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WRITTEN DECISION - ~~JUNE 2005~~ FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

In re	)	ADVERSARY CASE NO. 04-90544-H11
	)	
TRI-NATIONAL DEVELOPMENT	)	CASE NO. 01-10964-H11
CORP.,	)	
	)	
Debtor.	)	MEMORANDUM DECISION
<hr/>		
DOUGLAS P. WILSON, Chapter	)	
11 Trustee of Tri-National	)	
Development Corp.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
VIPER NETWORKS, INC., as	)	
successor in interest to	)	
TAIG VENTURES, INC.,	)	
	)	
Defendant.	)	
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VIPER NETWORKS, INC., as	)	
successor in interest to	)	
TAIG VENTURES, INC.	)	
	)	
Counter-Complainant,	)	
	)	
v.	)	
	)	
TRI-NATIONAL DEVELOPMENT	)	
CORPORATION (DOUGLAS P.	)	
WILSON, Chapter 11 Trustee	)	
of Tri-National Development	)	
Corp.), and ROES 1 through	)	
100,	)	
	)	
Counter-Defendant.	)	
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1 Douglas P. Wilson (the "Trustee"), the Chapter 11 trustee of  
2 Tri-National Development Corporation (the "Debtor"), filed his  
3 complaint against Viper Networks, Inc. ("Viper") on December 27,  
4 2004, seeking declaratory relief that Viper's purported return of  
5 certain stock shares to its treasury violated the automatic stay  
6 and damages for such violation under § 362(h). The Trustee also  
7 seeks the turnover of the shares because they constitute estate  
8 property.

9 Viper filed a counterclaim seeking specific performance of the  
10 contract (the "Contract") between Debtor and Viper involving a  
11 stock-for-land transaction. Alternatively, Viper seeks to rescind  
12 the Contract because Debtor has yet to deliver title to the real  
13 property to Viper.

14 The Trustee moves to dismiss the counterclaim filed by Viper  
15 pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule  
16 12(b)(6)"). With respect to both claims for relief, the Trustee  
17 contends that Viper is not entitled to either specific performance  
18 or rescission because both remedies fall within the scope of  
19 § 101(5)(B).<sup>1</sup> Therefore, the Trustee contends that Viper has  
20 nothing more than a general unsecured claim for damages for the  
21 breach of the Contract against the Debtor's bankruptcy estate.

22 At issue is whether Viper's counterclaim should be dismissed  
23 pursuant to Rule 12(b)(6) because its request for the equitable  
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25 <sup>1</sup> Section 101(5)(B) defines a "claim" as the

26 right to an equitable remedy for breach of performance if  
27 such breach gives rise to a right to payment, whether or  
28 not such right to an equitable remedy is reduced to  
judgment, fixed, contingent, matured, unmatured, disputed,  
undisputed, secured, or unsecured.

1 remedies of specific performance and rescission fall within the  
2 scope of § 101(5) (B) .

3 I.

4 FACTS

5 The following factual allegations appear to be undisputed and  
6 will be assumed to be true for purposes of disposing of the  
7 Trustee's motion.

8 The Debtor and Taig Ventures, Inc. ("Taig") entered into a  
9 Contract involving the transfer of real property on or about  
10 September 1, 1998. Pursuant to the Contract, Taig was to issue  
11 restricted shares of its common stock in exchange for the Debtor  
12 providing good and clean title to Taig of fifty (50) acres of real  
13 property located in Baja, California, Mexico (the "Real Property")  
14 known as the "Hills of Bajamar." According to the Trustee's  
15 complaint, at the time of the execution of the Contract, the Debtor  
16 was in the process of acquiring the real property through its  
17 wholly-owned Mexican subsidiary corporation, Planificacion  
18 Desarrollo Regaional Jatay, S.A. de C.V. ("Planificacion"), but had  
19 not yet acquired title to the real property in its own name, or in  
20 the name of Planificacion. The Trustee alleges that on December  
21 22, 1998, despite the fact that the Debtor had not yet delivered  
22 title to the Real Property, Taig did in fact issue and deliver the  
23 shares of its common stock, in the form of Stock Certificate No.  
24 2513.

25 Subsequent to entering into the Contract, through a series of  
26 mergers, acquisitions and/or name changes, Taig became known as  
27 Viper Networks, Inc. The Trustee alleges that on September 24,  
28 2001 - after the filing of the Involuntary Case but before the

1 filing of the Voluntary Case, and despite the fact that the Debtor  
2 had failed to deliver title to the Real Property - Viper issued  
3 and delivered to the Debtor 400,000 shares of the common stock of  
4 Viper in the form of Stock Certificate No. 3039 to replace the Taig  
5 shares represented by Stock Certificate No. 2513. It is the  
6 400,000 shares of Viper stock represented by Stock Certificate No.  
7 3039 which are at issue in the complaint.

8 To date, the Debtor has yet to obtain title to the Real  
9 Property. [See Trustee's Complaint ¶ 9]. The Trustee alleges that  
10 "Debtor's inability to deliver title to the Real Property has thus  
11 left the Defendant with a general unsecured claim for damages for  
12 the breach of the Contract against the Debtor's bankruptcy estate."  
13 Id. Nonetheless, the Trustee demanded that Viper's transfer agent  
14 turn over the shares to him. Viper refused to turn over the shares  
15 and purportedly cancelled the shares and returned them to its  
16 treasury. Allegedly, as of December 13, 2004, the shares were  
17 worth approximately \$108,000.<sup>2</sup>

18 II.

19 STANDARD OF LAW

20 The Trustee's Motion to Dismiss is governed by Rule 12(b)(6)  
21 made applicable here by Federal Rule Bankruptcy Procedure 7012. A  
22 motion to dismiss for failure to state a claim should only be  
23 granted if it "appears beyond doubt that the plaintiff can prove no  
24 set of facts in support of his claim which would entitle him to  
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26 <sup>2</sup> Debtor listed its interest in the 400,000 shares of common stock received  
27 from Viper as having a value of \$1,150,000 at the time of its voluntary petition  
28 filed on October 23, 2001. Debtor also listed its 100% ownership in Planificacion  
which "owned 600 acres of undeveloped land known as the Hills of Bajamar." See  
Schedule "B".

1 relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2  
2 L.Ed.2d 80 (1957). "Our review is based on the contents of the  
3 complaint, the allegations of which we accept as true and construe  
4 in the light most favorable to the plaintiff." Love v. United  
5 States, 915 F.2d 1242, 1245 (9th Cir.1989) (citations omitted).

6 III.

7 DISCUSSION

8 A. IS THE CONTRACT EXECUTORY?

9 Viper submitted the Contract entitled "Agreement of Purchase  
10 and Sale of Assets" with its supplemental brief filed on May 27,  
11 2005.<sup>3</sup> Taig and the Debtor entered into the Contract on  
12 September 1, 1998. Besides the stock-for-land transaction, the  
13 Contract also specified that Taig was to build a Communications  
14 Facility on all or a portion of the Real Property in which the  
15 Debtor would receive a 10% equity position. It is undisputed that  
16 the Debtor's president, Michael Sunstein, signed the Contract on  
17 behalf of the Debtor. It would appear that Debtor's interest in  
18 the Contract then constitutes property of the estate. See 11  
19 U.S.C. § 541(a)(1); see also In re Computer Communications, Inc.,  
20 824 F.2d 725, 730 (9th Cir. 1987) (a contract falls within § 541

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22  
23 <sup>3</sup> Rule 12(b)(6) provides that if matters outside the complaint are presented  
24 to and not excluded by the court, it should treat the motion to dismiss as a summary  
25 judgment motion. See Rule 12(b); Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct.  
26 1232, 31 L.Ed.2d 569 (1972). Although the Contract is not attached to Viper's  
27 counterclaim, Viper's counterclaim discusses the Contract and its factual  
28 allegations and claims for relief are expressly linked to and dependent upon the  
Contract. Therefore, the Court need not treat the Trustee's Motion to Dismiss as  
one for summary judgment since the Contract effectively merges into the pleadings  
and this Court can review it in deciding a motion to dismiss. See Branch v.  
Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose contents are alleged  
in a complaint and whose authenticity no party questions, but which are not  
physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)  
motion to dismiss.").

1 definition of property of the estate). Therefore, it is critical  
2 to determine whether the purchase agreement is an "executory  
3 contract" for purposes of assumption or rejection under § 365 of  
4 the Bankruptcy Code. Neither the Trustee nor Viper has addressed  
5 this issue.

6 There is no precise definition of what contracts are  
7 executory. But, within the Ninth Circuit, the "Countryman"  
8 definition is most frequently used in determining whether a  
9 contract is executory for bankruptcy purposes. Under the  
10 Countryman definition, a contract is executory if the obligations  
11 of both parties are so far unperformed that the failure of either  
12 party to complete performance would constitute a material breach  
13 and thus excuse the performance of the other. In re Alexander, 670  
14 F.2d 885, 886 (9th Cir. 1982) (citations omitted).<sup>4</sup>

15 Under this definition, the Contract was executory in nature  
16 because it remained substantially unperformed. Although Viper  
17 tendered the shares to the Debtor for payment of the purchase  
18 price, "[t]he contract did not cease to be executory when there was  
19 a tender of performance." Id. at 887. "Performance or the  
20 rendering of performance, not just tender of performance, is  
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22 <sup>4</sup> The Contract in this adversary proceeding is similar to that in Alexander.  
23 In Alexander, the debtor entered into a deposit receipt sales contract to sell her  
24 house to the plaintiffs. The plaintiffs tendered full performance, but debtor  
25 refused to convey title or surrender possession. The plaintiffs filed an action  
26 for specific performance in state court. On the day of the trial, the debtor filed  
27 her chapter 13 petition. The debtor's plan elected to reject the plaintiff's  
28 contract for the sale of debtor's home and the plan was confirmed. Plaintiffs then  
sought relief from stay to continue their action in state court. The debtor  
contended that the contract was executory and could therefore be rejected. The  
bankruptcy court concluded that the contract was not executory because the  
plaintiff's had tendered performance. The district court affirmed. The Ninth  
Circuit reversed finding that the contract did not cease to be executory when there  
was a tender of performance.

1 required." Id. Further, Viper's predecessor Taig agreed to  
2 develop a Communications Facility on all or a portion of the  
3 property and agreed that Debtor would retain a 10% equity position  
4 in the facility. On the Debtor's side, it had to give up  
5 possession and convey title. Both parties therefore had material  
6 obligations remaining under the Contract and it is clearly  
7 executory.

8 **B. THE PREPETITION BREACH**

9 The Trustee contends in both his complaint (see ¶ 9) and his  
10 Motion to Dismiss Viper's counterclaim that the Debtor's failure to  
11 obtain title to the Real Property constitutes a prepetition breach.  
12 While the Debtor may have breached the Contract prepetition, "the  
13 fact of breach does not somehow convert the executory contract into  
14 an executed contract...."

15 A material breach by a party to an executory  
16 contract before the bankruptcy of either party  
17 gives the other party a unilateral option to  
18 treat his own obligations under the contract as  
19 discharged and claim damages for the breach or  
20 to waive the breach and treat the contract as  
21 still in effect. This option of the  
22 nondefaulting party is qualified only to the  
23 extent that some provision of the contract or  
24 some provision of the applicable nonbankruptcy  
25 law gives to the defaulting party a right to  
26 cure the default. Alexander, 670 F.2d at 887  
27 n.1.

28 Therefore, Viper, the nondefaulting party, had the option to either  
29 treat the obligations under the Contract as discharged and claim  
30 damages for the breach or to waive the breach and treat the  
31 Contract as still in effect. From the pleadings submitted in  
32 connection with the Trustee's Motion to Dismiss, it appears that  
33 Viper did not exercise its option to treat its obligations under  
34 the Contract as discharged prepetition because it issued the

1 400,000 shares of stock in favor of the Debtor shortly after its  
2 involuntary petition was filed, but before the filing of Debtor's  
3 voluntary petition. The Contract has therefore remained executory  
4 because any termination by Viper would be stayed under § 362(a).  
5 See Computer Communications, 824 F.2d at 729 (9th Cir.1987)  
6 (holding that even an unassumable executory contract would be  
7 protected from termination by the automatic stay).

8 One court explained:

9 [T]he estate enjoys a rather privileged  
10 position. From the moment of filing to the  
11 moment of assumption or rejection, the non-  
12 debtor party is held to be barred from  
13 enforcing the contract and its terms. Of  
14 course, if the nondebtor party performs on the  
15 executory contract postpetition, it is entitled  
16 to a postpetition administrative claim for the  
reasonable value of such performance. Until  
then, however, the status of the non-debtor  
party's claims against the estate is held in  
*stasis*, pending the estate's decision. In re  
El Paso Refinery, L.P., 220 B.R. 37, 42 (Bankr.  
W.D. Tex. 1998) (citations omitted).

17 C. VIPER'S COUNTERCLAIM FOR RECISSION IS ESSENTIALLY A REQUEST TO  
18 TERMINATE THE CONTRACT

19 Viper's counterclaim for rescission does not fall within the  
20 scope of § 101(5)(B) because it is essentially a request to  
21 terminate the Contract.

22 [T]he effect of a rescission is as follows:  
23 When a contract is rescinded it is  
24 extinguished. Hence, if facts exist that  
25 justify a rescission by one party, and he  
26 declares a rescission in some effectual manner,  
he terminates the contract. The contract  
becomes [sic] a nullity; it and each of its  
terms and provisions cease to be subsisting or  
enforceable against the other party.

27 Holmes v. Steele, 269 Cal.App.2d 675, 677 (1969) (citation omitted).

28 Yet, the Trustee has not made the decision to assume or reject



1 the Contract in this bankruptcy case. See § 365(d)(2) (allowing the  
2 trustee to assume or reject an executory contract at any time  
3 before the confirmation of a plan). To allow Viper to terminate  
4 the Contract at this juncture would undermine the estate's options.

5 Further, Viper has not filed a motion for relief from stay  
6 which requires it to establish "cause" for relief. See  
7 § 362(d)(1). According to one court, "a party to an executory  
8 contract has no more right to 'relief from stay' to 'terminate' a  
9 contract with the estate than does any other unsecured creditor  
10 whose contract (executory or not) has been breached." El Paso  
11 Refinery, 220 B.R. at 44.

12 Indeed, when one thinks about it, the 'relief  
13 from stay' option is not a true alternative to  
14 the assumption or rejection choice framed by  
15 § 365 in any event. At the hearing on such a  
16 motion, the non-debtor party must establish  
17 'cause' for relief from stay, whereupon the  
18 estate must offer 'adequate protection' to the  
19 petitioning creditor. What 'cause' can the  
20 non-debtor party offer in the usual executory  
21 contract situation, other than a failure of  
22 performance on the part of either the pre-  
petition debtor or the post-petition estate?  
And if the 'cause' in question is the 'pre-  
petition breach' by the debtor, then no more  
cause has been shown than could be mustered by  
any unsecured creditor. Unsecured creditors  
cannot obtain relief from stay to pursue their  
claims against either the estate or the debtor  
based solely upon the existence of an  
outstanding pre-petition default which remains  
unsatisfied. Id.

23 D. SECTION 365(j) PROVIDES SPECIAL TREATMENT TO NONDEBTOR  
24 PURCHASERS UNDER AN EXECUTORY LAND SALE CONTRACT

25 Section 365(j) provides in relevant part:

26 [A] party whose executory contract to purchase  
27 real property from the debtor is rejected and  
28 under which such party is not in possession,  
has a lien on the interest of the debtor in  
such property for the recovery of any portion

1 of the purchase price that such purchaser or  
2 party has paid.

3 Under this provision and the facts of this case, Viper is granted  
4 protection in the form of a lien on the property for the amount of  
5 the purchase price paid under the Contract. Viper will also have a  
6 claim for any rejection damages. These are the only remedies  
7 available to Viper - a lien under § 365(j) on the estate's property  
8 equal to the purchase price tendered and any claim it can prove for  
9 breach damages pursuant to § 502(g).

10 E. SPECIFIC PERFORMANCE

11 The Court has previously ruled at the hearing on this matter  
12 that Viper would not be entitled to specific performance since it  
13 had the alternative right to payment of its damages for the breach  
14 of its contract rights under § 101(5)(B). Viper conceded as much  
15 in its opposition to the Trustee's motion. See Viper's Opposition  
16 5:25-26.

17 IV.

18 CONCLUSION

19 The Trustee's Motion to Dismiss with respect to Viper's  
20 counterclaim for specific performance and rescission is granted for  
21 the reasons set forth herein.

22 This Memorandum Decision constitutes findings of fact and  
23 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure  
24 7052. Attorneys for the Trustee are directed to file with this  
25 Court an order in conformance with this Memorandum Decision within  
26 ten (10) days from the date of entry thereof.

27 Dated: June 15, 2005

28   
JOHN J. HARGROVE  
UNITED STATES BANKRUPTCY JUDGE