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**Sandra Tarr v. Edward Dobkin, et. al.**

Contracts-Definiteness-Consideration-Power of Attorney

1. Generally, a contract is enforceable when the parties reach mutual agreement, exchange consideration and have outlined the terms of their bargain with sufficient clarity.
2. An agreement is sufficiently definite if (1) the parties intended to conclude a binding agreement and (2) the essential terms of that agreement are certain enough to provide the basis for providing an appropriate remedy.
3. To ascertain definiteness in the case of an oral contract, the court must examine the surrounding circumstances and the course of dealings between the parties to determine the intention of parties.
4. The requirement of consideration as an essential element of a contract is nothing more than a requirement that there be a bargained for exchange. Consideration confers a benefit upon the promisor or causes a detriment to the promisee. A valuable consideration consists in some right, interest or benefit to one party or some loss, detriment or responsibility resulting to the other party.
5. Consideration may consist of the promise or performance of act or forbearance, or some combination thereof. Even if a claim or right is doubtful, forbearance to pursue that claim or right will constitute sufficient consideration, so long as the forbearer has an honest and reasonable belief in the possible validity of the claim or right.

6. 20 Pa.C.S. Section 5602 does not require that a power of attorney explicitly identify the powers using specific language identical to or similar to the statutory language. The powers enumerated by Section 5602(a) can be granted by any language showing a similar intent, including general language.

(Edward L. Russakoff)

Bernard D. Marcus, Robert M. Barnes, for plaintiff, Sandra Tarr, George H. Crompton, Leonard J. Marsico, for defendants, Edward Dobkin, et al.  
No. G.D. 97-3355. In the Court of Common Pleas of Allegheny County, Civil Division.

**ADJUDICATION**

Penkower, J., December 22, 1999-Plaintiff Sandra Tarr (“Sandy”) and Defendants Edward Dobkin (“Ed”) and Ronald Dobkin (“Ron”) are the children of the late I. Todd Dobkin (“Todd”). Sandy filed this suit in equity against Ed and Ron in their individual capacities and as trustees of the I. Todd Dobkin Trust I (“Trust”), and against five corporate defendants: Allied Block Industries, Inc. (“Allied Block”), Therm-O-Rock East, Inc. (“T.O.R.E.”), Acme Management, Inc. (“Acme”), Todd Trucking, Inc. (“Todd Trucking”) and Therm-O-Rock West, Inc. (“T.O.R.W.”) [collectively “the family companies”]. Plaintiff seeks, inter alia, specific enforcement of an agreement between her and her brothers, Ed and Ron, on behalf of themselves and the family companies, to provide certain income and benefits to her.<sup>1</sup>

**FACTS**

As patriarch of the Dobkin family, successful businessman Todd founded a number of closely-held corporations, including the five corporate defendants, over which he exercised tight control as sole shareholder, sole director and chief executive officer. In 1989, at his request, Todd’s daughter Sandy returned to Pittsburgh after having pursued a career in the textile industry in New York and North Carolina. She became employed full-time by one of the family companies, Acme, and engaged in the business of renovating houses in the Pittsburgh area.

Acme was primarily a leasing company, which purchased and assumed mortgages for and, buildings and equipment owned by the other family companies, and then leased them back to those companies. Through the inter-company leases, Todd established a monthly stream of income to Acme from T.O.R.E., T.O.R.W. and Allied Block. The purpose of the leases was to provide an income for Sandy. Todd transferred 45% of the stock in Acme to Sandy and retained ownership of the remaining 55%. Sandy’s brother Ed ran another of the family companies, T.O.R.E., in New Eagle, Pennsylvania, and brother Ron ran T.O.R.W., in Arizona. T.O.R.E. and T.O.R.W. are in the business of processing and sale of soils and soil amendments such as vermiculite and perlite. Todd set the salaries for all three children.

In 1991, Todd established a revocable living trust, the I. Todd Dobkin Trust, which Todd originally served as sole trustee and sole lifetime beneficiary. The three children were designated as co-trustees and co-beneficiaries in the event of Todd’s death. The assets of the Trust consisted of all of Todd’s stock in the family companies. The Trust provided for mandatory profit distributions to Ed, Ron and Sandy from T.O.R.E. and T.O.R.W. after Todd’s death, in accordance with a schedule attached to the Trust. These profit distributions were intended to be

separate from and in addition to the income received by the three children from their respective companies.

On January 9, 1991, Todd executed a Springing Family Power of Attorney conferring broad powers upon Sandy as attorney-in-fact with respect to Todd's personal and business affairs in the event of Todd's incompetency or disability. Ed was designated as successor attorney-in-fact. Todd also executed a separate power of attorney to Sandy for health care purposes.

On September 27, 1994, as Todd's health was deteriorating, Ed arranged a meeting at the River's Club in downtown Pittsburgh attended by Sandy, Ed and Mark Unatin, Esq. ("Unatin"), an attorney who represented Todd, Ed, Ron and the family companies. At that meeting, Ed requested that Sandy sign a series of documents related to the family companies, in her individual capacity and as holder of the power of attorney, and also requested that she relinquish her rights under Todd's power of attorney so that Ed could assume that role as successor.

Sandy refused to do either, indicating that she wished to consult an attorney for herself and take some time to consider the requests. According to Sandy, after Unatin left the meeting, Ed indicated that he would cut off the flow of income to Sandy by stopping the lease payments to Acme if she did not cooperate in signing the corporate documents.

The day after the meeting, Ed instructed Robert Swalchick ("Swalchick"), controller of the family companies, to send Sandy a letter outlining the salary and benefits she was receiving and could expect to receive in the future ("Swalchick letter"). The letter, dated September 28, 1994 reads, in part, "You are now receiving and will continue to receive a salary and benefits (which are outlined) from Acme Management, Inc., rather than a draw of profits for refurbishing houses." The letter specifies a gross annual salary of \$122,900 plus various benefits that, when added to the salary, total \$129,827.2 Ed's purpose in sending the letter was to assure Sandy that her salary and benefits would continue as theretofore. The letter contained no time limitations.

According to Ed, the only limitation on the continuation of the salary and benefits was that the companies continue to be profitable.

After Sandy retained Henry Cohen, Esq. ("Cohen"), a meeting of the boards of directors and shareholders of the family companies was scheduled for February 10, 1995.

The proposed agenda included, among other action, removing Todd as sole director of the family companies and replacing him

with Ed, Ron and Sandy, and allocating over \$1,000,000 in fire insurance proceeds.

A preparatory meeting was held on February 8, 1995 at Unatin's office, attended by Sandy, Ed, Unatin, Cohen, and Rod Holsinger, an accountant for the family companies. Ed represented himself, Ron and the family companies.

The purpose of the meeting was to discuss the items to be voted on at the boards and shareholders meetings scheduled two days later, and to explain the proposed corporate actions to Sandy and Cohen. The meeting was recorded on audiocassette and a transcript was made from that recording (to the extent audible).

By way of background, by 1994 Todd had arranged for the transfer of some of the shares of stock in the family companies to be held individually by Sandy, Ed, and Ron outside of the trust. He had also restructured the ownership of Acme.

As of February 8, 1995 the Trust owned bare majorities of the stock in T.O.R.E., T.O.R.W. and Acme. Sandy, Ed, and Ron each owned one-third of the remainder of the stock in those companies. As a result of the deterioration of Todd's mental and physical health, Todd had become mentally incompetent, disabled and unable to continue involvement in his personal and business affairs.

According to stipulation of the parties entered into at trial, the power of attorney granted to Sandy became effective, and Sandy had the power to exercise all rights granted thereunder, at least as early as February 7, 1995.

At the February 8th meeting, in response to questions from Cohen as to what Ed and the others wanted Sandy to do, Ed and Unatin requested that Sandy consent to certain corporate actions. In particular, they sought her consent for the removal of Todd as President of T.O.R.E., T.O.R.W. and Allied Block, and for the installation of Ed as President of T.O.R.E. and Allied Block, and of Ron as President of T.O.R.W. Sandy was to become President of Acme. Secondly, they sought her consent for the reinvestment of a \$1,000,000+ insurance payment received as a result of a fire loss suffered by a building owned by Acme.

Thirdly, they sought her consent to convert the family companies from C-Corporations to S-Corporations. Finally, they sought Sandy's agreement to cancel certain equipment leases in which Acme received rental income from the family companies, which income had been used to pay Sandy's salary. The proposed actions would require Sandy voting as a shareholder, on her own and Todd's behalf, and as a co-trustee

of the Trust, to remove Todd as sole director of the family companies and as sole trustee of the Trust, and to replace him with the three siblings as co-trustees, co-directors and officers.

After concerns were raised by Sandy and Cohen regarding her belief that her income from the family companies would be threatened if she did not cooperate in signing the documents as requested, Ed responded by pulling out the Swalchick letter and stating:

**MR. DOBKIN:** Okay, Here's a copy on September 28th that I had Bob [Robert Swalchick, Controller of the family businesses] put that together for Sandy. And at that time, I even explained to Sandy that - that she doesn't even have to build houses in order to draw income. She even said to me: Geez, could I build a house up on Nantucket? I says: I don't give a damn where you build a house. You can do anything you want to do. That's-you'll-you'll get money every year whether you build a house or don't build a house.

**MR. DOBKIN:** So if it was my intention to - to cut my sis - to threaten my sister, I sure in hell wouldn't have had Bob send her a letter like that. [Meeting transcript, pp. 15-16.] Ed later reinforced his intentions.

**MR. DOBKIN:**-I think that basically you have misheard things-let me put it this way: My actions bespeak my words? Have I stopped the payments? Have you missed a check?

[Meeting transcript, p. 27].

The Swalchick letter's significance was reemphasized later in the meeting.

**MR. UNATIN:** Let's make it clear for Sandy that that letter controls. And however we-

**MR. COHEN:** The letter-you mean the salary.

**MR. UNATIN:** Right, that salary, that benefits, correct, and however you want us to restate it or confirm it or whatever, it will be done. [Meeting transcript, p. 52].

Sandy's durational concerns were also addressed during the meeting.

**MR. DOBKIN:** It's my feeling, and it's my want, to see that my sister is handsomely taken care of the rest of her entire life. I mean, I can't be anymore explicit than that. All right?

**MR. COHEN:** Good to hear.

**MR. DOBKIN:** All right.

**MR. UNATIN:** That was certainly Todd's plan.

**MR. DOBKIN:**-But I'm telling you and I'm telling Sandy that you heard what my position is. And I don't know, what the hell, if I've got to take an ad out in the God damn paper, you know what my position is. I want her to live comfortably all her life. [Meeting transcript, pp. 21-22, 32]. Sandy's anxiety about the continuation of the Acme rents was also considered.

**MR. DOBKIN:** Oh yes, your salary comes from Acme.

**MS. TARR:** It comes from Acme. Well if no money goes into Acme in the form of rent, 'cause that's the money that goes into Acme, this is moot. This means nothing. And you said to me that if I didn't sign-

**MR. DOBKIN:** No, I didn't say that.

**MR. DOBKIN:**-But as I sit here right now, I have no intention of stopping rent payments. I have no intention of that. It's not even in my power to do it. I have no intention of stopping rent payments. [Meeting transcript, pp. 17-18]. In response to Cohen's subsequent comments about Sandy's need to have her regular income maintained (as contrasted with the annual trust distribution), and to protect the structure of Sandy's salary flowing from the lease payments made to Acme, Unatin poignantly summed up Sandy's economic security concerns.

**MR. UNATIN:** And there-there should be something. She should be-she should have everything she wants, and she just articulated (inaudible), and whatever we can do to do that, she's entitled to. It's morally and legally correct. [Meeting Transcript, p.32].

At the conclusion of the meeting, it was agreed that Unatin would send to Cohen the corporate documents requiring Sandy's signature at the February 10th boards and shareholders meetings. After reviewing the documents, and based on his understanding that a binding agreement had been reached at the meeting two days previous, Cohen directed Sandy to sign the documents.

On February 10, 1999, the boards of directors and the shareholders of each of the family companies met, as did the trustees of the Trust, and took the actions proposed at the February 8th meeting. As co-trustee of the trust and co-shareholder of the companies, Sandy joined Ed and Ron in voting in favor of corporate resolutions removing Todd as sole

director, and as an officer of the companies, and replacing him with Ed, Ron and Sandy. Sandy also consented to resolutions giving up any rights that she or Acme had to the proceeds of the fire insurance policy for a building that had been owned by Acme and/or Todd and/or Sandy. These proceeds were assigned to T.O.R.E.

Ron received a copy of the audiocassette recording. He understood that Ed had spoken on his behalf at the meeting. Ron did not disavow any statements or promises made by Ed on his behalf, but, rather, agreed with them. From February 10, 1995 through November 1995, efforts to memorialize any agreements reached at the February 8th meeting, beyond what was captured on the tape recording or produced in writing at the meeting, were unsuccessful. However, according to Cohen, Unatin repeatedly reaffirmed the commitments made at the meeting. Todd's health continued to deteriorate. On October 2, 1995 an Order was obtained from Orphan's Court reforming the Trust to provide that Sandy, Ed, and Ron would serve as interim co-trustees of the Trust, replacing Todd.

The Orphan's Court Order was made retroactive to February 10, 1995, and ratified all actions taken by them as trustees. Todd died on October 19, 1995. From the time of the meeting on February 8th until Todd's death ten months later, Sandy fully cooperated with Ed and Ron with respect to any corporate actions and with respect to the Petition to Reform the Trust Agreements. During this time period, Sandy continued to receive the income and benefits outlined in the Swalchick letter.

