Mauck v. Cherry Oil Co., 2023 NCBC 62.

STATE OF NORTH CAROLINA

LENOIR COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 343

ARMISTEAD B. MAUCK and LOUISE CHERRY MAUCK,

Plaintiffs,

v.

CHERRY OIL CO., INC.; JULIUS P. "JAY" CHERRY, JR.; and ANN B. CHERRY,

Defendants,

AND

CHERRY OIL CO., INC. and JULIUS P. "JAY" CHERRY, JR.,

Counterclaim-Plaintiffs,

v.

ARMISTEAD B. MAUCK,

Counterclaim-Defendant.

ORDER AND OPINION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION IN THE CAUSE FOR COURT SUPERVISION OF CALL OF SHARES

THIS MATTER comes before the Court on two motions: Defendants' Motion for Summary Judgment ("Motion for Summary Judgment," ECF No. 81) and Defendants' Motion in the Cause for Court Supervision of Call of Shares ("Motion for Supervision," ECF No. 79) (collectively, "Motions").[1]

[1] Since the present Motions were argued, the parties have filed two additional motions. (Defs.' Mot. in the Cause for Supervision of Additional Document Requests, ECF No. 103; Pls.' Mot. for Leave to Suppl. the Second Am. Compl., ECF No. 108.) Those new motions are not addressed in this Opinion.

THE COURT, having considered the Motions, the briefs of the parties, the arguments of counsel, and all applicable matters of record, **CONCLUDES** that, for the reasons set forth below, the Motion for Summary Judgment should be **GRANTED** and the Court will **DEFER** ruling at this time on the Motion for Supervision.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Walter L. Tippett, Jr., and Katarina K. Wong, for Plaintiffs Armistead B. Mauck and Louise Cherry Mauck.

Womble Bond Dickinson (US) LLP, by Pressly M. Millen and Samuel B. Hartzell, for Defendants Cherry Oil Co., Inc.; Julius P. "Jay" Cherry, Jr.; and Ann B. Cherry.

Davis, Judge.

INTRODUCTION

1. As this Court has previously stated, "[t]his action, succinctly put, concerns a dispute among family members over the management and future direction of a family business." *Mauck v. Cherry Oil Co.*, 2021 NCBC LEXIS 81, at **2 (N.C. Super. Ct. Sept. 20, 2021). The present Motions require the Court to (1) address the scope of the fiduciary duty owed by majority shareholders to minority shareholders in the context of a close corporation; and (2) untangle the parties' web of contentions and finger-pointing regarding the breakdown in the process for completing the company's purchase of the minority shareholders' shares pursuant to a put/call provision in a shareholders' agreement.

FACTUAL AND PROCEDURAL BACKGROUND

2. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *McGuire v. Lord Corp.*, 2021 NCBC LEXIS 4, at **1–2 (N.C. Super. Ct. Jan. 19, 2021) (cleaned up).

3. A complete summary of the factual and procedural background of this case—as alleged in Plaintiffs' Second Amended Complaint ("SAC")[2]—can be found in the Court's Order and Opinion on Defendants' Motion to Dismiss Second Amended Complaint. *See Mauck v. Cherry Oil Co.*, 2022 NCBC LEXIS 39 (N.C. Super. Ct. May 2, 2022) ("2 May Order and Opinion").

4. The SAC originally contained nine causes of action, consisting of a mixture of derivative and individual (or direct) claims asserted by Plaintiffs Armistead B. Mauck ("Armistead") and Louise Cherry Mauck ("Louise")[3] in their dispute with Defendants Julius P. Cherry, Jr. ("Jay") and Ann B. Cherry ("Ann") over the control of Cherry Oil Co., Inc. ("Cherry Oil"). However, as a result of the Court's 2 May Order and Opinion, only the following two claims remain: (1) Plaintiffs' individual claim for breach of fiduciary duty; and (2) Plaintiffs' claim for breach of contract (based on Defendants' alleged breach of the above-referenced put/call provision of Cherry Oil's Shareholders' Agreement). *Id.*, at **49.

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[2] The SAC (ECF No. 48) is the operative pleading by Plaintiffs for purposes of the present Motions.

[3] In this Opinion, Armistead and Louise are referred to collectively as either "Plaintiffs" or the "Maucks."

5. Accordingly, the Court will summarize only those facts and procedural developments that are most directly relevant to the remaining claims that are the subject of the present Motion for Summary Judgment.

6. Defendant Cherry Oil is a business that—both directly and through its affiliates, AJAL Investments, LLC ("AJAL") and C-Gas, LLC ("C-Gas")[4]—owns propane and refined fuel distribution operations serving business and residential customers, including convenience stores. (Jay Cherry Dep., at 63:8–12, 107:3–6, 148:20–24, ECF No. 112.1.) Cherry Oil and its affiliates—which the parties refer to collectively as "Cherry Energy"—have been owned and managed by members of the Cherry family since Cherry Oil was founded in 1928 by J.P. Cherry, Sr. (Mauck Aff. I ¶ 4, ECF No. 14.)

7. Armistead and Louise are married and together own and control 194 (approximately 34%) of Cherry Oil's shares.[5] (Mauck Aff. I ¶¶ 2–3.)

8. Armistead joined Cherry Oil as an officer and director in 1995, and he performed various functions as an employee of Cherry Oil through the end of 2021. (Mauck Aff. I ¶ 2; J. Cherry Dep., at 32:2–22, 136:5–7.)

9. Prior to being terminated in 2021, Louise was employed by Cherry Oil for approximately fifteen years and was primarily responsible for payroll and related tasks. (Louise Mauck Dep., at 15:2–4, 17:14–17, ECF No. 112.3.) Louise also served

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[4] AJAL and C-Gas are not named parties to this action.

[5] Armistead and Louise each individually own 97 shares of Cherry Oil. (Mauck Aff. I ¶¶ 2–3.)

as a member and officer of Cherry Oil's Board of Directors (the "Board") from August 2000 until her purported removal from the Board on 16 June 2021. (J. Cherry Dep., at 136:5–7; Mauck Aff. I ¶¶ 2–3.)

10. Jay and Ann are married and together own and control 390 shares (approximately 66%) of Cherry Oil, which constitutes a majority interest in the company.[6] (SAC Ex. D-1, ECF No 48.6.)

11. Jay is Louise's brother and has worked for Cherry Oil since graduating from college. (J. Cherry Dep., at 10:7–14.) Jay also serves both as the chairperson of the Board and as president of Cherry Oil. (J. Cherry Dep., at 19:18–20; Mauck Aff. III ¶ 2, ECF No. 40; Cherry Decl. ¶ 2, ECF No. 15.1.) Ann is a shareholder, director, vice president, and assistant secretary of Cherry Oil. (Armistead Mauck Dep., at 87:1–2, ECF No. 112.2.)

12. On 15 October 1998, the Maucks and Cherrys entered into a shareholders' agreement (the "Shareholders' Agreement") outlining their rights and responsibilities as shareholders of Cherry Oil. (*See* S'holders' Agrmt., ECF No. 15.2.)

13. Section 11 of the Shareholders' Agreement contains a "put/call" provision that states, in pertinent part, as follows:

> Section 11: Put/Call.
>
> . . .
>
> Subject to the preceding provisions of this Agreement, the Corporation shall have the right to purchase (i.e., "call") from each Shareholder (or his legal representative) all, but not less than all, of his Shares for the

[6] Specifically, Jay owns 348 shares (59%), while Ann owns 42 shares (7%). (SAC Ex. D-1, at 1.)

> price specified in Section 6 and upon the terms specified in Section 7. If the Corporation shall elect to purchase all such Shares, the Corporation shall provide notice to the Shareholder whose shares are called (or his legal representative), which such notice shall fix a closing date not more than sixty (60) days after the receipt of the same.
>
> The Shareholder subject to a put or call shall vote, and take any other necessary action, in accordance with the vote of the Shareholders owning a majority of the remaining Shares.

(S'holders' Agrmt. § 11.)

14. Section 6B, in turn, states the following regarding the process for valuation of the selling shareholders' shares:

> Section 6: Purchase Price. The price of each share of capital stock purchased pursuant to this Section shall be determined in accordance with Subsections 6A or 6B below.[7]
>
> . . .
>
> B. Fair Market Value. Unless the price per share shall be determined in accordance with the provisions of Subsection 6A above, the purchase price for each share of stock shall be the fair market value of each such share. The fair market value of each share of stock shall be determined by one or more independent appraisers who shall be agreed upon in writing by the selling Shareholder (or the personal representative of a deceased Shareholder), and the remaining Shareholders. The written decision of such appraiser or appraisers shall be binding upon all parties as to the fair market value of such shares. If such parties cannot agree upon such appraiser or appraisers within thirty (30) days of the date when it becomes necessary to determine the fair market value, then, within fifteen (15) days after the expiration of such thirty (30) day period, the selling Shareholder (or the personal representative of a deceased Shareholder) shall appoint an appraiser, and the remaining Shareholders shall appoint a second appraiser, and the two so appointed shall appoint a third appraiser. If the two so appointed fail to appoint a third appraiser within said fifteen (15) day period, the Clerk of Superior Court of Lenoir County shall appoint a third appraiser. The written

[7] Subsection 6A applies in situations, unlike here, in which the company and the selling shareholders are able to agree on the price for which the shares will be purchased.

> decision of such appraisers shall be binding upon all parties as to the fair market value of such shares.

(S'holders' Agrmt. § 6B.)

15. In or around 2007, the dispute that ultimately gave rise to this lawsuit began when Jason Cherry ("Jason")—Jay and Ann's son—joined Cherry Oil as an employee. (J. Cherry Dep., at 56:7–8, 12–14.) Plaintiffs took issue with Jason's performance as an employee of Cherry Oil, pointing to critical reviews of Jason's job performance by company employees and a "family business consultant." (SAC Ex. I, ECF No. 48.13; *see also* SAC Exs. A–C, ECF Nos. 48.3–48.5.)

16. The Maucks' and Cherrys' efforts to find a path forward together ended on 17 July 2020, when Jay sent a letter to Armistead and Louise stating as follows:

> [T]he current working relationship has been strained for a while now and is not sustainable. To maintain meaningful relationships and provide for the continuity of operations, we need to develop a plan for you to transition out of ownership of Cherry Oil, C-Gas and AJAL.

(SAC Ex. V, ECF No. 48.26.)

17. On 9 April 2021, Plaintiffs sent a letter (the "Derivative Demand Letter") to Cherry Oil demanding that the company take appropriate action with regard to their allegations of misconduct by the Cherrys toward the company. (*See* SAC Ex. I.)

18. Before receiving a response to the Derivative Demand Letter, Plaintiffs initiated this action by filing their original Complaint in Lenoir County Superior Court on 6 May 2021 against Defendants Cherry Oil, Jay, and Ann. (Compl., ECF No. 3.) The original complaint asserted five claims for relief: (1) dissolution of Cherry Oil pursuant to N.C.G.S. § 55-14-30; (2) removal of Jay and Ann as directors under

N.C.G.S. § 55-8-09; (3) breach of fiduciary duty and constructive fraud against Jay and Ann; (4) breach of contract against Jay (relating to a promise allegedly made by him to Armistead regarding a transfer of stock); and (5) a putative claim for constructive trust against Jay and Ann.

19. This action was designated as a complex business case and assigned to the Honorable Gregory P. McGuire. (Design. Ord., ECF No. 1; Assign. Ord., ECF No. 2.)

20. On 16 June 2021, a special shareholders' meeting (the "16 June Shareholders' Meeting") was held for the purpose of downsizing the number of members of the company's Board from four to three. The vote passed, and Jay, Ann, and Armistead were elected as the members of the newly constituted Board. As a result, Louise was removed as a member of the Board. (SAC Ex. N, ECF No. 48.18.)[8]

21. The Maucks attended the 16 June Shareholders' Meeting along with their attorney. At the meeting, Armistead voiced his objections to the propriety of the notice provided to the shareholders of the meeting, which he claimed was inconsistent with Cherry Oil's Bylaws. (SAC Ex. N.) Specifically, Armistead objected on the following grounds:

> Article 2 Section 5 of the bylaws requires ten days' minimum notice of a special meeting of the shareholders, and the post office postmark on the notice received by Louise Mauck shows June 7 for a June 16th meeting. The post office mark for myself is only partially legible, but it was received a day after notice received by Louise, and to be [sic] postmarked

[8] As discussed in more detail below, the validity of the actions taken at the 16 June Shareholders' Meeting has been vigorously disputed by the Maucks throughout this litigation.

> June 8. Insufficient notice to either myself or Louise would not be sufficient for the conduct of business at this meeting.

(SAC Ex. N.)

22. Immediately after the adjournment of the 16 June Shareholders' Meeting, a special meeting of the newly-elected Board was held (the "16 June Directors' Meeting"). (SAC Ex. Q, ECF No. 48.21.) At the 16 June Directors' Meeting, Jay stated that the matter for consideration was the call by Cherry Oil of the shares owned by Armistead and Louise. (SAC Ex. Q.) The vote to call the Maucks' shares passed by a 2-1 vote with Jay and Ann voting in favor of the call vote and Armistead voting against the call vote. (SAC Ex. Q.) Armistead stated an objection to the validity of the notice of the 16 June Directors' Meeting. (SAC Ex. Q.)

