1969

Vulcan Steel Corporation v. Abraham Markosian v. Vulcan Steel Corporation And J. Dean Gerstner And Abraham Markosian v. Vulcan Steel Corporation And J. Dean Gerstner : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

VULCAN STEEL CORPORATION,
Plaintiff-Appellant,
vs.
ABRAHAM MARKOSIAN,
Defendant-Respondent,
ABRAHAM MARKOSIAN,
Plaintiff-Respondent,
vs.
VULCAN STEEL CORPORATION
and J. DEAN GERSTNER,
Defendants-Appellants,
ABRAHAM MARKOSIAN,
Plaintiff-Respondent,
vs.
VULCAN STEEL CORPORATION
and J. DEAN GERSTNER,
Defendants-Appellants.

Case No.
11554

RESPONDENT'S BRIEF

THE ISSUE

The sole issue raised by Vulcan's appeal from the District Court's Order of Partial Summary Judgment dated February 24, 1969, is whether the District Court was cor-

rect in ruling that the Agreement of April 12, 1965, imposed upon Vulcan a duty to redeem Mr. Markosian's shares of the capital stock of Vulcan.

PROCEEDINGS BELOW

On April 29, 1968, respondent Markosian filed his Complaint in the Third District Court, being docketed as Civil Action No. 179219 (R., pp. 1b-6b), seeking in the second count thereof specific performance of the redemption agreement contained in a certain Agreement dated April 12, 1965, by and between Mr. Markosian and Mr. J. Dean Gerstner, which Agreement was adopted and ratified by Vulcan. Upon Vulcan's answer (R., pp. 11b-13b) the claim came to issue.

Two other civil actions involving the same parties were consolidated for trial with No. 179219. However, the issues raised by this appeal involve only the second count of No. 179219.

Respondent's Motion for Partial Summary Judgment (R., pp. 112-113), seeking a determination that the April 12 Agreement required Vulcan to redeem, was argued by counsel before District Judge Bryant H. Croft on February 13, 1969. Thereafter, Judge Croft filed his memorandum decision (R., pp. 131-134) and the District Court's Order of Partial Summary Judgment (R., pp. 136-137) was entered. That order constituted a declaration that the April 12 Agreement imposes a duty upon Vulcan to redeem Mr. Markosian's stock, at a price to be determined, and that

Mr. Markosian is the owner of at least 200 shares of Vulcan's stock. Other issues raised by the parties' motions, heard at the same time, were left for determination at trial. On April 21, 1969, this Court granted an interlocutory appeal (R., p. 165) to review the District Court's order.

UNDISPUTED FACTS

By the Complaint and Answer in No. 179219 it is established that Vulcan is a Utah corporation engaged in steel fabricating in Salt Lake City, that respondent was until January 23, 1968, employed as Vice-President and General Manager of Vulcan; that under date of April 12, 1965, respondent and J. Dean Gerstner entered into a certain Agreement (R., pp. 6-14), which was ratified and adopted by Vulcan. The material terms of that Agreement are set forth in detail below. The entire Agreement is set forth in the appendix to this brief at pages i-xi.

It is also undisputed, as appellant admits in its brief (page 3), that respondent subscribed to and paid for at least 200 shares of Vulcan's capital stock. It is also undisputed that respondent by a letter dated January 23, 1968, terminated his employment by Vulcan and demanded the redemption of his stock in accordance with the terms of the April 12 Agreement, which demand has been refused (Appellant's brief, p. 5).

ARGUMENT

I. INTERPRETED AS A WHOLE, THE APRIL 12 AGREEMENT CLEARLY MEANS WHAT

THE DISTRICT COURT DETERMINED IT TO MEAN.

A. *The Agreement Should be Interpreted as a Whole In Light of the Obvious Hazards to Minority Shareholders The Agreement Was Designed to Avoid.*

This case presents the classic case of a 51% owner of a closely held corporation attempting to "squeeze out" the 49% owner. As every experienced lawyer knows minority shareholders in close corporations are, unless they had the foresight to insist upon a buy-sell agreement or some like arrangement, at the complete mercy of the majority owner.

> The inability of holders of minority interests in small corporations to dispose of their interest without serious financial loss undoubtedly prolongs dissension in many instances and encourages squeeze-plays. In a large public-issue corporation, a shareholder who is dissatisfied with the way the business is being operated can sell his stock at no great financial loss. That "way out" is not available to a shareholder in a close corporation. Anything less than a controlling interest in a close corporation does not have a ready market; and, if there is dissension in the corporation, a minority interest is likely to appear even less inviting to a prospective purchaser. Further, if there are restrictions on the transferability of shares, as is now often the case, an obstinate associate may be in a position to discourage sale of the shares even if a willing purchaser is found. A minority interest in a close cor-

> poration usually cannot even be pledged to obtain funds, because banks and other financial institutions will not accept it as collateral.
> Often the only prospective buyers of a minority interest in a small corporation are the majority shareholders. Thus the temptation is great for the majority shareholders to apply a squeeze. The minority shareholder cannot sell out and turn the fight over to persons with greater business knowledge or stronger financial resources.
> O'Neal & Derwin, *Expulson or Oppression of Business Associates* (1961), p. 31.

The sophisticated person who invests in a minority share of a close corporation is well aware of the danger of being "locked in" as well as the many devious methods the majority owners can use to squeeze him out of participation in profits while enjoying the benefit of the minority investment. The best defense against such an unscrupulous appropriation of the minority's investment is a buy-sell agreement between the shareholders designed to allow the minority investor to recoup his investment.

B. *Recital D of the Agreement Clearly Expresses the Shareholder's Intent that the Minority Owner, Respondent, Be Protected From an Appropriation of His Investment.*

The parties addressed themselves directly to the well-known hazards of minority shareholders, clearly stating that it was their intent, by the contract, to remove this hazard.

The April 12 Agreement sets forth in its recitals the two principal purposes of the Agreement (R., 6). Recital C is to the effect that Gerstner and Markosian wished to engage in the steel fabricating business in the name of Vulcan. Recital D reads as follows:

> Gerstner and Markosian wish to be *assured of a market at a fair price* for their shares of stock in Vulcan . . . *in the event their interest in (Vulcan) is terminated for any reason.* (Emphasis supplied.)

This language, conveniently ignored by Appellant, could not be clearer. The parties intended that neither could squeeze the other out or lock into the corporation the investment of the other. Yet by ignoring this express language as well as the detailed provisions designed to carry it out, Appellant is attempting the very appropriation specifically provided against.

C. *Paragraph 3 Carries Out the Intent of Recital D By Providing That Either Shareholder May Offer His Shares To Vulcan and By Requiring Vulcan to Purchase Any Shares Offered at Their Fair Price.*

Appellant in its Brief only considers a few words of the Agreement, out of context, failing to bring to the Court' attention other important provisions. When considered in its entirety the Agreement, and especially paragraph 3, obviously required Vulcan to purchase Markosian's shares whenever Markosian wished to dispose of them.

Paragraph 3 creates the rights and obligations of the shareholders in every major contingency in which a transfer of shares may occur. It is a comprehensive plan, requiring, in all but two instances, that Vulcan purchase or redeem shares sought to be transferred.

The only two types of transfers to which these requirements do not attach are — (a) by *gift* to a family member in which case the donee takes the stock subject to the same limitations as the donor (R., pp. 8-9) and (b) by a *joint transfer* by both Markosian and Gerstner of all of their interest, resulting in corporate liquidation (R., page 12).*

The provisions of paragraph 3 have two results. The first is to prevent a stranger from becoming associated without consent of all. The second is to provide that either party wishing to get out will receive a fair price for his shares, either from the corporation or from the remaining shareholder.

The key provisions applicable to this case are subparagraphs (b) and (c) (R., pp. 9-10). Subparagraph (b) concerns inter vivos transfers to nonfamily members. Thus if either Gerstner or Markosian desire to transfer their shares to a stranger he must first obtain "written consent of all other stockholders" and "in the absence of

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*In neither of these situations is "fair price" a consideration. A gift to a family member by definition does not call for any price. A joint transfer by both shareholders resulting in liquidation assures equitable division of the value of the assets.

such written consent, or at the request of the stockholder desiring to . . . dispose of his . . . stock, . . . shall give to [Vulcan] and to the other stockholders written notice of his . . . intention . . . contain[ing] an offer to sell . . . in accordance with the terms of this agreement" Vulcan is given 30 days from receipt of such notice to purchase at the formula price and if Vulcan "shall fail or refuse to purchase such stock within the time herein provided" then the stockholder is free to make such transfer as he may desire.

