

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION

GREGORY NEELY d/b/a ALGREG	)	
CELLULAR ENGINEERING,	)	
	)	
Plaintiff,	)	C.A. No. 00-7884
	)	Calendar No. 3
v.	)	Judge Cheryl M. Long
	)	
MOBILE BELL COMMUNICATIONS,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

In this action for declaratory judgment, the plaintiff has filed a Motion for Summary Judgment.<sup>1</sup> Other motions are pending as well, and this Court will adjudicate all of them in a comprehensive analysis herein.

The plaintiff is Gregory Neely D/B/A Algreg Cellular Engineering. The essence of the Complaint for Declaratory Judgment is that the plaintiff seeks to establish as a matter of law that he is not required to participate in an arbitration proceeding with the defendants and that other signatories to a previous business agreement have no rights under that contract.

To be clear, it is useful to note that the defendants are essentially in two camps: those who oppose the plaintiff's lawsuit and those who agree with the position of the

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<sup>1</sup> The plaintiff's Motion for Summary Judgment was filed on April 24, 2001, when this matter was on another calendar.

plaintiff but who apparently were sued for the sake of including all parties necessary to just adjudication of the issues.

Those who consent to the entry of judgment in favor of the plaintiff are: A-1 Cellular Communications, LLC, Frederick W. Ball, Alee Cellular Communications, Robert A. Bernstein, Cranford Cellular Communications, Seth M. Kaplowitz, Jaybar Communications, Robert Hewell, Pinellas Communications, John E. Hoffman, Zephyr Tele-Link, Guy J. Lanza, Jr., Cel-Tel Communications, Frank McSweeney, EJM Cellular Partners and Edward J. Massey (hereinafter “the Consenting Defendants”). On May 11, 2001, the Consenting Defendants filed a Motion for Summary Judgment with respect to their own Counterclaims and Cross-Claims.

Consenting Defendants request substantially the same relief in their Cross-Claim against Moving Defendants as does Neely in his Complaint against Moving Defendants, *i.e.* a declaratory judgment seeking to establish that they are not required to participate in an arbitration proceeding with the Moving Defendants and that other signatories to a previous business agreement have no rights under that contract. Moreover, Consenting Defendants seek the same relief against Neely, in their Counter-Claim, thereby ensuring that *all signatories* to the MCRSA are prevented from asserting rights under the contract or pursuing any arbitration.<sup>2</sup>

In addition to the two Motions for Summary Judgment, the other pending motions are the Amended Motion to Compel Arbitration (filed on February 1, 2001), the Motion

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<sup>2</sup> Both Neely and Consenting Defendants make claims for costs and fees stemming from this litigation. As the parties are surely aware, the American Rule does not grant the victor in an action his, her or its costs and/or fees absent some statutory right or a right conferred by court rule. Therefore, if a party wishes to seek costs and/or legal fees, that party must submit a Bill of Costs or an appropriate motion, demonstrating entitlement to attorneys’ fees.

for Discovery, and the Motion to Amend Answer to Add Counterclaims (filed on May 14, 2001). These three motions were filed by Cellular Concepts, John A. Settle, Serendipity Partnership, Ronald H. Wiseman, Jack Richardson, George A. Ralston, Duane Scarborough, 21<sup>st</sup> Century Cellular, and Doug Polich (hereinafter “the Moving Defendants”).

The Court has reviewed the entire record, including a host of responsive pleadings that set forth the issues embraced in the motions. Based upon the following analysis, this Court concludes as a matter of law that summary judgment must be entered in favor of the Plaintiff and the Consenting Defendants.

This Court will grant Plaintiff and Consenting Defendants’ Motions for Summary Judgment, ordering the Clerk of the Court to enter declaratory judgment that the Moving Defendants do not have legal or equitable rights under or related to the MCRSA. For reasons that are obvious from the disposition of the summary judgment issues, the Court will deny the Amended Motion to Compel Arbitration. The Court will grant the Motion to Amend Answer to Add Counterclaims. However, the counterclaims contained therein fail as a matter of law, even under the facts asserted by the Moving Defendants. Thus, the Court will grant summary judgment as to these counterclaims as well.

### **MATERIAL FACTS NOT IN DISPUTE**

In the late 1980’s and early 1990’s, the FCC awarded licenses to build and operate cellular telephone systems in 428 rural service areas (RSAs) through a lottery system. Order Denying Motion to Compel Arbitration, filed April 13, 2001 at 1 (hereinafter “Order”). Most of the parties in this case applied to the FCC for these licenses and

executed a Mutual Contingent Risk Sharing Agreement (MCRSA) among themselves so that if any one of the parties won the license they could share in the proceeds from operating or selling the cellular systems. *Id.* at 1-2. In a 1991 staff ruling, the FCC found that the MCRSA violated the FCC's rules. *Id.* at 2; *see also* 56 Fed. Reg. 28559 (June 21, 1991) (summary). The appeal process within the FCC concluded on June 3, 1997, when the full FCC released a decision upholding the absolute ban on partial settlements among non-wireline applicants set forth in section 22.33(b)(2), the expressed purpose of which was to bar abusive application practices that squander the Commission's time and administrative purposes. *Id.*

The FCC concluded that agreements that allowed lottery losers to participate in the economic benefits of the lottery winner's cellular system violated the ban on partial settlements. *Id.* Although the Plaintiff in this matter asked the FCC to permit reformation of the MCRSA, the FCC refused, stating that any such arrangement violated the FCC's rule banning partial settlements. *Id.* Furthermore, the FCC awarded licenses to two of the MCRSAs participants (including the Plaintiff) only after it found that they had rescinded the MCRSA. *Id.*

The FCC denied petitions for reconsideration of its decision, *Algreg Cellular Engineering*, 14 FCC Reg. 18524. *Id.* The United States Court of Appeals for the District of Columbia Circuit affirmed the FCC Decision, *Alee Cellular Communications v. FCC*, 2000 U.S. App. LEXIS 7111 (D.C. Cir. 2000), and no party appealed to the U.S. Supreme Court. *Id.*

This case was certified to this Court's calendar, pursuant to the Honorable Herbert B. Dixon, Jr.'s Order of June 14, 2001, which granted Civil I designation.

## HISTORY OF THE CASE

In June 2000, two of the non-winning signatories to the MCRSA distributed letters demanding, *inter alia*, an accounting by each of the Winning Applicants and a distribution of funds pursuant to the MCRSA. Consenting Defendants' Statement of Material Facts Not In Dispute In Support of Motion for Summary Judgment ¶ 11. (Consenting Defendants' Facts.) Prior to the institution of the present action, Defendants Cellular Concepts and Serendipity Partnership attempted to institute an arbitration under the MCRSA. Complaint ¶ 2.

On or about October 26, 2000, Plaintiff initiated this action for several forms of relief: (1) a declaratory judgment that the threatened arbitration is not arbitrable in light of the FCC's ruling, (2) an injunction barring the institution of any arbitration under the MCRSA, and (3) a declaratory judgment that the signatories to the MCRSA do not have any legal or equitable rights under the contract or related to the contract. *Id.* at ¶ 3. In addition, Plaintiff seeks a declaratory judgment that the institution of any arbitration under the MCRSA or any other action under or related to the MCRSA is barred by the statute of limitations and/or the doctrine of laches. *Id.* at ¶ 4.

On or about November 14, 2000, Moving Defendants filed an Answer and Affirmative Defenses and moved to compel arbitration under the MCRSA. Moving Defendants' relevant affirmative defenses consisted of (1) breach of the MCRSA; (2) *quantum meruit*; (3) unjust enrichment; and, (4) fraud. Answer and Affirmative Defenses, pp. 4-5.

On or about December 12, 2000, Consenting Defendants filed a Consenting Answer with Counterclaim and Cross-Claims in response to Plaintiff's Complaint. Consenting Defendants' Facts at ¶ 13.