23. On 5 August 2021, the Maucks received a "Notice of Closing to Be Held on August 13, 2021," which provided as follows:

> In accordance with the Resolution of the Special Directors' Meeting held on June 16, 2021, the date of closing for the sale and purchase of all of your Shares in Cherry Oil Co., Inc. in accordance with Section 11 of the Shareholders' Agreement, dated October 15, 1998, will be held on August 13, 2021 at 11:00 a.m. at the offices of Sitterson and Whitfield, P.A., 803 Plaza Boulevard Kinston NC 28501.
>
> The form of Share Redemption Agreement is provided with this Notice.
>
> Please bring the original copies of your stock certificates representing all of your shares of stock in Cherry Oil Co., Inc. to the closing.

(Mauck Aff. II Ex. A, ECF No. 25.1.) The attached Share Redemption Agreement stated that the total purchase price for the Maucks' shares would be $175,101 with $35,020 of the total purchase price due to the Maucks at the closing on 13 August

2021. (Mauck Aff. II Ex. A, at 2.) Thereafter, the balance of the purchase price would "be payable in ten (10) equal annual installments[.]" (Mauck Aff. II Ex. A, at 2.)

24. On 11 August 2021, Cherry Oil's attorney sent the Maucks a letter stating the following:

> In light of your clients' disagreement concerning the price representing the valuation of Cherry Oil Co., Inc., we will postpone the Friday closing to another date.
>
> At this point, it is incumbent on your clients to come forward with their own appraisal pursuant [to] the terms of the Shareholders' Agreement.

(Mauck Aff. III Ex. 3, ECF No. 40.4.)

25. As discussed in detail below, over the next 16 months the parties (through their attorneys) engaged in numerous communications on the subject of Cherry Oil's purchase of the Maucks' shares. However, as of the present date, the purchase has never occurred.

26. On 1 July 2021, this case was reassigned to the undersigned. (Reassign. Ord., ECF No. 11.)

27. Plaintiffs filed a First Amended Complaint on 19 July 2021. ("FAC," ECF No. 18.) The FAC restated the allegations and claims from Plaintiffs' original Complaint and added new derivative claims against Jay and Ann for gross negligence/willful misconduct, breach of fiduciary duty, constructive fraud, and a claim seeking the removal of Jay and Ann as directors under N.C.G.S. § 55-8-09.

28. On 1 October 2021, Defendants' counsel provided Plaintiffs' counsel with notice of a special shareholders meeting to take place on 12 October 2021 (the "12 October Shareholders' Meeting"). (Mauck Aff. V Ex. 9, ECF No. 89.9.) By letter dated

6 October 2021, Plaintiffs' counsel informed Defendants' counsel that the Maucks objected to the proposed meeting and requested that it be postponed for the following reasons:

> First, the meeting was not noticed as required by Cherry Oil's Bylaws and suffers the same deficiencies set forth i[n] the objections stated at the June 16, 2021 shareholders meeting[.] . . . Second, the proposed agenda misstates the shareholders' rights and obligations under the Shareholder Agreement that you previously withheld and the validity of actions taken during an improper Board meeting on June 16, 2021.

(Mauck Aff. III Ex. 5, ECF No. 40.6.)

29. Despite the Maucks' objections, the 12 October Shareholders' Meeting took place. (Mauck Aff. III Ex. 8, ECF No. 40.9.) At the meeting, Jay "noted that the business to be conducted . . . was the removal of Armistead Mauck as a director of [Cherry Oil], and the election of [Jason] as a director." (Mauck Aff. III Ex. 8.) Upon Jay's motion, Armistead was removed as a director and replaced by Jason. (Mauck Aff. III Ex. 8.)

30. Also on 12 October 2021, the Maucks were provided, through counsel, with a "Written Consent of the Directors of Cherry Oil Co., Inc. to Action Without Meeting" (the "12 October Written Consent"). (Mauck Aff. III Ex. 9, ECF No. 40.10.) The 12 October Written Consent removed Armistead "from the office of Secretary-Treasurer of the Corporation, and any and all other officer positions previously held by him" and elected Ann as the new Secretary-Treasurer. (Mauck Aff. III Ex. 9.) Moreover, the 12 October Written Consent provided that Jason had been elected as the Vice-President of Cherry Oil. (Mauck Aff. III Ex. 9.)

31. On 26 October 2021, Jay, acting in his capacity as President of Cherry Oil, terminated Louise's employment with the company. (Mauck Aff. IV ¶ 9, ECF No. 51.)

32. On 6 December 2021, this Court granted Plaintiffs leave to file the SAC, (ECF No. 46), which was filed shortly thereafter on 13 December 2021, (ECF No. 48).

33. The SAC added a new breach of contract claim against Defendants for allegedly "fail[ing] to take reasonable and necessary steps [pursuant to the Shareholders' Agreement] to complete the call transaction while exercising dominion and control over [Plaintiffs'] shares[.]" (SAC ¶¶ 156–64.)

34. On 16 December 2021, Armistead was notified by Defendants' counsel that his employment with Cherry Oil was being terminated effective 31 December 2021. (Mauck Aff. IV ¶ 3, ECF No. 51.)

35. The decision to terminate Armistead's employment with Cherry Oil was made by Jay, in his capacity as Cherry Oil's president. (J. Cherry Dep., at 32:6–18.) A termination letter sent to Armistead included the following explanation for Jay's decision:

> Although your employment is at-will and could be terminated for any lawful reason, the actions which inform my decision include, among other things, bringing a lawsuit to dissolve Cherry Oil, seeking to interfere with Cherry Oil's relationships with its lenders and insurers, and other generally disruptive and uncooperative behavior inconsistent with your role as an employee of the company. At this point, I simply do not think that you have Cherry Oil's best interests at heart or that you can faithfully serve as an employee of Cherry Oil at the same time you are suing the company.

(Mauck Aff. V Ex. 1, ECF No. 89.1.)

36. Armistead was instructed to provide Jay with all of the corporate books and accounting records of AJAL and C-Gas. (Mauck Aff. V ¶ 3; Mauck Aff. V Ex. 1.) In addition, he was "directed to remove all of [his] belongings and 'vacate the premises' the following day[,]" 17 December 2021. (Mauck Aff. V ¶ 3; Mauck Aff. V Ex. 1.) Armistead ceased being an employee of Cherry Oil as of midnight on 31 December 2021. (J. Cherry Dep., at 32:2–5.) He was not offered any severance or termination benefits. (Mauck Aff. V ¶ 3.)

37. On 12 January 2022, Defendants filed a Motion to Dismiss, requesting that the Court dismiss all claims asserted by Plaintiffs in the SAC pursuant to Rules 12(b)(1) and 12(b)(6). (Mot. to Dismiss SAC, ECF No. 49.)