The object of this provision is to prevent transfers to strangers without first obtaining unanimous consent or allowing Vulcan to purchase. The other side of the coin is subparagraph 3(c) which requires Vulcan to purchase from any shareholder who gives the written notice provided for in (b). Thus in (c) it is provided "it shall be mandatory for Corporation to purchase all of the stock . . . of any shareholder giving notice as herein provided . . ."

That this must be what the provision requires is obvious not only from Recital D, but also from the subparagraph heading — "Mandatory Obligation to Purchase Stock *Offered*" (Emphasis supplied). The duty to purchase does not arise solely upon "termination of employment"; it alternatively arises whenever a shareholder gives due written notice. The provision of (b) permitting a shareholder to make a free sale in the event Vulcan shall "fail or refuse" (language of breach of duty, not of option) to purchase does not raise a contrary implication. Such a failure or

refusal on Vulcan's part merely gives the shareholder a chance to pursue an alternative remedy or mitigate his damages.

To complete the plan of paragraph 3 in subparagraph (f) (R., pp. 12-13), it is provided that upon the death of any shareholder the decedent's stock shall be offered to Vulcan and "such stock shall be redeeemed or purchased."

This paragraph provides in detail for each major contingency of transfer, providing in each such contingency that the corporation must purchase from the offering shareholder. Such a contract is specifically enforceable. *Johnson* v. *Johnson,* 87 Colo. 207, 286 P. 109 (1930);*Bohnsack* v. *Detroit Trust Co.,* 292 Mich. 167, 290 N. W. 367 (1940); *Smith* v. *Bramwell,* 146 Ore. 611, 31 P. 2d 647 (1934); *Claire* v. *Wigdor,* 24 App. Div. 2d 992, 266 N. Y. S. 2d 6 (1965).

Read as a whole, in light of the intent manifested in Recital D, paragraph 3 requires Vulcan to purchase Markosian's shares at their fair market value. Any other interpretation would disregard the obligatory language of paragraph 3, fly in the face of the parties' clearly expressed intent, and leave minority shareholders at the mercy of a possibly rapacious majority owner.

II. THE PHRASE "BY CORPORATION" IN SUBPARAGRAPH 3(c) MODIFIES "EMPLOYMENT" GIVING RISE TO A DUTY TO PURCHASE UPON TERMINATION OF EMPLOY-

MENT EFFECTED BY EITHER PARTY FOR ANY REASON.

A. *Appellant's Argument that "by Corporation" Means "by the Corporation" Merely States the Obvious and Fails to Consider the Important Question Whether "by Corporation" Modifies "Employment" or "Termination," the Only Two Possibilities.*

1. Appellant conveniently ignores a parallel provision (which is not contended to have been drafted by respondent's counsel) found in subparagraph 3(e) (R., page 12). That paragraph uses almost exactly the same language as found in subparagraph 3(c). "In the event both Markosian and Gerstner wish to *terminate their employment by Corporation,* and desire to have Corporation purchase their stock, the parties hereto agree to vote their stock for the liquidation and dissolution of Corporation [emphasis supplied]." In that quoted clause the phrase "by Corporation" follows the word "employment," as it does in clause 3(c), and can only modify "employment," not "terminate." Where the language used in two separate clauses is so closely parallel, it is natural to suppose that the parties intended the meaning to be parallel.

2. As was pointed out to the district court, the phrase "termination of employment" has been held to mean termination by either employee or employer. *Hudson County Newspaper Guild, Local* 42 v. *Jersey Publ. Co.,* 23 N. J. Super. 419, 93 A. 2d 183 (App. Div. 1952), holds that the

phrase meant "all types of severance, including 'dismissals' and 'discharges' and voluntary severance at the instance of the employee." " 'Termination' is defined as 'ending' or 'concluding' and, when applied to employment, implies either a voluntary quitting by the employee or a discharge by the employer." *Burns* v. *Stento,* 9 N. Y. S. 2d 736, 742 (1939). See also *Lineberger* v. *Security Life & Tr. Co.,* 245 N. C. 166, 95 S. E. 2d 501 (1956); *Foltz* v. *Struxness,* 168 Kans. 714, 215 P. 2d 133, 136 (1950).

B. *The Phrase "Termination of Employment by Corporation" Should Not be Read in Isolation.*

1. Not only is 3(c) part of a comprehensive provision designed to assure a fair price for shareholders, but other language found within 3(c) itself impels the interpretation given by the district court. The clause refers to "termination . . . *for any reason*" [emphasis supplied]. Some meaning must be given this language and the obvious meaning is that it means in any circumstance, because of any cause, whether the Corporation's or Markosian's.

2. Conveniently ignored in Appellant's Brief is the second part of subparagraph 3(c), which reads: "it shall be mandatory for Corporation to purchase all of the stock of Markosian or Gerstner, *or any stockholder . . . giving written notice as herein provided of his . . . intention to dispose of his . . . stock.*" [Emphasis supplied.] The emphasized portion of this provision explicitly provides that any shareholder (such as Markosian) can upon notice require Vulcan to purchase, at the fair market value. It is

conceded that respondent gave such notice, and having done so he clearly comes within this provision and purchase by Vulcan becomes mandatory.

3. "Termination" is defined in *Webster's Unabridged International Dictionary*, 2d Edition, to mean "Act of terminating, or of limiting, . . . act of ending or concluding." As the verb "terminate," it is both transitive or intransitive. Thus, to "terminate employment" (intransitive) means to come to an end. The meaning ascribed by the district court is correct grammatically as well as one which makes sense.

4. Appellant would have the Court interpret clause 3(c) so as to result in Markosian's loss of his investment. Appellant says purchase by Vulcan turns on whether Markosian quit or was fired. Such an interpretation would permit a corporation to refrain from firing any minority shareholder while at the same time making life so difficult for the shareholder that simple human dignity impels him to quit. Such an interpretation would force the courts to examine the uncertain question whether the shareholder quit, was forced to quit (therefore being equivalent to being fired) or was fired.. The Agreement was designed to avoid putting the shareholders to the Hobson's choice of quitting, and sacrificing their investment, or staying on the job, and sacrificing their self-respect. Appellant's interpretation would make a nullity of Recital D and the express provisions of paragraph 3.

III. THE QUESTION OF PROFIT (OR LOSS) IS NOT BEFORE THE COURT.

At pages 12-14 of its brief appellant makes much of the supposed prejudice done Vulcan by the ruling below. Appellant says the purchase is at a premium — but nowhere does the record support this. All the Agreement provides is that if parties do not agree to a sales price on an annual basis, then the sales price shall be determined by valuing assets at book, estimating good will by multiplying average profit by 2½, adjusting inventories to fair market value (replacement cost), adjusting capital assets by adjusting for the difference in accelerated depreciation and straight-line depreciation, and making such other adjustments as would reflect corrections from departures from generally accepted accounting principles.

Appellant also argues that Vulcan has suffered losses since respondent's withdrawal. Again there is not a line of evidence in the record to support this assertion, nor for that matter the startling assertion that corporate losses are causally linked to respondent's withdrawal. Appellant also asserts that Markosian stands in breach of an employment contract, while at the same time arguing that the Agreement contemplated an employment contract which was never consummated (Appellant's Brief, page 16). At best this is a matter put in issue in one of the related cases which has not been proven.

Ultimately the thrust of Appellant's argument is that it is somehow unjust to permit Markosian to break a never consummated employment "contract" and at the same time recover the value of his investment. But this argument ignores the realities of the situation. In a close corporation

the investors usually contemplate that salary and other direct compensation will be the chief reward of their co-operation. Mutual cooperation and trust are the keystones to success of close corporations. Once that cooperation and trust have evaporated, as happened here, the investors will wish to withdraw with their investment. The only way to secure that end and promote the essential cooperation is to allow each investor the freedodm to get out with the value of his investment.

IV. THE APRIL 12 AGREEMENT SHOULD NOT BE CONSTRUED AGAINST EITHER PARTY THERETO.

A. *The Agreement Was Negotiated.*

Regardless of the identity of the person who wrote the words now at issue, the rule of § 559, *Corbin, Contracts* (1960), does not apply. In the first place the entire Agreement was negotiated by the parties. The rule stated at § 559 has its principal application to so-called "contracts of adhesion," or to contracts the entire terms of which are drafted by one party. Typical instances of the proper application of this rule are contracts where there is great disparity of bargaining strength, such as insurance policies, *Liverpool & London & Globe Ins. Co.* v. *Kearney,* 180 U. S. 132, 45 L. Ed. 460 (1901); *Prince* v. *Western Empire Life Ins. Co.*, 19 Utah 2d 174, 428 P. 2d 163, 166 (1967), and contracts like automobile franchise agreements. *Buono Sales, Inc.* v. *Chrysler Motors Corp.*, 363 F. 2d 43 (3d Cir. 1966). See also *Henningsen* v. *Bloomfield Motors, Inc.*, 32

N. J. 358, 161 A. 2d 69, 85 (1960); *Loftin* v. *United States Fire Ins. Co.*, 106 Ga. App. 287, 127 S. E. 2d 53, 58 (1960).

