STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

HENRI JAMES DEMIL, and individual, SARAH MAE DEMIL, an individual, HANNAH RENE DEMIL, an individual and SAVANNAH LYNN DEMIL, an individual

Plaintiffs,

vs. Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.
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OPINION AND ORDER

Defendants have filed a motion for reconsideration of the Court's June 9, 2014 Opinion and Order dissolving Defendant RMD Holdings, Ltd.

Factual and Procedural History

This matter involves alleged shareholder oppression and other corporate governance matters. Defendant RMD Holdings, Ltd. ("RMD") is a fencing contracting business. When RMD was formed, Defendant/Counter-Plaintiff Robert E. Demil ("Defendant R. Demil") and Plaintiff/Counter-Defendant Michael J. Demil ("Plaintiff M. Demil") received all of the voting stock, with Defendant R. Demil holding 51% and Plaintiff M. Demil holding the remaining 49%. The remaining Plaintiffs are all non-voting shareholders of RMD.

On March 22, 2013, Plaintiffs filed their second amended complaint in this matter asserting claims for: Count I- Shareholder Oppression under MCL 450.1489; Count II- Breach of

Fiduciary Duty; Count III- Breach of Contract; Count IV- Accounting; Count V- Violation of the Whistleblower's Protection Act and Count VII- Dissolution. In addition, Defendants have filed a counter-complaint against Plaintiff M. Demil for breach of fiduciary duty.

On June 28, 2013, Plaintiff M. Demil filed a motion for partial summary disposition of Defendants' counter-claims and Plaintiffs filed two separate motions seeking summary disposition of their shareholder oppression claim. On September 25, 2013, Defendants filed joint responses to the motions.

On June 28, 2013, Defendant R. Demil filed a motion for summary disposition of Plaintiff's claims for an accounting and dissolution. On September 25, 2013, Plaintiff filed a response to the motion requesting that the motion be denied and that summary disposition be entered in his favor. On October 2, 2013, Defendant R. Demil filed a reply in support of his motion.

On October 7, 2013, a judgment in favor of all Plaintiffs other than M. Demil was entered to reflect the parties' acceptance of case evaluation as to those Plaintiffs' claims. As a result those Plaintiffs have been dismissed from this matter.

On June 9, 2014, the Court entered its Opinion and Order granting Defendant R. Demil summary disposition of Plaintiff M. Demil's accounting claim, denying Defendant R. Demil's motion for summary disposition of Plaintiff M. Demil's dissolution claim, and granted Plaintiff M. Demil's request for a dissolution. The Court declined to address the pending motions related to Plaintiff M. Demil's oppression claims due to its ruling on the dissolution claim.

On June 30, 2014, Defendants filed their instant motion for reconsideration of the June 9, 2014 Opinion and Order. On July 10, 2014, the Court stayed the dissolution pending its decision on the reconsideration motion.

The Court has reviewed the motion for reconsideration and is now prepared to make its decision with respect to the motion, as well as the pending motions for summary disposition of Plaintiff M. Demil's shareholder oppression claims.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros,* 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority,* 253 Mich App 144, 161; 658 NW2d 804 (2002).

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers,* 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter

within the discretion of the trial court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Analysis

The Court based its decision to grant Plaintiff M. Demil's request for dissolution on Defendant R. Demil's unilateral decisions related to the wage determinations of RMD's shareholder employees. As discussed in the June 9, 2014 Opinion and Order Defendant R. Demil has continued to make salary determinations without consulting Plaintiff in clear violation of the Stock Agreement and RMD's Articles of Incorporation. Specifically, Defendant R. Demil has conceded that he has approved RMD's budget for the last few years without Plaintiff M. Demil's input or approval, and admits that the budget includes his wages, as well as the wages of other shareholder employees. Consequently, the Court held, and remains convinced that, Defendant R. Demil's annual determination as to the wages of shareholder employees was made in violation of the Stock Agreement and amended articles of incorporation and contrary to Plaintiff M. Demil's shareholder voting rights.

Defendant R. Demil's above-referenced improper unilateral decisions form a portion of the basis for Plaintiff M. Demil's shareholder oppression claims, as well as his dissolution claims. Plaintiffs' shareholder oppression claims are based upon MCL 450.1489, which provides:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to 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.
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> (3) As used in this section, "willfully unfair and oppressive conduct" means 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. 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.

At the time RMD's articles of incorporation and bylaws were adopted Plaintiff M. Demil was granted a right to vote, and de facto veto power, on any decision made by Defendant R. Demil regarding the wages, salaries, benefits and bonuses paid to RMD's shareholder employees, including Defendant R. Demil himself. Shareholder interests within the meaning of section 1489 include voting at shareholder meetings. *Franchino v Franchino*, 263 Mich App 172, 184; 687 NW2d 620 (2004). In this case, Defendant R. Demil has willfully oppressed Plaintiff M. Demil's right to vote on the annual budget, which includes matters requiring unanimous approval on an annual basis since January 16, 2012 when he approved RMD's budget after Plaintiff M. Demil left the shareholder meeting. As a result, the Court is convinced Plaintiff M. Demil is entitled to summary disposition of his shareholder oppression claim.

With respect to remedies for oppressive conduct, MCL 450.1489 provides, in part:

> If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
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> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Accordingly, unlike MCL 450.1823, which only provides for dissolution, MCL 450.1489 grants the Court flexibility in carving out a remedy which grants relief to the oppressed party without resorting to the "very drastic measure" and "a last resort remedy." *See Barnett v International Tennis Corp.*, 80 Mich App 396, 417; 263 NW2d 908 (1978). In this case, the Court is convinced that the forced buyout provision provided by MCL 450.1489(e) is the remedy that is best suited to compensate Plaintiff M. Demil for his interest in RMD and cure Defendant R. Demil's oppressive conduct. While both dissolution and a buyout would allow the brothers to separate their interests in RMD and provide Plaintiff M. Demil fair compensation for his interests, a forced buyout does not require the Court to destroy RMD.

RMD is a Michigan corporation which employs 113 employees, contributes to the local tax base, and is licensed in approximately 35 states. While it suffered some hardships over the past few years due to the difficult economic conditions, RMD has maintained its position as a preeminent commercial and industrial contractor, currently has approximately $21 million dollars in projects backlogged and had a positive net income for the first quarter of this year. Were the court to dissolve RMD it would destroy a successful business provides valuable services, and jobs which support numerous local families. MCL 450.1489 is equitable in nature and the Court is free under the language of the statute to grant relief as it considers appropriate and is not bound to the relief sought by the plaintiff. *Madugula v Taub*, --- Mich ---, --- NW2d ---

(2014). For the reasons discussed above, the Court is convinced that a forced buyout pursuant to MCL 450.1489(e) is the most equitable remedy in this matter as it will allow a successful business which supports the local community to remain in existence, while providing Plaintiff M. Demil with the relief he is entitled. Consequently, Defendants' motion for reconsideration must be granted, in part, to the extent that it seeks to vacate the dissolution.

Conclusion

For the reasons discussed above, Plaintiff Michael Demil's motion for summary disposition of his shareholder oppression claims is GRANTED. Defendants motion for reconsideration of the Court's June 9, 2014 Opinion and Order is GRANTED. The portion of the Opinion and Order dissolving Defendant RMD Holdings, Ltd. is VACATED.

The parties shall, within 30 days of the date of this Opinion and Order, submit to the Court their proposed terms of a buy-out pursuant to MCL 450.1489(e). The proposals shall include the method by which the buy-out should be effectuated, the date they believe a potential appraisal should be based on, the appraiser they suggest if an appraisal is ordered, as well as any support for their positions/requests.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: August 11, 2014

JCF/sr

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