Prior to the February 8th meeting, sometime in the fall of 1994, without the knowledge or approval of Todd or Sandy, Ed and Ron directed Swalchick (the family companies' controller) to pay each of them a lump sum payment of \$100,000. Shortly after Todd's death in 1995, Ed and Ron directed Swalchick to pay each of them an additional \$75,000 lump sum payment, without the knowledge or approval of Sandy.

On the day before Todd died, a letter was sent to Sandy on behalf of defendants raising for the first time a question of the economic viability of Acme. Three weeks after Todd's death, at a meeting attended by Ed, Unatin and Cohen, Ed stated for the first time that Sandy was receiving too much money from the family companies and that the companies would no longer underwrite her home renovation business. It was also proposed that Sandy's future trust distributions be reduced to reflect any alleged overpayment.

In December 1995, Sandy retained new counsel who began negotiating on her behalf to seek to have her brothers buy out

her one-third share of the companies. In the meantime, an appraiser had been hired to determine the value of the stock of the family companies for estate tax purposes. On April 22, 1996, Sandy was informed by letter that, effective May 1, 1996, her salary income would be reduced to \$3,800 per month and the expenses outlined in the Swalchick letter would no longer be paid.

These actions were then delayed until August 1, 1996 pending a buyout proposal from Sandy. In May, 1996 Sandy's automobile lease was terminated, and beginning June 1, 1996 defendants started recording payments to Sandy as "advances" for accounting purposes, rather than as income which had been the practice since 1989. Beginning in 1996, and continuing to the present, defendants reduced Sandy's year-end trust distributions by the amount of the "advances" paid by the family companies to Sandy.

On July 12, 1996, after receiving the estate tax appraiser's report in late June, Sandy's attorney sent a letter to Ed and Ron containing Sandy's buyout proposal. Apparently not pleased with the proposal, defendants reduced Sandy's income and benefits effective August 1, 1996, as previously threatened in the April 22, 1996 letter. On September 27, 1996, Sandy filed a petition in Orphans Court challenging the salary reduction and other conduct of her brothers as controlling trustees of the Trust. Shortly thereafter, Ron and Ed further reduced the \$3,800 stipend to \$1,050 per month. Since October 1996, defendants have continued to pay Sandy \$1,050 per month, but have characterized it as a loan to her and have deducted the payments from her year-end trust distributions.

In November 1996, the board of directors of T.O.R.E. offered additional shares of stock to all current shareholders. Ed and Ron purchased the offered shares by redeeming notes that they had previously taken from T.O.R.E. in lieu of profit distributions, which Sandy had received in cash. The Trust did not purchase additional shares, nor did Sandy.

## **DISCUSSION**

The primary issue in this case is whether there exists a legally binding contract between the parties. Plaintiff's position is that in return for Plaintiff cooperating with her brothers' plan to take control of the family companies, Defendants agreed to pay Plaintiff a definite amount of income and benefits from the family companies for her lifetime, unless and until the companies are sold, and so long as the companies remain profitable. Plaintiff is seeking specific enforcement of the contract. Defendants maintain that the alleged oral contract is not valid or enforceable because of a lack of definiteness of its terms and because of a lack of consideration.

**DEFINITENESS**

Generally, a contract is enforceable when the parties reach mutual agreement, exchange consideration and have outlined the terms of their bargain with sufficient clarity. *Greene v. Oliver Realty, Inc.*, 363 Pa.Super. 534, 539, 526 A.2d 1192, 1194 (1987), alloc. den., 517 Pa. 607, 536 A.2d 1331 (1987). An agreement is sufficiently definite if (1) the parties intended to conclude a binding agreement and (2) the essential terms of that agreement are certain enough to provide the basis for providing an appropriate remedy. *Linnet v. Hitchcock*, 324 Pa.Super. 209, 214, 471 A.2d 537, 540 (1984).

In the case of an oral contract, the court must examine the surrounding circumstances and the course of dealings between the parties to determine the intention of the parties. *Westinghouse Electric Co. v. Murphy, Inc.*, 425 Pa. 166, 171-2, 228 A.2d 656, 659 (1967). In this regard, the actions of the parties pursuant to the contract are significant and substantial evidence of their intention. *Fenestra, Inc. v. McShain*, 433 Pa. 137, 139, 248 A.2d 835, 836 (1969).

Under the two-part Linnet test for definiteness, the first part has clearly been satisfied. There can be no dispute that the parties intended for there to be an agreement along the lines of Sandy's cooperation with respect to the structure of the family companies, in return for economic security for Sandy.

The transcript of the February 28, 1995 meeting is replete with statements from the parties and their legal representatives to this effect, both specifically and in their totality.

Of particular significance on this issue, I found the testimony of Rodney Holsinger ("Holsinger") compelling and credible. Holsinger, the family companies' accountant, was the only disinterested participant in the February 8th meeting. He testified at trial, without qualification, that the parties made definite, specific promises. In particular, Ed promised that the lease payments to Acme would continue and that Sandy would receive an income commensurate with a memorandum written by Bob Swalchick earlier in the year, along with a benefits program. He testified further that the promised income to Sandy would continue for the rest of her life to the extent that the companies were able to fund it, or until the companies were sold.

Finally, he testified definitively there was no connection between any of Ed's promises and the trust income to which Sandy was already entitled.

The second prong of the Linnet test requires only that there

be a reasonably certain basis on which the court can provide an appropriate remedy. *Greene v. Oliver Realty, Inc.*, supra, 526 A.2d at 1194. Defendants argue that there were no terms definite enough to create an enforceable agreement. Specifically, they claim the alleged agreement does not sufficiently identify the amount to be paid to Sandy, the duration of the contract, and which of the defendants is responsible for making the payments.

**PAYMENT AMOUNTS**

The amounts required to be paid to Sandy under the agreement are clear and definite. At the February 8th meeting, Ed pulled out a copy of the Swalchick letter and stated that he had arranged for the letter to be put together for Sandy. Mark Unatin, representing Ed, stated that the Swalchick letter controls.

In response to Sandy's lawyer, Henry Cohen, asking whether Unatin, in referring to the letter, meant the salary, Unatin replied: "Right, that salary, that benefits, correct, and however you want us to restate it or confirm it or whatever, it will be done." The Swalchick letter is clear and unambiguous. It states, in relevant part, that Sandy "was receiving and will continue to receive a salary and benefits (which are outlined) from Acme Management, Inc.-" The outline then specifies an annual gross salary of \$122,900 and a seven-item benefit package with a total annual value of \$6,927.

The course of dealings among the parties, before and after the February 8th meeting, unquestionably supports the definiteness of the income terms of the contract. The amounts actually paid to Sandy during the relevant time frame (until the payments were drastically reduced effective August 1, 1996) approximate the gross amount referred to in the Swalchick letter. In 1994, the year of the Swalchick letter, according to Sandy's W-2 statement prepared by Defendants, she received a gross annual salary of \$113,5505. In 1995, the year of the February 8th meeting, Sandy received W-2 income of \$133,500.

Moreover, Ed testified at trial that Sandy continued to be paid the salary specified in the Swalchick letter for fifteen to eighteen months after the February 8th meeting. Swalchick, the controller of the family companies, testified in his deposition that he paid Sandy in accordance with the Swalchick letter for two years.

Ron testified that payments made to Sandy for fifteen to sixteen months after the February 8th meeting, were consistent with the promises made by Ed. Defendant's argument that the most Sandy might be entitled to is the "net" (i.e., after-tax) figure contained in the Swalchick letter, is not supported by the record. The language of the letter speaks for itself and is not

qualified in the manner suggested by Defendants. Moreover, at the February 8th meeting Ed never qualified his promise by referring to any “net” figure. Most significantly, for a year and a half after the February 8th meeting, Sandy was paid in accordance with the specified gross figure.

Similarly, the Court rejects Defendants’ claim that the payments to Sandy should be reduced by any mandatory trust distributions. Ed admitted at trial that the promise to pay Sandy the salary and benefits contained in the Swalchick letter were independent of, and in addition to, any entitlements she had from the Trust.

This was also confirmed by Holsinger’s testimony. With respect to the payment terms, the second prong of the Linnet test has been satisfied since this essential term is certain enough to provide the basis for providing an appropriate remedy. That remedy is simply to require Defendants to pay Plaintiff strictly in accordance with the terms of the Swalchick letter, which they had no problem complying with prior to August 1996.

#### **DURATION**

Defendants assert that there was no definite duration agreed upon by the parties and that the contract therefore fails for lack of definiteness of this essential term. Plaintiff’s position is that the contract that was formed at the February 8th meeting provides that Plaintiff is entitled to the salary and benefits for the remainder of her life, subject to certain conditions.

At the February 8th meeting, Ed was insistent that his sister be taken care of handsomely for her entire life. At trial, he testified that the only condition on the duration of the promise to pay Sandy in accordance with the Swalchick letter was that the companies remain profitable. Holsinger testified that the promise made at the meeting was to make the payments to Sandy for the rest of her life to the extent the companies were able to fund it, and only until the companies were sold. It was Cohen’s belief that there was a binding legal commitment to pay Sandy as long as she lived, subject only to the companies’ ability to pay. The fact that the parties failed to execute a written contract memorializing the agreement reached at the February 8th meeting, in large part because of Ed’s fear that the companies could not afford it, does not derogate from the Court’s conclusion that an enforceable conditional lifetime promise was made.

Defendants suggest that in the absence of a definite durational term, the Court has the power to impose a reasonable term. They propose that the contract should not extend beyond the year 2003 (the year Plaintiff becomes eligible for full social security benefits). Generally, if an essential term is left out of

an agreement, the law will not invalidate the contract, but will include a reasonable term. *Greene v. Oliver Realty, Inc.*, supra, 526 A.2d at 1194. However, the court should not attempt to fix contractual terms that are inconsistent with the intent of the parties. *Id.* The intent of the parties in this case is clear the salary and benefits to be paid to Sandy were to continue for the remainder of her life, unless the companies were sold, and to the extent that the companies remain profitable.

The Linnet test for definiteness requires a reasonably certain basis for giving an appropriate remedy. The remedy contemplated herein is to require that the salary and benefits continue until Plaintiff dies, or the companies are sold, whichever comes first. The remedy will also include a mechanism for modification of the payments in the event that the companies are unable to fund the payments.

#### **PARTIES TO THE CONTRACT**

The promises made by Ed at the February 8th meeting were made on behalf of Ed and Ron personally, as well as on behalf of the family companies. Ed testified that he was representing himself, Ron and the companies at the meeting.

Holsinger testified that based on Ed’s statements at the meeting, he was of the belief that Ed was making an individual promise and a promise on behalf of the companies. Sandy testified that she had the same impression. At no time during the meeting did Ed state or imply that his promises were only on behalf of the companies. Ron was not present at the meeting, but a tape recording of the meeting was delivered to him. He confirmed through his testimony at trial that he was aware that Ed had purported to speak on his behalf at the meeting and was aware of the promises made by Ed at the meeting concerning payments to be made to Sandy, yet did nothing to disavow the agreement. He testified that he agreed with and supported the promises made by Ed. By his words and conduct, as well as by the benefits he received as a result of the contract, Ron ratified the contract and became equally liable with Ed. See Restatement of Agency 2d, 82, 83, 94, & 98.

Placing individual responsibility on Ed and Ron under the circumstances is not unreasonable in light of the substantial benefits conferred on each of them as a result of Sandy complying with her end of the bargain. As acknowledged by Ron in his testimony, Sandy’s cooperation with Ed and Ron with respect to all requested corporate action gave Ed and Ron total control of the family companies.

It is only fair that the corporate defendants be primarily responsible for the payments under the contract, and that the individual defendants be liable only if the companies fail to

make the required payments to Plaintiff. All payments to Sandy over the years have come from Acme, which received its funds in the form of lease payments from the other family companies. It was Todd's intent in structuring the family companies that all three of his children receive adequate support from the family companies. Regardless of the conduit or mechanism for payment to Sandy, the individual defendants should be responsible for payment only if, by reason of their control of the corporate defendants, they wrongfully interfere in the ability of the companies to make the required payments.

### CONSIDERATION

Defendants claim that any promise Ed may have made to continue Sandra's income was not supported by consideration. In *Cobaugh v. Klick-Lewis, Inc.*, 385 Pa.Super. 587, 591, 561 A.2d 1248, 1250 (1989), the Superior Court reaffirmed that, "The requirement of consideration as an essential element of a contract is nothing more than a requirement that there be a bargained for exchange. Consideration confers a benefit upon the promisor or causes a detriment to the promisee." [Citations omitted]. A valuable consideration consists in some right, interest or benefit to one party or some loss, detriment or responsibility resulting to the other party. *PNC Bank, Nat. Ass'n. v Balsamo*, 430 Pa.Super. 360, 381, 634 A.2d 645, 658 (1993), alloc. den., 538 Pa. 659, 648 A.2d 790 (1994).

Defendants assert that Sandy offered and gave nothing in exchange for the promise of continued income. The record contradicts their position.

In reliance on the promises made by Ed, Sandy agreed to and took the following actions in her capacities as co-shareholder, co-director and co-trustee. She exercised Todd's power of attorney to vote to remove him as sole director of the family companies and replace him with Ed, Ron and her as co-directors. She allowed Ed to replace Todd as president of T.O.R.E. and Allied Block, and Ron to replace Todd as president of T.O.R.W. She allowed the \$1,000,000+ Acme fire insurance proceeds to be assigned to T.O.R.E. for the purpose of building a new facility for T.O.R.E. She thereby gave up any rights that she or Acme had in those proceeds and this also resulted in a decline in rental payments to Acme, Sandy's source of income. She allowed the family companies to be changed from C-Corporations to S-Corporations. She allowed equipment leases, from which Acme (and she) received income from the other family companies, to be terminated. In sum, Sandy cooperated fully with her brothers taking full control of the family companies.

Defendants argue that Ed and Ron did not legally require Sandy's cooperation to accomplish the corporate restructuring

and other actions taken on February 10, 1995, but were involving her in the interests of family harmony. However, it is the parties' objective manifestation of intent, as opposed to their unstated motives, which determines whether or not a contract is formed. *Ingrassia Construction. Co., Inc. v. Walsh*, 337 Pa.Super. 58, 486 A.2d 478 (1984).

Defendants' intent was manifested by their words at the February 8th meeting, as well as their subsequent conduct, which clearly demonstrated an exchange of adequate consideration. They further assert that Sandy suffered no detriment as a result of the actions that she took at their request. Again, neither the record nor the law supports this position.

Consideration may consist of the promise or performance of an act or forbearance, or some combination thereof. See Restatement (2d) of Contracts, 71 and comment d. Even if a claim or right is doubtful, forbearance to pursue that claim or right will constitute sufficient consideration, so long as the forbearer has an honest and reasonable belief in the possible validity of the claim or right. *Lombardo v. Gasparini Excavating Co., Inc.*, 385 Pa. 388, 391-392, 123 A.2d 663, 665 (1956). Restatement (2d) of Contracts, 74. I find that to the extent that any of Plaintiff's claims or rights was of doubtful validity, Plaintiff had an honest and reasonable belief in their validity.

Plaintiff's forbearance consisted of the following. She abstained from pursuing potential shareholder claims regarding her and Acme's entitlement to a share of the fire insurance proceeds, as well as challenging the discontinuance of the lease payments to Acme. As a shareholder, Plaintiff had rights to challenge all of the corporate actions to be taken on February 10, 1995. See, e.g., 15 Pa.C.S. 1782, 1791-93. Sandy also had substantial rights as of February 8th, 1995 under the power of attorney, which she agreed not to exercise to prevent any of the proposed corporate actions or interfere with Ed and Ron's taking control of the family companies.

In addition to specific powers granted, the power of attorney empowered Sandy "generally to act for [Todd] in all matters affecting [his] business or property, with the same force and effect and to all intents and purposes as though [he] were personally present and acting for [him]self." These powers included, inter alia, the power to create trusts, renounce fiduciary positions, withdraw and receive the income or corpus of a trust, to engage in personal property transactions and to engage in stock, bond and other securities transactions. 20 Pa.C.S. 5602(a)(2), (6), (7), (11) and (12).

Defendants argue that in the absence of specific language in

the power of attorney granting certain authority, Plaintiff did not have the power to exercise some of the permitted powers under 20 Pa.C.S. 5602, such as the power to engage in stock, bond and other securities transactions. However, Section 5602 does not require that a power of attorney explicitly identify the power using specific language identical to or similar to the statutory language. The powers enumerated in Section 5602(a) can be granted by any language showing a similar intent, including general language. Estate of Reifsneider, 531 Pa. 19, 24-25, 610 A.2d 958, 961 (1992). See also In the Matter of Mosteller, 719 A.2d 1067 (1998) (specific grant of power to make trusts and make additions to trusts includes power to revoke trust, particularly with general language in the power of attorney approximating the language in the power of attorney in the case sub judice).

Armed with the powers under the power of attorney, as of February 8, 1995 Sandra could have resigned Todd from his positions as sole trustee and sole director of the family companies, and caused the appointment of a new trustee. She also could have withdrawn the shares in the family companies from the Trust, created a new trust with herself as sole trustee and transferred the stock to the new trust. She also could have withdrawn the shares from Trust and voted them to elect herself as new sole director. In essence, she could have taken control of the companies on behalf of Todd and herself and removed Ed and Ron from their positions.

There is some dispute as to whether or not Todd owned any stock on February 8, 1995, whether Sandy had the authority to transfer and vote Todd's stock under the power of attorney, and whether Sandy potentially had the right to exercise Todd's vote as a director of the family companies. The court does not have to determine these matters.

While the extent of Sandy's rights under the power of attorney may be unclear, what is clear is that Defendants believed she might have such rights, and were concerned with "eliminating any doubt", to use the words of Mark Unatin, Defendant's attorney. Again, in his words, Sandy's cooperation "sure made it a lot easier". Sandy's forbearance to pursue any of these rights constitutes sufficient independent consideration.

## CONCLUSION

An enforceable contract was entered into between Plaintiff and Defendants on February 8, 1995. Defendants agreed to provide Plaintiff specific income and benefits for life, subject only to the condition that the family companies remaining profitable, and unless and until the companies were sold in return for Plaintiff's full cooperation in turning control of the family companies over to her brothers. Plaintiff fulfilled her part of the bargain and

performed fully under the terms of the contract. Defendants blatantly violated their obligations under the contract by substantially reducing the promised payments to Plaintiff.

Plaintiff is entitled to specific performance of the contract as well as damages. Wherefore, the following Decree Nisi is entered.

## DECREE NISI

On this 22nd day of December, 1999, after trial in the above equity matter, based upon the findings set forth in the October 21, 1999 Order of Court and for the reasons set forth in the foregoing adjudication, IT IS HEREBY ORDERED AND DECREED as follows:

1. A legally binding contract was entered into between Plaintiff and Defendants on or about February 8, 1995 and that contract continues in full force and effect.
2. Plaintiff is entitled to specific performance of the contract.
3. As a result of Defendants breach of contract, Defendants shall, within thirty (30) days of the date of this Decree, pay damages to Plaintiff in the total amount of \$534,815.00. This includes (1) the sum of \$426,508.00, representing past salary and benefits due to Plaintiff from June 1, 1996, the date of the first breach, through December 31, 1999 (2) the sum of \$55,065.00, which is the net amount due to Plaintiff based upon expert reconciliations of amounts due between the parties separate and apart from (1) and (3) the sum of \$53,224.00 in pre-judgment interest on the above amounts calculated through the date of this Order. Per diem interest of \$78.00 shall be added for each day between December 22, 1999 and the date of payment.
4. In accordance with the terms of the contract, Defendants shall henceforth pay to Plaintiff the annual sum of \$122,990.00, payable in twelve monthly installments of \$10, 241.67. The monthly installments shall be payable on the last day of each month with the first payment due on January 31, 2000.
5. Defendants shall provide the following annual benefits to Plaintiff at Defendants' cost or pay the equivalent cash value to Plaintiff for any such benefit not provided: hospitalization-\$2,126.00 auto phone-\$1,320.00 life insurance-\$1,350.00 auto insurance-\$650.00 auto garage-\$780.00 auto expense-\$400.00 and travel-\$301.00.
6. The payments and benefits provided for in paragraphs 4 and 5 above shall continue until the earliest of the following events: i) the death of the Plaintiff ii) in the event the Defendant

companies are sold, the date Plaintiff receives full payment for all of her ownership interest in the Defendant companies or iii) the date of any modification created in accordance with paragraph 8 below.

**7.** All Defendants, individual as well as corporate, are liable for the payment of the sums provided for in paragraphs 3, 4 and 5 above, subject to the following conditions. The corporate defendants shall be primarily responsible for the payment of any and all sums due and the individual defendants shall be responsible for said payments only in the event of, and to the extent of, the failure of the corporate defendants to make such payments.

**8.** If at any time the Defendants contend that the corporate defendants are not able to pay the amounts set forth in paragraphs 4 and 5 above, due to adverse business conditions not caused (directly or indirectly) by Defendants or by distributions or transfers to or among Defendants, Defendants shall so notify Plaintiff and her counsel in writing of such contention and provide to Plaintiff and her counsel all supporting documentation, including financial statements and accounting records.

Within ten (10) days of receipt of such notice and supporting documentation by Plaintiff and her counsel, Plaintiff and her counsel may request additional documentation and information related to such contention, which shall be provided by Defendants within five (5) days of such request. Within five (5) days thereafter, counsel for Plaintiff and counsel for Defendants shall meet and confer in an attempt to resolve the matter by agreement between the parties. If the parties are unable to resolve the matter, Defendants may file a motion with this Court requesting that this Decree be amended because of the corporate Defendants' inability to pay in accordance with the standards set by this paragraph. Upon the filing of such motion, the parties may engage in additional discovery in preparation for an evidentiary hearing to be held by the Court.

If Defendants file a motion to amend this Decree as provided herein, and such motion is denied, Defendants shall pay to Plaintiff reasonable attorney's fees and costs incurred in conjunction with such motion. Unless and until such time as this Court's Decree is amended or modified, all payments and benefits in accordance herewith shall continue to be made to Plaintiff without interruption.

#### **BY THE COURT**

/s/Penkower, J.

**1.** The complaint contains four counts: Breach of fiduciary duty against Ed and Ron Breach of Contract against all defendants Promissory Estoppel against Ed and Ron and Unjust Enrichment against all defendants. With the consent of all parties, the Court dismissed Defendant Acme's counterclaim against plaintiff on September 1, 1999.

**2.** The original letter contained different figures. However, shortly after the letter was sent, Swalchick, after recompiling figures, sent Sandy an amended copy (i.e., the initial typed copy with handwritten changes Plaintiff's Exhibit 35).

**3.** Although not present, Ron was available by phone.

**4.** See pp. 5-7, above.

**5.** This figure approximates the figure contained in the original Swalchick letter, before it was amended to \$122,900. See fn. 2, above.