STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HEATHER SPITLER, individually and as Successor Trustee of the Todd M. Spitler Trust dated July 25, 2006, and Personal Representative of the Estate of Todd Spitler, an individual, and derivatively in the right of BRIGHTON FORD, INC.,
Plaintiff,

Case No. 19-030330-CB
Hon. Suzanne Geddis

v

GERALD SPITLER, SCOTT SPITLER, AND BRIGHTON FORD, INC.,
Defendants.

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OPINION & ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, County of Livingston,
State of Michigan, on the 1st day of October, 2019.

PRESENT: HONORABLE SUZANNE GEDDIS
CIRCUIT COURT JUDGE

THIS MATTER HAVING COME BEFORE THE COURT on Defendants' joint motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10), and the parties' respective counsel having briefed the matter, and the parties' respective counsel having appeared for the scheduled hearing on September 19, 2019, and this Court being otherwise fully advised in the premises now DENIES IN PART AND GRANTS IN PART Defendants' joint motion for summary disposition for the reasons that follow.

I. Relevant Facts and Procedural History

Gerald Spitler was, for many years, the sole owner of the stock of Brighton Ford, Inc. (hereinafter "Brighton Ford"), but over many years he gifted most of the stock to his sons, Scott and Todd, themselves employees of Brighton Ford.

On September 4, 2018, Todd Spitler committed suicide. He had been the general manager of the dealership during a time when the financial condition of the dealership was in decline. At the time of his death, Todd Spitler owned 50% of the non-voting stock, and 25% of the voting stock. Scott Spitler owned 49% of the non-voting stock, and 24% of the voting stock. Gerald Spitler continued to own 1% of the non-voting stock, and 51% of the voting stock. Todd Spitler's trust holds his shares of stock, and following his death, Plaintiff Heather Spitler became successor trustee of his trust.

A Buy-Sell Agreement (hereinafter "the Agreement") executed in 2006 by Todd, Scott, and Gerald Spitler granted the other shareholders an option to buy out a member's stock upon, *inter alia*, that member's death. The Agreement also laid out how the purchase price of the stock would be determined. If the other shareholders declined to exercise the option to purchase, the Agreement states that the corporation "shall redeem" the decedent's stock.

Brighton Ford had obtained and paid premiums for a $6 million policy on Todd Spitler, the proceeds of which appear, from the language of the Agreement, to have been intended to purchase his shares from his trust. However, the $6 million was paid out to Scott Spitler, as the primary beneficiary of the policy, and Scott Spitler has not used this money to buy Todd Spitler's stock.

Following Todd Spitler's passing, Plaintiff and Defendants began discussions about valuation of decedent's stock and on what terms Defendants may purchase it. The parties proceeded according to the Agreement, hiring professionals to evaluate the proper price of the stock Todd Spitler's estate owned. The professionals sought to interview Gerald Spitler as part of that process, but he refused to be interviewed until Plaintiff agreed to use nothing from the valuation in any subsequent action involving the shares. After the stock valuation process broke down, Plaintiff filed a six count Complaint for Declaratory Relief, Specific Performance by Defendants, Breach of Contract, Shareholder Oppression, Shareholder Derivative Action, and Unjust Enrichment. Defendants' first responsive pleading was this motion for summary disposition.

II. Argument

Defendants moved for summary disposition of Counts I, II, and III under C(8). They argued that Plaintiff has not and cannot state claim against Brighton Ford because Brighton Ford did not sign the Agreement, only its three shareholders did. Defendant Gerald Spitler moves for summary

disposition on Count IV under C(8). Count IV is a shareholder oppression claim and Defendant Gerald Spitler argues that Plaintiff has failed to allege any specific wrongdoing by him, so she failed to state such a claim. Further, he argues that the alleged breach of the shareholder agreement does not give rise to shareholder oppression claims. In addition, Defendants assert that because Counts V and VI are shareholder derivative claims, and Plaintiff has failed to deliver written demand on Brighton Ford at least ninety days before filing this lawsuit, her claims must fail under C(10).

Defendants go on to contend that Counts V and VI should be dismissed under C(7) because Brighton Ford released Scott Spitler of such claims, Count V should be dismissed under C(8) because Scott Spitler's receipt of the proceeds from Todd Spitler's life insurance policy was not self-dealing, and that Count V should be dismissed under C(10) because Todd Spitler assented to the purchase of life insurance by Brighton Ford.

Plaintiff responds that Counts I, II, and III are validly stated claims because the three shareholders of Brighton Ford signed the Agreement with the actual authority to bind the company, and so bound Brighton Ford to the agreement. Plaintiff continues that Count IV states a valid claim for shareholder oppression because the Complaint, taken as a whole, contains many allegations of wrongful conduct by Gerald Spitler.

As to Count V, Plaintiff asserts the ninety days after the demand letter was delivered to Brighton Ford will have run by time Defendants file their Answer, whether the release signed by Gerald and Scott Spitler is valid is a question of fact under C(10) and it violates the Agreement.

As to Count VI, Plaintiff maintains that even if the procedural requirements of making a derivative claim were not met, Plaintiff properly pled a direct claim of unjust enrichment against Scott Spitler.

III. Standard of Review

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *See Skinner v Square D Co*, 445 Mich 153, 161 (1994); *Babula v Robertson*, 212 Mich App 45, 48 (1995). Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *see also Coblentz v City of Novi*, 475 Mich 558 (2006). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Atty Gen v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 26–27 (2010) (quoting *West v GMC*, 469 Mich 177, 183 (2003)). Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *See Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618 (1995). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *See Quinto v Cross & Peters Co*, 451 Mich 358, 363 (1996).

Under MCR 2.116(C)(8), a Court can dismiss a claim where the plaintiff fails to state a claim on which relief can be granted. A summary disposition motion under C(8) should be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff's claim for relief. *See Maiden v Rozwood*, 461 Mich 109, 119 (1999). The Court considers the pleadings alone, must accept all pled facts as true, and must construe all allegations in the light most favorable to the nonmoving party. *See e.g. Capital Props Group, LLC v 1247 Ctr St, LLC*, 283 Mich App 422, 425 (2009).

IV. Analysis

A. Counts I, II, and III of the Complaint

Defendants argue Brighton Ford cannot be bound by the Agreement because Brighton Ford as an independent entity did not sign the Agreement. In their Reply Briefs, Defendants Scott and Gerald Spitler each claim that Counts I-III do not state a claim as to them because the Agreement gave them the option, not the obligation, to purchase the stock. In their Reply Briefs, Defendants Scott and Gerald Spitler also argue that the request for relief asks for Brighton Ford to redeem the stock, not for them as individuals to take some action. Plaintiff rebuts the argument that Brighton Ford did not agree to the Agreement by way of arguing that the signatories had authority to bind the corporation because they were the only three shareholders.

Defendants' joint argument that Plaintiff failed to state a claim as to Brighton Ford, and Defendants Gerald and Scott Spitler's arguments that Plaintiff failed to state a claim as to them individually shall be treated each in turn.

1. Whether Plaintiff Has Stated a Claim as to Brighton Ford

It is true, as Defendants argue, that a corporation is a separate legal entity from its shareholders. *See Kline v Kline*, 104 Mich App 700, 702 (1981). However, under *Industrial Steel Stamping Inc v Erie State Bank*, 167 Mich App 687, 692 (1988), the sole stockholder of a corporation was held to be one and the same with the corporation, and thus his agreement not to pursue litigation against the controller who diverted funds, was binding on the corporation. Because of the unity in interest between the shareholder and the corporation, and the fact that the contract plainly evidenced the sole shareholder's intent to bind his corporation to the agreement, the Court treated the shareholder and the corporation as one entity, and determined the shareholder had bound the corporation, even though the corporation did not sign the agreement. *See id.* Furthermore, under *Altobelli v Hartmann*, 499 Mich 284, 296-97 (2016), it is well established that corporations can only act through their officers and agents. *See also Atty General v Nat'l Cash*

Register Co, 182 Mich 99, 111 (1914). The acts of officer and agents, within the scope of their employment, are acts of the corporation. *See id.*

Here, Brighton Ford did not sign the Agreement. However, as in *Industrial Steel*, the agreement evidences the intent to bind Brighton Ford. *See* section 5(h), committing the corporation to redeem shares not bought out by the stockholders. In *Industrial Steel, supra,* it was appropriate to look beyond the legal fiction of the corporation and allow the shareholder's act to bind the corporation. To do otherwise would have allowed an unjust result. Here is much the same situation. The three shareholders in Brighton Ford had a unity of interest with the corporation. The agreement evidenced the intent of the shareholders to bind the corporation. It is appropriate here to allow the signatures of the three shareholders to bind Brighton Ford. Further, under *Altobelli* and *Nat'l Cash Register, supra,* the three stockholders were agents or officers of the corporation. Therefore, their act of signing the Agreement was sufficient to bind the corporation.

For those reasons, Plaintiff has properly stated a claim against Brighton Ford in Counts I-III of the Complaint.

2. Whether Plaintiff Has Stated a Claim as to Scott and Gerald Spitler

Defendants Scott Spitler and Gerald Spitler each filed and served Reply Briefs in support of Defendants' joint motion for summary disposition on September 16, 2019. In those Reply Briefs Defendants Scott Spitler and Gerald Spitler each raised for the first time that Counts I, II, and III of Plaintiff's Complaint failed to state a claim as to them individually, and accordingly should be dismissed under C(8). These arguments may have been made in response to one sentence in Plaintiff's Response to Defendants' joint motion for summary disposition which contended that even if the Complaint failed to state a claim as to Brighton Ford, no arguments had been raised that the Complaint did not state a claim as to Scott and Gerald Spitler. Whether one sentence in

Plaintiff's Response is a sufficient hook to make Scott and Gerald Spitler's Reply arguments rebuttals to Plaintiff's arguments within the meaning of MCR 2.116(G)(1)(a)(iii) need not be analyzed by this Court because Defendants' Scott and Gerald Spitler's Reply Briefs were not timely filed.

MCR 2.116(G)(1)(a)(iii) requires that a movant's reply brief be filed and served at least four days before the scheduled hearing. Here, the hearing on Defendants' joint motion for summary disposition was scheduled for September 19, 2019 at 1:30 P.M. Per MCR 2.116(G)(1)(a)(iii), Defendants' Reply Briefs could be filed and served no later than September 15, 2019. While this Court recognizes that September 15, 2019 is a Sunday, the aforementioned court rule clearly states that reply briefs must be filed and served *at least* four days prior to the hearing. [emphasis added] Defendants Scott and Gerald Spitler, therefore, had the option under the applicable court rule to file and serve their reply briefs any time before September 15, 2019, and this Court does not interpret the rule as requiring them to file on a weekend.

Defendants' Reply Briefs were not filed on or before September 15, 2019, and therefore Defendants' Reply Briefs are not timely. Accordingly, this Court declines to consider the arguments raised in said Reply Briefs. Thus, Plaintiff's Counts I-III shall not be dismissed as to Scott and Gerald Spitler at this time.

B. Count IV of the Complaint:

Defendants' argument for dismissal of Count IV has two prongs:

1. Plaintiff failed to allege wrongful conduct
2. Even if Plaintiff alleged breach of the stockholder agreement, that does not constitute oppressive conduct

Both prongs of Defendants' arguments fail for the reasons set forth below.

1. Whether Plaintiff Failed to Allege Wrongful Conduct

Defendants begin by arguing that Plaintiff failed to plead any wrongful conduct under Count IV. They go on to quote paragraphs 52-55 under Count IV in the Complaint, which does not contain much in the way of supporting factual allegations. This argument ignores paragraph 51 under that Count, which incorporates by reference all the allegations made up to that point in the Complaint. Therefore, Count IV does incorporate specific allegations of wrongdoing – namely the failure to abide by the stockholder agreement. The specific allegations of fact incorporated by reference are sufficient under MCR 2.111(B) to properly plead facts that inform the adverse party of the nature of the claims, and allow them to formulate a response.

2. Whether the Alleged Conduct Constitutes Shareholder Oppression

Having established that the Complaint does plead conduct under Count IV, the Court can then move on to whether the plead conduct counts as shareholder oppression. MCL 450.1489(3) defines shareholder oppression. It reads as follows:

> "[W]illfully 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."

In addition, *Madugula v Taub*, 496 Mich 685, 717-21 (2014) is instructive as to what rises to the level of shareholder oppression. The facts in that case are analogous in the broad strokes to

the facts in this present case. The parties in *Madugula* were shareholders in a closely held corporation, and they entered into a shareholder agreement that governed how directors and employees would be appointed or terminated, among other things. Taub fired Madugula without a supermajority of the shareholders, and Madugula sued for, *inter alia*, shareholder oppression, alleging breach of the agreement constituted oppression. The Court carefully examined the language of MCL 450.1489, quoted above, in order to determine what constituted shareholder oppression. The Court began by broadly defining shareholder oppression as follows:

> Notably, "willfully unfair and oppressive conduct" occurs when the conduct "substantially interferes with the interests of the shareholder as a shareholder."

The *Madugula* Court went on to hold that the shareholder agreement laid out the rights and interests of the shareholders, so a breach of that agreement was a failure to afford the shareholder his rights. The Court concluded that breach of a shareholder agreement "may be evidence" of shareholder oppression. *Id. at* 720. The Court added in a footnote that evidence of such breach does not per se establish a claim for shareholder oppression. The Court ultimately remanded the matter back to the trial court to determine if the specific conduct at issue rose to the level of shareholder oppression.

While the agreement in *Madugula* was about a different topic than the agreement in the present case, the reasoning of the Michigan Supreme Court is still applicable. Here, as in *Madugula*, Plaintiff is a shareholder in her position as trustee of Todd Spitler's trust. The trust owns 50% of the nonvoting stock, and 25% of the voting stock. Gerald Spitler owned 51% of the voting stock, and 1% of the non-voting stock. Following the reasoning of *Fenestra Inc v Gulf American Land Corp*., 377 Mich 565, 599-600 (1966), a shareholder who owns 51% of the stock (here voting stock) and/or has control of the corporation is a majority shareholder. Under these

circumstances, this Court finds Defendant Gerald Spitler is a majority shareholder and Plaintiff, as trustee, a minority shareholder. In light of *Madugula*, the two unpublished cases Defendants' rely on for their argument that the alleged breach fails to state a claim for shareholder oppression is unpersuasive. *See* MCR 7.215(C)(1).

Here Defendants entered into a shareholder agreement regarding the buying out of a decedent Todd Spitler's stock. Plaintiff has alleged in Count IV that Defendants breached that shareholder agreement, and in so doing committed shareholder oppression. Defendants argue that breach of a shareholder agreement cannot be shareholder oppression as a matter of law. Plaintiffs argue that refusal to honor a shareholder agreement is oppression conduct. The answer, given in *Madugula, supra*, is that such conduct may be oppression. A motion for summary disposition pursuant to C(8) should only be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff's claim for relief. *See Maiden v Rozwood*, 461 Mich 109, 119 (1999). Under *Maiden, supra*, the factual allegations that Defendants have breached the shareholder agreement are sufficient for Plaintiff's Count IV to survive a C(8) claim.

C. Count V of the Complaint

Defendants raise three arguments as to why Count V should be dismissed. They are as follows:

1. Plaintiff failed to abide by the demand letter procedure in MCL 450.1493a so the claim should be dismissed under (C)(10);
2. Plaintiff failed to allege conduct that constitutes breach of fiduciary duty, so the claim should be dismissed under (C)(8);

3. Plaintiff is barred from challenging Brighton Ford's payment of the premiums on the life insurance policy when Todd Spitler assented to it, therefore the claim should be dismissed under (C)(10).

Defendants' first argument succeeds, and Count V should be dismissed for the reasons laid out below, and therefore the second and third arguments need not be reached.

Count V is a derivative claim. That is, Plaintiff is making a claim that Defendants have harmed the corporation, and she, as a shareholder, is suing on behalf of the corporation. For derivative claims, Plaintiff must first make written demand on the corporate directors asking them to cure the harm, before filing a lawsuit for the same. *See* MCL 450.1493a.

MCL 450.1493a governs demand letters in derivative actions. It states as follows:

> A shareholder may not commence a derivative proceeding until all of the following have occurred:
>
> (a) A written demand has been made upon the corporation to take suitable action.
>
> (b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

In this case, Plaintiff made the written demand on Brighton Ford on April 29, 2019, then filed this present lawsuit on May 8, 2019. There is no dispute that the ninety days required by MCL 450.1493a did not elapse between the issuing of a demand letter, and the commencement of suit. Plaintiff's argument that ninety days will have elapsed by time Defendants must Answer the Complaint misses the mark. The language of the statute clearly states that 90 days must elapse before *commencement* of the derivative claim, not before the Answer is due.

If Plaintiff had produced some facts that showed the demand had been rejected by the Board before May 8, 2019, or irreparable harm would come to the company by waiting ninety

days, then Plaintiff's failure to file the demand ninety days before suit may be excused. Plaintiff has not produced such facts, so demand should not be excused. In addition, under *Campau v McMath,* 185 Mich App 724, 729-30 (1990), a plaintiff's failure to issue a demand should be excused when the plaintiff can show that such demand would have been futile. However, Plaintiff has not raised that argument, so demand should not be excused for being futile.

Defendants are correct that under MCL 450.1493a, Plaintiff cannot bring her derivative claims until ninety days after making written demand on Brighton Ford. Ninety days did not elapse between when she made demand and when she filed suit. Therefore, Count V of the Complaint should be dismissed under C(10).

Since Defendants' C(10) argument regarding written demand succeeds in achieving dismissal of Count V, the Court need not reach the arguments about the Release Agreement, whether Plaintiff stated a claim for breach of fiduciary duty, or the argument regarding Todd Spitler's assent to the alleged breach of duty.

D. Count VI of the Complaint

Defendants seek to have Count VI dismissed under C(10) for failure to make a timely written demand on Brighton Ford. Plaintiff responds that Count VI states a direct claim as well as a derivative claim. Defendant Scott Spitler further argues that no direct claim for unjust enrichment is stated, as Plaintiff has not claimed that Scott Spitler unjustly received a benefit from her.

Before determining if Count VI should be dismissed, this Court must evaluate whether Count VI states a direct or a derivative claim. Count VI states that Scott Spitler has been unjustly enriched as a result of his breach of fiduciary duty. There is no allegation in that count that Todd Spitler's trust has been harmed as a result of Scott Spitler's retention of the life insurance proceeds.

MCL 450.1491a defines derivative proceeding as a civil suit brought by the shareholder "in the right of a domestic corporation or a foreign corporation that is authorized to or does transact

business in this state." Whether a shareholder action is in the right of a corporation is dictated by the nature of the alleged injury. If the corporation suffers the primary injury so that the shareholder's action is to "enforce a claim of the corporation," the action is derivative; that is, the shareholder's injury is derivative or secondary to that suffered by the corporation. *See Dean v Kellogg*, 294 Mich 200, 207 (1940); *see also Christner v Anderson, Nietzke & Co., P.C.,* 433 Mich 1, 8-9 (1989). The most common shareholder action - alleging a violation of a director's or officer's fiduciary duties, is a derivative claim, not a direct claim. *See id., at 9.*

Here, the Complaint as a whole reads as containing both direct and derivative claims. Count VI in particular refers to breach of Scott Spitler's fiduciary duty. That language indicates that the harm being alleged in that particular Count is a harm suffered by Brighton Ford. Without more, Count VI reads like a derivative claim. Therefore, it is subject to the demand letter requirements of MCL 450.1493a.

As stated above, Plaintiff made written demand on Brighton Ford fewer than ninety days before filing the present lawsuit. Plaintiff has not alleged facts that show the demand was rejected before the 90 days expired, the waiting period would cause some irreparable harm to the corporation, or that the demand was futile. Without Plaintiff presenting evidence that the demand requirement should be waived, the derivative claim in Count VI is improperly made. For the same reasons stated above in regards to Count V, Count VI should be dismissed under C(10).

Since Defendants' argument that Count VI should be dismissed for failure to timely make written demand on Brighton Ford succeeds in achieving dismissal of Count IV, Defendant Scott Spitler's argument that Plaintiff has not stated a direct claim for unjust enrichment against him need not be reached.

E. Amendment Permitted

Pursuant to MCR 2.116(I)(5), unless some evidence has been brought before the Court demonstrating that amendment would be unjustified, this Court must allow Plaintiff to amend her Complaint when her claims have been disposed of under C(8) and C(10). Here, Plaintiff's claims under Count V and Count VI have been disposed of under C(10), so the amendment provision of MCR 2.116(I)(5) applies. There is no evidence before this Court indicating that amendment would be unjustified. Therefore, per MCR 2.116(I)(5) and MCR 2.118, Plaintiff shall be permitted to amend her Complaint within thirty days of the date of this Opinion and Order.

V. Conclusion

For the reasons stated above, Defendants' motion for summary disposition is hereby DENIED IN PART AND GRANTED IN PART. That is to say, Defendants' motion for summary disposition is DENIED as to Counts I, II, III, and IV of the Complaint, and Defendants' motion for summary disposition is GRANTED as to Counts V and VI of the Complaint.

IT IS SO ORDERED.

/s/ Suzanne Geddis
Hon. Suzanne Geddis (P35307)
Circuit Court Judge