STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – MAY 14, 2007)

TRI-STATE TRUCKING OF RHODE ISLAND, LLC and WE DISPOSE, LLC	:	
v.	:	**C.A. No. PC 06-4967**
TRI-STATE TRUCKING, INC., EDWARD SCANLON, JR., and RICHARD NICHOLSON	:	
TRI-STATE TRUCKING, INC.	:	
v.	:	**C.A. No. PM 06-4986**
TRI-STATE TRUCKING OF RHODE ISLAND, LLC, WE DISPOSE, LLC, AND PETER CALCAGNI	:	

DECISION

SILVERSTEIN, J. Before this Court after a bench trial are various claims for damages and other relief arising out of the sale of a waste hauling business. Also, before the Court is a motion for the release of funds from an escrow account. These claims arise from the sale of substantially all of the operating assets of Tri-State Trucking, Inc. (TST) to Tri-State Trucking of Rhode Island, LLC (TSTRI, LLC) on or about February 2005.[1]

[1] In addition to the above-captioned actions, another lawsuit, We Dispose, LLC v. Tri-State Trucking, Inc., C.A. No. PC 06-6668, involves one claim which has been referred to binding arbitration. That claim arises out of an alleged agreement between We Dispose, LLC and TST to perform waste hauling services rendered prior to the asset sale which is the subject of this decision. We Dispose, LLC claims that it has not been paid for its services. The issues involved in that action are not presently before the Court.

I
Facts and Travel

TSTRI, LLC and We Dispose, LLC are two entities in the waste removal business, and are controlled by Peter Calcagni. The Court will refer to these two entities and Mr. Peter Calcagni collectively as Calcagni in this decision, unless the context requires otherwise. TST formerly was in the waste disposal business until it sold substantially all of its operating assets to Calcagni. Edward Scanlon Jr. and Richard Nicholson are Defendants in C.A. No. 06-4967 and are principals of Defendant TST.

There are two issues raised by Calcagni's complaint which are before the Court at this time.[2] The first is the allegation that TST and its principals fraudulently induced Calcagni into entering into the various agreements by misrepresenting the average monthly revenue of the waste hauling business. Calcagni contends that he is entitled to a revision of the initial purchase price based upon the actual revenue numbers.[3] TST denies that any misrepresentation occurred.

An additional dispute involves the application of an "adjustment clause" in the Agreement. The Agreement provides for an adjustment to the initial purchase price based upon customers lost within 90 days of the closing date. (Agreement ¶ 2.3(d).) Stated in an oversimplified manner, the clause provides that for every dollar of monthly revenue that is lost, the initial purchase price will be reduced by fifteen dollars. <u>See</u> <u>id.</u>

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[2] Two counts of Calcagni's three-count complaint are no longer before the Court. Count II was dismissed without prejudice and relates to a covenant not to compete. Count III relates to various claims which have been referred to binding arbitration. (Binding Arbitration Agreement, C.A. No. 06-4967, Mar. 5, 2007).

[3] The Court will refer to the price before application of the adjustment clause in ¶ 2.3(d) of the Agreement as the "initial" purchase price.

The paperwork memorializing the asset sale is hardly a model of clarity or precision, but resolution of this dispute requires the Court to interpret it.[4] The closing of the asset sale occurred in early February 2005.[5] The transaction provided that TST would sell substantially all of its equipment, customer lists, and goodwill to TSTRI, LLC, an entity which Peter Calcagni caused to be created for the purpose of purchasing those assets.[6] In exchange, the Asset Sale Agreement (Agreement) provides that TSTRI, LLC would pay the sale price of $ 3,403,843 for the assets. (Trial Ex. 10, ¶ 2.3.) This was to be paid via a $720,000 down payment at closing, and a promissory note (Note) for the balance. Id. The Agreement also provides that Peter Calcagni would personally guarantee the obligation represented by the Note. Id. ¶ 2.3(c); see Guaranty Agreement, Trial Ex. A.

Following the closing, relations between the parties broke down due to various disputes arising from the asset sale and loan transaction. Calcagni invoked the adjustment clause and contends that he is entitled to approximately $600,000 in reductions to the purchase price. (Trial Ex. 16.) Because of that contention, he also argues that he has overpaid on his obligation under the Note. TST disagrees, however, believing that Calcagni is in default under the Note. TST has exercised its claimed right to accelerate the due date on all payments under the Note. TST brought its two count complaint in C.A. No. 06-4986 seeking damages arising from the Note and the appointment of a receiver for TSTRI, LLC.

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[4] The instruments have been generated from a word processing program in which the "track changes" feature has been utilized. The executed agreements are "red-lined" versions which exhibit the evolution of the document from draft to final form.

[5] The parties do not dispute that the closing occurred in February 2005, although the typewritten portion of the Asset Purchase Agreement contains a date of January 4, 2005. The promissory note is dated February 4, 2005. (Trial Ex. B.)