38. In its 2 May Order and Opinion, this Court dismissed all of the claims in the SAC except for Plaintiffs' individual claim for breach of fiduciary duty and new claim for breach of contract (based on Defendants' failure to follow through on the purchase of the Maucks' shares following the call vote). *Mauck*, 2022 NCBC LEXIS 39, at **49.

39. Defendants filed an Answer to the SAC on 23 May 2022 in which they asserted counterclaims against Armistead for breach of fiduciary duty and duty of loyalty and breach of the AJAL Operating Agreement, as well as a counterclaim seeking a declaratory judgment concerning the parties' rights under the Shareholders' Agreement. (Answer and Countercls., ECF No. 63.)[9]

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[9] These counterclaims remain pending and are not addressed in this Opinion.

40. On 7 April 2023, Defendants filed the present Motion for Supervision in which they have asked the Court to supervise the process for finalizing the purchase of Plaintiffs' shares.

41. Seven days later, Defendants filed their Motion for Summary Judgment.

42. The Court held a hearing on the Motions on 25 July 2023, and they are now ripe for resolution.

LEGAL STANDARD

43. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (citation and internal quotation marks omitted).

44. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of

establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985) (citation omitted).

45. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

ANALYSIS

I. Motion for Summary Judgment

A. Breach of Fiduciary Duty

46. In their breach of fiduciary duty claim, Plaintiffs assert that Jay and Ann—in their capacities as majority shareholders—owed a fiduciary duty to the Maucks by virtue of their status as minority shareholders and that this duty has been breached.

47. To succeed on a breach of fiduciary duty claim, "a plaintiff must show that: (1) defendant owed plaintiff a fiduciary duty; (2) the defendant breached that

fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019) (citation omitted).

48. Under North Carolina law, a fiduciary relationship is defined as "one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dalton v. Camp*, 353 N.C. 647, 651 (2001) (internal quotations omitted).

49. With respect to the fiduciary duty owed by majority shareholders to minority shareholders, this Court has explained as follows:

> Majority shareholders owe fiduciary duties to minority shareholders. *Gaines v. Long Mfg. Co.* (*Gaines II*), 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951) ("The controlling majority of the stockholders of a corporation, while not trustees in a technical sense, have a real duty to protect the interests of the minority in the management of the corporation, especially where they undertake to run the corporation without giving the minority a voice therein."); *see also Loy v. Lorm Corp.*, 52 N.C. App. 428, 432, 278 S.E.2d 897, 901 (1981) ("[I]n North Carolina majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation."). Those duties include paying over to the minority shareholder his "just proportion of the income and of the proceeds of the corporate property." *Gaines II*, 234 N.C. at 344, 67 S.E.2d at 353. A fiduciary duty arises regardless of whether the majority shareholder is an individual or an entity acting through individuals.

Johnston v. Johnston Properties, 2018 NCBC LEXIS 119, at **28–29 (N.C. Super. Nov. 15, 2018).

50. Moreover, in the context of close corporations, this Court has observed the following:

> [I]n closely-held corporations, "[t]he devolution of unlimited power imposes on holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them -- the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."

Thomas v. McMahon, 2015 NCBC LEXIS 67, at **27–28 (N.C. Super. Ct. June 23, 2015) (quoting *Loy*, 52 N.C. App. at 432–33).

51. Based on these principles, the Court expressly held in its 2 May Order and Opinion that "it is abundantly clear that under North Carolina law the Cherrys, as majority shareholders, owed a fiduciary duty to the Maucks, as minority shareholders." *Mauck v. Cherry Oil Co.*, 2022 NCBC LEXIS 39, at **34 (citing *Raymond James Capital Partners, L.P. v. Hayes*, 248 N.C. App. 574, 580 (2016)). The question currently before the Court is whether a genuine issue of material fact exists as to whether Defendants breached that duty so as to proximately cause injury to Plaintiffs.

52. Plaintiffs make a number of different arguments in an attempt to show that Defendants have, in fact, breached the fiduciary duty owed to the Maucks. However, for the reasons set forth below, the Court concludes that Plaintiffs have failed to offer sufficient evidence to survive summary judgment on this claim.

53. First, Plaintiffs continue to assert that by taking away the Maucks' long-time management roles within Cherry Oil, Jay and Ann have frustrated the Maucks' reasonable expectations that they would retain such responsibilities going forward indefinitely. For example, Plaintiffs contend that Defendants' actions included

"engag[ing] in a campaign to exclude Plaintiffs from essential management roles, activities, communications, and decisions[.]" (Pls.' Br. Opp. Mot. Summ. J., at 14.) However, this Court has previously rejected this argument.

> The SAC sets out various examples of acts committed by Jay and Ann that Plaintiffs contend demonstrate the Cherrys' desire to marginalize Armistead and Louise while simultaneously increasing Jason's role within the company. Plaintiffs assert that the Cherrys' conduct constituted "breach[es] of Armistead and Louise's reasonable expectations regarding management of Cherry Oil."
>
> . . .
>
> The SAC is replete with allegations that Jay and Ann have acted inconsistently with Plaintiffs' reasonable expectations regarding their continuing status with Cherry Oil. But the Put/Call Provision in Section 11 of the Shareholders' Agreement reflects a bargained-for agreement between the shareholders that a shareholder's right to receive fair market value for his or her shares is sufficient to protect the "reasonable expectations" of minority shareholders such as the Maucks. *See Harris*, 243 N.C. App. at 39–40, 777 S.E.2d 776 (holding that where a complaining shareholder's shares were "called" by the corporation pursuant to a provision in the shareholders' agreement, the complaining shareholder's "reasonable expectations" were "adequately protected" by the buying out of his shares at the price set forth in the "call" provision).
>
> . . .
>
> [T]he Court agrees with Defendants that the Put/Call Provision precludes Plaintiffs from relying on a "reasonable expectations" theory as the basis for their individual breach of fiduciary duty claim[.]

Mauck v. Cherry Oil Co., Inc., 2022 NCBC LEXIS 39, at **8, **20, **34.

54. Second, Plaintiffs point to several actions taken by Defendants relating to the Maucks' status as employees, officers, or directors of Cherry Oil. For example, Plaintiffs allege in the SAC that the termination of Louise's employment and Defendants' ensuing false characterization of that event as a resignation constituted

a breach of fiduciary duty. (SAC ¶ 112.) Furthermore, Plaintiffs have identified the following acts as additional examples:

> Before Jay and Ann attempted to call Plaintiffs' shares and remove Plaintiffs as directors on 16 June 2021, they engaged in a campaign to exclude Plaintiffs from essential management roles, activities, communications, and decisions; make discrediting statements about Armistead to other employees and investigated transactions involving Armistead without any good-faith basis.

(Pls.' Br. Opp. Mot. Summ. J., at 14.)

