STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

Heath M. Trerice,
Plaintiff,

vs. Case No. 18-4695-CB

Howard O. Trerice,
Defendant.
_____/

OPINION AND ORDER

Defendant Howard O. Trerice ("Defendant Howard") filed a motion for summary disposition under MCR 2.116(C)(8). Alternatively, Defendant Howard seeks to add Miljoco Corp. as a necessary party and to stay the litigation. Miljoco Corp. moved to be added as a necessary party or alternatively to intervene and have the Court appoint a disinterested person and to stay the litigation.

I. Factual and Procedural Background

This action concerns the internal affairs of Miljoco Corp., a closely-held corporation. Miljoco Corp., a family owned business that manufactures temperature and pressure control instruments, operates in Macomb County but is organized under the laws of Florida. Plaintiff Heath M. Trerice ("Plaintiff Heath") is the half-brother of Defendant Howard. According to the Complaint, Defendant Howard owns 51% of Miljoco Corp. while Plaintiff Heath owns the remainder. Plaintiff Heath bases his Complaint on alleged shareholder oppression and self-dealing.

Plaintiff Heath previously filed a similar lawsuit in Florida in April 2016 seeking payment of shareholder distributions. The trial court there entered a "status quo order" and an order granting a motion to dismiss on the basis of forum *non-conveniens*, lack of personal

jurisdiction, and failure to make a derivative demand. The Florida Court of Appeals affirmed the dismissal order but vacated the status quo motion.

Plaintiff Heath filed his present Complaint on December 5, 2018 alleging: count I, violation of MCL 450.1489; count II, breach of common law fiduciary duty; and count III, derivative breach of fiduciary duty. The Court heard oral argument on the motions and took the matter under advisement.

II. Standard of Review

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

III. Arguments, Law and Analysis

A. Counts I and II, Internal Affairs Doctrine

Defendant Howard argues that the Court should dismiss Counts I and II of the Complaint because the internal affairs doctrine requires application of the law of the jurisdiction of the state of incorporation—in this case Florida. Therefore, according to Defendant Howard, Count I fails because it purports to state a claim under the Michigan Business Corporations Act ("BCA").

In addition, Defendant Howard seeks dismissal of Count II of the Complaint because under Florida law, a direct fiduciary duty claim only arises when a shareholder suffers direct harm not flowing from an initial harm to the company and where the shareholder suffers an injury separate and distinct from the other shareholders. Since Plaintiff Heath bases his claim on salary over-payments that deprived Miljoco Corp. of additional profits, Defendant Howard argues that Count II is derivative.

Plaintiff Heath responds that the internal affairs doctrine does not bar his claims against Defendant Howard because Miljoco Corp. has its headquarters in Michigan and conducts all of its operations here. Plaintiff Health claims Count II asserts an individual rather than derivative claim because he suffered a distinct injury as minority shareholder.

The internal affairs doctrine is a conflict-of-laws principle holding that "only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar v MITE Corp*, 457 US 624, 645; 102 S Ct 2629 (1982), see also, *Rogers v Guar Tr Co of New York*, 288 US 123, 130; 53 S Ct 295, 297 (1933)("It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state. . .").

However, Michigan courts have not clearly adopted the internal affairs doctrine as a choice-of-law principle. In the only published opinion analyzing the doctrine, the Michigan Supreme Court quoted language from the United States Supreme Court in *Rogers* but then concluded "where the act complained of affects the complainant solely in his capacity as a

member of the corporation . . . such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, our courts will not take jurisdiction." *Wojtczak v Am United Life Ins Co*, 293 Mich 449, 453–54; 292 NW 364 (1940). Subsequent courts have struggled to apply *Wojtczak* because it approached a choice-of-law doctrine in terms of jurisdiction and then ultimately upheld discretionary dismissal of the case in a manner similar to forum *non-conveniens*.

Recently, the Michigan Court of Appeals concluded that *Wojtczak* does not negate the subject-matter jurisdiction the trial court otherwise holds. *Daystar Seller Fin, LLC v Hundley*, ___ Mich App ___; ___NW2d___ (2018) (Docket No. 339467) slip op at 3. The *Daystar Seller Fin, LLC* Court read *Wojtczak* as simply recognizing that "the choice-of-law considerations implicated by the internal affairs doctrine should guide a trial court's discretion in determining whether it ought to decline jurisdiction over certain actions involving foreign corporations that would be more appropriately adjudicated in another forum." *Id.* Recognizing discretion to "decline jurisdiction over certain actions" without "negating subject matter jurisdiction" again treats a choice-of-law doctrine as one of forum *non-conveniens*. Put differently, the question becomes whether the Court hears the case instead of whether the Court applies the law of another jurisdiction to the case.

Two federal decisions, not binding on this Court, have read *Wojtczak* as addressing something other than traditionally understood choice-of-law doctrine. See *Stewart v Geostar Corp*, 617 F Supp 2d 532, 538 (ED Mich, 2007) (Reference to internal affairs in *Wojtczak* captures a different concept than decisions from the United States Supreme Court. Concluding the internal affairs doctrine does not limit the court's jurisdiction.); *Lapides v Doner*,

248 F Supp 883, 888 (ED Mich, 1965) (The rule in *Wojtczak* may be properly characterized as a rule of forum *non conveniens*—a rule of venue rather than jurisdiction).

Without expressly addressing *Wojtczak* or the internal affairs doctrine, the Michigan Court of Appeals also recently concluded in an unpublished opinion, also not binding on this Court, that a circuit court correctly applied the BCA to a Delaware corporation that had its principal place of business in Michigan. *Madden v Avila*, unpublished per curium opinion of the Court of Appeals, issued October 20, 2016 (Docket No. 326716) p, 3. The *Madden* Court found no "other law that would exempt" the corporation from the BCA. *Id.*

By its own terms, the BCA "applies to every domestic corporation and to every foreign corporation which is authorized to or does transact business in this state except as otherwise provided in this act or by other law." MCL 450.1121. A "foreign corporation" "means a corporation for profit formed under laws other than the laws of this state, which includes in its purposes a purpose for which a corporation may be formed under this act." MCL 450.1107(1). Under MCL 450.1489, "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."

Turning to the case at hand, the Court has not located any controlling authority requiring or even permitting the application of the internal affairs doctrine as traditionally understood—particularly, permitting application of Florida law to Plaintiff Heath's shareholder claim in a Michigan forum. *Wojtczak* does not expressly support retaining jurisdiction and applying foreign law.

The Court has also not found authority to disregard the plain language of the BCA. When drafting the BCA, the Legislature could have adopted the principles of the internal affairs doctrine and exempted foreign corporations from its reach. Instead, the Legislature plainly opted to generally apply the BCA to foreign corporations transacting business in this state.

Even under traditional choice-of-law analysis, Michigan law should apply in this case. The Court begins with the presumption that Michigan law applies and then asks whether a rational reason exists to displace Michigan law. *Sutherland v Kennington Truck Serv, Ltd*, 454 Mich 274, 285; 562 NW2d 466 (1997).

> In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests.

Id. citation omitted. Defendant Howard presented no persuasive reason, other than the state of incorporation, why Florida has any interest in the application of its law to this matter. Therefore, the presumption that Michigan law applies has not been rebutted. Even if Florida had an interest, Michigan's superseding interests mandate the application of Michigan law. Specifically, because Miljoco Corp. has its sole place of business here and Michigan has determined by passage of the BCA that it has an interest in regulating foreign corporations transacting business in this state, Michigan law properly governs Plaintiff Heath's shareholder oppression claim.

If the Court were to read *Wojtczak* merely as guiding its discretion to decline jurisdiction, as instructed by *Daystar Seller Fin, LLC*, ___Mich App ___ at 3, the Court still would not exercise that discretion here. Because Defendant Howard previously argued in Florida that the Florida forum was improper, it would be an inapposite result to now conclude that the matter belongs in Florida, leaving Plaintiff Heath with no forum to litigate his claim.

For these reasons, the Court will deny the motion for summary disposition as to Count I. Since Plaintiff Heath bases his arguments relating to Count II exclusively on Florida law, the motion regarding Count II fails for the same reasons.

B. Notice of Derivative Claim

Defendant Howard next argues that the Court should dismiss count III because before filing a derivative complaint, a plaintiff must first make a demand upon the corporation. Plaintiff Heath alleges that he made a demand in 2016 and a supplemental demand in 2017. Complaint ¶34, 38. On a motion under MCR 2.116(C)(8), the Court only reviews the Complaint. Therefore, for the purposes of the present motion, Plaintiff Heath has satisfied the demand requirement. Defendant Howard also has not cited any Michigan law supporting its position. Consequently, the motion for summary disposition will be denied.

C. Motion to Add Party

Miljoco Corp. also moves to be added as a necessary party or to intervene "for the limited purpose" of asking this Court to appoint a disinterested person and to stay the proceedings under Florida law. According to Defendant Howard, Florida law permits certain persons to review whether proceedings are in the company's best interest. Defendant Howard's procedural arguments and request to stay the litigation likewise all depend on the application of Florida rules to this matter. If Michigan has similar rules, Defendant Howard has not cited them. Therefore, the request to stay the litigation and appoint a disinterested party will be denied.

Regarding the motion to intervene, "[i]n general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). The general rule does

not apply to violations of duties owed directly to an individual. *Id.* citation omitted. The exception does not arise "merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Id.*

Again, on a motion under MCR 2.116(C)(8), the Court is constrained to the Complaint. Therefore, the Court will not inquire into the facts of whether a duty was owed to an individual or a corporation. However, Plaintiff Health admits that he pled Count III in the alternative as a derivative claim and in his Complaint alleges that the fiduciary duty in Count III was to "avoid wasting corporate assets." Complaint ¶ 49. Consequently, the Court is satisfied that Count III attempts to assert a derivative claim. Consequently, Miljoco Corp. is a necessary party.

For these reasons, the Court will deny the motion for summary disposition except for the request to add Miljoco Corp. as a necessary party.

IV. Conclusion

For the reasons set forth above, Defendant Howard's motion for summary disposition is DENIED. The motion to add Miljoco Corp. as a necessary party is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

DATED:

Hon. JULIE GATTI
Circuit Judge

cc: Norman C. Ankers, Esq.
Daniel D. Quick, Esq.