Investors, Hallowell, Chariot Management, Rivco Realty, Rivco Management, Rivco Acquisition, CSC Recovery, Jenkins Realty, Jenkins Management, and Jenkins Acquisition for failing to retain counsel. (D.I. 181.)

on the stock of Rivco and Jenkins, in favor of Summit, and directing Rivco Acquisition and Jenkins Acquisition to transfer such shares to Summit; (c) an order directing the Gray and the Gray Entities to account for all funds that flowed to them from Chariot, or its successor, Summit, or ESP; (d) an order directing Gray to account for all funds that flowed to him from any of the Gray Entities; and (e) an order directing the Gray Entities to account for all funds that they transferred to Gray. (D.I. 211 at 32.)

Summit also seeks the following legal remedies: (a) damages against Gray, Harcar, Hallowell, Chariot Plastics, and Chariot Holdings, jointly and severally, in the amount of $15 million for the sale of ESP; (b) damages against Gray in the amount of $7,772,403, against Chariot Holdings in the amount of $6,781,953, and against VDC Recovery Corp. in the amount of $990,450 for the payment of improper fees from 1991 to 1995; (c) damages in the amount of $4,909,264 against Gray, in the amount of $2,300,00 against Chariot Management, and in the amount of $2,200,000 against Harcar for improper dividends paid by ESP after June, 1995; (d) $2,448,600 against Gray and Chariot Management, jointly and severally, for the diversion of management fees from ESP and B.F. Rich; (e) damages in the amount of $3,164,668 against Gray for diversion of the corporate opportunity to earn management fees from Rivco and Jenkins, and damages against Jenkins Management in the amount of $1,964,668 and against Rivco Management in the amount of $1,200,000; and (f) damages against Gray and Chariot Holdings in the amount of $9 million for the injury caused to Summit by filing fraudulent tax returns. (D.I. 311 at 45-47.)

Rivco and Jenkins, the only two defendants represented by counsel at trial,[3] request that to the extent I enter a judgment ordering Gray and the Gray Entities to transfer the stock of Rivco and Jenkins to Summit, “the transfer be conditioned on Summit (or any third party acquiring the stock) not liquidating Rivco or Jenkins without further express authority from this Court and that Summit (or any third party acquiring the stock) take whatever reasonable steps necessary to ensure that Rivco and Jenkins remain as ongoing businesses.” (D.I. 214.)

[3]Summit states that it is not seeking to hold either of these entities liable for the acts that will be discussed herein. “Rather, Rivco and Jenkins are defendants because Sumit is seeking an order directing other defendants to transfer the stock of Rivco and Jenkins to Summit.” (D.I. 211 at 34.)

On January 13, 2004, I held a bench trial to address Summit's claims.[4] The following post-trial findings of fact and conclusions of law are issued pursuant to Fed. R. Civ. P. 52(a).[5]

II. Findings of Fact

A. The Parties

1. Summit is a Delaware corporation.[6] Gray is Summit's sole director and has served in that capacity since 1990.[7] Defendant Chariot Plastics is currently the sole shareholder of Summit, and has been the majority shareholder of Summit or its

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[4]Gray, an attorney and former member of the bar of the State of New York, has represented himself *pro se* in this case since I granted his counsel's motion to withdraw in March 2003. Since March 2003, Gray asked me, on several occasions, to reschedule his trial. For the convenience of Gray, I granted his requests three times, and moved the trial from September 2003 to November 2003, to December 2003, and then to January 12, 2004.

Trial was scheduled to commence on January 12, 2004, at 9:00 a.m. At approximately 8:45 a.m., Gray telephoned my chambers to advise me that he had just filed a personal bankruptcy petition in the United States Bankruptcy Court for the Northern District of New York. (January 12, 2004 Trial Transcript ["Jan. 12 Trial Tr."] at 3.) I recessed the trial so that Summit could determine if any other defendant in this matter had filed bankruptcy, and to give Summit the opportunity to seek a lifting of the automatic bankruptcy stay. (Jan. 12 Trial Tr. at 19-20.) Summit filed a motion to lift the stay on the same day, and by late afternoon obtained an Order from the New York bankruptcy court lifting the automatic stay. (D.I. 205.)

I scheduled the trial to reconvene on January 13, 2004. Gray did not appear at trial. (Trial Tran. at 4.) However, Gray has submitted proposed findings of fact and conclusions of law. (D.I. 215.)

[5]Throughout these findings and conclusions, I have considered and adopted language suggested by litigants. In all such instances, the finding or conclusion in question has become my own, based upon my review of the evidence and the law.

[6] Plaintiff's Exhibit ("PX") 64.

[7] Trial Tr. at 26-27.

predecessors since 1984.[8] Chariot Plastics is the wholly owned subsidiary of Chariot Holdings, which, in turn is wholly owned by Gray. Thus, Gray, through two holding companies, is the controlling shareholder of Summit.[9]

2. Summit is the successor of Chariot.[10] In August 1995, Gray, acting as the sole director and majority shareholder of Summit and Chariot, caused Chariot to merge with and into Summit.[11] Prior to this merger, Chariot was a public company, with approximately 25% of its shares publicly held, and the remaining 75% held by defendant Chariot Plastics, a Gray-owned holding company.[12] The public Chariot shareholders became creditors of Summit as a result of the merger.[13]

3. Prior to 1987, Chariot was known as Sandusky Plastics.[14] Gray was a director of Sandusky Plastics, and a majority of that entity's outstanding stock was held by Chariot Plastics. Chariot Plastics, in turn, was wholly owned by Gray's wholly owned corporation, Chariot Holdings.[15]

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[8] PX 135, 136, 137, 138.

[9] Trial Tr. at 23; PX 138.

[10] Trial Tr. at 19.

[11] *Id.* at 19-20, 23; PX 62-65.

[12] Trial Tr. at 12.

[13] PX 64.

[14] Trial Tr. at 12, 25; PX 135.

[15] Trial Tr. at 25-26; PX 135.

4. At all relevant times Gray has served as a director, or the sole director, of Sandusky Plastics, Chariot, and Summit. Gray has also been the indirect controlling shareholder in each of those entities at all times since 1986.[16]

5. Gray also directly or indirectly owns or controls all of the other corporate defendants currently in this case.[17]

B. The Tax Claim

6. From1984 to 1986, Summit, while known as Sandusky Plastics, filed consolidated tax returns with its parent companies, Chariot Plastics and Chariot Holdings, which, in turn, were wholly owned by Gray.[18]

7. Sandusky Plastics calculated its tax liabilities on a standalone basis and sent Gray the tax information and funds owed to the IRS. Gray was supposed to prepare a consolidated tax return for Chariot Holdings, Chariot Plastics, Sandusky Plastics, and the other companies in the consolidated reporting group, and remit payment to the IRS for the amount due.[19]

8. During the 1984 to 1986 time period, Sandusky Plastics calculated that its tax liabilities were approximately $1.7 million, and it forwarded that amount to Gray for payment to the IRS. Gray never paid these funds to the IRS. Instead, he kept the

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[16] PX 135-138.

[17] PX 135-138; PX 6 at ¶ 12, 14, 19-26; PX 7 at pp. 38-40.