55. Plaintiffs also argue that when Jay terminated Louise's employment, he "promised her severance which was never provided." (Pls.' Br. Opp. Mot. Summ. J., at 7.) They further assert that with respect to Armistead's termination, he "was offered no severance or other termination benefits, and has received none." (Pls.' Br. Opp. Mot. Summ. J., at 8.)

56. Finally, Plaintiffs attempt to rely on the fact that "Jay Cherry testified in his deposition that since Louise and Armistead started serving on the board in the early 2000s, there had never been any discussion about Louise and Armistead not serving on the board prior to spring 2021" and then contend "that Jay and Ann's decision to exclude and remove Louise and Armistead from the Board was an unprecedented and egregious act against Plaintiffs." (Pls.' Br. Opp. Mot. Summ. J., at 14–15.)

57. However, as discussed above, the fiduciary duty at issue in this case is premised solely on Plaintiffs' status as *minority shareholders*. It is axiomatic that the existence of such a duty does not—by itself—mean that the Maucks were entitled either to employment (or continued employment) with the company or to service as

officers or directors of the company. Therefore, any of Defendants' acts relied upon by Plaintiffs that relate to the Maucks' capacities separate and apart from their status as minority shareholders cannot serve as the basis for a valid breach of fiduciary duty claim in this case.[10]

58. Third, the Maucks make a series of allegations on the subject of the call vote, ranging from (1) Defendants' failure to give proper notice of the 16 June Shareholders' Meeting and the 16 June Directors' Meeting; to (2) Defendants' deliberate decision not to finalize the purchase of the Maucks' shares. However, aside from the fact that (as discussed later in this Opinion) the record does not actually support Plaintiffs' assertions on these issues, they are more appropriately analyzed under Plaintiffs' breach of contract claim than their breach of fiduciary duty claim.

59. Fourth, Plaintiffs argue that Defendants breached their fiduciary duty by hiding corporate records from Plaintiffs and by "unlawfully withhold[ing] information as part of their strategy to undermine Plaintiffs." (Pls.' Br. Opp. Mot. Summ. J., at 1, 13.) Specifically, Plaintiffs assert that Defendants withheld information by "fail[ing] to provide a copy of the Shareholder Agreement when Plaintiffs asked for the [Cherry Oil] corporate records" and that the Shareholders' Agreement was improperly removed from Cherry Oil's office. (Pls.' Br. Opp. Mot. Summ. J., at 14.)

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[10] Similarly, Plaintiffs contend that Defendants engaged in conduct such as "mak[ing] discrediting statements about Armistead to other employees and investigat[ing] transactions involving Armistead without any good-faith basis." (Pls.' Br. Opp. Mot. Summ. J., at 14.) However, Plaintiffs have failed to cite to case law holding that such conduct would give rise to a breach of the fiduciary duty owed by a majority shareholder to a minority shareholder.

60. However, Cherry Oil's bylaws do not require that the Shareholders' Agreement be maintained at Cherry Oil's offices. Instead, the only document required thereunder to be kept "at the registered or principal office of the corporation" is "a record of shareholders showing the name and address of each shareholder and the number of shares held by each." (Bylaws art. V § 7, ECF No. 100.1.) Moreover, the proper remedy for a shareholder improperly denied access to a corporate document is a statutory claim pursuant to N.C.G.S. § 55-16-04 rather than through a breach of fiduciary duty claim.[11]

61. Fifth, Plaintiffs assert that Cherry Oil improperly refused to issue a dividend that would have been helpful to the Maucks in satisfying their tax liability as set out in K-1 forms they were issued. However, there is nothing in the summary judgment record evidencing a demand by Plaintiffs that Cherry Oil issue a dividend to its shareholders.

62. Sixth, Plaintiffs assert that Defendants relied on Plaintiffs' "outdated personal guarantees [sic]" without Plaintiffs' permission in obtaining loans from two specific entities—Saratoga Rack Marketing and First Citizens Bank. (Pls.' Br. Opp. Mot. Summ. J., at 6.) However, the evidence in the record either does not support this contention or expressly refutes its validity. For example, a Saratoga Rack Marketing representative emailed Armistead to inform him that the guaranties at issue were not considered when conducting a credit review:

[11] Plaintiffs concede that at all relevant times they possessed an unexecuted copy of the Shareholders' Agreement and do not contend that the contents of the unexecuted copy were in any respect substantively different from the fully executed version.

> After we were originally notified of the legal situation within Cherry Oil in August 2021, a credit review was performed. The corporate guarantees from both AJAL Investment, LLC and C-Gas, LLC were not taken into consideration at that time. You can consider both guarantees as terminated and no longer supporting the credit of Cherry Oil Co., Inc.

(Mot. Summ. J. Ex. B, ECF No. 81.2.)

63. Similarly, a First Citizens Bank employee confirmed via email the following:

> The bank is aware of the lawsuits and issues between the owners [of Cherry Oil]. Nothing has been approved based on the statement that appears in the financials. The bank has approved the line of credit being fully aware of all that is happening.

(Defs.' Not. of Filing Ex. 4, ECF No. 100.4.)

64. Finally, the Court has carefully reviewed all of Plaintiffs' remaining arguments in support of their breach of fiduciary duty claim and finds that none of their contentions are sufficient to show a genuine issue of material fact.

65. Accordingly, the Court **GRANTS** Defendants' Motion for Summary Judgment with respect to Plaintiffs' individual claim for breach of fiduciary duty.

B. Breach of Contract

66. The theory underlying Plaintiffs' breach of contract claim has been somewhat of a moving target.

67. As pled in the SAC, this claim was premised on the allegation that despite voting to call Plaintiffs' shares, Defendants have subsequently "failed and refused to take any steps necessary to close the transaction." (SAC ¶ 160.)

68. However, in opposing Defendants' Motion for Summary Judgment as to this claim, Plaintiffs make very different arguments—contending instead that their

breach of contract claim is actually based on the entirely separate proposition that no valid call vote ever took place. This is so, Plaintiffs contend in their summary judgment response brief, for two reasons. First, Plaintiffs argue that "Defendants breached the Shareholder Agreement when they failed to provide sufficient notice with respect to the 16 June 2021 shareholder meeting[,]" and, as a result, "[a]ny action taken at this meeting, including the removal of Louise Mauck as a director and the alleged call of Armistead and Louise's shares was thus invalid." (Pls.' Br. Opp. Mot. Summ. J., at 19.) Second, Plaintiffs assert that "the 16 June 2021 call was invalid because under Section 11 [of the Shareholders' Agreement], [Cherry Oil] has the right to call a shareholder's shares *only after* a price is specified in Section 6 and upon the terms specified in Section 7." (Pls.' Br. Opp. Mot. Summ. J., at 19)

69. Although the SAC elsewhere contains the allegation that improper notice was given of the two 16 June 2021 meetings, the breach of contract claim—as noted above—is implicitly premised on the notion that the call vote was *valid* and that the breaching conduct on the part of Defendants was the failure to go through with the purchase of the Maucks' shares. Thus, there is a disconnect between the arguments contained in Plaintiffs' summary judgment response brief regarding this claim and the manner in which the claim was actually pled in the SAC.

70. This Court has explained as follows:

> Our State follows traditional rules of notice pleading. One of the purposes of the complaint is to frame the issues and put the opposing party on notice of them. Thus, the complaint must give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it . . . ." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). Both sides

> benefit. For plaintiffs, the notice requirement is backed up by liberal rules of discovery and the promise that leave to amend "shall be freely given when justice so requires." N.C. R. Civ. P. 15(a). For defendants, it is an assurance of sorts that they will not be blindsided by new claims or theories when preparing for trial.
>
> . . .
>
> *But it is the operative complaint that must adequately notify defendants of plaintiff's claims. . . . Courts routinely caution that parties should introduce new issues through the amendment process, not through briefing*, discovery responses, or expert reports.

Potts v. KEL, LLC, 2019 NCBC LEXIS 61, at *22, *24 (N.C. Super. Sep. 27, 2019) (cleaned up and emphasis added). *See also Fund 19-Miller, LLC v. Isbill*, 2021 N.C. App. LEXIS 624, at *11–12 (N.C. Ct. App. Nov. 16, 2021) (unpublished) ("Litigants are unable to assert new theories of recovery that were not alleged in the complaint at summary judgment because these belated changes fail to provide sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it." (citation and quotation marks omitted)); *see also Bradshaw v. Maiden*, 2020 NCBC LEXIS 106, at *19–20 (N.C. Super. Ct. Sept. 15, 2020) (declining to consider novel theory of recovery that party failed to plead); *Wake County v. Hotels.com, L.P.*, 2012 NCBC LEXIS 63, at *30–33 (N.C. Super. Ct. Dec. 19, 2012) (same).

71. In any event, the Court concludes that Plaintiffs' breach of contract claim fails under any of the various theories that they have asserted.

72. With regard to Plaintiffs' contention that Defendants breached the Shareholders' Agreement by failing to follow through with the actual purchase of the Maucks' shares, the record shows that Defendants repeatedly attempted to move

forward with the process but that it was *Plaintiffs* who were primarily responsible for the lack of progress. The Court deems it helpful to set out the chronology of relevant events regarding this issue.

73. Following the call vote at the 16 June Directors' Meeting, Defendants offered to pay the Maucks for their shares "based on the higher of the two [Cherry Oil] valuations in the Propane Resources' appraisal[.]"[12] (Defs.' Br. Supp. Mot. Super. Ex. 1, ECF No. 80.2.) However, the Maucks rejected that offer, taking the position that the call vote was invalid. (Defs.' Br. Supp. Mot. Super. Ex. 1.)

74. On 11 August 2021, Defendants' counsel notified Plaintiffs' counsel in writing that "[i]n light of [the Maucks]' disagreement concerning the price representing the valuation of [the company]," the closing date for the call would be postponed. (SAC Ex. W, ECF No. 48.27.) In addition, Defendants' counsel stated that "[a]t this point, it is incumbent on [the Maucks] to come forward with their own appraisal pursuant to the terms of the Shareholders' Agreement." (SAC Ex. W.)

75. For the next twelve months, the parties largely focused on conducting discovery in this lawsuit. On 24 August 2022, Defendants' counsel sent a letter to Plaintiffs' counsel to address the "logjam regarding the [call] process" and to ascertain whether Plaintiffs were "interested in trying to get the Call process under the . . . Shareholders' Agreement unstuck." (Defs.' Br. Supp. Mot. Super. Ex. 1.) Specifically, Defendants' counsel explained Defendants' position as follows:

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[12] Propane Resources is a third-party company that undertook a business valuation of Cherry Oil and C-Gas in 2015 at the direction of Armistead and Jay. In 2020, Propane Resources updated the 2015 valuation. (A. Mauck Dep. 55:14–56:9.)

> As you will recall, our clients offered to pay your clients based on the higher of the two [Cherry Oil] valuations in the Propane Resources' appraisal. At the time, our thinking was that your clients would be comfortable with the Propane Resources' appraisal since the company was chosen by your client who provided them with all of the pertinent information and had most of the communications with the company.
>
> Nevertheless, your clients rejected that offer and took the position that the Call was defective and never appointed their own appraiser which would otherwise have been the next step in the process outlined under the Agreement.
>
> In looking for a way forward, I have confirmed with our clients that they would be willing to buy out your clients' position in [Cherry Oil] on the same terms as offered last year, *i.e.*, using the Propane Resources' calculation. In our view, that should be an attractive offer since it would use the higher Propane Resources' valuation and not include the otherwise standard fair market value discounts for lack of control and marketability.
>
> If that offer is not acceptable to you, I would ask that your clients follow the provisions of § 6 of the Shareholders' Agreement and appoint your own appraiser, after which our clients will appoint theirs. Just to make things clear, in that circumstance our position will be that the [Cherry Oil] appraisal will be done accounting for both the C-GAS-[Cherry Oil] lease and the discounts described above.
>
> In the event that your clients refuse to agree to the Propane Resources' appraisal and refuse to appoint their own appraiser, we will simply, without prejudice to our current position, restart the Call process.

(Defs.' Br. Supp. Mot. Super. Ex. 1.)

76. In response, by letter dated 9 September 2022, Plaintiffs' counsel rejected Defendants' offer to purchase the Maucks' shares based on the Propane Resources' appraisal or otherwise restart the call process. (Defs.' Br. Supp. Mot. Super. Ex. 2, ECF 80.3.) Instead, Plaintiffs' counsel informed Defendants' counsel that "the Maucks are more interested in pursuing a global resolution using the mediation process[.]" (Defs.' Br. Supp. Mot. Super. Ex. 2.)

77. On 6 October 2022, Cherry Oil's Board issued a "Written Consent of the Directors of Cherry Oil Co., Inc. to Action Without Meeting" (the "6 October Written Consent") confirming, and ratifying, the Board's prior 16 June 2021 exercise of the call option:

> WHEREAS, at a special meeting of the Board of Directors (the "Board") of the Company held on June 16, 2021 (the "June 2021 Board Meeting"), the Board authorized the Company to exercise its call rights under Section 11 of the Company's Shareholders' Agreement, dated October 15, 1998 (the "Shareholders' Agreement"), to purchase all of the shares of stock in the Company held by Louise Mauck and Armistead Mauck (such Board authorization, the "Call Rights Exercise")
>
> . . .
>
> NOW, THEREFORE, BE IT:
>
> RESOLVED, without in any way prejudicing the effectiveness of the Call Rights Exercise at the June 2021 Board Meeting, the Board hereby confirms and ratifies the Call Rights Exercise at the June 2021 Board Meeting in all respects, including without limitation the validity and effectiveness of the Board's authorization and approval of the Call Rights Exercise; and
>
> FURTHER RESOLVED, without in any way prejudicing the effectiveness of the Call Rights Exercise at the June 2021 Board Meeting, the Board hereby confirms that the Company is authorized to and has elected to exercise its call option under Section 11 of the Shareholders' Agreement to purchase all of the shares of stock in the Company held by Louise Mauck and Armistead Mauck, all in accordance with the operative terms of the Shareholders' Agreement[.]

