STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

THOMAS MACKLEY,

Plaintiff,

vs. Case No. 2017-2250-CB

AMERICO VALENTE, individually and as trustee for the AMERICO VALENTE REVOCABLE LIVING TRUST, and D-M TOOL & FAB, INC.,

Defendants.
_____/

OPINION AND ORDER

Plaintiff Thomas Mackley ("Plaintiff") has filed a motion for summary disposition of his breach of contract claim (Count I). Defendants Americo Valente ("Defendant Valente"), Americo Valente Revocable Living Trust ("Defendant Trust"), and D-M Too & Fab, Inc ("Defendant DM")(collectively hereinafter referred to as "Defendants") have filed a response and request that the motion be denied, and that summary disposition be granted in their favor as to Counts I and III. In addition, Plaintiff has filed a response to Defendant's motion for summary disposition, as well as a reply brief in support of his motion.

Additionally, Plaintiff has filed a motion for summary disposition of his breach of fiduciary duty (Count VI) and shareholder oppression (Count VII) claims. Defendants have filed a response and request that the motion be denied and that summary disposition be entered in their favor pursuant to MCR 2.116(I)(2). Plaintiff has also filed a reply brief in support of his motion.

I. Factual and Procedural Background

Defendant DM was incorporated on November 8, 1989.[1] Defendant DM is a closely held corporation with two shareholders, Plaintiff and Defendant Trust. Defendant Valente is the Trustee of Defendant Trust. It is undisputed that Plaintiff was an employee of Defendant DM until on or around May 23, 2017. (See ¶¶ 3, 51 of Second Amended Complaint; Defendants Answer to Second Amended Complaint, ¶¶ 3, 51.) It is also undisputed that Plaintiff became a shareholder of Defendant DM on or around January 1, 1998. (See Stock Bonus Plan ("SPB") attached as Ex. 1 to Defendant DM's Response.)

On January 1, 1999, Defendant Trust and Plaintiff entered into a Stockholders' Agreement ("Stock Agreement"). (See Ex 1 to Second Amended Complaint.) At the time of executing the Stock Agreement, Defendant Valente, as Trustee of Defendant Trust owned 10,000 shares in Defendant DM and Plaintiff owned 204 shares.[2] (Id. at Paragraph A, Schedule A.) As of 2013, Plaintiff had a 16% interest and Defendant Trust had an 84% interest in Defendant DM. (See Second Amended Complaint at ¶21, Defendant DM's Response, p 5.)

On or around May 23, 2017, it is undisputed Plaintiff's employment with Defendant DM was terminated. (See Second Amended Complaint, ¶51, Answer to Second Amended Complaint, ¶51.) Plaintiff alleges that Defendant Valente

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[1]Defendant DM, originally incorporated as D-M Fabrication, Inc. changed its corporate name to D-M Tool & Fab, Inc on May 12, 2104. (See Second Amended Complaint, ¶19, SPB.)

[2] The parties dispute how Plaintiff obtained the initial 204 shares of Defendant DM stock. (See Second Amended Complaint, ¶21, Answer to Second Amended Complaint, ¶ 21.)

terminated his employment with Defendant DM, citing alleged embezzlement of funds from Defendant DM by Plaintiff.

Immediately following the termination of his employment, Plaintiff filed this lawsuit alleging, among other things, shareholder oppression. Generally, Plaintiff alleges that Defendant Valente engaged in a "series of actions . . . designed to coerce [Plaintiff] into otherwise surrendering his shares for a drastically reduced price[ ]", ultimately "retain[ing] most all of the proceeds of the sale" of Defendant DM to the detriment of Plaintiff. (Second Amended Complaint, ¶ 6.)

On December 15, 2017, Plaintiff filed his second amended complaint in this matter. The Second Amended Complaint contains the following claims: Count I- Breach of Contract against all Defendants; Count II- Specific Performance against all Defendants; Count III- Wrongful Discharge against all Defendants; Count IV- Promissory Estoppel against all Defendants; Count V- Unjust Enrichment against Defendant Valente individually and trustee of Defendant Trust, Count VI- Breach of Fiduciary Duty against Defendant Valente individually, and as trustee of Defendant Trust; Count VII- Shareholder Oppression against all Defendants; Count VIII- Breach of Partnership against Defendant Valente; Count IX- Accounting against Defendant DM; Count X- Defamation against Defendant Valente; Count XI- Declaratory Judgment against all Defendants; Count XII- Statutory and Common Law Conversion against Defendant Valente; and, Count XIII- Request for a Constructive Trust.

On January 22, 2018, Plaintiff filed his instant motion for summary disposition of Count I- Breach of Contract. On March 27, 2018, Defendants filed

their responses. On April 5, 2018, Plaintiff filed a reply brief in support of his motion. Further, on May 10, 2018, Plaintiff filed a response to Defendants' request for summary disposition of Counts I and III. On the same day, Defendant DM filed a reply brief in support for its request for summary disposition of Count III.

On May 14, 2018, Plaintiff filed his instant motion for summary disposition of Counts VI- Breach of Fiduciary Duty and VII- Shareholder Oppression. On June 4, 2018, Defendants filed their response to the motion and request for summary disposition in their favor pursuant to MCR 2.116(I)(2). Plaintiff has since filed a reply in support of his motion.

The Court subsequently heard oral argument, and has since all of the motions under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121.

If the trial court is satisfied that "the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2). In other words, the trial court may grant summary disposition to the nonmoving party if it is entitled to judgment as a matter of law. See *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

III. Law and Analysis

A. Breach of Contract (Count I)

Plaintiff claims that Defendants breached the unambiguous terms of Section 1.6 of the Stock Agreement, as amended, when Defendant Valente, as Trustee, failed to sell his shares to Defendant DM and Defendant DM failed to purchase the shares on June 30, 2013. Section 1.6 of the Stock Agreement provides:

> 1.6 Transfers at Death or Disability. On the death [or disability] of any Stockholder, his or her Personal Representative will immediately be deemed to have offered to sell to the surviving Stockholder all of the deceased Stockholder's shares of Stock at the Agreement Price and on the Agreement Terms, and the surviving Stockholder shall accept such offer and agree to buy such shares of the Offered Stock.
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> Further, in the event that [Defendant Valente], as trustee for the Americo Valente Revocable Living Trust UAD 11/9/82, continues to own shares of stock on January 1, 2013, said Trustee will immediately be deemed to have offered to sell to the Corporation all of the Trust's shares of Stock at the Agreement Price and on the Agreement Terms, and the Corporation shall accept such offer and agree to buy such shares of the Offered Stock. [See Stock Agreement, Ex 1 to Second Amended Complaint.]

It is undisputed that the parties agreed to extend the January 1, 2013 date to June 30, 2013 pursuant to an Amendment to Stockholder's Agreement

("Amended Stock Agreement.") which provides in relevant part:

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> WHEREAS, Section 1.6 of the Agreement provides for certain action to be taken by the Trustee and the Corporation on January 1, 2013 which would trigger a purchase by DM of the shares of DM stock owned by Valente on such date; and
>
> WHEREAS, Mackley and Valente desire to postpone the effective date of such actions for a period of six months to June 30, 2013 without prejudice to the rights or responsibilities any of of the parties to the Agreement.
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> NOW, THEREFORE, it is agreed:
>
> 1. Section 1.6 of the Agreement is hereby amended by changing the date "January 1, 2013" in such section 1.6 to read "June 30, 2013".
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> ***
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> [See Exhibit 3 to Defendants' Response.]

1. Interpretation

In response, Defendants argue that the unambiguous terms of the Stock Agreement merely provide that if Defendant Valente were dead or disabled (i.e. the triggering conditions for the first paragraph of Section 1.6) as of June 30, 2013, Defendant DM, rather than Plaintiff individually, would be responsible for purchasing Defendant Valente's shares. Thus, because Defendant Valente is neither dead nor disabled, Defendants argue the provision does not apply.

A contract must be interpreted according to its plain and ordinary meaning." *Ally Fin, Inc. v. State Treasurer*, 317 Mich App. 316, 329; 894 NW2d 673 (2016) (quotation marks and citation omitted). "Courts should construe contracts so as to give effect to every word or phrase as far as practicable." *Barton–Spencer v. Farm Bureau Life Ins. Co. of Mich.*, 500 Mich 32, 40; 892

NW2d 794 (2017) (quotation marks and citations omitted). "[C]ontract interpretation that would render any part of the contract surplusage or nugatory must be avoided." *McCoig Materials, LLC v. Galui Constr., Inc.*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

As a preliminary matter, the words "or disability" in the first sentence, and the cross out sentence that begins the second paragraph appear to have been hand written changes made after drafting, but before execution. Consequently, the Stock Agreement, as executed, does not contain the crossed-out portion of Section 1.6, and clearly, the first paragraph sets forth what would happen if either Plaintiff or Defendant were to pass away or become disabled. The issue before the Court is the meaning of the second paragraph of Section 1.6, as amended.