Application of this rule would result in interpretation against Gerstner who, as reflected by the fact that he secured 51 per cent control and the presidency of the Corporation, appears to have had bargaining superiority.

Appellant's argument that the Agreement should be construed against respondent is founded upon certain deposition testimony given by respondent. This deposition was filed in the District Court by the reporter, at that time being sealed, closed and bearing a notation that it was to be opened only by order of court. No such order of the court appears in the record. The record also is barren of any order for the publication of the deposition. There is nothing in the record to indicate that the deposition was offered or received into evidence as contemplated by Rule 26(d) of the Utah Rules of Civil Procedure. The record fails to show affirmatively that the deposition was before the District Court. If appellant seeks inclusion of the deposition in the record, it has the burden of showing that the deposition was before the District Court. If the deposition was not before the District Court, it should not be considered here, even though transmitted to this Court by the District Court clerk. *United States* v. *City of Brookhaven,* 134 F. 2d 442 (5th Cir. 1943); *Belt* v. *Holton,* 197 F. 2d 579 (D. C. Cir. 1952); *Worsham* v. *Duke,* 220 F. 2d 506 (6th Cir. 1955); *Charles* v. *Judge & Dolph Ltd.,* 263 F. 2d 864, 867 (7th Cir. 1959). See also *Black & Yates, Inc.* v. *Mahogany Ass'n,* 129 F. 2d 227 (3d Cir. 1941); *McKinney*

v. *Boyle,* 404 F. 2d 632 (9th Cir. 1968); *Creason* v. *American Bridge,* 384 F. 2d 475, 478 (10th Cir. 1967); cf., *Jaconski* v. *Avisun Corp.,* 359 F. 2d 931 (3d Cir. 1966).

Not only is the deposition not properly before this Court, but the testimony found therein and relied upon gives rise to the inference that respondent's counsel drew the entire agreement in question. But as counsel for Vulcan well knows, such an inference would be false. Mr. Beesley, counsel for Vulcan and Gerstner, participated in the negotiation of the agreement and indeed exchanged preliminary drafts with respondent's counsel and approved the final document himself on behalf of Mr. Gerstner. Conceding that there is little in the record* regarding Mr. Beesley's participation, respondent expects appellant's counsel to concede his participation in a spirit of candor and fairness in order that this Court will not be misled on the facts.

B. *The Agreement is Unambiguous.*

In the absence of ambiguity there is no reason to construe the agreement against either party. "It is frequently said that this rule is to be applied only as a last resort. It should not be applied until other rules of interpretation have been exhausted; nor should it be applied unless there remain two possible and reasonable interpretations. The rule is hardly to be regarded as truly a rule of interpretation . . . It is chiefly a rule of public policy, generally favoring the underdog." *Corbin, Contracts,* § 559 at pp. 268-270

*The District Court was informed that the April 12 Agreement was negotiated by and between both parties in respondent's memorandum filed in support of its motion (R., p. 126).

(1960). See Restatement, *Contracts,* § 236. Where, as here, a party makes a far-fetched claim of ambiguity in order to claim advantage of the rule *contra proferentum,* without offering evidence of the actual intent of the parties, the Court should afford him very little comfort. *Michigan Mut. Liab. Co.* v. *Carroll,* 271 Ala. 404, 123 So. 2d 920 (1960).

As show in Part I of this Brief, the Agreement is unambiguous, being susceptible to only one interpretation, that made by the District Court.

V. THE APRIL 12 AGREEMENT IS AN INTEGRATED CONTRACT.

Appellant argues in its Brief (pages 15 and 16) that the April 12 Agreement is not an integrated agreement and therefore parol evidence may be admitted to qualify it. Vulcan relies on the fact that the Agreement contemplated a further agreement relating to employment of respondent. However, the Agreement was fully integrated as to the rights and obligations arising upon transfer of shares, a completely independent provision, and hence the introduction of parol evidence as to that portion is not permissible. Restatement, Contracts, §§ 232, 239; *Smith* v. *Bear,* 237 F. 2d 79, 85 (2d Cir., 1956) (applying California law); *Keeler* v. *Murphy,* 117 Cal. App. 386, 387, 3 P. 2d 950 (1931); *Schwartz* v. *Shapiro,* 229 Cal. App. 2d 238, 40 Cal. Rptr. 189, 197 (1964).

Appellant's argument that parol evidence should be admitted to vary the terms of the Agreement fails on an-

other score. Vulcan did not place in the record before the District Court any such parol evidence, despite an opportunity to do so, and is not now in a position to assert such parol evidence. Neither the District Court nor this Court has ever been informed of any parol evidence which would vary the language of the contract.

Appellant also asserts that merely because the parties now assert divergent interpretations of the contract is an indication that it is uncertain or ambiguous. If such were the case, any person who sought to avoid the most clearly expressed obligation would merely have to claim some fanciful interpretation of the obligation in order to produce evidence contrary to its plain terms.

CONCLUSION

The order of the District Court, determining that the Agreement of April 12, 1965, requires Vulcan to purchase respondent's stock, should be affirmed. The interpretation rendered below gives full effect to the parties' expressed intent, and is the only interpretation which takes into consideration the entire plan of restrictions and obligations imposed upon transfers of stock.

Respectfully submitted,

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APPENDIX

AGREEMENT

AGREEMENT made and entered into this 12th day of April, 1965, by and between J. DEAN GERSTNER, hereinafter referred to as Gerstner, and ABRAHAM MARKOSIAN, hereinafter referred to as Markosian.

RECITALS:

A. Markosian is the sole stockholder in Vulcan Steel Corporation, a Utah corporation, hereinafter called Corporation, which at present is inactive. The only asset of Corporation is cash in the amount of $1,200.00. Corporation has no liabilities, actual or contingent.

B. Gerstner has heretofore been engaged in the steel manufacturing and selling business through a corporation, Gerstner Steel Supply Company, Inc.

C. Gerstner and Markosian are desirous of engaging in the business of steel fabricating and related activities, through Vulcan Steel Corporation.

D. Gerstner and Markosian wish to be assured of a market at a fair price for their shares of stock in Vulcan Steel Corporation in the event their interest in Corporation is terminated for any reason.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. *Subscription for Stock.* Markosian shall cause Corporation to accept a subscription for 805 shares of authorized capital stock of Vulcan Steel Corporation and shall cause Corporation to issue and deliver 505 shares as follows:

(a) 417 shares will be issued to Gerstner upon payment in full of $41,700, by the transfer to Corporation, free of all encumbrances, of steel inventories, at the prices agreed upon by the parties, set forth in schedule A attached hereto and incorporated herein by reference.

(b) 88 shares shall be issued to Markosian upon payment by him to Corporation of $8,800 in cash.

(c) Markosian subscribes to an additional 300 shares of stock in Corporation for a total consideration of $30,000, or a price of $100 per share, to be paid

(i) $10,000 on or before May 1, 1965, and

(ii) $20,000 on or before April 1, 1966.

The shares of stock subject to this subscription shall be issued in proportionate amounts as the subscription price is paid. At completion of the issuance of stock provided herein, Gerstner shall own 51 per cent of the outstanding stock of the corporation and Markosian shall own 49 per cent.

2. *Control.* The parties shall vote their stock so as to provide for the following:

(a) The directors shall be Gerstner, Markosian, and ....., to serve until their successors are duly elected and qualified.

(b) The officers shall be as follows:

Gerstner	President and Treasurer
Markosian	Vice-President, General Manager and Secretary

(c) The employment of Markosian as Vice-President, General Manager and Secretary of Corporation at a monthly salary of $800 per month, payable in equal semi-monthly installments, plus 5% of the net profits before taxes as shown on the federal income tax return, which amount shall be paid on or before March 15 of each year. Markosian shall devote his entire time and efforts to the affairs of Corporation. Within thirty days after closing a written contract of employment shall be entered into by and between Corporation and Markosian, and such contract shall provide, among other things that may be agreed upon between the parties, a five-year term of employment of Markosian, with an automatic renewal on the part of Corporation for continuing one-year periods upon the same terms and conditions, unless Corporation notifies Markosian in writing within sixty days of the end of the term or any extension thereof of its intention to terminate such agreement, and such contract shall include provision for a car to be furnished to Markosian and for an expense account covering normal travel and entertainment expenses incurred on behalf of Corporation.

3. *Restrictions on Sale of Stock.* Neither of the parties hereto shall encumber or dispose of this stock except in accordance with the following terms and conditions:

(a) *Transfer to Members of Family.* Either party hereto may transfer all or part of his stock by gift to or for the benefit of himself or his spouse, or any lineal ancestor or descendant. In such case, the transferee shall receive and hold such stock subject to the terms of this agreement and to the obligations hereunder of the transferor, and there shall be no further transfer of such stock except by gift between members of such family or except in accordance with the other terms of this agreement. Such transfer shall be subject to the further requirement that the transferee must agree in writing prior to the transfer that he will, at the request of the other stockholders, file a consent by shareholder with the Internal Revenue Service, agreeing to an election by Corporation to be taxed as a "small business corporation" under the provisions of Subchapter S of the Internal Revenue Code, or such other provisions of law now or hereafter applicable to such election. Transfers to members of families cannot be made in such numbers as would render Corporation ineligible to be taxed under the Subchapter S provisions of the Internal Revenue Code or like provisions. This provision does not constitute an agreement by the parties hereto to elect to be taxed as a "small business corporation."

(b) *First Option to Purchase Stock.* Except as provided in subparagraph (a) of this paragraph 3, no stockholder and no transferee who has received stock in accordance with the provisions of said subparagraph (a) shall encumber or dispose of all or any part of his or her stock in Corporation, now owned or hereafter acquired by him or her, without the written consent of all other stockholders. In the absence of such written consent, or at the request of the stockholder desiring to encumber or dispose of his or her stock, such stockholder shall give to Corporation and to the other stockholders written notice of his or her intention, and such notice shall contain an offer to sell all of his or her stock in accordance with the terms of this agreement. The Corporation shall have thirty days from the date of the receipt of such notice with which to purchase the stockholder's stock. The purchase price of the stock offered for sale shall be in accordance with the provisions of subparagraph (c) of paragraph 3. In the event Corporation shall fail or refuse to purchase such stock within the time herein provided, then the party desiring to sell or dispose of said stock shall be free to make any other disposition of it afforded or desired.

(c) *Mandatory Obligation to Purchase Stock Offered.* At the termination of employment by Corporation of Markosian or Gerstner for any reason, it shall be mandatory for Corporation to purchase all of the stock of Markosian, Gerstner, or any stockholder

or transferee giving written notice as herein provided of his or her intention to dispose of his or her stock. The purchase price of the stock offered for sale shall be its fair market value at the date of the offer to sell, determined as follows:

(i) The parties shall determine the value of the assets annually and such resultant sum shall be the total sales value of the shares of stock of said corporation. In the event the parties fail to establish the value of the assets on or before January 15 of each year, then the value of the assets for that year shall be determined under subdivisions (ii), (iii), and (iv) hereof.

(ii) The assets shall be valued at the book value to be fixed by an immediate inventory thereof.

(iii) The good will of said corporation shall be estimated by taking the yearly average profits during the previous five years and multiplying the same by 2½.

(iv) The amount determined by adding the amounts of items (ii) and (iii) shall be adjusted by:

(A) Inventories shall be increased to fair market value. (Fair market value shall be defined for this purpose as replacement value at that date for such items when pur-

chased in quantities normally purchased by the Corporation.)

(B) Net book value of property plant and equipment shall be adjusted by adding back the excess of accelerated depreciation over straight-line depreciation taken by Corporation.

(C) Any other items wherein the accounting treatment of transactions by Corporation differs from generally accepted accounting principles as determined by an independent certified public accountant.

The purchase price determined herein shall be paid in three equal installments, unless the selling stockholder notifies the corporation in writing of his desire to receive 29 per cent of the purchase price as the initial payment, with the first installment payable within 15 days after the determination of the price and the other two installments to be made yearly on the same date in each succeeding year with interest at the rate of 5 per cent on the unpaid balance. Said purchase price shall be determined not more than 45 days after the written offer to Corporation by the selling stockholder.

(d) If at the time Corporation is required to make payment of the purchase price its surplus is insufficient for such purpose, then (1) stock to the ex-

tent of the entire available surplus shall be purchased, and (2) Corporation and the stockholder shall promptly take all required action to reduce the capital stock of Corporation to the extent necessary for the redemption of the unpurchased stock at the fair market value price determined as provided herein. If Corporation does not or is unable to reduce its capital stock, or by any statutory provision or rule of law is prevented from making the purchase of the stock offered for sale, then the remaining stockholders shall be jointly and severally obligated to purchase the stock at the determined price. Each of said remaining stockholders shall be entitled to purchase a proportionate share of the stock offered for sale. The term "proportionate share" shall mean that portion of the stock of Corporation offered for sale which the stock of Corporation owned by each of the stockholders bears to the stock of Corporation (other than offered for sale) owned by all stockholders. In addition, if any stock of Corporation offered for sale is not purchased by the stockholder first entitled thereto, the term "proportionate share" shall include that portion of the stock of Corporation not purchased by the stockholder first entitled thereto, which the stock of Corporation owned by the stockholder bears to the stock of Corporation (other than offered for sale) owned by all stockholders other than the stockholder first entitled to purchase.

(e) *Dual Notice.* In the event both Markosian and Gerstner wish to terminate their employment by Corporation, and desire to have Corporation purchase

their stock, the parties hereto agree to vote their stock for the liquidation and dissolution of Corporation.

(f) *Purchase and Sale of Stock upon Death of a Stockholder.* Upon the death of any of the stockholders, all of the stock owned by him in Corporation at the time of his death and any stock owned by any transferee who shall receive stock from him in accordance with the provisions of subparagraph (a) of this paragraph 3 shall be offered or deemed to have been offered for redemption or sale by the legal representative of his estate and by any such transferee, within ten days after qualification of such legal representative. Such stock shall be redeemed or purchased in the manner provided by subparagraph (c) of this paragraph 3 at a price determined as provided therein, except that the purchase price shall be paid in cash to the legal representative of his estate and for any such transferee. The parties hereto agree to vote their shares to have Corporation purchase a life insurance policy on each of their lives in an amount not less than ..... per cent of the net book value of the total outstanding stock of Corporation at the end of each calendar or fiscal year, with the premium to be paid by Corporation, and Corporation to be named as beneficiary, and the proceeds of such policies to be applied against the purchase price or redemption of stock of the stockholder or his transferee. Said amounts of insurance shall be increased each year to the minimum amount provided herein, within 60 days after the

end of the calendar or fiscal year to the extent that the parties hereto are insurable.

4. *Termination of Restrictions on Disposition of Stock.* Provisions restricting the sale of stock contained in this agreement shall terminate upon the happening of any of the following events:

(a) The adjudication of Corporation as a bankrupt, the execution by it of any assignment for the benefit of creditors or the appointment of a receiver for Corporation.

(b) The involuntary or voluntary dissolution of Corporation.

5. *Endorsement of Stock Certificates.* The certificates of stock of Corporation to be issued pursuant to the agreement shall bear the following endorsement:

"The shares of stock represented by this certificate are subject to all the terms of an agreement made April ...., 1965, between J. Dean Gerstner and Abraham Markosian, a copy of which is on file at the office of the corporation."

6. *Closing.* The date of closing shall be ....., 1965, at which time the shares of capital stock of Corporation, subscribed for by the parties hereto, will be issued and delivered and the subscription price paid by each. The time of closing shall be ....., and the place of closing shall be the offices of Fabian & Clendenin, Continental Bank Building, Salt Lake City, Utah. Each of the

parties shall do all further acts and execute all documents that may be necessary to the carrying out of this agreement.

7. *Ratification of Agreement.* The parties shall vote their stock so as to cause Corporation to adopt and ratify all the terms of this agreement by resolution. A certified copy of this resolution shall be delivered to each of the parties hereto.

8. *Notices.* Any notices to be given under the terms of this agreement shall be in writing and addressed to Corporation at its principal place of business, and any notices to be given to either of the individual parties to this agreement shall be addressed to them at their residences, or at such other address as any of such parties may hereafter designate in writing to the others. Any such notice shall be deemed fully given when enclosed in a properly sealed envelope or wrapper addressed as herein required, certified and deposited (postage and certification fee prepaid) in a post office or branch post office regularly maintained by the United States government in the continental United States.

9. *Benefit.* This agreement shall survive the closing and shall be binding upon and inure to the benefit of Corporation and the parties hereto, their respective successors and assigns.

IN WITNESS WHEREOF, the parties have executed this agreement.

/s/ J. DEAN GERSTNER
/s/ ABRAHAM MARKOSIAN