On February 1, 2001, Moving Defendants served an amended motion to compel arbitration proceedings. *Id.* at ¶ 14. The Honorable Stephanie Duncan-Peters entered an Order denying the Moving Defendants' motion to compel arbitration on April 13, 2001. *Id.* at ¶ 15. In addition to denying the request to arbitrate, Judge Duncan-Peters also concluded in her Order that (1) it was the "unambiguous" intent of the parties to be relieved of all obligations under the MCRSA upon a final FCC adjudication that the agreement was contrary to its rules; (2) because the FCC did just that, the MCRSA therefore "by its own provision, terminated" and (3) because the MCRSA is an illegal contract "wholly contrary to the FCC rules," it is unenforceable in any event. *Id.* at ¶ 16.

Plaintiff moved for summary judgment on April 24, 2001, alleging that based on "undisputed facts found in the April 13, 2001 Order and April 13 Order's findings about the FCC Decision . . . under D.C. law, there could not be any breach of the MCRSA, unjust enrichment or *quantum meruit* claim based upon the illegal MCRSA or illegal promises derived from the MCRSA." Plaintiff's Status Report, p. 2. The Consenting Defendants sought summary judgment on the same basis. This Motion was contested by the Moving Defendants on May 10, 2001, who alleged that Plaintiff was liable to them under the following claims: *in pari delicto*, breach of contract, promissory estoppel, *quantum meruit*, unjust enrichment, and negligent misrepresentation.

Additionally, Moving Defendants filed a Motion to Amend Answer to Add Counterclaims, in which for the first time, Moving Defendants seek to add negligent

misrepresentation and unclean hands affirmative defenses and breach of contract (*quantum meruit*), unjust enrichment, negligent misrepresentation, and promissory estoppel counterclaims. Plaintiff and Consenting Defendants have opposed this Motion. Plaintiff and the Consenting Defendants filed Replies to Moving Defendants' Opposition to Summary Judgment on June 5, 2001.

The parties appeared before this court for a status conference on October 7, 2002, at which time they agreed that oral argument on the matter was only necessary if the Court deemed it so. As this Court is able to rule on the Motion for Summary Judgment based on the detailed pleadings and the record before it, oral argument is not necessary.

#### **APPLICABLE LAW AS TO SUMMARY JUDGMENT**

A Court's decision to grant summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). After the movant makes an initial showing that he, she, or it is entitled to judgment as a matter of law, the non-moving party must demonstrate that there is a genuine issue of material fact that requires a trial. *Townsend v. Waldo*, 640 A.2d 185, 187 (D.C. 1994).

The party opposing summary judgment is entitled to the benefit of all favorable inferences which may reasonably be drawn from the evidentiary materials and uncontested facts. *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C. 1994) (en banc); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991).

Rule 56 of the Superior Court Civil Rules governs the litigation of summary judgment motions. The Rule itself provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this Rule, **an adverse party may not rest upon the mere allegations of denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule,** must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

SCR-Civ. 56(e) [emphasis added].

The District of Columbia Court of Appeals has emphasized that affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Beard, supra*, at 199. “Mere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment.” *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994), citing *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991).

Summary judgment is properly granted only “if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof.” *Nader, supra*, at 42.

When a party has pled affirmative defenses, “in considering a motion for summary judgment, the court is not bound by the pleadings, but may pierce them and find that there is no triable issue.” *Drug Fair Community Drug Co., Inc. v. Sheldon Magazine*, 259 A.2d 831, 832 (D.C. 1969). “Summary judgment is proper not only where the issues raised are shown in the supporting documents to be sham but also where they are frivolous or so

unsubstantial that it would be futile to try them.” *See generally Yates v. District Credit Clothing, Inc.*, 241 A.2d 596, 598 (D.C. 1968). As will be shown below, the affirmative defenses will fail as a matter of law, therefore, they raise no material issue of fact.

### **ANAYLSIS**

Moving Defendants’ counterclaims and affirmative defenses are all based on the same set of facts and circumstances surrounding the drafting of, entering into, and illegality and ultimate rescission of MCRSAs for cellular applications. The lynchpin to this Court’s decision to grant summary judgment is that the FCC ruled that these MCRSAs were illegal under FCC rules and that any such arrangement violated the FCC’s rule banning partial settlements. The FCC further required “each applicant separately to bear the risk that it might lose the lottery by barring the creation of ‘financial safety nets’ for applicants to preclude a ‘risk-free investment climate’ for applicant.” *FCC Decision* at 8167. If this Court allows Moving Defendants to recover for equitable or other claims on and surrounding the MCRSAs, such a ruling would render the FCC ruling a sham and would serve as an end-run to evade FCC prohibitions for future applicants. This, the Court will not do. Moreover, when parties have entered into an illegal contract, such contract is unenforceable and, typically, the Superior Court should leave the parties where the Court finds them. *McMahon v. Anderson Hibey & Blair*, 728 A.2d 656 (D.C. 1999). One who has participated in a violation of law will not be allowed to assert any right based upon the illegal transaction. WILLISTON ON CONTRACTS § 12:4 at 23-24 (4<sup>th</sup> ed. 1995); *see also* Order at pp. 6, 7.

### **In Pari Delicto (Unclean Hands)**

Moving Defendants do not argue that that the FCC ruled that the MCRSA violated FCC rules or that this Court recognized the ruling. They do, however, assert that “they should not be prevented from asserting claims with respect to the relationship among the parties . . . in light of the inequitable action of the Plaintiff and [Consenting Defendants].” Moving Defendants’ Opposition p. 4. Their contention is that Plaintiff and Consenting Defendants make their Motions for Summary Judgment with “the most unclean of hands.” This allegation, whether labeled “unclean hands” or *in pari delicto* must be dismissed because it fails a matter of law.

If the parties to an illegal contract are not in equal fault (not *in pari delicto*), one party may be allowed to recover any monies paid, otherwise known as performance rendered, to the other. *Remsen Partners, Ltd. v. Stephen A. Goldberg, Co.*, 755 A.2d 412, 413, n.2 (2000); *see also William J. Davis Inc. v. Slade*, 271 A.2d 412, 415 (D.C. 1970). The Court finds, however, that the parties were equally responsible in entering into this MCRSA. The MCRSA’s plain language, Article 8, Section 4, states:

Each participant recognizes that the FCC has not approved, ruled on the validity of, or been given the opportunity to approve or rule on the validity of this Agreement. Each Participant accepts the risks that the FCC could disapprove of this Agreement, require a Participant to withdraw from the Agreement as a condition to receive an Authorization, dismiss or deny a Participant’s FCC Application as a result of its execution of this Agreement, or otherwise take action adverse to the interest of one or more Participants . . . Each Participant recognizes that these and similar risks are not calculable, and that it has entered into this Agreement after due consideration of the potential benefits and detriments of this Agreement.

Terms and Conditions of MCRSA, Article 8, Section 4, p.9.

In light of this clause, the parties knew equally well that the FCC might judge the MCRSA illegal as per the FCC rules, and all “rolled the dice” by signing the MCRSA with the hopes of a large payday.<sup>3</sup> This Court cannot say that Plaintiff was any more at fault than the Moving Defendants in entering into this MCRSA.

Moreover, the theory of *in pari delicto* states that one party may be allowed to recover any monies paid *to the other*. *Remsen, supra*, at 413. Moving Defendants did not pay Plaintiff anything. Cellular Concepts and Serendipity Partnership purchased their FCC applications from the Cellular Corp. (TCC), a company which prepared applications and in which Plaintiff had no interest. Plaintiff’s Reply in Opposition to Motion for Summary Judgment, p.13. (Plaintiff’s Reply.) Thus, this theory of recovery is foreclosed to Moving Defendants.

Finally, Moving Defendants are unable to convince the Court that awarding them money on their *in pari delicto* claim would not make a mockery of the FCC ruling that these risk-sharing agreements were against FCC regulations. Granting restitution to the Moving Defendants would render the FCC decision, and thus, the seven years of litigation on this subject, meaningless. This Court finds that the FCC did not intend its Opinion, which made these “financial safety nets” illegal, to permit recovery on the contract simply by labeling it differently.

### **Negligent Misrepresentation**

Moving Defendants claim that at a March 28, 1988 meeting among partners to the MCRSA, Plaintiff’s alleged agent, Bill Franklin, stated that the MCRSA was “90-95-98%”

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<sup>3</sup> While the MCRSA was ultimately rescinded, thus rendering this clause a nullity, it is certainly evidence that the parties were equally aware of the risks involved in entering into the MCRSA.

certain to be approved by the FCC; that some of the attendees were going to “win the big ones and some the small ones, but we are looking forward to the average as a whole to be able to come up with a big profit format” and that if the partnerships continued to finance TCC, “everyone would be a winner.” Plaintiff’s Reply, p. 14. Further, Moving Defendants claim that Plaintiff failed to disclose the rules of the FCC disapproval and the contents of the MCRSA, including the language regarding risk.

Moving Defendants’ damages could potentially arise from two different areas. First, is the money they would have received as a result of successful, *i.e.* legal, MCRSAs. As stated above, these risk-sharing agreements were declared illegal by the FCC and were eventually rescinded by the parties. Order, pp. 6-7. Thus, this Court will not permit the Moving Defendants to assert any right, whether it be legal or equitable, on this illegal contract.

A second source for the money is that which the Moving Defendants spent in creating the MCRSAs, monies that they paid to TCC. Moving Defendants’ theory is that without Plaintiff’s agent’s statements that the MCRSA were ‘sure things’ with big profit potential, they would have never entered into the MCRSAs. Even if these statements were made, however, Moving Defendants’ claim of negligent misrepresentation fails as a matter of law. Moving Defendants make no showing that Plaintiff knew or should have known that the alleged misrepresentations were false, an indispensable element of the tort. *Sherman v. Adoption Ctr. of Washington, Inc.*, 741 A.2d 1031, 1037 (D.C. 1999).

Plaintiff had every reason to believe the statement to be true as he was investing much time, effort and expense in the MCRSA. Also, the seven year litigation in the FCC lends credence to the fact that the legality of the MCRSAs was a heated battle within the

Commission and that no reasons existed that Plaintiff or his agent, who did not work for the FCC, should have known his statements to be false. Nothing in the record or any pleading states otherwise.

Moving Defendants knew or should have known that risks existed, regardless of what was said, in entering into these MCRSAs. In fact, Article 8, Section 4 of the agreement, stated as much. See *supra*. Moving Defendants claim that the Plaintiff did not show them copies of the full MCRSA or FCC rules, yet the onus is on them to ask for such documents, and fault lies with them for failing to do so. In entering into this agreement with the potential for millions of dollars in profit, the most elementary step would be to demand a copy of the very thing you are signing or else not sign it. The record herein reflects no legal concept or set of facts to establish that Moving Defendants owed a legal duty to anyone, so as to supplant the Plaintiff's common sense obligations.

Moreover, Plaintiff is correct in stating that the alleged misrepresentation was not even the proximate cause of Moving Defendant's injury, thus their misrepresentation claim should fail as a matter of law. See *Steele v. Isikoff*, 130 F.Supp.2d 23, 36 (D.D.C. 2000); see also *Thompson v. Shoe World, Inc.*, 569 A.2d 187, 189 (D.C. 1990).

A negligent misrepresentation is the proximate cause of an injury only if the injury is the natural and probable consequence of the negligence or wrongful act. *Sanders v. Wright*, 642 A.2d 847, 849 (D.C. 1994). The injury occurred not when the parties agreed to enter into these MCRSAs, but rather, when the FCC ruled that these MCRSAs were illegal; a determination out of the Plaintiff's control. Further, unlike Plaintiff and Consenting Defendants, Moving Defendants had no lottery winnings to fall back on. If Moving Defendants had won a lottery, they simply could have rescinded the MCRSA and

reaped the benefits, like Consenting Defendants and Plaintiff. If they had won a lottery, there would be no injury. Thus, the proximate cause of the Moving Defendants' loss was not any alleged misrepresentation. Rather, it was the FCC ruling and the luck of the draw, or lack thereof.

### **Promissory Estoppel**

This Court will not permit the Moving Defendants to recover benefits stemming from this illegal agreement. Moving Defendants allege that Plaintiff promised that all the "partners" to the MCRSA would benefit if one or more of them were awarded licenses, and that after the award occurred, Neely promised that non-winning partnerships would be "fairly compensated." Amended Answer and Counterclaim at p. 8; Reply at p. 5. The doctrine of promissory estoppel provides:

a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

*Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979) citing

RESTATEMENT OF CONTRACTS § 90 (1932).

As the Moving Defendants base their claim on promises associated with the illegal contract, injustice is in fact avoided, only by denying the Moving Defendants' claim. To do otherwise, would provide the Moving Defendants with the very benefit that the FCC declared illegal. The FCC held that any arrangement whereby a loser of a cellular lottery was able to share in the economic benefits with a winner violated the FCC rules and was illegal. For this Court to permit Moving Defendants to recover based on alleged promises

associated with the MCRSA would defeat the purpose of the FCC Order and cause nonsensical consequences.

### **Breach of Contract**

Moving Defendants point to two separate contracts, one allegedly made before the creation of the MCRSA and one after.

The first alleged contract, made before the execution of the MCRSA, was an agreement by which all parties “would share expenses to allow partnerships to apply for cellular licenses.” Amended Answer and Counterclaims, p.6. Moving Defendants allegedly expected to be paid by Plaintiff should Plaintiff “end up profiting from the fruits of the joint agreement.” *Id.* This recovery cannot be allowed in light of the FCC’s explicit finding that the MCRSAs were illegal as they attempted to provide a financial safety net for their applicants and attempted to share the risks and the costs associated with the applications and licenses. For this Court to rule otherwise would be tantamount to declaring the FCC ruling a sham.

Moreover, when the parties entered into the MCRSAs, their signatures acknowledged that the agreement nullified any prior agreements between the parties.<sup>4</sup>

Specifically, Article 11, Section 2 states:

This Agreement constitutes the entire Agreement between the Participants and it *supercedes all prior agreements or understandings among them.*

MCRSA, p.12

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<sup>4</sup> While the MCRSA was ultimately rescinded, thus rendering this clause a nullity, it is certainly evidence that the parties intended all prior agreements superceded by the MCRSA.

Thus, even if the alleged oral contract arose between the parties prior to the entering of the MCRSA, it would carry no weight because the parties specifically voided it.

The second alleged contract that Plaintiff breached was his promise to make the Moving Defendants “whole” after the FCC issued its decision and after the parties rescinded the MCRSA. Opposition to Motion for Summary Judgment, p.6. Moving Defendants allege that this contract should be enforced because it would have been made “after the process that the FCC sought to protect had been protected” and that it was made “presumably based on the consideration and benefits [Neely] had received from them.” *Id.* This logic does not hold.

The FCC ruling was meant to ensure that the lottery losers could not be made whole through risk sharing agreements because each party was supposed to bear its own costs of applying for the cellular licenses. Moving Defendants would have this Court opine that although the FCC found the written MCRSAs illegal, it was essentially giving the parties a winking approval of a subsequent oral promise granting the same benefits as the risk-sharing contract. This theory strains all common sense.

This alleged oral promise, even if made, was not legally binding on the Plaintiff. According to Moving Defendants, Neely made this “promise” based on consideration and benefits he had received from them. The Court infers from statements in the Opposition that this “consideration was the “original consideration paid by Defendants, particularly the capital collected by Cellular Corporation for application preparation that allowed Plaintiffs and Movants to prepare the very applications that led to their being rewarded [*sic*] licenses.” Opposition, p.6. This consideration is not sufficient to make an alleged

new promise legally binding on Neely, as there was no consideration for this new promise. *See generally* FARNSWORTH ON CONTRACTS § 2.5 (2<sup>nd</sup> ed. 2001).

Neely's statement was simply a gratuitous gesture. In light of the FCC ruling that the MCRSA was illegal, a gratuitous promise based on the same transaction and promising the same rewards cannot be sound. For Moving Defendants to rely on such a gratuitous promise, knowing that the FCC judged the MCRSA illegal would be highly unreasonable. Thus, this alleged promise is not binding on Plaintiff. *See generally Franklin Inv. Co. v. Huffman*, 393 A.2d 119, 122 (D.C. 1978). (Gratuitous promise or other conduct must cause party to reasonably to rely upon the performance of definite acts of service by him as the other's agent. *quoting* RESTATEMENT (SECOND) OF AGENCY § 378 (1958).

Finally, Moving Defendants also claim that this post MCRSA promise discharged the existing MCRSA and replaced it with a new obligation; thus, creating a novation. This argument is not meritorious. For there to be a novation, there must be present four indispensable elements: (1) there must be a previous valid debt, (2) there must be extinguishment of the old contract, (3) there must be agreement by all parties to the new contract, and (4) validity of the new contract. *Drug Fair Community Drug Co. v. Magazine*, 259 A.2d 831, 832 (D.C. 1969); *Hemisphere Nat'l Bank v. District of Columbia Ins. Guar. Ass'n*, 412 A.2d 31, 36 (D.C. 1980). Here, the MCRSA was judged to be invalid by the FCC. Thus, a novation cannot be made upon it.

### **Quantum Meruit and Unjust Enrichment**

Simply stated, these claims will be denied based on the above stated analysis. These claims arise out of the breach of contract claims and will be dismissed for the same reasons. The Court also finds merit in the cases cited by Plaintiff, *Cevern, Inc. v. Ferbish*,

666 A.2d 17, 22-23 (D.C. 1995) and *Saul v. Rowan Heating and Air Conditioning*, 623 A.2d 619 (D.C. 1993), holding that there can be no *quantum meruit* claim or unjust enrichment claim arising out of an illegal contract or promise.<sup>5</sup>

### **Statute of Limitations**

While a discussion of the Statute of limitations is unnecessary in light of the above analysis, this Court, for the sake of completeness, will conduct a brief discussion on the subject.

Viewing the facts in the light most favorable to the Moving Defendants, this Court finds that the statute of limitations began to run in June 1997, when the FCC issued its final order on the legality of the MCRSAs and the awarding of licenses.<sup>6</sup> This would make any claim filed after June 2000, untimely. *See* D.C. Code § 12-301(8) (three-year statute of limitations for negligent misrepresentation claim.) It was in June 1997 that the parties rescinded the MCRSAs to permit the award of the cellular licenses. Upon their rescission, Moving Defendants had no excuse not to know that their time to file a negligent misrepresentation claim was beginning. Thus, as Moving Defendants first made their negligent misrepresentation claims after June 2000, they must be denied.

The other claims, breach of contract, promissory estoppel, quantum meruit, and unjust enrichment, are barred for the same reasons. These claims are also governed by a three-year statute of limitations. D.C. Code § 12-301(7), (8). Any injury accrued by June

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<sup>5</sup> Though these cases have distinguishable facts, the propositions of law ring true.

<sup>6</sup> Plaintiff also makes meritorious arguments as to why the statute of limitations on the negligent misrepresentation claim should have begun to run back in 1991, the first point in time when then legality of the MCRSAs was in question. Arguably, Moving Defendants should have known at this point that they may have a claim for the alleged negligent misrepresentation about the certainty of the MCRSA's approval.

1997, when the FCC announced that the Plaintiff had rescinded the MCRSA. Thus, the Moving Defendants had to file their civil actions by June 2000. Clearly, Moving Defendants did not do so. One exception to this would be the alleged oral promise made by Neely after the MCRSA had been rescinded. While it is not clear whether a statute of limitations violation occurs on this promise, it is clear that as a matter of law, Moving Defendants have no legal rights as a result of the alleged promise. See *supra*.

Moving Defendants allege that they could not have discovered the existence of their claims until June 2000, at which point it became clear to them that the Plaintiff and Consenting Defendants were not going to distribute proceeds, re-pay monies invested, Plaintiff was not going to abide by his promise and that they were the victims of negligent misrepresentations. Reply, p. 7. This simply is not plausible.

When a claim is based upon a type of injury that allegedly is difficult to discern (as compared to discrete physical injuries), a plaintiff is required to file suit within the requisite period of time if by the exercise of reasonable diligence he should know (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing. *Morton v. Nat'l Med. Ente.*, 725 A.2d 462, 468 (D.C. 1999). Once the plaintiff knows these elements, he is deemed to be on “inquiry notice” of the basis for a lawsuit. At that juncture, the statutory filing deadline begins to run. It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises. The key issue is the plaintiff’s knowledge of “some injury.” *Knight v. Furlow*, 553 A.2d 1232, 1236 (D.C. 1989).

For practical application to the present lawsuit, this Court looks to a cogent articulation of the discovery rule as set forth by Judge Ferren in *Diamond v. Davis*, 680

A.2d 364 (D.C. 1996)(concurring in the result and dissenting in part). The partial dissent is not relevant to the instant case. However, the recapitulation of the discovery rule itself is worth noting. It is a very useful and practical measure by which to assess the plaintiff's timeliness in filing suit. Judge Ferren stated,

A claim accrues under the discovery rule when one knows, or by the exercise of reasonable diligence should know – **based on evidence as insubstantial as hints, suspicions, and rumors** – of an injury, its cause in fact, and *some evidence of wrongdoing*. Inquiry notice, therefore, **can arise upon unconfirmed information** that, through reasonable diligence, should lead at least to evidence of **a suspected, though ill-defined, wrong**.

*Id.* at 393 (citations omitted) (italics in original, other emphasis added).

Here, the FCC judged the MCRSAs illegal, and as a result, the parties' action of rescinding them certainly was more than a *hint* that Moving Defendants may have a claim against Plaintiff and Consenting Defendants and should have given them *suspicion* of their injuries.

### **ADDITIONAL DISCOVERY**

In light of the above findings, that as a matter of law there are no material facts in dispute and that this Court will dispose of Moving Defendants' claims by summary judgment, any additional discovery is unnecessary. Thus, this Court will deny the Moving Defendants' Request for Additional Discovery.

### **CONCLUSION**

In conclusion, the circumstances surrounding this lawsuit were well documented during the seven years of litigation in the FCC. Both the FCC and this Court, through the

Honorable Stephanie Duncan-Peters, found the contract that underlies all Moving Defendants' claims to be an illegal contract. Accordingly, any claim on this agreement, contract or equitable or otherwise, is precluded as a matter of law and public policy.

WHEREFORE, it is by the Court this 10<sup>th</sup> day of January, 2003

ORDERED that Moving Defendants' Motion to Amend Answer to Add Counterclaims is GRANTED; and it is further

FURTHER ORDERED that the Motion for Discovery is DENIED; and it is

FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is granted; and it is

FURTHER ORDERED that the Motion for Summary Judgment filed by the Consenting Defendants is granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the defendants herein do not have any legal or equitable rights under or related to the MCRSA under theories of: *in pari delicto*, unclean hands, negligent misrepresentation, promissory estoppel, breach of contract, *quantum meruit*, unjust enrichment or otherwise; and it is

FURTHER ORDERED that the Clerk of this Court shall enter final judgment in favor of the Plaintiff on the complaint; and it is

FURTHER ORDERED that the Clerk of the Court shall enter final judgment in favor of the Consenting Defendants (A-1 Cellular Communications, LLC, Frederick W. Ball, Alee Cellular Communications, Robert A. Bernstein, Cranford Cellular Communications, Seth M. Kaplowitz, Jaybar Communications, Robert Hewell, Penellas Communications, E. John. Hoffman, Zephyr Tele-Link, Guy J. Lanza, Jr., Cel-Tel

Communications, Frank McSweeney, EJM Cellular Partners, and Edward J. Massey) on their counterclaims and on their cross-claims against the Moving Defendants (Cellular Concepts, John A. Settle, Serendipity Partnership, Ronald H. Wiseman, Jack Richardson, George A. Ralston, Duane Scarborough, 21<sup>st</sup> Century Cellular, and Doug Polich.

A separate declaratory judgment is filed of even date herewith, as to the substance of the declaratory relief that is granted to the plaintiff on the original Complaint and which is granted to the counterclaiming/cross-claiming parties against the plaintiff and all remaining defendants.



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Cheryl M. Long  
Judge

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