Upon reviewing Section 1.6, as amended, the Court is convinced that Defendants' position that the second paragraph of Section 1.6 applies only if Defendant Valente died or was disabled is without merit. While Section 1.6 is titled "transfers at death or disability", the sentence in question does not contain any language limiting itself to situations in which Defendant Valente was dead or disabled; rather, the sentence simply provides that in the event Defendant held shares on June 30, 2013, he would be deemed to have offered to sell those shares to Defendant DM, and that Defendant DM would be deemed to have accepted that offer. If the Court were to interpret the second paragraph of Section 1.6 in the manner proffered by Defendant it would have to read a limitation into its terms that does not exist. When engaging in judicial construction, a court may not add words of limitation that do not exist. *Smith v*

Starke, 196 Mich 311, 314-315; 162 NW 998 (1917). As a result, the Court is convinced that Defendants' proposed interpretation violates the rules of judicial construction and must be rejected.

The Court further finds that Defendants alternative argument that Section 1.6 is ambiguous equally unconvincing. Rather, the Court is satisfied that the unambiguous terms of Section 1.6, as amended, provide that Defendant Valente, as Trustee, was deemed to have offered the shares and Defendant DM was deemed to have accepted the offer and agree to buy the shares on June 30, 2013 even though Defendant Valente was in good health.

2. Modification/Waiver

Next, Defendants argue that the Stock Agreement was modified or that the provision in question was waived. Parties to a contract may modify or waive rights and duties set forth in that contract. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 102; 878 NW2d 816 (2016). However, a contract's terms may not be modified unilaterally. *Id.* Rather, both sides must mutually assent to the modification, just as both sides mutually assented to the original contract's terms. *Id.* With respect to waiver, "a waiver is a voluntary and intentional abandonment of a known right." *Id.* at 374. "This waiver principle is analytically relevant to a case in which a course of conduct is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. *Id.*

In this case, Defendants argue that the parties' failure to pursue the sale anticipated in Section 1.6, along with their ongoing discussions and actions

concerning the sale of Defendant DM to a third party until the time of Plaintiff's termination establishes that parties agreed to modify the Stock Agreement, as amended and/or that Plaintiff waived his right to enforce Section 1.6. Specifically, Defendants point to evidence outlining efforts made to market and sell Defendant DM. First, Defendants rely on an unexecuted confidential agreement and unexecuted agency agreement that appears to have been drafted in 2013. (*See* Defendants' Exhibit 11.) The documents indicate that efforts had been made to find a third party purchaser of Defendant DM's assets, including Plaintiff and Defendant Valente's shares. Defendants also rely on a November 2015 valuation document, prepared by an investment bank (*See* Defendants' Exhibit 12), as well as a letter of interest which would have allowed Marsdam to market Defendant DM's stock for sale. (See Defendants' Exhibit 13.) Defendants also rely on Defendant Valente's deposition where he testified that Plaintiff agreed to try to sell Defendant DM to a third party. (*See* Defendants' Exhibit 7, at ¶¶203-204.) Defendants also refer to Plaintiff's testimony in which he acknowledges that he and Defendant Valente had appraisals done and discussed working with Edgepoint, a merger and acquisition firm, in 2015/2016 in an effort to sell Defendant DM. (*See* Defendants' Exhibit 4, at ¶¶194-195.) In his reply, Plaintiff concedes that he entertained offers to purchase Defendant DM and was silent with respect to Defendant Valente's failure to sell his shares back to Defendant DM.

The Court is satisfied that Defendants have presented sufficient evidence to create a genuine issue of material fact as to whether Plaintiff agreed to modify

the Stock Agreement or waive compliance with the second paragraph of Section 1.6. While Plaintiff argues his willingness to discuss alternatives to the sale anticipated in Section 1.6 of the Stock Agreement does not amount to a binding modification or a waiver of his right to enforce Section 1.6, the evidence, when viewed in a light most favorable to Defendants, indicates that Plaintiff agreed to explore a sale to a third party in lieu of enforcing Section 1.6 and that those efforts continued up until the time that Plaintiff was terminated. Accordingly, such evidence creates a genuine issue of fact as to whether the parties modified the terms of the Section 1.6 and/or whether Plaintiff agreed to waive compliance with that provision. For these reasons, Plaintiff's motion for summary disposition of his breach of contract claim must be denied.

3. Standing

Defendants further argue that Plaintiff lacks standing to bring a breach of contract against Defendants because he is not a party to the applicable provision of Section 1.6. However, Defendants have failed to provide any legal authority supporting this position. Additionally, Defendants' argue that Plaintiff's standing argument centers on whether he is a third party beneficiary of the Stock Agreement. However, in his response, Plaintiff does not argue that he is a third party beneficiary of the Stock Agreement. Rather, Plaintiff argues that he has standing as a party to the Stock Agreement under Sections 13.1 and 13.6. Likewise, however, Plaintiff has failed to provide any legal authority supporting his position that he has standing. Consequently, the Court is unable to make a determination on this issue without further briefing. Accordingly, Plaintiff and

Defendants shall submit supplemental briefs within 14 days of the date of this Opinion and Order including without limitation the following: (1) whether this is a legal question, (2) if not a legal question, identify the relevant and material facts, (3) and provide legal authority supporting respective positions.

To the extent Plaintiff argues that Defendants have waived their ability to contest his standing to pursue his claims because they did not list lack of standing in their affirmative defenses, this Court disagrees. "Under MCR 2.111(F) a defendant must raise defenses and affirmative defenses in its responsive pleading, and the failure to do so constitutes a waiver of the defense or affirmative defense." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 311; 503 NW2d 758 (1993). In this case, it appears undisputed that standing has not been raised as required by MCR 2.111(F). However, that does not render the defense waived. Affirmative defenses may be amended in the same manner as pleadings. *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208, 213; 850 NW2d 667 (2013), rev'd in part on other grounds, 498 Mich 68; 869 NW2d 213 (2015). Consequently, a party's failure to properly plead a defense in its first responsive pleading does not necessarily operate to waive the defense. *Southeast Michigan Surgical Hospital, LLC v Allstate Ins Co*, 316 Mich App 657, 663; 892 NW2d 434 (2016), citing *Tyra*, 302 Mich App at 213-214.

Leave to amend shall be freely given when justice so requires. MCR 2.118(A)(2). A party "may move to amend [his or her] affirmative defenses to add any that become apparent at any time, and any such motion should be granted as a matter of course so long as doing so would not prejudice the

plaintiff." A plaintiff is prejudiced where circumstances are present that would preclude the plaintiff from prevailing on his claim if the defense were added, but that would not have had such an effect had the defense been properly raised originally. *Tyra*, 302 Mich App at 217.

In this case, the issue of whether Plaintiff has standing to pursue a portion of his claims would have been equally pertinent and consequential had it been raised in Defendants' original affirmative defenses. Consequently, Plaintiff would not be prejudiced by Defendants being allowed to amend their affirmative defenses to add the defense of standing. As a result, the Court is satisfied that Defendants should be permitted to amend their affirmative defenses to add the defense of standing.

4. Standing/Third Party Beneficiary

Defendant also argues that Plaintiff lacks standing because he is not a third party beneficiary of the provision of the Stock Agreement. The third-party beneficiary statute, MCL 600.1405, provides: "Any person for whose benefit a promise is made by way of contract ... has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." The statute continues, "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." MCL 600.1405(1). "[A] person who qualifies under the third-party-beneficiary statute gains the right to sue to enforce the contract." *Shay v. Aldrich*, 487 Mich 648, 666; 790 NW2d 629 (2010). The Michigan Supreme Court has

held that "the plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise." *Schmalfeldt v. North Pointe Ins. Co.*, 469 Mich 422, 427; 670 NW2d 651 (2003) (internal citation and quotation marks omitted). By using the modifier "directly," the statute makes clear that only expressly intended beneficiaries may enforce the promise as a statutory third-party beneficiary. *Id.* Therefore, the statutory language "indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Koenig v City of South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). Courts look to the objective "form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary." *Id.* (internal quotation marks omitted).

In his response, Plaintiff does not address Defendant's position that he is not a third party beneficiary of Section 1.6. Rather, he argues that he has standing as a party to the Stock Agreement as a whole. However, in his Second Amended Complaint, Plaintiff alleges that he was an intended beneficiary of Section 1.6. (See Second Amended Complaint at ¶24.) Having failed to address the argument, the Court is convinced that Plaintiff has waived it, and thus Defendants are entitled to summary disposition of the portion of Plaintiff's breach of contract claim to the extent that he maintains that he has standing to bring said claims as an intended third party beneficiary.

5. Impossibility

Defendants also argue that Plaintiff's breach of contract claim should be dismissed pursuant to MCR 2.116(I)(2) because compliance with Section 1.6 was impossible. Michigan courts have recognized two types of impossibility. *Bissell v LW Edison Co*, 9 Mich App 276, 284, 156 NW2d 623 (1967). In the first situation, unknown circumstances exist when the contract is formed that render performance impossible. It appears undisputed that this type of impossibility is not at issue in this case. The second type of impossibility is impossibility due to supervening events, or supervening impossibility. *Id.* Under this theory, the occurrence of an event after contract formation renders performance impossible. *Daul v Dewey*, 37 Mich App 708, 710 n1, 195 NW2d 309 (1972); see also *Patterson v Gala Realty Co*, 12 Mich App 654, 163 NW2d 451 (1968) (nonoccurrence of liquor control commission approval for purchase of bar may relieve purchaser of his obligations).

The key to excusing nonperformance under a theory of impossibility is the foreseeability of the circumstances rendering performance impossible. If the circumstances are known to the parties when they enter the contract, nonperformance will not be excused. *Rogers Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 743, 189 NW2d 346 (1971). Furthermore, if the parties reasonably should have foreseen the circumstances, impossibility will not excuse performance. *Id.*

As a preliminary matter, Plaintiff argues that Defendants waived their impossibility defense by failing to plead it as an affirmative defense. However, as

discussed above, leave to amend is freely given. Moreover, as is the case with Defendants' standing defense, the issue of whether it was impossible to satisfy Section 1.6 would have been equally pertinent and consequential had it been raised in Defendants' original affirmative defenses. Consequently, Plaintiff would not be prejudiced by Defendants being allowed to amend their affirmative defenses to add the defense of impossibility. As a result, the Court is satisfied that Defendants should be permitted to amend their affirmative defenses to add the defense of impossibility.

Turning to the issue of whether complying with Section 1.6 was impossible, Defendants merely argue that a genuine issue of material fact exists as to whether compliance with Section 1.6 was impossible. The Court has already determined that multiple questions of fact exist as it relates to the enforceability of Section 1.6, including whether its terms were modified and/or waived. As a result, determining whether compliance with Section 1.6 was impossible is not achievable at this time as the issues of when and what was needed for compliance with Section 1.6 has yet to be resolved.

6. Termination of Plaintiff's Employment

Finally, Defendants argue that Section 1.6 is not controlling because Section 1.5 operated to terminate Plaintiff's shareholder interest, thereby extinguishing his ability, if any, to enforce Section 1.6. Section 1.5 of the Stock Agreement provides, in relevant part:

> It is agreed that any Stockholder who is currently an Employee-Stockholder and, at any time hereafter, ceases to be an Employee-Stockholder (other than as a result of death or disability), which are otherwise covered herein) whether as a result of voluntary

> termination of employment, termination of employment by the mutual consent of the Stockholder and the Corporation, or involuntary termination of employment by the Corporation, shall be deemed to have offered to sell all of his shares of the Stock to the other Stockholders and the Corporation for the Agreement Price and on the Agreement Terms. Such offer shall be deemed made on the date on which such Stockholder ceases to be an Employee-Stockholder.
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> (*See* Plaintiff's Exhibit 2, at ¶1.5.)

In response, Plaintiff argues that Defendants cannot enforce Section 1.5 for two reasons. First, Plaintiff avers that he cannot be fired pursuant to the terms of Section 1.5.4 of the Stock Agreement, which provides:

> Notwithstanding the provisions of this Section it is agreed by Americo Valente, Trustee and the Corporation that [Plaintiff's] employment cannot be terminated for any reason, except his voluntary termination delivered in writing to the Corporation, during any period following the death or disability of Americo Valente, in which [Plaintiff] has, by the provisions of this Agreement an outstanding and continuing option or right to purchase the shares of the Trust, either directly or through the action of the Corporation.
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> (Id. at Section 1.5.4)

Plaintiff argues that this provision unambiguously provides that his employment with Defendant DM cannot be terminated.

Upon reviewing Section 1.5.4, the Court is satisfied that Plaintiff's position is without merit. The unambiguous terms of Section 1.5.4 merely provide that Plaintiff's employment cannot be terminated following death or disability of Defendant Valente so long as he, directly or through Defendant DM, has the option to purchase Defendant Valente's shareholder interest. This interpretation is also consistent with the fact that Section 1.5 anticipates that either Plaintiff or Defendant Valente could potentially be involuntarily terminated. As a result,

Plaintiff's position that his employment could never be terminated is without merit. Furthermore, pursuant to MCR 2.116(I)(2), to the extent that Plaintiff's wrongful termination claim is based on Section 1.5.4, that claim must be dismissed.

Next, Plaintiff asserts that Defendants cannot enforce Section 1.5 because they materially breached the Stock Agreement first by failing to comply with Section 1.6. However, the Court has already held that a genuine issues of material fact exists including as to whether Defendants breached Section 1.6 of the contract, whether the Stock Agreement was modified, and whether Plaintiff waived his right, if any, to enforce Section 1.6. These issues of fact also bar this Court from determining whether a material breach occurred which would bar Defendants from enforcing Section 1.5.

B. Shareholder Oppression (Count VII)/Breach of Fiduciary Duty (Count VII)

1. Statute of Limitations

Defendants' first argue that Plaintiff's oppression claim is barred by the statute of limitations set forth in MCL 450.1489(1)(f), which is a portion of the statute governing claims for shareholder oppression. Specifically, Defendants rely on MCL 450.1489(1)(f), which provides:

> 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 comes first.

In response, Plaintiff avers that the subsection (1)(f) only applies to a claim for legal damages under the statute, not claims for equitable relief under

the statute.

The Court of Appeals, in *Irish v Natural Gas Compression Systems, Inc.*, unpublished per curiam of the Court of Appeals, issued July 18, 2016 (Docket No. 266021), in citing to *Estes v Idea Engineering & Fabrication, Inc.*, 250 Mich App 270; 649 NW2d 84 (2002), held:

> Under *Estes*, [250 Mich App at 286], this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages.

Irish, unpub op, at 3. See also *Forsberg v Forsberg*, unpublished per curiam of the Court of Appeals, issued December 5, 2005 (Docket No. 253762), at footnote 2 ("MCL 450.1489(1)(f) clearly distinguishes a claim for money damages and even provides a separate statute of limitations specifically for such claims"). Accordingly, the statute of limitations defense applies to Plaintiff's oppression claim to the extent Plaintiff seeks to recover money damages.

In this matter, Plaintiff has not specified what relief he is seeking to remedy the alleged oppression. However, to the extent that Plaintiff seeks monetary damages, his claim is barred if based on actions taking place prior to June 21, 2014 (three years before the original complaint was filed), or actions he discovered, or reasonably should have discovered, prior to June 21, 2015 (two years before the original complaint was filed).

B. Merits of Oppression Claim

Turning to the merits of Plaintiff's oppression claim itself, a party may only prevail on a claim for shareholder oppression to the extent that he establishes that the defendant shareholder committed one or more acts that were illegal, fraudulent or willfully unfair and oppressive to the corporation or the plaintiff. MCL 450.1489(1). In this case, Plaintiff relies on numerous actions that he alleges amounts to oppression, either independently or as a whole. However, Plaintiff's motion only focuses on some of those allegedly oppressive actions, which the Court will now address.

1. Termination of Plaintiff's Employment

The first basis for Plaintiff's oppression claim is the allegation that his termination was oppressive. The definition of "willfully unfair and oppressive conduct" is set forth in MCL 450.1489(3), which provides:

> (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.

Accordingly, termination of employment can only be oppression to the extent that it interferes with shareholder interests disproportionately as compared to other shareholders. In this matter, Plaintiff argues that his shareholder rights were disproportionately affected by his termination in three ways.

First, Plaintiff argues that his termination eliminated the only financial benefit he received from his shareholder status. The only evidence Plaintiff cites in support of his position is a summary of lost compensation that is a letter drafted by CPA Jeffrey Bagalis that states that Plaintiff has lost $4,847,000.00 as a result of Defendants' actions. (*See* Plaintiff's Motion for Summary Disposition of Counts VI and VII, at Exhibit 2.) As a preliminary matter, the letter does not identify what portion of the $4,847,000.00 is attributable to Plaintiff's termination. Moreover, the letter does not indicate what portion of the alleged losses are attributable to losses Plaintiff incurred in his capacity of a shareholder rather than in his capacity as an employee. Consequently, Plaintiff has failed to present any evidence indicating that his interests as a shareholder have been disproportionately affected by his alleged loss of compensation.

Second, Plaintiff maintains that his termination has shut him out of participating in Defendant DM's affairs, including voting on material business decisions. However, Plaintiff has failed to identify any matter he has not been permitted to vote on, or any issue that he was entitled to be heard in connection with that he has not been so heard.

Finally, Plaintiff argues that his shareholder interest have been affected by his termination because the termination requires him to sell his shareholder interest in Defendant DM pursuant to Section 1.5 of the Stock Agreement. Section 1.5 of the Stock Agreement provides, in pertinent part:

> Therefore, it is agreed that any Stockholder who is currently an Employee-Stockholder and, at any time thereafter, ceases to be an Employee-Stockholder (other than as a result of death or disability, which are otherwise covered herein) whether as a result of

> voluntary termination of employment, termination of employment by the mutual consent of the Stockholder and the Corporation, or involuntary termination of employment by the CORPORATION, shall be deemed to have offered to sell all of his shares of Stock to the other Stockholders and the Corporation for the Agreement Price and on the Agreement Terms. Such offer shall be deemed made on the date on which such Stockholder ceased to be an Employee-Stockholder.
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> (See Second Amended Complaint, at Ex. 1.)

Accordingly, Plaintiff's termination required him to offer to sell his shareholder interest. As all of Plaintiff's shareholder interests would be extinguished upon that forced sale, his shareholder interests were clearly disproportionately affected by his termination. Consequently, Defendants' contention that Plaintiff's termination did not affect his shareholder interests is without merit.

Defendants also argue that Plaintiff's termination cannot form the basis for a claim of oppression because he was an at-will employee.[3] Defendants maintain that Plaintiff's termination was permitted by the Stock Agreement, and that as a result, it is not oppressive pursuant the last sentence of MCL 450.1489(3), which provides:

> The term ["Willfully unfair and oppressive conduct"] 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.

Plaintiff has not addressed whether firing an at-will employee can form the basis for an oppression claim. Moreover, it does not appear that the

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[3]Plaintiff first argues that he could not be fired pursuant to Section 1.5.4 of the Stock Agreement. However, the Court has already held that Section 1.5.4 does not bar Plaintiff's employment from being terminated. As a result, Plaintiff's position is without merit.

Michigan Court of Appeals nor Michigan Supreme Court has addressed this issue. However, the Michigan Court of Appeals has held that the portion of MCL 450.1489(3) Defendants rely upon "cannot be read as permitting willfully unfair and oppressive conduct under the guise" of an action authorized by an agreement. *Berger v Katz*, unpublished per curiam opinion of the Court of Appeals, decided July 28, 2011 (Docket Nos. 291663, 293880). Given that Defendants position was first raised in its response to Plaintiff's motion for summary disposition, Plaintiff was not given a full opportunity to address Defendant's position. As a result, Plaintiff will be given 14 days from the date of this Opinion and Order to file a supplement addressing Defendant's position. Defendant will then be given 14 days to respond to Plaintiff's supplement.

2. Tax Distributions

Next, Plaintiff argues that Defendants oppressed his shareholder rights by failing to issue tax distributions as required by the Stock Agreement. However, even if such tax distributions were required, it is undisputed that neither shareholder was ever issued a tax distribution. In order to form the basis for oppression, the complained of act must have affected the complaining shareholder disproportionately. MCL 450.1489(3). Given that neither shareholder has been issued a tax distribution, the fact that Plaintiff has not received any tax distributions, in and of itself, is not evidence of oppression.

3. Self-Interested Transactions

Plaintiff also maintains that Defendant Trust has oppressed his shareholder interest by causing Defendant DM to pay rent to itself and/or another

entity owned by Defendant Trust or Defendant Valente. In addition, Plaintiff points to the undisputed fact that Defendant Trust caused Defendant DM to pay a portion of the cost of expanding the premise Defendant DM was leasing from an entity owned by Defendant Valente. Defendant Valente has admitted that Defendant DM paid a portion of the cost of the expansion and that he owns the landlord entity. (*See* Plaintiff's Exhibit 1, at pp 111-112, 132-133.) While these transactions undisputedly involved a conflict of interest in that Defendant Trust/Defendant Valente were on both sides of the transactions, Plaintiff has failed to prove that the transactions were fraudulent, illegal, or willfully unfair and oppressive, and failed to establish which shareholder interest(s) were disproportionately harmed as a result of the transactions. Consequently, the Court is convinced that while these transactions could potentially form the basis for an oppression claim, he has failed to prove such a claim at this time. As a result, summary disposition is not appropriate on this portion of the claim.

4. Certificate of Value

Additionally, Plaintiff asserts that Defendants oppressed his shareholder interest by re-determining Defendant DM's "certificate of value" without a unanimous vote as required by Section 2 of the Stock Agreement. Section 2 of the Stock Agreement provides that the per share value of DM was to be determined every year and that the decision to do so must be made unanimously by Defendant DM's shareholders. While Plaintiff cites to evidence indicating that Defendant DM's value went from 2 million to 13 million from 2012 to 2013 (See Plaintiff's Exhibit 12, at p. 44), Plaintiff has not provided any evidence that the

decision was not unanimous. Accordingly, summary disposition is not warranted based on this fact alone. Moreover, Plaintiff does not address how his shareholder interest was disproportionately damaged by the alleged action, and has not demonstrated that the action, even if oppressive, was unfair. For these reasons, summary disposition based on the 2013 determination must be denied.

5. Indemnification

Plaintiff also argues that his shareholder interest has been oppressed by Defendants refusing to indemnify him in this litigation. In support of his position, Plaintiff relies on Section 1 of Defendant DM's bylaws. However, the section itself provides that indemnification is provided in certain circumstances where the person is being sued "by reason of the fact that the person is our /was a Director or officer of the Corporation, or, while serving as a director or officer of the Corporation....." (See Plaintiff's Exhibit 16.) Accordingly, the right to indemnification, if any, was not as a result of Plaintiff's status as a shareholder. Therefore, the failure to indemnify did not affect Plaintiff's rights as a shareholder. Consequently, Defendants' alleged failure to indemnify cannot form the basis for an oppression claim.

6. Failure to Observe Corporate Formalities

Next, Plaintiff argues that Defendants failed to observe corporate formalities such as holding annual stockholder meetings and failing to provide him with notice of corporate consents. However, Plaintiff has failed to identify shareholder interests which have been disproportionately damaged/oppressive by these alleged failures. As a result, Plaintiff has failed to establish that these

actions constitute oppression.

7. Insurance Claim

Finally, Plaintiff avers that Defendants fraudulently filed an insurance claim; however, Plaintiff once again failed to establish that this action, even if true, constituted oppression of his shareholder interests. As a result, Plaintiff's motion for summary disposition of this portion of his oppression claim must be denied.

C. Breach of Fiduciary Duty (Count VI)

In his motion, Plaintiff asserts that Defendant Trust breached its fiduciary duty as a majority shareholder. Under Michigan common law governing corporations, a majority or controlling shareholder is a fiduciary and holds a duty to the corporation and its minority shareholders to act in good faith. *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1979). Specifically, Michigan Courts have recognized two types of situations in which a minority shareholder may maintain a breach of fiduciary duty claim against a majority shareholder: (1) When he has sustained a loss separate and distinct from that of other stockholders generally [*Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989)], and (2) When he can show a violation of a duty owed directly to him that is independent of the corporation. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003).

Plaintiff's breach of fiduciary duty claim is based on the identical actions that formed the basis for his oppression claim. However, Plaintiff does not address how any of the complained of activities either caused him to sustain a

loss separate and distinct from Defendant DM or violated a duty owed directly to him independent of the Defendant DM. As a result, Plaintiff's request for summary disposition of his breach of fiduciary duty claim must be denied.

IV. Conclusion

Based upon the reasons set forth above:

1) Plaintiff's motion for summary disposition of Count I is DENIED;
2) Defendants' motion for summary disposition of Count I, to the extent that they argue that Plaintiff lacks standing to enforce Section 1.6 of the Stock Agreement, as amended, remains under advisement. The parties shall file supplemental briefs on this issue within 14 days of the date of this Opinion and Order. Defendants' motion for summary disposition of Count I is GRANTED, in part as to Plaintiff's claim as a Third Party Beneficiary, and DENIED, in part as to the extent based on other arguments.
3) Defendants' motion for summary disposition of Count III is GRANTED in part to the extent that Count III is based on Plaintiff's argument that his employment could not be terminated pursuant to Section 1.5.4 of the Stock Agreement. Defendants' motion for summary disposition of Count III is otherwise DENIED.
4) Plaintiff's motion for summary disposition of Counts VI and VII is DENIED; and
5) With respect to Defendant's motion for summary disposition of Counts VI and VII:
    a. The portion of Plaintiff oppression claim seeking monetary

damages is barred if based on actions taking place prior to June 21, 2014 (three years before the original was filed), or actions he discovered, or reasonably should have discovered, prior to June 21, 2015 (two years before the original complaint was filed);

b. The issue of whether Plaintiff's termination may form the basis for an oppression claim where he was an at-will employee remains under advisement. The parties shall, within 14 days of the date of this Opinion and Order, file supplemental briefs on this issue.

c. Plaintiff's oppression claim is DISMISSED to the extent it is based on Defendants' failure to issue tax distributions in and of itself and/or refusal to indemnify him in this litigation.

d. The remainder of Defendants' request for summary disposition of Counts VI and VII pursuant to MCR 2.116(I)(2) is DENIED.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

SEP 21 2018
Date

Kathryn A. Viviano
Hon. Kathryn A Viviano, Circuit Court Judge