[6] Peter Calcagni and his wife are the only members of the LLC.

Therefore, the Court must first consider the allegations of fraud and misrepresentation in order to determine the initial purchase price. Then, it must ascertain whether any reductions are required to that price under the adjustment clause, and if so, the amount of any reductions. The Court will also address Calcagni's contention that TST lacks capacity to sue because its certificate of incorporation has been revoked. Finally, the Court will consider whether Calcagni is in default under the Note and whether any remedies should follow from the Note.

II
The Initial Purchase Price

A.
Findings of Fact

The Note provides that Calcagni shall pay the principal amount of $2,683,843 plus interest at 3.5 percent annually. (Trial Ex. B.) This principal amount is consistent with the Agreement, which provides for a down payment of $720,000 against the stated purchase price of $3,403,843. Compare Agreement ¶ 2.3(a), (c) with Note. The Note was executed and delivered at the closing, and provides for 48 equal payments of $60,000 per month until the Note is paid in full. Id. An amortization schedule consistent with these terms appears at Trial Exhibit C, and indicates that if all payments are made on schedule, the total interest paid would be $196,157. The total of principal and interest, therefore, would be exactly $3.6 million.

Calcagni disputes that the "actual" initial purchase price was $3,403,803 as stated in the Agreement. Rather, Calcagni contends that the price was conceived as a function of the monthly revenues of TST's waste hauling business. Peter Calcagni testified that he values a business by multiplying the average monthly revenue of that business by some number—in this case, fifteen—in order to arrive at the purchase price.[7] He claims that he relied upon the average monthly revenue amount provided in "Schedule 1.1(b)," which was provided by TST, was present at the closing, and is referenced by the Agreement in many places. (Trial Ex. 11.) That document gives an average monthly billing amount of $197,725, which when multiplied by 15, equals $2,965,875. Therefore, Calcagni contends that this figure is the initial purchase price represented by the agreements.

Calcagni then claims that Richard Nicholson, a principal of TST, misrepresented the amount of the monthly billings in Schedule 1.1(b). See Trial Ex. 11. Therefore, Calcagni contends that he was induced to pay a higher price than he otherwise would have paid. Based on his review of the "Quickbooks" records, which were maintained by TST on a computer that was eventually transferred to Calcagni, the average monthly billing was actually $194,259. See Sales Analysis Report, Nov. 15, 2006, Trial Ex. 14.

Mr. Fred Guarino, the accountant who prepared that report for Calcagni, concluded in his report that Schedule 1.1(b) overstated the actual average monthly revenues by $3466. He also testified about the methodology used to reach those numbers. He had analyzed the three-month period before the closing to reach his $194,259 figure. Mr. Nicholson, conversely, could not remember during his testimony which time period he used to reach the $197,725 figure contained in Schedule 1.1(b).

Using the multiple of 15, the discrepancy revealed by the Sales Analysis Report would amount to a change of $51,992 in the sale price. See Trial Ex. 14. However, this does not explain the difference between the approximately $2.9 million initial purchase

[7] The particular multiplier chosen depends, according to Calcagni's testimony, on a variety of factors relating to the financial well being of the business, and was arrived at through consultation with his accountant, Mr. Guarino.

price that Calcagni asserts, and the approximately $3.4 million price contained in the Agreement that Calcagni signed.

Calcagni contends that the difference is explained by the concept of "imputed interest." He contends that interest for the life of the Note was aggregated and added to the purchase price to reach the sum of $3,403,843.[8] That imputed interest would be the difference between the stated amount in the Agreement, and the multiple of the monthly billings, which equals $437,968. See Letter of Guarino to Boland, Jan. 29, 2007, Trial Ex. 16 (containing the computations of Fred Guarino, an accountant and witness for Calcagni, which summarizes Calcagni's position); Letter of Fallago to Boland, Nov. 15, 2006, Trial Ex. 22 (containing letter of attorney Jean Fallago, Peter Calcagni's sister, expressing that the sale price contains $437,968 of imputed interest). Therefore, Calcagni's position is that the "actual" purchase price for the waste hauling business was approximately $3 million and that any adjustments should begin at that number. Once the initial price is corrected for any misrepresentation, and the adjustment clause applied, the "imputed interest" would apparently be added back to the resulting price under Calcagni's methodology.

The evidence does not reveal how the $437,968 interest figure was reached—neither the amount used as principal, the interest rate, or the number of monthly payments, are evident to this Court. See Trial Ex. 22 (containing letter of Fallago which

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[8] Imputed interest is a tax concept that applies when parties to a transaction make a loan at an interest rate below the prevailing market rate. See Walter C. Cliff and Philip J. Levine, Interest Accrual and the Time Value of Money, 34 Am. U.L. Rev. 107, 139 n.164 (1984). Under § 483 of the Internal Revenue Code, 26 U.S.C. § 483, portions of payments made in connection with the sale or exchange of property are recharacterized as interest for purposes of taxation. Id. For example, assume that the terms of the asset sale transaction were as TST contends, but with no stated interest. The price would be $ 3.6 million, with a $720,000 down payment. The loan would be a $2,880,000 loan at zero interest payable in 48 equal installments of $60,000. In that case, the Internal Revenue Service (IRS) would treat a portion of the loan payments as interest for tax purposes based upon a rate designated by IRS regulations.

mentions an interest rate of 7% after making adjustments to the purchase price); Trial Ex. 23 (similarly mentioning a 6.5% interest rate, but not revealing any calculations or methodology). It suffices to note that Calcagni's imputed interest figure is wholly inconsistent with the Note's terms of $2,683,843 principal, at 3.5% interest annually over 48 months, which would result in $196,157 of interest over the life of the loan. See Note; Trial Ex. C (amortization schedule).

B.
Interpreting Contracts and the Parol Evidence Rule

Because the Agreement and the Note were executed as part of the same transaction, the Court will consider them as one instrument for purposes of interpretation. See Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., 786 A.2d 1063, 1065 (R.I. 2001) (stating that instruments "executed at the same time, for the same purpose and in the course of the same transaction are to be considered as one instrument and are to be read and construed together")(internal quotations omitted).

As a general rule, where there exists an integrated, written agreement, parol evidence may not be used to vary, alter, or contradict that written agreement. Supreme Woodworking Co. v. Zuckerberg, 107 A.2d 287, 290, 82 R.I. 247, 252 (1954).[9] By excluding evidence of prior or contemporaneous negotiations, the rule reinforces the importance and primacy of written instruments.

[9] Clearly, the paperwork memorializing this transaction should be considered integrated with respect to the price and loan terms. See Restatement (Second) of Contracts, § 209(1) (defining an integrated agreement as "a writing or writings constituting a final expression of one or more terms of an agreement.") The documents were the culmination of negotiations which were reduced to writing in a formal closing. See Agreement ¶ 2.3; Note (containing loan terms consistent with the purchase price in the Agreement). Moreover, the agreement itself states that it "supersede[s] all prior agreements, understandings, negotiations, and discussions, whether oral or written, of the parties." (Agreement ¶ 11.4.) Therefore, it is a final expression of the price and loan terms.

Calcagni's interpretation of the initial purchase price is clearly an attempt to modify the terms of the writings. The writings contain terms for a purchase price, loan principal, an interest rate, and periodic payments. There is nothing in the documents that would suggest that a portion of the stated purchase price should be treated as interest. In fact, the Agreement states that the consideration of $3,403,843 was allocated as $600,000 to equipment, furniture, and fixtures; $2,703,843 to goodwill and customer files, and $100,000 for a non-competition agreement. (Agreement ¶ 2.5.) Moreover, the Note specifically provided for interest at a stated 3.5% rate, which presumably was consistent with IRS regulations. In sum, everything contained in the writings provides for a $3,403,843 purchase price, or $3.6 million including interest during the life of the loan. Therefore, unless the parol evidence rule is inapplicable, the Court must accept the terms of the writing as conclusive.

Two exceptions to the rule are arguably relevant. First, parol evidence may be used to interpret the meaning of ambiguous terms of an instrument. See, e.g., Paolella v. Radiologic Leasing Assocs., 769 A.2d 596, 599 (R.I. 2001). However, the Court finds that neither the price term in the Agreement nor the principal term in the Note are reasonably susceptible to multiple interpretations. See, e.g., W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994) (defining ambiguous as a term which is reasonably susceptible to multiple interpretations).

Second, such evidence may be used to show "illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause." Restatement (Second) of Contracts § 214(d). Therefore, in order to be entitled to relief, Calcagni must demonstrate that he was fraudulently induced to enter the contract.

C.
Fraud or Misrepresentation

Courts have recognized that misrepresentations about the productivity of a business may constitute fraud. See generally M. L. Cross, False Representations as to Income, Profits, or Productivity of Property as Fraud, 27 A.L.R.2d 14 (1953). A plaintiff seeking to establish common law fraud must show that "the defendant made a false representation intending thereby to induce plaintiff to rely thereon, and that the plaintiff justifiably relied thereon to his or her damage." Zaino v. Zaino, 818 A.2d 630, 638 (R.I. 2003).

As described above, Calcagni alleges fraud based upon a $3,466 discrepancy between the average monthly revenue stated in Schedule 1.1(b) (Trial Ex. 11), and the Sales Analysis Report of TST's financial records (Trial Ex. 14). If the parties intended that the purchase price would solely be a multiple of the monthly revenues, as Calcagni contends, then the alleged misrepresentation would require a $51,992 adjustment to the sale price after applying the multiple of fifteen.

If the Agreement had explicitly provided for a sale price of fifteen times the figure in Schedule 1.1(b)—$2,965,875, then perhaps Calcagni's position would be tenable, and he could plausibly seek a $51,992 adjustment to the initial price. See Stebbins v. Wells, 766 A.2d 369, 372 (R.I. 2001) (noting that a victim of fraud or misrepresentation may "elect either to rescind the contract, or to affirm the contract and sue for damages in an action for intentional deceit or misrepresentation"). In this case, however, Calcagni cannot demonstrate that he detrimentally relied upon the Schedule 1.1(b). If he truly relied solely on Schedule 1.1(b), he could not possibly have agreed to a figure as high as the $ 3.4 million figure contained in the Agreement.

Calcagni's claim that the stated purchase price includes $437,968 of hidden, imputed interest is not credible because it is contradicted by the terms of the writings he signed, and which he is presumed to have read. First, various components of the $3,403,843 are explicitly provided in the Agreement, and include no interest. (Agreement ¶ 2.5.) Second, the Note contains actual provisions for payment of interest of 3.5 percent on the $2.683 million principal. If $437,968 of the purchase price was interest, that sum could only result from a rate much higher than the 3.5 percent rate which was explicit on the face of the Note that Calcagni signed. Finally, the Note clearly provided that Calcagni would pay 48 installments of $60,000. The total of these payments is $3.6 million, or $3,403,843 plus interest. See Trial Ex. C. Therefore, even if Schedule 1.1(b) constituted a misrepresentation of average monthly revenue, Calcagni's claim that he relied upon that misrepresentation is not tenable.

Rather, there are two possible explanations for any harm befalling Calcagni. Peter Calcagni might have misunderstood the effect of the agreements that he was signing— specifically the concept of imputed interest—at the time of the closing.[10] If so, that misunderstanding caused him to agree to a price much higher than the fifteen times average monthly revenue that he claims he intended. While unfortunate, such circumstances would not entitle him to relief. See Westerly Hosp. v. Higgins, 106 R.I. 155, 160, 256 A.2d 506, 509 (1969) (noting that a party's failure to read or understand the terms of the contract is not a defense where the ignorant party has still manifested his

[10] Incidentally, an e-mail from Richard Nicholson to Calcagni states that the purchase price was $3.6 million. (Trial Ex. 5.) The concept of imputed interest explains why the stated purchase price in the Agreement was approximately $ 3.4 million, as opposed to $ 3.6 million. If the Note had simply provided for 48 payments of $60,000 without any stated interest, the IRS would have re-characterized portions of those payments as interest. A specific allocation of interest would make the re-characterization unnecessary.

assent to the contract by signing the writing"). By manifesting his assent to the contract, Calcagni caused TST to proceed with the transaction as detailed in the writings. Therefore, even if Calcagni misunderstood that transaction, he must be bound by its terms.

Alternatively, Peter Calcagni might have completely understood the effect of the agreements he was signing, but after the fact, became dissatisfied with the arrangement and sought alternation of the purchase price. In that case, not only would Calcagni lack entitlement to relief, but would also be guilty of committing a fraud upon this Court. In either case, however, he is not entitled to a revision of the initial purchase price stated in the Agreement.

Finally, the Court notes that the "average monthly revenue" is not an absolute figure. Its determination entails a variety of accounting decisions—most notably the time period for which that figure will be computed.[11] Mr. Guarino used a three-month time period prior to the closing for his computation. Schedule 1.1(b) states no time period. While it is not known how Mr. Nicholson computed the Schedule 1.1(b) figures, it is not unreasonable to conclude that a different time period could have produced a slightly different average revenue number. Moreover, Peter Calcagni admitted that TST offered to make its financial information available to him prior to the closing, and that Calcagni did not avail himself of the opportunity to inspect those statements. Therefore, the figures contained in Schedule 1.1(b) constitute at best an estimate or opinion, and not an absolute fact which is capable of being misrepresented. If he sought a more precise revenue figure, he should have inspected the books of TST before making the purchase.

[11] The parties also disagree on some other accounting decisions. For example, Mr. Guarino testified that he would have accounted for a "fuel adjustment fee" as a reduction in expenses rather than an increase in revenues.

Under these circumstances, Calcagni cannot claim that such a small discrepancy constitutes a misrepresentation which would entitle him to relief.

Because the Court finds that Calcagni has failed to demonstrate fraud, the parol evidence rule applies. The Court may not consider any evidence for the purpose of contradicting the initial purchase price and principal terms as stated in the writings, and must therefore conclude that those writings express the final agreement of the parties.

III
Applying the Adjustment Clause

Having found that no fraud or misrepresentation occurred, the Court must now apply the adjustment clause to the $3,403,843 initial purchase price contained in the Agreement. The Court must examine evidence of events occurring post-closing in order to apply the terms of the clause. In addition, unlike the purchase price term, the Court finds that the adjustment clause is fraught with ambiguity. Therefore, the Court will examine parol evidence to the extent necessary to interpret the meaning of the ambiguous adjustment clause. See, e.g., Paolella, 769 A.2d at 599.

A.
Findings of Fact

The Agreement provides for an adjustment based upon business lost in the first ninety days following the closing.

The adjustment clause states:

> "In the event of "Termination" of any client accounts during the first ninety (90) days after Closing, the Purchase Price above shall be reduced based on a ratio of 15:1, with the result that the monthly billing amount for that client shall be multiplied by 15 and reduce the purchase price. Termination is herein defined as termination of service by a

> client for any reason or delinquency (except in the event of bad service) in payment by a client." Agreement ¶ 2.3(d).[12]

TST concedes that some adjustment is warranted because some clients were lost within 90 days of the asset sale. However, the parties dispute how this clause should be applied and, therefore, the amount of the adjustment.

The waste hauling business includes several types of services. See Schedule 1.1(b), Trial Ex. 11. For example, the business had continuing relationships with certain customers to provide and service front-end and rear-end loading dumpsters. However, the testimony indicated that "roll-off" and compactor rental services are generally temporary arrangements. For example, a roll-off is commonly used for waste from a construction site—once the particular project is finished, the roll-off is no longer needed.

Calcagni seeks to make the following categories of adjustments: (1) miscellaneous adjustments; (2) adjustments based upon the roll-off and rental account types; and (3) adjustments based upon loss of the "Goulin" accounts. The Court will consider the following exhibits as evidence of lost business in the 90 days following the closing: (1) the "Sales Analysis Report" contained at Trial Exhibit 14; (2) the "Other Adjustments Report" contained at Trial Exhibit 15; (3) the notices of termination and summary contained at Trial Exhibit D.

B.
Miscellaneous Adjustments

Calcagni's evidence of adjustments contains both reductions in service and complete terminations of service. (Trial Ex. 15, Schedules I and II.) The Court ruled during trial that evidence of reductions in service, as opposed to complete terminations of service, should be excluded from evidence. Implicit in that ruling was the legal

[12] The capitalized terms, Purchase Price and Closing, are defined elsewhere in the Agreement.

conclusion that the adjustment clause only applies to terminations, and not mere reductions, based upon the plain language of the Agreement.

The parties do not dispute that certain clients terminated their service within the 90 day adjustment period. A summary of the undisputed accounts are contained in Trial Exhibit D. Compare Other Adjustments Report, Trial Ex. 15, Schedule I. Enclosed with that summary are various notices transmitted by Calcagni to TST addressing the individual accounts. These amount to $869.73 in lost monthly revenues, and require an adjustment of $13,045.95.

TST argues that these are the only accounts subject to the adjustment clause because Calcagni did not send notice of any other account within the 90 day period. However, the Court does not find a requirement of notice in the adjustment clause. Rather, so long as the termination occurred within the 90 day period, an adjustment is required whether or not notice was given within that time period. Therefore, the Court finds that an additional adjustment is required for certain other accounts as follows.

Account Name	Average Monthly Revenues x 15
Capital City Concrete	$1,298.70
Custom House Tap	$2,568.00
NE Satellite	$2,247.45
Pizza Pro’s	$1,613.25
Ryan Welter	$2,467.35
Sourmandis	$850.20
TOTAL:	$11,044.95

(Other Adjustments Report, Trial Exhibit 15, Schedule I.) An adjustment for the lost Newport Creamery account based upon its seasonal average revenues, in the amount of $69,496.56, may also be allowed. Id.

Schedule I also lists $106.24 of bad debts for two accounts which are subject to the adjustment clause, and which require an adjustment of $1,594.35. Id. No adjustment may be allowed for the Pentair accounts listed on that schedule. The cross-examination of Mr. Guarino indicated that the Pentair figures were erroneous, and no competent evidence exists to otherwise establish an adjustment for the Pentair account.

C.
"Roll-off" and Rental Adjustments

The adjustment clause refers to "clients" and "client accounts," neither of which is defined. TST suggests that only customers with a permanent relationship should be considered clients under this clause. Therefore, any reduction in roll-off/rental business should not affect the purchase price, because such customers are only temporary. Conversely, Calcagni claims that all of the services are subject to the adjustment clause, and that all customers at the time of closing should be considered "clients" even if they only purchased roll-off services.

According to Calcagni, the amount of lost roll-off and rental business would be $23,327, resulting in a price adjustment of $349,905. (Trial Ex. 14, Schedule D.) In order to reach this figure, Calcagni first adopts the average monthly revenue for roll-off and rental business in Schedule 1.1(b)—$74,500. Then, based upon the revenues for March 2005 through May 2005, Calcagni calculates an average monthly revenue of $51,173. The difference, when multiplied by fifteen, equals the $349,905 adjustment advocated by Calcagni.

The problem with this methodology is that no individual client is identified—rather, only changes in the aggregate volume of business are measured. See Sales Analysis Report, Trial Ex. 14 (noting that the accountants "prepared a schedule comparing post closing revenue to the average monthly revenue per Schedule 1.1(b). . ."). The adjustment clause requires Calcagni to identify a specific client whose account existed on the date of sale, and which terminated—as opposed to reduced—its service during the 90 day period. See Agreement § 2.3(d) (calculating the adjustment based upon the monthly billing amount "for that client"). Mere evidence of decreased revenues alone is insufficient to demonstrate entitlement to an adjustment. It is unlikely that such computations are possible, which suggests that the parties never contemplated including roll-off business in the adjustment clause.[13] Even if that type of business was subject to the adjustment, however, Calcagni has failed to provide a sufficient evidentiary basis for determining such an adjustment. Therefore, the Court will not allow for an adjustment based upon changes in roll-off and rental services.

[13] The evidence suggests that there is no way to measure such terminations based upon the records kept by TST and TSTRI, LLC. (Sales Analysis Report, Trial Ex. 14.)

D.
The "Goulin" Accounts

Calcagni also seeks an adjustment to the purchase price on the basis of the so-called "Goulin" accounts. Peter Calcagni's testimony indicated that TST serviced one or more accounts for an individual known to this Court only as Mr. Goulin, who apparently ran a competing waste hauling business.[14] Calcagni claims that at the time of the closing, TST orally agreed to secure a "covenant not to compete" from Mr. Goulin.

Peter Calcagni testified that he had reason to believe that, based upon some prior history with Mr. Goulin, he might terminate the accounts after learning of the asset sale to Calcagni. Therefore, TST allegedly agreed to secure an agreement with Mr. Goulin which would protect Calcagni from losing his accounts. Such a covenant was never consummated with Mr. Goulin, and the "Goulin" accounts were terminated. However, Peter Calcagni testified that the accounts were not terminated until November 2006, well after the expiration of the 90 day adjustment clause. Therefore, any damages relative to the Goulin accounts would not arise from the adjustment clause.

The parol evidence rule prohibits the use of prior or contemporaneous negotiations to contradict written terms. However, the agreement claimed by Calcagni here does not contradict anything in the writing. Rather, it is in the nature of an additional agreement which is consistent with the other terms. Therefore, the Court must determine whether the Agreement and related writings constitute a completely integrated agreement. If so, then the Court may not consider any additional terms, even if they would be consistent with the writings. Restatement (Second) of Contracts, § 213(2). A complete integration "is an integrated agreement adopted by the parties as a complete and

[14] The amount of such an adjustment, if Calcagni is entitled to it, would be $66,342 based upon $4,423 in lost average monthly revenues. (Sales Analysis Report, Trial Ex. 14, Schedule C.)

exclusive statement of the terms of the agreement." Id. § 210. The Court may consider any pertinent evidence in order to determine whether the writing is a complete integration. See id. § 210, com. b. and § 214(b).

The Agreement states that the various writings "constitute the entire agreement among the parties pertaining to the subject matter of such agreements." (Agreement ¶ 11.4.) This clause weighs heavily in favor of finding a complete integration. Moreover, although the writings were sloppy, they represented the culmination of lengthy negotiations at a formal closing intended to consummate the asset sale transaction. Under these circumstances, the Court must find that the parties intended the writings to constitute the entire agreement between them.

If the writing is a complete integration, then it discharges all other agreements that are within its scope. Id. § 213(2). Therefore, the Court may not consider evidence of additional terms which are within the scope of the writings, even if those terms would not contradict the writings. See Restatement (Second) of Contracts § 213(2). In other words, the Court must ask: if there was such an agreement as Calcagni claims, should the Court expect that agreement to be contained in the writings?

Calcagni asserts that concerns about the Goulin accounts were expressed to TST at the closing. Calcagni alleges, therefore, that a term of the sale was that TST would procure a non-competition covenant. Because the consideration for that agreement would be the purchase price, if such a term existed, it would necessarily be within the scope of the purchase and sale transaction. Moreover, the adjustment clause represents an attempt to compensate Calcagni in the event that any accounts were terminated, which reveals that the potential for lost accounts was considered as part of the agreement. That the

Goulin accounts were not addressed in the writings indicates that the agreement did not become part of the final bargain between the parties.

Therefore, the Court must conclude as a matter of law that the purported agreement was within the scope of the completely integrated writings. Because that agreement was not contained in the writing, the parol evidence rule operates to discharge that agreement even if it existed at some point during the closing discussions.

E.
Total of Adjustments

Based upon the foregoing, the Court finds that Calcagni is entitled to an adjustment of $95,181.81 in the purchase price as follows.

Category	Amount
Undisputed Adjustments	$13,045.95
Monthly Account Adjustments from Schedule I	$11,044.95
Newport Creamery Seasonal Average	$69,496.56
Bad Debt Adjustments	$1,594.35
TOTAL ADJUSTMENTS:	$95,181.81

Calcagni is not entitled to any adjustment for the “Goulin” accounts, the “roll-off” accounts, or the rental accounts.

IV
Revocation of Corporate Charter

After the close of evidence, Calcagni moved for judgment as a matter of law, pursuant to Super. R. Civ. P. Rule 52, on the grounds that TST was no longer an active corporation.[15] It argues, therefore, that it lacks the capacity to sue on its promissory note in C.A. No. 06-4986. It is undisputed that in October 2005, the Secretary of State revoked TST's articles of incorporation for failure to file its annual report. See G.L. 1956 § 7-1.2-1310(a)(3)(providing for such revocation).[16]

When a revocation has occurred, "the authority of the corporation to transact business in this state ceases." Section 7-1.2-1311(b). However, a corporation whose articles of incorporation have been revoked "nevertheless continues for five (5) years after the date of the . . . revocation for the purpose of enabling it to settle and close its affairs, to dispose of and convey its property, to discharge its liabilities, and to distribute its assets, but not for the purpose of continuing the business for which it was organized." Section 7-1.2-1325. This statute modifies the common law rule, which provided that the dissolution of a corporation "marked the death of its corporate existence and, in the absence of statutory provisions to the contrary, terminated that existence for all purposes whatsoever." Theta Props. v. Ronci Realty Co., 814 A.2d 907, 912 (R.I. 2003). Under these statutes, a corporation continues to exist for the "limited purposes of winding up the business and of defending lawsuits or filing any claims related to the business." Id.

While conceding that TST is within the five-year "wind up" period, Calcagni argues that TST is continuing its business and is not winding up as contemplated by § 7-1.2-1325. For example, it contends that it still owns one waste disposal truck and is servicing one account. However, the Court will not engage in an inquiry of the

[15] TST argues that Calcagni waited too long to raise this issue and should be estopped from raising it. Calcagni raised the issue in his answer, but apparently did not raise it again until after the close of evidence. Calcagni's motion essentially asserts that TST no longer exists as a corporate entity with legal capacity to bring suit. If true, any judgment in favor of such an entity would almost certainly be void. Therefore, this is probably not the type of issue which could be waived. The Court need not decide the waiver issue, however, because it finds Calcagni's position to be without merit.

[16] Under § 7-1.2-1312, a corporation can correct the failure to file a report and be reinstated as if the revocation never occurred. TST has not corrected the deficiencies which led to the revocation, however.

principals' subjective intent in order to determine whether TST actually intends to wind up its business.

Rather, the Court notes that the "shareholders, directors, and officers" of a revoked corporation "have power to take any corporate or other action that is appropriate to carry out the purposes" of the wind-up provision in § 7-1.2-1325. The Court finds that bringing suit upon a defaulted note is an appropriate action for the purpose of settling and closing a corporation's affairs, and may even be a necessary step in distributing its remaining assets to creditors and shareholders. Therefore, even if the principals do not intend to wind up the business as the law requires, the Court will not prevent their suit from proceeding.

If the principals are operating the business without authority, perhaps they are running the risk of incurring personal liability arising from those endeavors. Perhaps there exists some other remedy for such unlawful actions. See, e.g., § 7-1.2-303 (allowing for certain classes of individuals, which do not include corporate creditors, to assert the lack of capacity or power as a defense, and also allowing the attorney general to seek an injunction of unauthorized transactions). However, the Court finds that the revocation should not prevent TST from maintaining its suit on the promissory note.

V
Default under the Note

TST seeks judgment on the Note because it claims that TSTRI, LLC is in default. Similarly, it seeks judgment against Peter Calcagni on his personal guaranty of the Note. (Trial Ex. A.)[17]

[17] We Dispose, LLC is also a named Defendant in the action on the Note. This entity is controlled by Peter Calcagni. However, other than the naked assertion that it is an "alter ego" of Peter Calcagni, TST has made no attempt to demonstrate why this entity ought to be held liable for a note whose maker is Tri-State

A.
Findings of Fact

As one would expect, failure to remit the required installment payments is an event of default under the Note. Upon default, TST was required to give notice of default and a ten day opportunity to cure. (Note 2.) TST gave such notice on August 7, 2006. See Trial Ex. F.[18] On August 28, 2006, TST accelerated the entire amount of indebtedness owed on the Note.

The Court accepts the payment schedule found in Trial Ex. E as evidence of when payments were made. Those payments are allocated based upon Schedule A to TST's Post-Trial Memorandum of March 23, 2007. This schedule reveals that Calcagni fell behind on the required payments, and ceased making all payments after July 28, 2006. After accounting for principal, regular interest, default interest, and late fees through March 23, 2007, Calcagni allegedly owes $2,174,941.47 on the accelerated Note. This amount includes default interest for the period from May 2006 to August 2006.

B.
Acquiescence

Calcagni argues that TST acquiesced to the late payments on the Note. See Royal Props. Assocs. v. Rhode Island Hosp. Trust Nat'l Bank, 1992 R.I. Super. Lexis 146 (R.I. Super. Ct. 1992) (stating that waiver of default "arises or may be inferred where the [lender] passively acquiesces to events otherwise resulting in default, or from the

Trucking of Rhode Island, LLC. Therefore, to the extent that TST seeks relief against We Dispose, LLC, the Court will deny such relief.

[18] The Court does not find that the letter of May 22, 2006 from Richard Nicholson to Peter Calcagni was adequate notice of Calcagni's default, and his right to cure that default. (Trial Ex. I.) Therefore, the Court will not allow TST to invoke the default interest rate for the period prior to the August 7, 2006 notice of default.

[lender's] continued recognition that the agreement is binding and enforceable under conditions of default") (citing 50 C.J.S. § 501).

The evidence reveals that between November 2005 and August 2006, the parties communicated in an attempt to reconcile the various amounts owed by each party to the other. See, e.g., Letter of Nicholson to Calcagni, May 22, 2006, Trial Ex. I. Therefore, the Court will not permit default interest to be charged prior to the August 7, 2006 notice of default, because the Court finds that TST acquiesced to those defaults. However, when the efforts to reconcile failed, and Calcagni made no further payments, TST was within its rights to demand in August 2006 that Calcagni cure the default, and to accelerate the Note when the default was not cured.

C.
Right to Set Off Indebtedness

Calcagni claims a right to set-off the various purchase price adjustments against his indebtedness on the Note. As described above, however, many of his claimed adjustments were erroneous. The purchase price adjustment of approximately $95,000 provides no excuse for non-payment, as Calcagni's overdue payments far exceeded that amount at the time TST invoked its default and acceleration rights.[19] Moreover, the Note did not provide a right to set-off such debts against the required payments under the Note.[20] Therefore, the Court finds that TST properly found TSTRI, LLC to be in default under the terms of the Note.

The entire amount due should be calculated as evidenced by Schedule A, but excluding default interest for May 2006 through August 2006. Therefore, without any

[19] Calcagni has paid a total of $857,000 since agreeing to the Note. By August 2007, approximately seventeen payments of $60,000 would have been due for a total of $1,020,000.
[20] The Note does provide, however, that TST has a right to set-off any monies owed by Calcagni to TST.

regard to the effect of the adjustment clause, the total amount due on the accelerated Note is $2,142,766.10.

VI
Type of Relief

Calcagni has described its request for relief as an adjustment to the purchase price and the principal due under the Note, and it is clear that some adjustment is warranted. It is not clear, however, whether Calcagni asks this Court to reform the price terms contained in the Agreement and Note, or simply to award damages against TST in the amount of the adjustment.

Following the asset sale, in July 2005, TST conveyed a security interest in the Note to Rhode Island Resource Recovery Corporation (Resource Recovery), which held the Note under a pledge agreement. Based on its status as a holder of that security interest, Resource Recovery moved to intervene in this litigation prior to trial, and this Court denied its motion.

After trial, in March 2007, Resource Recovery gave notice to TST that it had defaulted under its obligations, that it was accelerating its loan with TST, and was assuming the rights of TST under the Note. Therefore, it seems that Resource Recovery is now the owner of the Note in question.

Any reformation of the Note's principal term, reducing the amount owed, would certainly be opposed by Resource Recovery.[21] See generally Right to Reformation of Contract or Instrument as Affected by Intervening Rights of Third Persons, 79 A.L.R.2d 1180 (1961). Therefore, the Court will conduct such further proceedings as are necessary to address whether reformation, damages, or perhaps some other remedy is appropriate as

[21] The Note contains the same adjustment clause language as the Agreement, so Resource Recovery had notice of the potential for invocation of its terms.

a result of the Court's conclusion that Calcagni is entitled to an adjustment to the purchase price. As the net effect of these actions is approximately $2 million owed to TST, the Court will order that the remaining funds presently held in escrow be released. However, the parties are directed to address whether those funds should be paid to either TST or Resource Recovery. Finally, in light of the indebtedness now owed by TSTRI, LLC to TST, the parties are directed to address TST's request that TSTRI, LLC be placed into receivership. The resolution of these questions is necessary before judgments may enter in either of the actions pending before the Court.

VII
Conclusion

After due consideration of the evidence introduced at trial, and the arguments advanced by counsel at oral argument and in their memoranda, the Court finds that in C.A. No. PC 06-4967, TSTRI, LLC is entitled to an adjustment to the purchase price of $95,181.81 as a result of the adjustment clause.

In C.A. No. PM 06-4986, the Court finds that TST is entitled to damages against TSTRI, LLC on Count I of its complaint in the amount of $2,142,766.10 arising from default under the Note. Similarly, it is entitled to damages against Peter Calcagni on his guarantee of that Note. The Court will not enter judgment against We Dispose, LLC, however.

Judgments in both actions may not enter until the parties address the type of relief which should follow as a result of the Court's finding that a purchase price adjustment is warranted. The Court will conduct such further proceedings as are necessary to resolve this question, and Resource Recovery shall be given notice of these proceedings.

Counsel may present orders consistent with the foregoing, which shall be settled after due notice to counsel of record.