(Defs.' Br. Supp. Mot. Super. Ex. 3, ECF No. 80.4.) The Board set the closing date for the purchase of the Maucks shares as 5 December 2022. (Defs.' Br. Supp. Mot. Super. Ex. 7, ECF No. 80.8.)

78. In addition, the 6 October Written Consent required Plaintiffs to designate their appraiser (pursuant to Section 6B of the Shareholders' Agreement) no later than 21 November 2022. (Defs.' Br. Supp. Mot. Super. Ex. 7.)

79. Forty-six days later, Plaintiffs' counsel sent Defendants' counsel a letter dated 21 November 2022 that identified C. Joseph Ciccarello, CPA, MST, as Plaintiffs' chosen appraiser. (Defs.' Br. Supp. Mot. Super. Ex. 4, ECF No. 80.5.) This was the first time since the 16 June 2021 call vote that Plaintiffs' counsel had ever designated an appraiser.

80. On 30 November 2022, Defendants' counsel sent a letter to Plaintiffs' counsel identifying Cooper Wilburn as Defendants' designated appraiser and inquiring as to what information Plaintiffs' appraiser, Ciccarello, needed to complete his appraisal of the Maucks' Cherry Oil shares. (Defs.' Br. Supp. Mot. Super. Ex. 5, ECF No. 80.6.) Furthermore, Defendants' counsel noted that "[a]t this point, Mr. Ciccarello and Mr. Wilburn will need to consult concerning the appointment of a third appraiser in the next fifteen days (which, barring agreement, will fall to the Lenoir County Clerk of Court to chose [sic])." (Defs.' Br. Supp. Mot. Super. Ex. 5.) Defendants' counsel also suggested that the 5 December 2022 closing date previously set by the Board be pushed back to "a date to be determined after completion of the appraisal." (Defs.' Br. Supp. Mot. Super. Ex. 5.) Defendants' counsel explained his concern that otherwise the parties would only have two weeks to complete the appraisal process, including the appointing of a third appraiser.

81. On 4 December 2022, the Board executed another "Written Consent of the Directors of Cherry Oil Co., Inc. to Action Without Meeting" (the "4 December Written Consent") postponing the 5 December 2022 closing date "to a date to be established after completion of the appraisal process for the Mauck shares[.]" (Defs.' Br. Supp. Mot. Super. Ex. 6, ECF No. 80.7.) The 4 December Written Consent stated as follows:

> WHEREAS, on October 6, 2022, the Board ratified, confirmed and re-authorized the Company's exercise of all of its call rights under Section 11 of the Company's Shareholders' Agreement, dated October 15, 1998 (the "Shareholders' Agreement"), to purchase all of the shares of stock in the Company (collectively, the "Mauck Shares") held by Louise Mauck and Armistead Mauck (collectively, the "Maucks," and such Board authorization, the "Call Rights Exercise"), such action having been previously authorized by the Board at a special meeting of the Board held on June 16, 2021; and
>
> WHEREAS, the closing date for the Call Rights Exercise (the "Closing Date") was previously set by the Board for December 5, 2022 pursuant to and in accordance with the terms of Section 11 of the Shareholders' Agreement
>
> . . .
>
> NOW, THEREFORE, BE IT:
>
> RESOLVED, the Board hereby authorizes the postponement of the Closing Date from December 5, 2022 to a date to be established after completion of the appraisal process for the Mauck Shares, as outlined and in accordance with the terms of Section 6.B. of the Shareholders' Agreement, and as soon as is reasonably practicable after the completion of such appraisal process.

(Defs.' Br. Supp. Mot. Super. Ex. 7.)

82. On the following day, Defendants' counsel sent Plaintiffs' counsel a letter regarding his failure to respond to the 30 November letter and attached the 4 December Written Consent. (Defs.' Br. Supp. Mot. Super. Ex. 6.) Additionally,

Defendants' counsel asked Plaintiffs' counsel for his thoughts on how the two designated appraisers should proceed with respect to the appointment of the third appraiser. (Defs.' Br. Supp. Mot. Super. Ex. 6.)

83. By letter dated 8 December 2022, Plaintiffs' counsel stated his belief that the Shareholders' Agreement required that the appraisal process take place *before* a call vote can occur. (Defs.' Br. Supp. Mot. Super. Ex. 8, ECF No. 80.9.)[13] Plaintiffs' counsel also reiterated the Maucks' belief "that the meetings necessary to call shares were not properly noticed or held, and that Defendants' duties to the Maucks render the call option unlawful." (Defs.' Br. Supp. Mot. Super. Ex. 8.)

84. This timeline is inconsistent with Plaintiffs' argument that Defendants have breached the Shareholders' Agreement by failing to take steps to follow through on the purchase of the Maucks' shares. To be sure, there were periods during this chronology during which neither party sought to break the logjam. On balance, however, the record shows that if anyone was attempting to thwart the timely completion of the process it was *Plaintiffs* rather than *Defendants*. On several occasions, Defendants sought to move forward with the valuation process but were repeatedly thwarted by Plaintiffs' unwillingness to participate. Indeed, throughout this time period, Plaintiffs continued to maintain that the call vote was invalid. As a result, Plaintiffs have fallen short of successfully opposing Defendants' Motion for Summary Judgment on the breach of contract theory actually pled in the SAC.

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[13] In this letter, Plaintiffs' counsel also requested certain discovery responses from Defendants. (Defs.' Br. Supp. Mot. Super. Ex. 8.)

85. Moreover, even if the Court was to consider the "new" theories of liability asserted in Plaintiffs' summary judgment response brief, its result would remain unchanged.

86. The argument that Plaintiffs assert most vigorously is that notice of the 16 June Shareholders' Meeting was improper because the applicable ten-day notice period mandated by the bylaws was not given.

87. This contention is based on article II, section 5 of the Bylaws, which governs shareholders' meetings and states as follows:

> Notice of Meetings: Written or printed notice stating the time and place of the meeting shall be delivered not less than ten nor more than fifty days before the date thereof, either personally or by mail, by or at the direction of the President, the Secretary, or other person calling the meeting, to each shareholder of record entitled to vote at such meeting. . . . In the case of a special meeting, the notice of the meeting shall specifically state the purpose or purposes for which the meeting is called.

(Bylaws art. II § 5.)

88. The notice of the 16 June Shareholders' Meeting addressed to Plaintiffs was mailed on 4 June 2021. (Cherry Decl. II ¶ 10, ECF No. 21.)

89. Because the notice was postmarked 7 June 2021, Plaintiffs contend that it could not have been received (i.e., "delivered") until less than ten days before the meeting. The flaw with Plaintiffs' argument, however, is that it ignores N.C.G.S. § 55-2-06(b), which provides that "[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation *that is not inconsistent with law* . . . " N.C.G.S. § 55-2-06(b) (emphasis added).

90. Based on this statutory provision, a leading treatise has noted that "[a]ll bylaws must be consistent with . . . all applicable state and federal laws. Any conflict between a bylaw provision and the superior authority of . . . a statutory or constitutional provision will necessarily be resolved in favor of the latter." 1 Robinson on North Carolina Corporation Law § 4.04.

91. The above-quoted provision in Cherry Oil's bylaws making dispositive the date the notice is actually delivered to the shareholder is superseded by N.C.G.S. § 55-1-41(c), which states in pertinent part as follows:

> Written notice by a domestic or foreign corporation to its shareholder is effective *when deposited in the United States mail* with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.

N.C.G.S. § 55-1-41(c) (emphasis added).

92. Therefore, pursuant to N.C.G.S. § 55-1-41(c), notice to Plaintiffs of the 16 June Shareholders' Meeting was proper in that it was mailed twelve days before the meeting.

93. Plaintiffs also argue that the 4 June 2021 notice that was mailed to Plaintiffs of the 16 June *Directors'* Meeting was invalid—albeit for a different reason.

94. As recited above, at the 16 June Shareholders' Meeting, Jay and Ann (representing a majority of the company's shareholders) voted to dissolve the existing Board and replace it with a new Board consisting solely of Jay, Ann, and Armistead. The newly constituted Board conducted a meeting immediately following the conclusion of the 16 June Shareholders' Meeting in which it voted to call the Maucks' shares.

95. Notice of the 16 June Directors' Meeting was sent to Plaintiffs on 4 June 2021. Plaintiffs argue that this notice was invalid because it was sent prior to the election of the "new" Board of Directors. Plaintiffs assert that because the composition of the Board at the time the Board meeting took place was different than its composition at the time notice of the meeting was given, a new notice was required to be sent out to the members of the newly constituted Board.

96. Plaintiffs' argument appears to elevate form over substance given that the "new" Board consisted entirely of individuals who had likewise served on the "old" Board—that is, Armistead, Jay, and Ann. Each of them received sufficient notice of the upcoming 16 June Directors' Meeting.

97. However, even assuming *arguendo* that Plaintiffs are correct on this issue, any such defect was cured by the Board's adoption of the 6 October Written Consent, which—as noted above—ratified the call vote taken at the 16 June Directors' Meeting.

98. At the 25 July hearing on the present Motions, Plaintiffs' counsel conceded that the 6 October Written Consent would have cured any notice defects regarding the 16 June Directors' Meeting—assuming that the 16 June Shareholders' Meeting was properly noticed. Given that the Court has now concluded that notice of the 16 June Shareholders' Meeting was, in fact, properly given, the Court likewise concludes that the 6 October Written Consent rendered moot any objections to the manner in which notice was given of the 16 June Directors' Meeting.

99. Plaintiffs' second argument in its summary judgment response brief is unrelated to the notice issue. Instead, Plaintiffs contend in this second argument that the Shareholders' Agreement should be interpreted as requiring—as a condition precedent to the actual call vote—a prior determination of the value of the selling shareholders' shares. For this reason, Plaintiffs contend, it was improper for the call vote to have been taken at the 16 June Directors' Meeting because there had been no prior valuation of the Maucks' shares in Cherry Oil.

100. However, the Court is unable to agree with this interpretation. As Plaintiffs concede, there is no express language in the Shareholders' Agreement supporting the proposition that the valuation of the Maucks' shares was a condition precedent to the call vote. Moreover, based on its careful reading of the Shareholders' Agreement, the Court believes the better interpretation is that the entire process is triggered by the call vote. In other words, only once such a vote has occurred does the procedure for determining the price of the selling shareholders' shares (as set out in Section 6) become necessary.

101. Therefore, the Court concludes that summary judgment should be **GRANTED** in favor of Defendants on Plaintiffs' breach of contract claim.

II. Motion for Supervision

102. In their Motion for Supervision, Defendants ask the Court "to undertake supervision of the call of shares of [Cherry Oil] pursuant to the . . . Shareholders' Agreement, dated October 15, 1998 . . . so that the process can finally be completed[.]" (Mot. for Super., at 1–2.) Defendants seek the Court's intervention based on their

contention that "Plaintiffs have thwarted the Call process" while simultaneously "assert[ing] a contradictory claim against Defendants for failure to complete the Call process." (Defs.' Br. Supp. Mot. Super., at 5, ECF No. 80.)

103. Plaintiffs do not appear to oppose Defendants' request that the Court take some form of supervisory role regarding this process but argue that the Court should first rule on the substantive issues contained in the pending Motion for Summary Judgment, including the question of whether the call vote was taken at a properly noticed meeting. In this Opinion, the Court has now definitively ruled on these issues.

104. Based on the briefs submitted by the parties and the arguments of counsel at the 25 July hearing, it is clear that the parties disagree in a number of respects on how the process set out in the Shareholders' Agreement should proceed going forward, particularly with regard to harmonizing the respective deadlines contained in Sections 6B and 11.

105. Although it appears the Court will need to resolve the parties' disputes on this subject, the Court believes the parties should be given the opportunity to submit new briefs focusing solely on this issue now that the Court has granted summary judgment on Plaintiffs' breach of fiduciary duty and breach of contract claims.

106. Accordingly, the Court **DEFERS** ruling on the Motion for Supervision at the present time. The parties are **DIRECTED** to file briefs on or before **25 September 2023** containing their respective positions on the remaining steps that

need to be taken to complete the purchase of the Maucks' shares by Cherry Oil pursuant to the Shareholders' Agreement. Each side's brief shall contain no more than 5,000 words and shall comply in all respects with the provisions of the Business Court Rules applicable to briefs.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED** with respect to Plaintiffs' claims for breach of fiduciary duty and breach of contract;
2. The Court **DEFERS** ruling on Defendants' Motion for Supervision; and
3. The parties are **DIRECTED** to file new briefs under the terms set forth above on or before **25 September 2023**.

SO ORDERED, this the 15th day of September, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases