**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**
**BUSINESS COURT**

**HERBERT TYNER TRUST, ET AL,**
**Plaintiffs/Counter-Defendants,**

**v.**

**Case No. 16-152846-CB**
**Hon. James M. Alexander**

**BERNARD L. HARTMAN, ET AL,**
**Defendants/Counter-Plaintiffs.**
_____/

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on cross motions for summary disposition. This is a contentious case involving two families that, for many years, worked together to grow and operate Defendants Hartman & Tyner, Inc. and Hazel Pak Racing Association into successful businesses.

It appears that the families' relationship began to sour upon the death of Herbert Tyner in August 2015. Since that time, Plaintiffs allege that the Hartman Defendants "seized control of the businesses, ignored basic corporate governance, refused to share information, excluded the Tyner family, took for themselves disproportional benefits of ownership, and sought to harass and squeeze-out the Tyner family through a variety of acts, including the willful withholding of annual distributions previously promised."

On these general allegations, Plaintiffs filed their Complaint on claims of (Count I) minority shareholder oppression under MCL 450.1489; (Count II) common law breach of fiduciary duty; and (Count III) civil conspiracy.

The Hartman Defendants, on the other hand, claim that their governance of Hartman and Tyner both before and since the Herbert Tyner's death

> has been (1) in the best interests of the company and its shareholders, (2) faithful to the company's Articles of Organization . . . and Bylaws, and (3) consistent with the February 4, 2004 "Shareholder Agreement" created at the instance of Herbert Tyner to entrust the company's management to Messrs. Hartman and Adkins upon Mr. Tyner's death."

Defendants further allege that, for many years, Mr. Tyner "abused his position as an officer of H&T by taking for himself and others over a million dollars in improper benefits that were not correspondingly taken or enjoyed by Mr. Hartman or the Hartman family." Defendants also claim that Mr. Tyner failed to repay some $4.3 million in loans to the company.

And in response to Plaintiffs' lawsuit, based on the above allegations, Defendants filed a Counterclaim alleging claims for (Count I) improper benefits; (Count II) unpaid loans; (Count III) declaratory judgment as to the enforceability of the Management Agreement; and (Count IV) declaratory judgment as to the buy-out provision in the Buy-Sell Agreement.

Both sides now move for summary disposition of the other's claims. Plaintiffs do so under MCR 2.116(C)(7) and (C)(10). And Defendants do so under MCR 2.116(C)(7), (C)(8), and (C)(10). And, just for good measure, in their Response, Plaintiffs also seek summary as to liability on their oppression claim under (I)(2).

A (C)(7) motion considers whether a claim is barred, among other grounds, by a limitations period. A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] And a (C)(10) motion tests the factual support for a plaintiff's

1 Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633

claims. *Id.*[2]

## I. Defendants' Motion for Summary of Plaintiffs' Complaint

It makes sense to first address Defendants' motion seeking dismissal of Plaintiffs' Complaint. As stated, said Complaint alleges claims for shareholder oppression, breaches of fiduciary duty, and conspiracy.

It is worth noting that both parties' filings are founded almost exclusively on the oppression claim. In fact, Defendants' motion seeks summary of the breach of fiduciary duty claim "for the same reasons as the oppression claim." And Defendants seek summary of the conspiracy claim based on the presumption that, once summary is granted as to the underlying claims, there is no viable tort, on which, to base said claim.

In any event, under MCL 450.1489(1), in order to establish a shareholder oppression claim, a plaintiff must establish "that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder."

Michigan's Business Corporation Act, at MCL 450.1489(3), defines "willfully unfair and oppressive conduct" as:

> a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.

---

(2003).

2 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

But the statute continues:

> The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure. MCL 450.1489(3).

In 2014, our Supreme Court considered MCL 450.1489 and held that claims based thereon are to be heard by a court sitting in equity rather than a jury. *Madugula v Taub*, 496 Mich 685, 720; 853 NW2d 75 (2014). The Court also held that "violations of a shareholder agreement may constitute evidence of shareholder oppression pursuant to § 489(3)." *Id*.

It is worth noting that the *Madugula* Court recognized also that "MCR 2.509(D) allows a court to use an advisory jury to determine issues of fact. In fact, this Court has long recognized the use of advisory juries in equity settings." *Madugula*, 496 Mich at 716. But, in any event, because of the equitable nature of such a shareholder oppression claim, such cases are appropriately tried to the bench. *Madugula v Taub*, 496 Mich at 715.

This ruling is important because it recognizes that factual determinations are critical in shareholder oppression claims. This is particularly true when, as the case here, those in control the corporation have a course of conduct in managing a company that may not have always necessarily adhered to the procedures outlined in the company's governing documents.

And also inherent in the Court's required determination of whether the complained-of acts of those in control are "illegal, fraudulent,[3] or willfully[4] unfair and oppressive to the corporation or to the shareholder," the Court is bound to examine the motive and intent of those in control of the

3 "[I]n case involving state of mind such as the Scienter requirement in fraud, summary judgment will hardly ever be appropriate because it will be difficult to foreclose a genuine dispute over this factual question." *Whalen v Bennett*, 67 Mich App 720, 725; 242 NW2d 502 (1976).

4 Black's Law Dictionary defines "Willful" as "Voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least

company. But it is well settled that "granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial." *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

It seems unquestionable that a minority shareholder oppression claim actually presents a mixed question of fact and law. The fact questions include (1) whether certain events occurred, and (2) the motivation or intent of those in control in performing the complained of acts. But whether those facts, once determined, constitute oppression under the statue is undoubtedly a question of law. This conclusion is consistent with our Supreme Court's reasoning in *Madugula v Taub*, 496 Mich 685.[5]

The reason that this background is important is that the Court sees many summary motions on shareholder oppression claims that really seek factual rulings rather than legal ones – contrary to the (C)(10) standard. In other words, each side often argues that **their version of events** cannot legally support a shareholder oppression claim. Both sides' motions in this case are largely such.

The Court recognizes, of course, that if the parties either (1) stipulate to, or (2) do not dispute the underlying facts, the Court is left with a solely legal question of whether oppression occurred. And, in such a case, a summary motion would be appropriate. But such a case must be rare, and this one is certainly not.

On the pending motions alone, the parties have provided the Court with hundreds of pages of exhibits – including letters, deposition transcripts, company financials, spreadsheets, check registers, account statements, affidavits, invoices, reports, discovery responses, and email exchanges –

---

inexcusable carelessness, whether the act is right or wrong."

5 It is also consistent with the reasoning of courts in other states considering this issue. See, e.g. *Edler v Edler*, 745 NW2d 87; 307 Wis 2d 443 (Wis 2007); *Argo Data Res Corp v Shagrithaya*, 380 SW3d 249, 264 (Tex App 2012); and *Baur v Baur Farms, Inc*, 780 NW2d 249 (Iowa Ct App 2010).

supporting their respective version of events. And their versions of events **wildly** differ.[6]

Both parties' arguments also rest on the underlying premise that, in order to reach a conclusion, the trier-of-fact needs to believe one side and not the other. In other words, both parties have also made credibility an issue. It is well settled that "courts 'may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *White v Taylor Distributing Company, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

With this background in mind, the Court will turn to Defendants' specific arguments in favor of their summary motion.

A. Evidence barred by MRE 408

First, Defendants argue that Plaintiff cannot use allegations of threats made during settlement negotiations to support their oppressions claims. This argument requests a legal ruling and is appropriate for summary disposition.

MRE 408 prohibits admission of certain aspects of settlement negotiation.[7] It is identical to Rule 408 of the Federal Rules of Evidence. Plaintiffs respond that MRE 408 is not available to preclude evidence of threats made in settlement negotiations – as Plaintiffs offer, citing *Uforma/Shelby Bus Forms, Inc v NLRB*, 111 F3d 1284 (CA 6 1997). The *Uforma* Court reasoned, at

6 Defendants' motion begins with a five-page recitation of their version of the facts. And Plaintiffs' response begins with a ten-page recitation of their version. Each supports their version with documentary evidence. Their respective "facts" serve as the foundation, on which, they make their arguments.

7 The Rule provides, in full:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or

1293 (emphasis removed):

> Rule 408 is ... inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, *unfair labor practice*, and the like.... Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations.

Based on the same, Plaintiffs argue that "Defendants cannot use the guise of buy-out negotiations to shield their otherwise improper conduct." The Court agrees. It appears that Plaintiffs wish to use some allegations of conduct occurring during settlement negotiations to establish that oppression occurred. The Court is not inclined to preclude introduction of such evidence at this time – but may revisit this issue as pending objections at trial.

B. Plaintiffs' personal knowledge

Defendants next argue that Plaintiffs lack personal knowledge regarding their claim and, therefore, cannot testify. The Court disagrees. As argued by Plaintiffs and supported by deposition testimony, "Ms. Tyner aptly testified as to Defendants' oppressive conduct toward her personally." Plaintiffs have presented sufficient evidence to survive summary on this basis.

C. The Business Judgment Rule

Defendants next argue that their actions were protected by the Business Judgment Rule, citing *In re Estate of Butterfield*, 418 Mich 241; 341 NW2d 453 (1983). Indeed, Butterfield provides that "[i]n the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors," and therefore, "[a] court should be most reluctant to interfere with the business

---

> prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

judgment and discretion of directors in the conduct of corporate affairs." *Id.* at 255. But the very next sentence of *Butterfield* continues "[h]owever, when a board's refusal to declare a dividend constitutes a breach of its fiduciary duty to the shareholders, this amounts to a breach of trust and is ground for court intervention." *Id.* at 255-256.

But whether Defendants are protected by the business judgment rule is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.

Further, as cited by Plaintiffs, this Court has repeatedly cited with approval the reasoning found in *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880): "[a]lthough the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder."

The *Berger* panel went on to conclude: "[t]he exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage [the business]." Questions of fact also remain on this issue.

D. Distributions were equal / Compensation / Prerequisites / Director Interference

Defendants next argue that (1) distributions were equal, (2) there was no oppression regarding Mr. Hartman's compensation, (3) any denial of Mr. Tyner's widow's prerequisites was not oppressive, and (4) any alleged violations of Ms. Tyner's rights as a director could not be oppressive. The Court finds that these arguments are founded on factual disputes inappropriate for resolution on

summary disposition.

The Court will further note that, even if each of these alleged acts were not individually sufficient to establish oppression, viewing the evidence in the light most favorable to Plaintiffs, it is possible with a full factual record that some combination of these alleged acts (unequal distributions, salaries and bonuses, interference with management and access to H&T facilities, books, and records) could establish a pattern of oppression that falls within the type of conduct actionable under MCL 450.1489.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that resolution of these issues is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition on the same wholly inappropriate. As a result, Defendants' motion for summary disposition is DENIED.

For the same reasons, Plaintiffs' (I)(2) motion is also DENIED.

## II. Plaintiffs' Motion for Summary of Defendants' Counterclaim

Next, Plaintiffs move for dismissal of Defendants' Counterclaim, which alleges claims for (Count I) improper benefits; (Count II) unpaid loans; (Count III) declaratory judgment as to the enforceability of the Management Agreement; and (Count IV) declaratory judgment as to the buy-out provision in the Buy-Sell Agreement.

### A. Improper Benefits

Plaintiffs first seek dismissal of Defendants counterclaim for improper benefits because (1) the vast majority of said claims are time-barred, (2) any claims not time-barred have no legal basis,

and (3) alternatively, any claims regarding the Florida expenses were resolved through accord and satisfaction.

*1. Time-barred?*

Plaintiffs first argue that the majority of Defendants' improper benefits claims are time-barred by a three-year statute of limitations applicable to claims sounding in breaches of fiduciary duty. Defendants base this claim on the allegation that Mr. Tyner improperly ran several personal expenses through H&T to the detriment of other members.

In response, Defendants do not dispute the applicability of a three-year limitations period to the majority of their improper benefits claims. Rather, Defendants argue that the limitations period does not affect their Counterclaim because the same is based in the common-law theory of recoupment and the counterclaim savings statute.

> The defense of recoupment refers to a defendant's right, in the same action, "to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract." Recoupment is "a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced.
>
> . . .
>
> Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be reduced, and *the plaintiff will not be permitted to insist upon the statute of limitations as a bar to such a defense* when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises.
>
> Accord *Bull v. United States*, 295 U.S. 247, 261–262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935) (the defense of recoupment is never barred by the statute of limitations as long as the main action itself is timely).

> *Mudge v Macomb Co*, 458 Mich 87, 106–07; 580 NW2d 845, 855 (1998) (internal citations and quotations omitted) (emphasis in original).[8]

In their Reply Brief, Plaintiffs argue that recoupment is unavailable unless Defendants can establish a valid, underlying claim. But, as argued by Plaintiffs in their original Brief, Defendants' claim sounds as a breach of fiduciary duty claim under MCL 450.1541a. As a result, the Court cannot conclude that there is no cognizable claim, on which, Defendants base their improper benefits claim.

Plaintiffs next argue that the Court should decline to exercise its equitable powers to permit Defendants a recoupment. But, just as Plaintiffs' oppression claim is "equitable in nature" under *Madugla*, the Court will not close the door to recoupment under Defendants' Counterclaim on summary disposition.

Finally, Plaintiffs cite *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684; 818 NW2d 410 (2012) for the proposition that Defendants' claimed recoupment theory does not stem from the same transaction as Plaintiffs' claims and is, therefore, unavailable. The *McCoig* Court reasoned:

> Michigan caselaw holds that a claim for recoupment must be premised on the same contract or *transaction.* The categorization of the parties' agreement as a single contract or an open account is not determinative. Rather, the claim for recoupment by the defendant must be premised on the same transaction raised in the plaintiff's complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment. *McCoig*, 295 Mich App at 698.

But this argument is curious because Plaintiffs allege years-long disproportionate distributions and benefits from H&T as a part of their claims. These are the same type of allegations

8 In the alternative, Defendants argue that the Counterclaim savings statute permits a set off against any damages awarded to Plaintiffs, citing MCL 600.5823. This statute provides: "To the extent of the amount established as plaintiff's claim the periods of limitations prescribed in this chapter do not bar a claim made by way of counterclaim unless the counterclaim was barred at the time the plaintiff's claim accrued."

that serve as the basis of Defendants' improper benefits Counterclaim. As such, the Court cannot conclude that the defense of recoupment is based in a different transaction as contemplated by *McCoig*. As a result, the Court will not bar the defense.

*2. Improper?*

Plaintiffs next argue that there was "nothing improper" about the subject expenses. But this argument is a purely factual one inappropriate for summary disposition.

*3. Accord and Satisfaction?*

Plaintiffs next argue that there was an accord and satisfaction that precludes any claims relating to the household expenses at the Tyner Florida residence. But this argument is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.

B. Unpaid Loans.

Plaintiffs next argue that Defendants' claim for unpaid loans must be dismissed. But it is apparent that Plaintiffs base their summary request on factual arguments that the parties never intended to collect on the loans. But that is not clear to the Court. As such, Plaintiffs' motion for summary of this claim is similarly DENIED.

C. Declaratory Judgment.

Finally, Plaintiffs argue that they are entitled to dismissal of Defendants' declaratory

judgment claims because, if they are successful on their oppression claims, "MCL 450.1489(1) provides the Court with broad discretion to fashion a remedy for shareholder oppression," including the alteration of any of the company's governing documents.

But as Defendants point out in their Response, Plaintiffs' summary request is "based on the bare expectation that [they] will prevail on their oppression claim." The Court agrees. The Court will not foreclose on Defendants' declaratory relief counterclaims until it has had the opportunity to hear all of the evidence and decide the merits of each side's claims.

**Summary/Conclusion**

To summarize, both parties' motions for summary disposition are DENIED in their entirety.

**IT IS SO ORDERED**

May 24, 2017
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge