

Axtell, Maynard & Sandregio

(draft)

2/02 MPT 1 (#11)

Dear Mr. Dirksen:

As I promised in our conversation of Feb 25, 2002,

here is a written opinion answering your questions

regarding your (FCC's) liability to MDI & the Venture.

### Factual Statement:

FCC & MDI entered into two agreements last November.

One agreement acted to assign FCC's exclusive right <sup>from Agency</sup>

to negotiate for the acquisition & development of the

parcel at 3<sup>rd</sup> & Market Sts. in Boyceville, Franklin to

MDI in exchange for MDI's agreement to transfer

\$350,000 to FCC for use as deposit with the

agency. The second agreement is to create a

joint venture between MDI & FCC. The

joint venture agreement included articulation of purpose of the joint venture, the capital contributions of each party, the management of venture with MDI as the managing venturer, sharing in distribution of profits with MDI receiving 90% and FCC receiving 10%, and the terms of the venture including the provision that if the Agency terminates the exclusive right of negotiation MDI retains the right to declare the venture terminated and to withdraw.

On Feb 13 <sup>you</sup> ~~Ralph Dinkson~~ received a letter from the Agency terminating the exclusive negotiating rights and stating that all monies deposited are nonrefundable.

On Feb 22, you received a letter from Arthur Millman, President of MDI, terminating the joint venture, demanding FCC to try to recover the deposit, and repay the sum to MDI.

Short Answer:

1. ~~FCC~~ FCC is not obligated under either of its two contractual undertakings to pay either MDI or the Venture any part of the money demanded by MDI in its letter of Feb. 22.

On the face of these two agreements, FCC made no agreement or commitment to <sup>personally</sup> refund or to pursue a refund of the deposit advanced by MDI.

2. According to case law and state statutes FCC has no obligation to pay MDI any part

of the money owed. If there is any obligation to recover and pay any money, the money would go to Venture to then be distributed.

3. Under case law interpretations of the duties owed in a joint partnership, FCC has no obligation to undertake efforts to recover the money from Agency.

Opinion:

1. As to the question of whether FCC is obligated to pay either MDI or the Venture under the two contractual agreements, I reached my conclusion by closely examining the provisions of the two agreements.

A. The Assignment agreement

In this agreement you agreed to transfer your exclusive right to negotiate with the agency to MDI. In exchange MDI agreed to give you the \$350,000 to be deposited with the agency plus \$60,000 for yourself. The agreement was conditional on the making of a joint venture agreement, which you did, and agency acceptance of MDI as an authorized party, which it did in its resolution of Nov 20. All the conditions were fulfilled and so there was no right to refund under the Assignment agreement.

### B. The Joint Venture agreement

In the joint venture agreement the only mention of MDI's capital contribution to the  
the \$350,000 is a

venture recognizing your (FCC's) contribution of skills & local expertise. The sharing of profits and distributions is addressed, but the refunding of the deposit or the allocation of losses is not addressed in the agreement.

MDI did ~~say that it had~~ <sup>reserve</sup> the right to terminate the joint venture if the Agency terminated the exclusive right of negotiation, but there was no mention of the deposit.

Under neither the Assignment Agreement nor the Joint Venture agreement did FCC contract to refund the deposit made as a capital contribution ~~to~~ by MDI.

2. As to the question of whether FCC is obligated under the statutes or case law to pay either MDI or the Venture, first I examined the definition of a joint venture which requires a community of interest, a sharing of profits, an equal right of control of the enterprise and a fiduciary relationship.

Your agreement with MDI created a joint venture through your purpose to obtain the property, the sharing of profits and the fiduciary relationship. The fact the MDI had all the control did not negate the venture since you freely granted MDI control in the agreement.

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According to case law if nothing is said about profits, losses are shared as profits.

Since you would have received 10% of any profits, you must bear, at most 10% of the profits.

However, that division assumes both parties have contributed money. If one party has contributed only money and the other party has contributed only skills, as between FCC and MDI, the Franklin Supreme Court stated in <sup>a case called</sup> Kovacic, that "neither party is liable to the other for contribution of ~~the~~ <sup>any</sup> loss sustained." If there is a loss of money, the party who contributed only services is not liable to the other party for



the loss. I think this rationale applies to your situation, since your loss was equaled out by MDI's monetary loss even though you did not share equally in the profits. At most you owe 10%, but probably nothing.

3. You do not have a duty to try to recover the money from Agency. Although generally duties are owed between joint venturers, a duty of loyalty and a duty of care - it is stated in case law that it is the duty of the managing venturer (here MDI) to take action ~~against debtor~~ to preserve

and recover assets of the joint venture.

MDI holds this obligation.

Also, as there was no agreement to do so,

there is no obligation for you to protect MDI's

~~the~~ investment, or to help them recover it.

Please contact me w/ further questions.