[18] Trial Tr. at 12, 14-17, 159-160.

[19] *Id.*

money and submitted consolidated tax returns to the IRS for Chariot Holdings, which stated that no tax was due.[20]

9. Gray never returned the $1.7 million to Sandusky Plastics or to any of its successor corporations.[21]

10. The IRS audited Chariot Holdings, rejected the consolidated tax returns filed from 1984 to 1986, and sent a notice of deficiency to Chariot Holdings for this time period.[22] The IRS also disallowed a deduction for a brokerage commission that Gray claimed had been paid to a steel broker, because the IRS determined that the brokerage commission contract was fictitious and had never been paid.[23]

11. In November of 1994, Gray, on behalf of Chariot Holdings, signed a consent judgment against Chariot Holdings in favor of the IRS, in an amount exceeding $2 million, including fraud penalties and interest ("Consent Judgment").[24]

12. Neither Gray nor Chariot Holdings has ever paid the Consent Judgment. As of today, the amount of the Consent Judgment, together with penalties and interest, is approximately $9-10 million.[25]

13. Having failed to collect from Chariot Holdings, the IRS brought a claim against Chariot Plastics and Summit asserting that they, as parties to the consolidated

[20]Trial Tr. at 159-160; PX 127 at p. F-3; PX 128.

[21]Trial Tr. at 159-160.

[22]PX 15; Trial Tr. at 164-166.

[23]Trial Tr. at 16-18.

[24]PX 16; Trial Tr. 18, 165-166.

[25]Trial Tr. at 166-167.

tax filing, were jointly and severally liable, regardless of fault, for the entire amount of the unpaid Consent Judgment, plus penalties and interest.

14. In a 1998 opinion, the United States District Court for the Southern District of New York ruled against Summit and Chariot Plastics and entered judgment against both companies for the full amount of the unpaid Consent Judgment.[26]

C. The Looting Claims

15. During the period from1991 to 1995, when Summit was known as Chariot, Gray unilaterally caused Chariot to pay approximately $7.7 million in fees to its indirect majority shareholder, Chariot Holdings, and another Gray controlled entity, VDC Recovery Corp.[27]

16. During this time period Gray also caused Chariot to write-off loans it had made to Chariot Holdings and to Gray personally.[28] Although Gray stood on both sides of these transactions, none of these payments was approved by anyone other than Gray himself, the only director of Chariot since 1990.[29] The record shows the following payments were made during this time period:[30]

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[26]Trial Tr. at 24; *Chariot Plastics v. United States,* 28 F. Supp. 2d 874 (S.D.N.Y. 1998).

[27]Trial Tr. at 43-47; PX 135-138.

[28]PX 25-29, 67, 68, 131; Trial Tr. at 42-43, 45.

[29]*See* PX 67, 68; Trial Tr. 26.

[30]PX 26, 27, 28 29, 83, 92, 131.

Year	Amount	Recipient
1991	**$2,168,813**	**Chariot Holdings**
1992	**$3,064,000**	**Chariot Holdings**
1993	**$890,000**	**Chariot Holdings**
1994	**$659,140** **$168,100**	**Chariot Holdings** **VDC Recovery Corp.**
1995	**$822,350**	**VDC Recovery Corp.**
TOTAL	**$7,772,403**	

17. According to James Kelly ("Kelly"), the president of Chariot during the time these payments were made, neither Gray, nor Chariot Holdings, nor VDC Recovery Corp. provided management services to Chariot that would justify paying these so-called consulting or management fees.[31] In fact, Kelly testified that he was not aware of any services that Gray, Chariot Holdings, or VDC Recovery Corp. provided in exchange for the payments.[32]

18. Gray did not disclose to Chariot's public shareholders that Chariot was making payments to companies he owned and controlled. Moreover, although Chariot and Sandusky Plastics, when the entity was conducting business under that name, had filed reports with the Securities and Exchange Commission ("SEC") up to 1990, Gray

[31] Trial Tr. at 48-49.

[32] Trial Tr. at 45.

caused Chariot to stop filing periodic reports with the SEC in 1990. As a result, no financial information about the company was publicly available.[33]

19. One of Chariot's public shareholders brought suit seeking to inspect Chariot's books and records pursuant to 8 Del. C. § 220. The shareholder prevailed in October of 1994[34] and Gray was forced to disclose Chariot's internal financial statements. These statements revealed the fees that Gray and his affiliated entities had been receiving.[35]

20. After disclosure of these payments, a minority shareholder of Chariot filed a lawsuit in New York in August of 1995, alleging that Gray violated his fiduciary duties by engaging in these self-dealing transactions.[36]

D. The Sale Of ESP And Chariot's Merger Into Summit

21. In 1988, Chariot acquired 92% of the outstanding stock of ESP and ESP became a subsidiary of Chariot.[37] In 1990, ESP acquired 100% interest in B.F. Rich and this entity became a subsidiary of ESP.[38]

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[33] *Id.* at 25-27, 29.

[34] PX 13.

[35] Trial Tr. at 29-30, 169-70; PX 26-31.

[36] Trial Tr. at 169-73.

[37] Trial Tr. at 64, 78-80; PX 136.

[38] Trial Tr. 32, 49; PX 46 at 5, 7.

22. ESP and B.F. Rich were Chariot's only operating subsidiaries.[39] Both were in the business of manufacturing windows and doors.[40] Kelly was the president of Chariot from 1991 to 1995, and was the Chairman and Chief Executive Officer of ESP and B.F. Rich from 1991 to 2002.[41]

1. Sale of ESP

23. After the commencement of the first shareholder lawsuit in New York, the record shows that Gray made efforts to sell Chariot's operating subsidiaries and eliminate its public shareholders.

24. On June 30, 1995, Gray caused Chariot to enter into a transaction whereby it sold its 92% stock interest in ESP to Homestar Acquisition Corporation ("Homestar"), a company wholly owned by Gray.[42] Homestar was acting as a nominee for Harcar, another Gray owned and controlled entity, and the owner of 100% of Homestar's stock.[43]

25. Gray stood on both sides of the transaction and implemented this purported transaction unilaterally. He signed the written consent approving the sale as Chariot's sole director. He signed the written shareholder consent approving the sale

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[39] PX 136, 137.

[40] Trial Tr. at 19; PX 2 at p. 2; PX 119 at pp. 27-28.

[41] Trial Tr. at 26, 62.

[42] PX 47-51.

[43] Defendant Richard E. Gray's Answer to Complaint, ¶ 30; Trial Tr. at 77-78.

on behalf of Chariot Plastics, Chariot’s majority shareholder. He also signed the sale agreement for both Chariot and Homestar.[44]

26. On June 30, 1995, Chariot's 92% stock interest in ESP had a value of at least $15 million.[45] In1994, Gray received at least one offer to purchase ESP for up to $17 million, but Gray rejected that offer as inadequate.[46]

27. In exchange for its ESP stock, Gray arranged for Chariot to receive a $15 million note ("Note") from Hallowell.[47] The Note was payable over a 10 year period, with no payments due for two years and interest only payments due until 2000, five years after the transaction. Gray owns and controls Hallowell and he signed the Hallowell Note as “Chairman” of that company.[48]

28. Hallowell had no assets, income, operations, employees or ability to repay the Note.[49] Gray, who was Hallowell’s owner and chairman, knew that Hallowell could never pay the Note and, in another proceeding, testified that Hallowell "ha[d] a negative net worth."[50] The Note was the only consideration Chariot received in exchange for ESP and B.F. Rich.

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[44] PX 52-54.

[45] Trial Tr. at 67-68; PX 47-51 (appraisals valuing the Company between $12.6 and $24 million).

[46] PX 51; Trial Tr. 140-43.

[47] PX 52.

[48] PX 54.

[49] Trial Tr. at 153-54.

[50] PX 126 at p. 733.

29. On June 30, 1995, the same day Gray purports to have sold ESP to Homestar, he merged Homestar into ESP, with ESP being the surviving entity. Gray signed the certificate of merger.[51] Pursuant to the merger, Harcar, Homestar's owner, became the sole owner of ESP.

30. Although Gray in effect sold Chariot's stock in ESP to himself on June 30, 1995, he did not disclose the sale to Chariot's public stockholders until several weeks after the transaction. Even then, he did not disclose that he owned and controlled Harcar, the purchaser, or Hallowell, the entity providing the consideration.[52]

31. Kelly was Chairman of ESP on June 30, 1995. Gray did not inform Kelly of the sale transaction, did not seek his approval, and did not seek the approval of any of the other directors of ESP or B.F. Rich.[53] As a result, for several years after June 30, 1995, ESP's financial statements continued to report that Chariot was its parent corporation. Kelly, who maintained the stockholder records of ESP, testified that no stock was ever issued to Homestar or Harcar.[54] Moreover, the sale of ESP was not the result of competitive bidding.[55]

32. The Hallowell Note has not been paid.[56]

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[51] PX 53.

[52] PX 56.

[53] Trial Tr. at 62-64.

[54] Trial Tr. at 80.

[55] Trial Tr. at 67-68.

[56] Trial Tr. at 67, 153-54.

2. Merger of Chariot Into Summit

33. On August 7, 1995, a few weeks after selling ESP to Harcar, Gray, in his capacity as majority shareholder and sole director of Chariot, caused Chariot to be merged with and into Summit.[57] The terms of the merger agreement provide that Chariot's minority shareholders were to receive notes in exchange for their interest in Chariot.[58]

34. Gray did not advise Chariot's public shareholders of the sale of the ESP stock or the merger with Summit until after the transactions were purportedly consummated. Following disclosure of these transactions, another lawsuit was filed in the New York Supreme Court challenging the sale of the ESP stock and merger with Summit as an unfair, self-dealing transaction.[59]

3. The New York Injunctions

35. Plaintiffs in the New York lawsuits filed motions for a temporary restraining order and preliminary injunctive relief with respect to: (1) the alleged looting of Chariot by Gray; (2) the sale of Chariot's interest in ESP to Harcar; and (3) the merger of

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[57] PX 62-66.

[58] PX 64.

[59] In October 2000, while this case was pending before this Court, creditors of ESP filed an involuntary petition for relief under the United States Bankruptcy Code, thereby placing that entity into bankruptcy. ESP has not emerged from bankruptcy, and is not expected to do so because it has sold all of its assets, and because the ESP creditors committee has proposed that the liquid assets ESP currently holds be distributed to creditors under a liquidating plan.

Chariot into Summit.[60] The first two claims are being pursued in this adversary proceeding.

36. By stipulation dated August 17, 1995, the parties to the New York proceedings agreed to the entrance of a temporary restraining order pending the resolution of the plaintiff's motion for a preliminary injunction. The temporary restraining order provided, among other things, that "defendants . . . shall be restrained and enjoined from consummating the sale, assignment, transfer, encumbrance or other disposition of the stock and/or assets of . . . [ESP]."[61]

37. On October 21, 1996, the New York State Supreme Court ("New York Court") issued an opinion granting plaintiffs' motion for a preliminary injunction.[62] In its opinion, the New York Court reviewed evidence concerning Gray's alleged looting, the sale of ESP, and the merger of Chariot into Summit. The New York Court granted the motion in its entirety, finding that plaintiff had established a probability of success on all claims.[63]

38. With respect to the claims of looting, which are similar to the looting claims asserted in this case, the New York Court found that Chariot's payment of over $7.7 million in "consulting" and other fees to Gray and his companies was grossly unfair:

> Plaintiff has amply demonstrated a likelihood of success on the merits of [his] claims against Gray for corporate waste and mismanagement. The evidence of defalcations by Gray

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[60] Trial Tr. at 173-76; PX 2 at pp. 1-2.

[61] PX 4 at 2.

[62] PX 2; Trial Tr. at 177-78.

[63] PX 2 at p. 12.

> is overwhelming and, for the most part, completely uncontradicted, i.e. the payment of exorbitant management fees to Chariot Holdings; the forgiveness of loans to that corporation and personal loans to Gray.[64]

39. The New York Court also found that the evidence was "overwhelmingly supportive" of plaintiff's claim that Gray's sale of ESP to Harcar was a breach of Gray's fiduciary duty.[65] The Court also found that one of the motives for the Chariot/Summit merger, which had no business purpose, was to deprive the public shareholders of "standing" to pursue the derivative claims.[66]

40. The New York Court also held that Gray's disclosures to shareholders about the transactions, which occurred after the fact, were misleading.

> First [the notice] fails to advise the minority stockholders of the fact that all of the corporate participants are corporations wholly owned and controlled by Gray, particularly ... Hallowell, the corporation that owes the $15 million note to Summit. Second, absolutely no financial information is given about ... Hallowell ... and fails to mention that the affiliate [issuing the note] is Hallowell, another corporation owned and controlled by Gray....[67]

41. On January, 30, 1997, the New York Court entered a preliminary injunction order that enjoined Gray and the Gray Entities from "paying or otherwise disbursing monies to Gray, or to any of the corporate defendants herein, or to any other corporation owned or controlled by Gray, directly or indirectly in the form of loans, fees

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[64]PX 2 at pp. 3, 12-13.

[65]PX 2 at pp. 10, 11.

[66]PX 2 at pp. 8-9. Kelly testified that although he was president of Chariot at the time, he had no role in the merger, and was not even informed of it at the time. Trial Tr. at 38.

[67]PX 2 at pp. 11.

or any other type of payment, when such monies are obtained directly or indirectly from the stock, assets or revenues of ... [ESP] ... ."[68]

E. Chariot's Management Services Business

42. Prior to the merger of Chariot into Summit, Chariot was in the business of providing management services to ESP and B.F. Rich in exchange for a total management fee equal to approximately $600,000 per year. Those management services were provided by Kelly, Thomas Aylward ("Aylward"), and their staff, all of whom remained employed by Chariot/Summit after the 1995 sale and merger transactions.[69]

43. In September of 1995, less than two months after selling ESP and merging Chariot into Summit, Gray created a new corporation, Chariot Management, to perform the same management services Chariot/Summit had performed in the past. Subsequent to September 1995, Chariot Management utilized the same personnel, equipment, and offices that Chariot had previously utilized to provide management services.[70]

44. While all of the management services business was transferred to Chariot Management, neither Chariot nor Summit was paid anything for this transfer.[71] Gray owns Chariot Management.[72]

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[68] PX 3 at p. 9.

[69] Trial Tr. at 52.

[70] Trial Tr. at 56-57.

[71] Trial Tr. at 58.

[72] Trial Tr. at 57; PX 37.

45. From 1995 to 2001, Chariot Management received over $2.4 million in fees from the management business Gray transferred to it.[73] The breakdown of such fees is as follows:

Year	Amount
1996	**$605,102**
1997	**$591,512**
1998	**$576,176**
1999	**$675,810**
2000	**$396,821**
2001	**$395,721**
Total	**$2,448,600**

46. The evidence strongly suggests that if Gray had not transferred the management services business from Chariot to Chariot Management, these fees would have been paid to Chariot or Summit.

47. The record reflects no legitimate business reason for the transfer of the management services business from Chariot. In fact, Kelly testified that the actual reason Gray diverted the management fees from Chariot was to prevent the IRS, which had a claim against Chariot, from levying on those moneys.[74]

[73] PX 132, 39-41, 110; Trial Tr. at 60.

[74] Trial Tr. at 59-60.

F. Violation of the New York Injunctions

1. The Diversion of ESP Dividends to Gray

48. Although the temporary restraining and preliminary injunction orders issued by the New York Court precluded Gray from transferring any of ESP's assets to Gray or any entities he owned or controlled,[75] in 1996 and 1997, Gray caused ESP to pay dividends and other fees to entities controlled by him. None of the dividends went to Chariot or its successor Summit.[76]

49. The following dividends were declared and paid by ESP in 1996 and 1997:[77]

Year	Amount	Recipient(s)
1996	**$1,540,000**	**Chariot Mgt. and Others**
1997	**$2,200,000** **$ 800,000** **$ 369,264** **Total: $3,369,264**	**Harcar** **Chariot Mgt.** **Others**
Total	**$4,909,264**	

2. Contempt for Violating the New York Court's Injunctive Order

50. Upon learning that ESP had funneled money to Gray and the Gray Entities through dividends and other payments, the New York plaintiffs filed a motion for contempt. On October 16, 1998, the New York Court held Gray, ESP, and VDC Recovery Corp. in civil contempt for violating the preliminary injunction. Gray was

[75] PX 3 at p. 9; PX 4 at p. 2.

[76] Trial Tr. at 100.

[77] PX 40, 41, 133; Trial Tr. at 85-101.

ordered to return a total of $4.3 million that had been misappropriated after entry of the preliminary injunction order.[78]

51. On December 30, 1998, Gray filed for bankruptcy on behalf of Summit. The bankruptcy stayed the prosecution of the New York lawsuits, but did not bar the contempt proceedings against Gray.[79]

52. Therefore, in January 1999, the New York Court entered an order and judgment of contempt, which provided that Gray could purge the contempt by returning the $4.3 million within ten days from service of the order.[80] The New York Court's opinion and order were affirmed on appeal in May, 2000.[81]

53. In July, 1999, the plaintiffs in New York filed a motion alleging that the contempt had not been purged, and requested the imposition of additional, coercive sanctions to compel compliance. On October 18, 2000, the New York Court issued an opinion holding that Gray had access to assets which could be used to purge the contempt, but had failed to do so.[82] The New York Court concluded that:

> Gray's conduct in connection with the Contempt Judgment is another example in the continuing pattern of bad faith

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[78]PX 8; Trial Tr. at 179. Summit's petition for bankruptcy automatically stayed the prosecution of the New York lawsuits as the claims asserted in those suits represented assets of Summit's estate and, thus, the disposition of those claims had to be resolved in the context of the bankruptcy proceeding. The stay did not bar the contempt proceedings against Gray, and those proceeded notwithstanding the bankruptcy. Trial Tr. at 187.

[79]Trial Tr. at 187.

[80]PX 9.

[81]*Richardson v. Gray*, 707 N.Y.S.2d 436 (N.Y. App. Div. 2000).

[82]PX 10 at 4.

> demonstrated by him since the commencement of this litigation. Gray made no good faith effort to purge the contempt while his appeal of the Contempt Judgment was pending before the Appellate Division, First Department, although no stay had been issued with respect to that judgment . . . . Even following the Appellate Division's affirmance of the Contempt Judgment, and until the present time, Gray has made neither any good faith effort to purge the contempt, nor any application for modification or extension of the purge order.[83]

Nevertheless, the New York Court held that it did not have the power to impose any additional contempt sanctions to induce compliance.[84] Plaintiffs appealed that portion of the Court's ruling.

54. On June 14, 2001, the Appellate Division affirmed the New York Court's determination that the contempt had not been purged, but reversed its holding that additional, coercive contempt sanctions could not be imposed.[85] The Appellate Division directed the New York Court "to hold a hearing, within ten days of service of this order with notice of entry, for a determination of whether defendant Gray should be confined to prison for his contempt ...."[86] It further held that:

> Given the amount of time that has passed since the original contempt order was entered in this case, the outrageous nature of [Gray's] abuse of his fiduciary duties as a corporate officer, and his seeming indifference to, and blatant disregard for, numerous judicial directives, we direct the court to hold a hearing, where Mr. Gray will have the burden of either establishing that he does not have, and has not had, the financial ability to return the requested funds, since entry of the first contempt order, or be confined to

[83] PX 10 at 6.

[84] *Id*.

[85] *Richardson v. Gray*, 726 N.Y.S.2d 105 (N.Y. App. Div. 2001).

[86] *Richardson*, 726 N.Y.S.2d at 106.

> prison for contempt pursuant to Judiciary Law § 753 until such time as his outstanding debts are satisfied. The hearing should also address the discrepancy revealed by the record between Mr. Gray's lavish lifestyle and his claims of financial distress. [87]

55. In September and October of 2001, the New York Court held a hearing to determine whether Gray had the financial ability to purge the contempt.[88] After reviewing the evidence and argument, the New York Court committed Gray to prison until such time as the contempt was purged. In support of its determination, it found that Gray had the wherewithal to purge the contempt because he owned corporations that had significant value, including Rivco, Rivco Realty, Jenkins, and B.F. Rich.[89]

56. The New York Court rejected Gray's testimony that various educational and religious institutions, among others, were the true owners of these and other corporations. After plaintiffs issued subpoenas to some of the alleged institutional owners, Gray entered into a series of signed stipulations conceding that, if these institutions were called upon to testify, each would testify that it "has never owned any stock or other financial interest of any kind" in any of Gray's corporations.[90]

57. The New York Court also found that Gray was not a credible witness and that his testimony was, in large part, not worthy of belief. In addition to his demeanor, which the Court found to be evasive and combative, the Court considered the following factors: (1) Gray had already been held in contempt for violating a preliminary

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[87] *Id*. at 107.

[88] PX 6 at p. 1; PX 7 at pp. 38-40.

[89] PX 6 pp. 5-7; PX 7 at 38-40.

[90] PX 6 at p. 8; PX 7 at 38-40.

injunction; (2) Gray refused to purge the contempt while representing to the Court that he had done so; (3) Gray represented to the Court that he had no ownership interest in any of the companies he controlled, a representation which had been proven to be untrue; (4) Gray's financial arrangements were, in general, not above board; (5) critical documents were missing, and systematic efforts had been made to hide Gray's true income and assets; (6) Gray's excuses for failing to purge the contempt, including his alleged fears that doing so would violate the preliminary injunction, were demonstrably baseless.[91] On the final day of the hearing, the New York Court, addressing Gray's counsel, stated that it "found your client totally incredible," "I don't believe your client," and "every time he's testified about something, it's been refuted by documentary evidence."[92]

58. Gray was committed to prison on November 19, 2001 and remained there until his contempt was purged in November of 2003.[93] Even then Gray did not return any of the $4.3 million. Instead, so that Gray could be present for trial in this action, the plaintiffs stipulated that Gray could purge the contempt by depositing certain stock into escrow pending the resolution of this adversary proceeding.[94]

[91]PX 6 at p. 10; PX 7 at 38-40.

[92]PX 7 at pp. 27, 28 and 29.

[93]PX 5, 10.1; Trial Tr. at 185-86.

[94]PX 10.1.

59. Additionally, while in prison for contempt, Gray pled guilty to bankruptcy and tax fraud in the United States District Court for the Eastern District of Missouri, and was sentenced to two years imprisonment.[95]

G. Misappropriation of the Rivco and Jenkins Business Opportunities

60. In addition to being in the business of managing corporations in the window and door business, Chariot was in the business of acquiring such companies.[96] As previously discussed, Gray shut down Chariot's operations in 1995 by selling Chariot's 92% stake in ESP, merging Chariot into Summit, and transferring the management business to Chariot Management.

61. The record indicates that Gray usurped Chariot's opportunities to acquire window and door businesses by shutting down Chariot's operations in 1995.

62. In January of 1997, Gray acquired Jenkins, a manufacturer of windows and doors.[97] Gray acquired Jenkins through his wholly owned holding company, Jenkins Acquisition. Gray indirectly owns over 90% of the stock of Jenkins and Jenkins Acquisition.[98]

63. In February of 1998, Gray acquired Rivco, a company engaged in window and door manufacturing and distribution.[99] Gray acquired Rivco through his wholly

[95]PX 11, 12.

[96]Trial Tr. at 53.

[97]Trial Tr. at 106-09; PX 119 at pp. 28-29; PX 138, 139.

[98]Trial Tr. at 106-07; PX 119 at 29-31; PX 138, 140.

[99]Trial Tr. at 106-09; PX 119 at pp. 28-31.

owned holding company, CSC Recovery, and it's wholly owned subsidiary, Rivco Acquisition.[100]

64. At the time of these acquisitions, ESP, B.F. Rich, Jenkins and Rivco were all in the same line of business.[101] Kelly testified that Jenkins and Rivco were acquired precisely because they were a "good fit" with Gray's existing companies, ESP and B.F. Rich.[102]

65. Because the opportunity to acquire Rivco and Jenkins were within the line of business of Chariot and Summit, it appears that if Gray had not transferred ESP, B.F. Rich, and the management services businesses away from Chariot, then Chariot or Summit could have taken advantage of these opportunities.

66. After the acquisitions, Gray placed Kelly and Aylward in charge of Rivco and Jenkins. Both Kelly and Aylward had been the senior operating executives at Chariot, and were the senior operating executives at ESP and B.F. Rich before and after the purported sale of ESP in 1995.[103]

67. The funds Gray used to purchase Rivco and Jenkins, apart from what was paid or borrowed by the acquired companies, were obtained directly or indirectly from dividends or other payments made by ESP.[104] Specifically, the $1 million equity

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[100]*Id.*

[101]PX 119 at 28-32.

[102]Trial Tr. at 11-13, 55-56, 111-13, 123-25.

[103] Trial Tr. at 134.

[104]Trial Tr. at 114-18, 125-29; PX 22 (attached transactional documents), 116, 117, 139, 140.

investment used in the acquisition of Rivco was part of a $2.2 million dividend Gray caused ESP to pay to Harcar.[105] The $700,000 equity investment in Jenkins was also obtained from dividends paid by ESP.

68. Summit, Jenkins, and Rivco have stipulated that, if called as a witness, Timothy Larkin would testify that:

> (a) At the end of 2003, Rivco employed 212 employees;
>
> (b) In 2003, Rivco provided payments and benefits to its employees in excess of $10,000,000;
>
> (c) Rivco has annual sales of approximately $39,000,000. In 2003, approximately $28,000,000 of this revenue went toward the purchase of materials, products and services from Rivco's vendors;
>
> (d) Rivco's place of business, Penacook, New Hampshire, is a small community located near Concord, New Hampshire. According to Mr. Larkin, Rivco is one of the largest employers in Penacook and one of the larger employers in the greater Concord, New Hampshire area;
>
> (e) Jenkins is a manufacturer of windows and doors. Its principal place of business is in Anniston, Alabama. Jenkins was established in 1888;
>
> (f) Jenkins employs 211 individuals. It has annual sales of approximately $18,000,000;
>
> (g) Jenkins plays an important role as an employer in its local community and provides significant revenue for its various vendors and product suppliers;
>
> (h) The management of Rivco and Jenkins is concerned with the pending litigation. The specific concern is that any order resulting from the litigation will ultimately lead to the liquidation of Rivco or Jenkins by the plaintiff; and

[105] As set forth above, the New York Court determined that the payment of dividends to Harcar violated the preliminary injunction issued in New York. PX 8 at pp. 12-14.

(i) Given the status of Rivco and Jenkins as ongoing, viable commercial entities, any such liquidation would have a very real and negative effect not only upon these entities, but also upon their employees, vendors, and the local communities in which they are located.[106]

69. Ambrose Richardson, the Chairman of the Committee testified that:

(a) Given the condition of Rivco and Jenkins, it would not make sense to liquidate Rivco and Jenkins if the stock of Rivco and Jenkins were turned over to Summit; and

(b) If Summit is successful in recovering the stock of Rivco and Jenkins, Soundview, an entity in which Richardson holds an interest, may submit an offer to acquire a controlling interest in Summit, Rivco and/or Jenkins.[107]

H. Additional Management Fees Usurped By Gray

70. After the acquisitions of Rivco and Jenkins, employees of Chariot Management, who had previously worked for Chariot, provided management services of the same type to Rivco and Jenkins.[108]

71. The management fees paid by Rivco and Jenkins were not paid to Chariot Management, the entity rendering the services, but to Rivco Management and Jenkins Management.[109] Gray owns 100% of the stock of these entities.[110]

72. During the period from 1997 to 2001, Rivco and Jenkins paid over $3 million in management fees to Gray. Whether or not the payments of these

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[106]Defendant's Exhibit 1.

[107]Trial Tr. at 189-192.

[108]Trial Tr. at 134-35.

[109]PX 134.

[110]Trial Tr. 106-07; PX 138.

management fees were a legitimate way of pulling money out of these corporations, the fees would have been paid to Chariot or Summit, but for Gray's efforts to shut Chariot down in 1995. The following chart summarizes the fees paid:[111]

Year	Amount	Payor	Recipient
1997	**$308,726**	**Jenkins**	**Jenkins Mgt.**
1998	**$300,000** **$335,739**	**Rivco** **Jenkins**	**Rivco Mgt.** **Jenkins Mgt.**
1999	**$300,000** **$378,179**	**Rivco** **Jenkins**	**Rivco Mgt.** **Jenkins Mgt.**
2000	**$300,000** **$600,000**	**Rivco** **Jenkins**	**Rivco Mgt.** **Jenkins Mgt.**
2001	**$300,000** **$342,024**	**Rivco** **Jenkins**	**Rivco Mgt.** **Jenkins Mgt.**
Total	**$3,164,668**		

I. The Adequacy of Legal Remedies

73. Rivco Acquisition and Jenkins Acquisition, the companies that hold the Jenkins and Rivco stock, do not have the ability to satisfy any significant award of monetary damages.

74. Gray's personal bankruptcy filing before trial indicated that his total assets had a value of $1 million or less and that his total liabilities exceeded his assets.[112]

75. The New York Court concluded that Gray and the Gray Entities did not have the liquid assets to purge the $4.3 million contempt judgment. Therefore, the New York Court ordered Gray, in lieu of such a payment, to deliver all the Rivco and Jenkins

[111] PX 100-102, 105-107, 134; Trial Tr. at 109.

[112] D.I. 203.

stock (held by Rivco Acquisition and Jenkins Acquisition), Summit stock (held by Chariot Plastics), and ESP stock (held by Harcar) into escrow.[113]

III. Conclusions of Law

A. Self-Dealing and the Entire Fairness Standard

1. Gray is a Fiduciary Who Engaged in Self-Dealing Transactions

76. Gray, as a director and controlling shareholder of Chariot and Summit, owed fiduciary duties to Chariot/Summit and its shareholders. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) ("a shareholder owes a fiduciary duty . . . if it owns a majority interest in or exercises control over the business affairs of the corporation"); *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938) (directors of Delaware corporations owe fiduciary duties to the corporation and its shareholders).

77. The transactions that Gray caused or approved between Chariot or Summit and the Gray Entities, as a fiduciary of Chariot and Summit, and as the owner or controlling shareholder of the Gray Entities, were self-dealing transactions. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("classic self-dealing transaction" occurs "where a director or directors stand on both sides of a transaction"); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing").

78. Gray appeared on both sides of at least the following transactions:

(a) Chariot's payment of $7,772,403 in management or consulting fees to various Gray-owned entities between 1991 and 1995;

[113] PX 10.1.

(b) the purported sale of Chariot's interest in ESP to Harcar;

(c) the transfer of Chariot's management services business to Chariot Management; and

(d) the payment of dividends by ESP to Gray-owned companies other than Summit.

2. Gray Bears the Burden of Proving the Entire Fairness of His Self-Dealing Transactions

79. Under Delaware law, self-dealing transactions between a corporation and a director or controlling shareholder are subject to the entire fairness test. *Kahn v. Lynch Communication Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction . . . bears the burden of proving its entire fairness").

80. A self dealing fiduciary must prove the entire fairness of the transaction by a preponderance of the evidence. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983).

81. Entire fairness has two components: fair price and fair dealing. In *Weinberger*, the Delaware Supreme Court held:

> When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts. ....
>
> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The

> latter aspect of fairness relates to the economic and financial considerations of the [transaction]....

Id. at 710. *See also Nixon v. Blackwell*, 626 A.2d 1366, 1375-76 (Del. 1993); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

82. The entire fairness standard also applies where the transaction is with a controlling shareholder. The Delaware Supreme Court held that:

> [o]rdinarily, in a challenged transaction involving self-dealing by a controlling shareholder, the substantive legal standard is that of entire fairness, with the burden of persuasion resting upon the defendants.

Kahn v. Tremont Corp., 694 A. 2d 422, 428 (Del. 1997). *See also Kahn v. Lynch Communication Systems, Inc*., 638 A.2d 1110, 1115 (Del. 1994) (A controlling ... shareholder standing on both sides of a transaction ... bears the burden of proving its entire fairness").

83. In *Technicorp International II, Inc. v. Johnston,* No. Civ. A. 15084, 2000 WL 713750 (Del. Ch. May 31, 2000), the Chancery Court applied the entire fairness test in a case similar to this one:

> Corporate officers and directors, like all fiduciaries, have the burden of showing that they dealt properly with corporate funds and other assets entrusted to their care. Where, as here, fiduciaries exercise exclusive power to control the disposition of corporate funds and their exercise is challenged by a beneficiary, the fiduciaries have a duty to account for their disposition of those funds, i.e. to establish the purpose, amount and propriety of the disbursements. And where, as here, the fiduciaries cause those funds to be used for self-interested purposes, i.e. to be paid to themselves or to others for the fiduciary's benefit, they have the 'burden of establishing [the transactions'] entire fairness, sufficient to pass the test of careful scrutiny by the court.

Id. at *16 (footnotes and citations omitted).

3. Gray's Breach of His Fiduciary Duties

84. Gray, a director and controlling shareholder of Chariot, caused Chariot, a company that was not paying dividends, to pay him $7,772,403 in management and consulting fees from 1991 to 1995. The payment of these fees was self-dealing, and Gray thus has the burden of proving entire fairness. *Kahn*, 638 A.2d at 1115. Because he failed to appear for trial, Gray did not introduce any evidence of the fairness of the fee payments at trial, and he has not introduced any such evidence in his post trial submission of proposed findings of fact and conclusions of law. (Trial Tr., D.I. 215.) In fact, the record reveals that Gray provided Chariot with little, if any, services in exchange for these fees. Accordingly, Gray breached his fiduciary duties of loyalty and good faith and is thus liable to Chariot for $7,772,403.

85. In 1995, Gray, as the sole director and majority shareholder, sold Chariot's stock in ESP to Harcar. In exchange, Chariot received a promissory note for $15 million from Hallowell, an entity that had no assets, business, income, operations, or ability to pay. This was a self-interested transaction, *see Kahn*, 638 A.2d at 1115, and Gray has not met his burden of proving the entire fairness of that transaction. (Trial Tr., D.I. 215.) Accordingly, I find that Gray breached his fiduciary duties of loyalty and good faith to Chariot when he caused the sale of the ESP stock to Harcar, and is liable for that breach in the amount of $15 million.[114]

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[114]Although the $15 million promissory note was a self-interested transaction, I accept $15 million as a fair valuation of ESP, given that the company was appraised by an expert at $12.6 million and that there was a $17 million offer to purchase ESP the previous year. *See supra* n.'s 45-46. It is also noteworthy that the plaintiff apparently

86. In September 1995, Gray transferred Summit's management services business to Chariot Management, his wholly owned company, without consideration. Gray has not demonstrated that this self-dealing transaction was entirely fair to Summit. *Kahn*, 638 A.2d at 1115. Gray has thus breached his fiduciary duties of loyalty and good faith to Summit in connection with this transaction, and as a result of Gray's breach, Summit was unable to earn the fees it otherwise would have earned. From 1996 to 2001, the fees amounted to $2,448,600, an amount for which Gray is liable.

87. Gray engaged in self-dealing through the sale of the ESP stock to his wholly owned companies for essentially worthless consideration. Gray has not submitted any evidence regarding the entire fairness of this transaction, and has thus breached his fiduciary duties of loyalty and good faith. *See Kahn*, 638 A.2d at 1115.

88. ESP paid $4,909,264 in dividends in 1996 and 1997 to several of the Gray Entities. Gray's payment of these dividends to entities he controlled was self dealing and a breach of the fiduciary duties he owed to Chariot. *See Kahn*, 638 A.2d at 1115. Therefore, Gray is liable to Chariot for his breach in the amount of $4,909,264.

89. Several of the Gray Entities participated in, benefitted from, and aided and abetted Gray's violations. Specifically:

> (a) Chariot Holdings and VDC Recovery Corp. participated in, benefitted from and aided and abetted the looting

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accepts this as a fair valuation. (*See* D.I. 211 at 12.)

Because Gray is liable for money damages for his breach of the fiduciary duties of loyalty and good faith to Chariot, and because the ESP stock is, at this point, of questionable value, *see supra* n. 59, Summit's inconsistent request to rescind the sale of ESP and direct Gray and the Gray Entities to transfer all shares of ESP stock they own or control to Summit (D.I. 211 at 32) will be denied.

violations, by serving as conduits by which the improper payments of $7,772,403 were transferred to Gray;

(b) Harcar participated in, benefitted from and aided and abetted the wrongful transfer of the ESP stock to Harcar in 1995, by serving as the vehicle for receipt of Summit's interest in ESP. Hallowell participated in and aided and abetted that transaction by issuing the $15 million promissory note utilized as "consideration" for the transaction;

(c) Chariot Management participated in, benefitted from and aided and abetted the wrongful transfer of the management services business from Summit to Chariot Management, by serving as the vehicle for the transfer of that business and the receipt of $2,448,600 in management fees, and by serving as the conduit by which those management fees were transferred to Gray and/or to Gray's other business interests;

(d) Harcar received $2.2 million in dividends issued by ESP in 1996 and 1997. By accepting these payments in violation of an injunction issued by the New York Court, Harcar aided and abetted Gray's breach of duty; and

(e) Chariot Management received approximately $2.3 million in dividends issued by ESP in 1996 and 1997. By accepting these payments in violation of an injunction issued by the New York Court, Chariot Management aided and abetted Gray's breach of duty.

90. It is well established that a corporate entity can be liable for aiding and abetting breaches of fiduciary duties. *See Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 386 (Del. Ch. 1999). Any such claims require that the following elements be pleaded with sufficient supporting facts in order to survive a motion to dismiss: "(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary." *Id.* Here, all of the elements have been satisfied.

91. Accordingly, Chariot Holdings will be liable in the amount of $6,781,953 and VDC Recovery Corp. will be liable in the amount of $990,450 for aiding and abetting the $7,772,403 of improper payments to Gray. Harcar and Hallowell will be jointly and

severally liable in the amount of $15 million for aiding and abetting the sale of ESP. Chariot Management will be jointly and severally liable in the amount of $2,448,600 for aiding and abetting the improper transfer of management services. Chariot Management will be liable in the amount of $2,300,00 and Harcar will be liable in the amount of $2,200,000 for aiding and abetting the improper payment of dividends after June 1995.[115]

B. Gray Breached His Duty Of Loyalty When He Appropriated Rivco and Jenkins for Himself

1. The Acquisitions Of Rivco and Jenkins Were Corporate Opportunities for Summit

92. A corporate opportunity exists when:

> (1) the corporation is financially able to undertake it;
> (2) it is within the corporation's line of business; and,
> (3) the corporation would have had an interest in the opportunity.

Guth v. Loft, Inc., 5 A.2d 503 (Del. 1938). *See also Broz v. RFB Cellular, Inc.*, 673 A.2d 148 (Del. 1996).

93. In *Equity Corp. v. Milton*, 221 A.2d 494 (Del. 1966) the Court reaffirmed the recognized principle that a corporate fiduciary usurps a corporate opportunity if he utilizes corporate resources to finance the acquisition for himself:

> [W]hen a business opportunity comes to a corporate officer, which, because of the nature of the opportunity, is not one which is essential or desirable for his corporation to embrace, being an opportunity in which it has no actual or expectant interest, the officer is entitled to treat the business

[115]Summit has requested equitable relief in the form of an accounting of funds transferred by Gray and the Gray Entities. (D.I. 211 at 32.) However, because Summit has set forth a specific dollar amount regarding the funds in dispute, this request will be denied.

> opportunity as his own and the corporation has no interest in it, provided the officer has not wrongfully embarked the corporation's resources in order to acquire the business opportunity.

Milton, 221 A.2d at 497. *See also Kaplan v. Fenton*, 278 A.2d 834 (Del. 1971) (director is free to pursue an opportunity as his own only if "the corporate resources have not been wrongfully embarked thereon"); *Rapistan Corp. v. Michaels*, 511 N.W.2d 918 (Mich. 1994) (applying Delaware law) (where corporate funds are used to make the acquisition, the fiduciary is estopped from denying that the transaction was a corporate opportunity).

94. Rivco and Jenkins operated in Summit and its subsidiaries' lines of business, namely window and door manufacturing. Summit could have acquired Rivco and Jenkins if Gray had not diverted this line of business from Summit and breached his fiduciary to duties to Summit by wrongfully using assets of ESP to acquire those companies. *Milton*, 221 A.2d at 497 (fiduciary usurps a corporate opportunity if he employs the corporation's resources to acquire a business opportunity for himself). Finally, Gray's decision to use ESP assets and Gray's decision to have Kelly and Aylward, Summit's operating executives, serve as the operating executives of Rivco and Jenkins, demonstrates that Summit would have had an interest in acquiring Rivco and Jenkins. Accordingly, the acquisition of Rivco and Jenkins were corporate opportunities that belonged to Summit.

2. The Imposition of a Constructive Trust on the Rivco And Jenkins Stock Held By Gray and the Gray Entities

95. The remedy for misappropriation of a corporate opportunity is the imposition of a constructive trust in favor of the corporation upon the property. See *Guth*, 5 A.2d at 511 (when "the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired"), *Stephanis v. Yiannatsis*, 1993 WL 437487 at * 8 (Del. Ch. 1993) (granting imposition of constructive trust over stock fiduciary acquired in violation of corporate opportunity doctrine).

96. Jenkins and Rivco were both in the same line of business as ESP and B.F. Rich, which was, again, the manufacturing and distribution of windows and doors. The acquisition of companies in this line of business was the business of Summit's predecessor, Chariot.

97. The Jenkins and Rivco acquisitions occurred in 1997 and 1998, respectively. By that time, Gray had transferred, at least on paper, the stock of ESP from Summit's predecessor, Chariot, to Harcar, and had diverted all of Chariot's assets to himself and his related entities. As discussed, the resources of ESP, including its ability to borrow money, were used to finance the acquisitions of Rivco and Jenkins. The fact that Gray had improperly misappropriated ESP from Summit by this time cannot be a defense to this claim. The purported transfer of ESP was a fraudulent, transaction, whose implementation had been barred by a preliminary injunction issued

by the New York Court, and cannot serve as a basis to preclude the imposition of a constructive trust.

98. Accordingly, a constructive trust will be imposed for the benefit of Summit over all shares of Jenkins or Rivco held by Gray and the Gray Entities, and both Gray and the Gray Entities will be ordered to transfer to Summit any Jenkins or Rivco stock they hold.[116]

3. Management Fees Paid to Rivco Management and Jenkins Management

99. By transferring Summit's management services to Chariot Management, and then directing Rivco and Jenkins to pay such fees in the amount of $1,200,000 to Rivco Management and $1,964,668 to Jenkins Management, entities wholly owned by Gray, Gray also usurped Chariot's and Summit's opportunity to earn $3,164,668 in management fees. The right to these fees belonged to Summit, and therefore Gray, Rivco Management, and Jenkins Management are liable for this diversion of corporate opportunity. Neither Gray, nor Rivco Management, nor Jenkins Management, has set forth any evidence pertaining to the entire fairness of this action. *Schreiber v. Bryan*, 396 A.2d 512, 519 (Del. Ch. 1978). Therefore, Rivco Management and Jenkins Management are liable to Summit for $1,200,000 and $1,964,668 respectively, and Gray is jointly and severally liable for the full $3,164,178.

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[116] Jenkins and Rivco seek an order limiting Summit's ability to liquidate them. Although mindful of the impact such liquidation would have on the managers and employees of those companies, and the communities they inhabit, this request must be denied. In effect, Jenkins and Rivco seek relief when there is no case or controversy between them and Summit at this point.

C. Gray's Failure To File Accurate Tax Returns

100. From 1984 to 1986, Sandusky Plastics transferred $1.7 million to Gray to pay the taxes that entity owed the IRS. Gray did not deliver these funds to the IRS and did not return them to Sandusky Plastics. From this, I conclude that Gray kept the $1.7 million, thereby violating his duty of loyalty to Sandusky Plastics. *Cede*, 634 A.2d at 361 ("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest by a director, officer or controlling shareholder and not shared by the stockholders generally.")

101. During this time period, Gray also caused Chariot Holdings to file fraudulent tax returns on behalf of a consolidated group of companies, including Sandusky Plastics. In those returns, Gray included fraudulent tax deductions which were ultimately disallowed by the IRS.

102. Gray's wrongful conduct resulted in the entry of a tax deficiency judgment against Summit that has grown, with penalties and interest, to approximately $9 million. Gray's fraud and breach of his fiduciary duty of loyalty caused Summit to incur the tax deficiency, and is thus liable to Summit for the full amount of the judgment. *See Kahn*, 638 A.2d at 1115.

IV. Conclusion

For the foregoing reasons, an appropriate judgment order will be entered in favor of Summit and against the defendants, with the exception of B.F. Rich and Rich Realty. *See supra* p. 1 at n.1.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
SUMMIT METALS, INC.,	)	
	)	Case No. 98-2870
Debtor.	)	
	)	
SUMMIT METALS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No. 00-387 (KAJ)
RICHARD E. GRAY, et al.,	)	
	)	
Defendants.	)	
	)	

JUDGMENT

Judgment shall be entered in favor of Summit Metals Inc. ("Summit") as follows:

I. On the first cause of action, challenging the purported sale of ESP, the amount of $15 million is awarded as damages, jointly and severally as against defendants Richard E. Gray ("Gray"), Harcar, Inc., Hallowell Industries, Inc., Chariot Plastics, Inc., and CHH Holdings Ltd.[1] Prejudgment interest is to be awarded, running from June 30, 1995.

II. On the third cause of action, alleging looting of Chariot by Gray:

A. Damages are awarded against CHH Holdings Ltd. in the amount of $6,781,953 and against RAC Investors, Inc.[2] in the amount of $990,450 for aiding and abetting improper management fees, consulting fees, loan forgiveness and other

[1] Formerly known as Chariot Holdings Ltd.

[2] Formerly known as VDC Recovery Corporation.

payments improperly made during the period 1991-1995. Gray is jointly and severally liable for the full $7,772,403. Pre-judgment interest is to be awarded, running from the end of each calendar year during which such improper payments were made.

B. Damages are awarded against Chariot Management, Inc. in the amount of $2,300,000, and against Harcar, Inc. in the amount of $2,200,000 for improper dividends paid by ESP after June, 1995, during a period when Summit was the rightful owner of ESP stock. Gray is jointly and severally liable for the full $4,909,264. Pre-judgment interest is to run from the end of each calendar year during which such payments were made.

III. On the sixth cause of action, alleging diversion of management fees from ESP and B.F. Rich, the amount of $2,448,600 is awarded as damages, jointly and severally, against defendants Gray and Chariot Management. Pre-judgment interest is to be awarded, running from the end of each calendar year during which these fees were paid.

IV. On the seventh cause of action, alleging theft of corporate opportunities in connection with the Rivco and Jenkins acquisitions:

A. A constructive trust is imposed on the stock of Riverside Millwork Co.,[3] Rivco Realty, Inc., Jenkins Manufacturing, Inc., and Jenkins Realty Inc. held by defendants Rivco Acquisition Corporation, Inc. ("Rivco Acquisition"), and Jenkins Acquisition, Inc. ("Jenkins Acquisition"). Rivco Acquisition and Jenkins Acquisition are hereby directed to transfer all shares of those companies to Summit forthwith.

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[3]Formerly known as Rivco Inc.

Defendants Riverside Millwork Co., Inc., Rivco Realty, Inc., Jenkins Manufacturing, Inc. and Jenkins Realty, Inc. are hereby directed to amend their stock records to reflect that Summit is now the beneficial owner, and holder of record, of all of those shares.

B. Damages against Jenkins Management, Inc. are awarded in the amount of $1,964,668, and against Rivco Management, Inc. in the amount of $1,200,000 for diversion of Summit's opportunity to earn management fees from Riverside Millwork Co. and Jenkins Manufacturing, Inc. Gray is jointly and severally liable for the full $3,164,668. Prejudgment interest is to run from the last day of each calendar year during which such fees were paid to those entities.

V. On the eighth cause of action, alleging breach of fiduciary duty in connection with the non-payment of taxes, damages are awarded jointly and severally against Gray and CHH Holdings Ltd. for the full amount of the Consent Judgment.[4]

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

August 6, 2004
Wilmington, Delaware

[4]Gray entered into a Consent Judgment with the IRS in November of 1994, in an amount exceeding $2 million, on behalf of Chariot Holdings (n/k/a CHH Holdings Ltd.), for its failure to pay taxes on behalf of Summit's predecessor, Sandusky Plastics. *See* Findings of Fact and Conclusions of Law p. 8 at ¶¶ 7-11. Summit is liable for the full amount of the Consent Judgment, which, including fraud penalties and interest, plaintiff estimates to be approximately $9-10 million. *Id*. at ¶¶ 12-14.