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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

KATHY HOLT WEEDMAN, JACK SANDERS HOLT, JANELLE HOLT, JUDY BAUMAN and DONNA ETHERIDGE,	)	
Plaintiffs,	)	
vs.	)	**No. 16-464-BC**
SANDERS MANUFACTURING COMPANY, OWEN SANDERS, JAMES J. SANDERS III, ERIC O. SANDERS, and LOREN G. KIRKPATRICK,	)	
Defendants.	)	

MEMORANDUM AND ORDER DENYING ORAL MOTION AT TRIAL TO RECONSIDER RULE 41.02 DISMISSAL OF PARAGRAPHS 1, 10, & 12 OF THE FIRST AMENDED COMPLAINT PERTAINING TO CONFLICTING INTEREST TRANSACTION CLAIMS

At the completion of the Plaintiffs presentation of evidence in the December 11, 2017 trial of this case, Defendants' Rule 41.02 motion was granted in part, and the Court entered a *Memorandum And Order Granting In Part Defendants' Rule 41.02 Motion For Involuntary Dismissal*, December 13, 2017.

Thereafter, the Plaintiffs orally moved the Court to reconsider the ruling. As grounds, the Plaintiffs asserted that the Rule 41.02 decision erred in placing the burden of proof on the Plaintiffs.

So as not to delay the trial, the Court orally denied Plaintiffs' motion to reconsider with this follow-up Memorandum on which the denial is based.

It is ORDERED that the Plaintiffs' oral motion to reconsider the December 13, 2017 Rule 41.02 dismissal with prejudice of "[p]aragraphs 1, 10, and to the extent paragraph 12 pertains to the February 2016 Resolution" of the *First Amended Complaint* is denied for failure of the Plaintiffs to meet their initial burden of demonstrating a *prima facie* case of breach of fiduciary duty based upon a conflicting interest transaction.

The law on which this ruling is based is as follows.

<u>Background – Claims Dismissed</u>

The part of the Plaintiffs' case which was dismissed under Rule 41.02 was their claim that a February 2016 Resolution adopted by the Defendant Company constituted an improper conflicting interest transaction pursuant to Tennessee Code Annotated sections 48-18-701, *et. seq.*

The Rule 41.02 *Memorandum And Order*, entered December 13, 2017 dismissed with prejudice "[p]aragraphs 1, 10, and to the extent paragraph 12 pertains to the February 2016 Resolution" of the *First Amended Complaint*. These paragraphs sought the following relief:

> 1. That this Court enter a preliminary injunction and ultimately permanent relief determining the Resolution ineffective as the result of a director's conflicting interest transaction, and enter an order prohibiting the Board of Directors from adding Eric Sanders, Eugene Sanders, Jimmy Sanders, and Loren Kirkpatrick to "Exhibit A" for the Supplemental Executive Retirement Plan.
>
> 10. That this Court find that the Resolution was the result of a conflicting interest transaction and accordingly order it undone.

12. That this Court find that all expenditures made by the Directors not reasonably related to the winding down of the business pursuant to 48-24-101 through -109 was improper and accordingly order the Directors to reimburse Sanders Manufacturing for the same.

First Amended Complaint For Shareholder Derivative Action And Shareholder Petition For Judicial Dissolution And Declaratory Judgment, ¶¶ 1, 10, 12 (Mar. 29, 2017).

In the *Memorandum And Order* dismissing these claims with prejudice pursuant to Rule 41.02, the Court concluded that the Plaintiffs failed to "put on enough proof to show that the premature adoption of the Resolution was a conflicting interest transaction pursuant to TCA 48-18-701, *et al.* [sic]" This decision, the Plaintiffs assert in their motion to reconsider, misplaces the burden of proof on the Plaintiffs.

<u>Law On Prima Facie Case And Burden Shifting</u>

The Court agrees with the Plaintiffs that under Tennessee law the burden of proof is placed on an officer or director to prove that a transaction between the officer and director is not a conflicting interest transaction.[1] This rule, however, is more nuanced

[1] The following cases were cited by the Plaintiffs for this established rule of Tennessee law. *May v. Scott*, 388 F. Supp. 2d 828, 838, 2005 WL 2249744 (W.D. Tenn. 2005) ("Courts closely scrutinize a corporation's transactions with an officer or director, and the burden of proving that such transactions were entered into in good faith is placed upon that officer or director."); *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) (citations omitted) ("In addition to the duties of care and loyalty, or as part of them, certain transactions, called conflict of interest transactions, between the corporation and a director or officer are subject to close scrutiny. '[C]lose investigation is accorded a corporation's transactions with an officer or director, and the burden of proof is placed upon the officer or director because of his fiduciary capacity.'"); *Johns v. Caldwell*, 601 S.W.2d 37, 41 (Tenn. Ct. App. 1980) (citations omitted) ("Therefore, close investigation is accorded a corporation's transactions with an officer or director, and the burden of proof is placed upon the officer or director because of his fiduciary capacity.); *Intertherm, Inc. v. Olympic Homes Sys., Inc.*, 569 S.W.2d 467, 471 (Tenn. Ct. App.

than argued by the Plaintiffs. It is a burden-shifting rule by which the Plaintiffs have the initial burden, in cases alleging a breach of fiduciary duty by an officer or director, to establish a *prima facie* case of a conflicting interest transaction prior to the burden shifting to the Defendant Directors. Collected in Appendix 1 is Tennessee law, as well as general corporate law from other jurisdictions, which establishes this proposition.

As explained in *Becker v. Knoll*, 239 P.3d 830, 833 (Kan. 2010), "[t]he reviewing court does not *weigh* the evidence to find the more meritorious position, but merely determines whether the evidence *exists* to establish the position in the first place." Additionally helpful is the explanation in *Richards v. Bryan*:

> "*Newton* requires a complaining party to offer more than a bald allegation of impropriety, while still assigning the ultimate burden of proof to the fiduciary. This somewhat confusing shift in the burden of proof was very well explained in *Cookies Food Products v. Lakes Warehouse,* 430 N.W.2d 447 (Iowa 1988). In *Cookies,* the plaintiff was first required to make out a prima facie showing of self-dealing. After that was established, the burden then shifted to the defendant to prove that its actions were done in good faith. After the defendant presented its evidence, the plaintiff was then afforded the opportunity to counter with rebuttal arguments. 430 N.W.2d at 453."

879 P.2d 638, 649 (Kan. Ct. App. 1994), *as modified on denial of reh'g* (Sept. 27, 1994)).

Furthermore, as stated in *Becker v. Knoll*, the concept of the business judgment rule impacts the burden-shifting analysis.

> The second concept underlying the burden-shifting approach is the business judgment rule. This rule is a presumption that in making business decisions

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1978) ("[C]lose investigation is accorded a corporation's transactions with an officer or director, and the burden of proof is placed upon the officer or director, because of his fiduciary capacity.").

> not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and *209 in the honest belief that their actions are in the corporation's best interest. The party challenging the business decision has the burden to establish facts rebutting the presumption. *Kansas Heart Hospital v. Idbeis,* 286 Kan. 183, 209, 184 P.3d 866 (2008).
>
> ****
>
> Because the business judgment rule is a rebuttable presumption, it places an initial burden on the party challenging a corporate decision to demonstrate the decisionmaker's "self-dealing or other disabling factor." If a challenger sustains that initial burden, then the presumption of the rule is rebutted, and the burden of proof shifts to the defendants to show that the transaction was, in fact, fair to the company. *In re PSE & G Shareholder Litigation,* 173 N.J. at 277, 801 A.2d 295.
>
> "'The threshold inquiry in assessing whether a director violated his duty of loyalty is whether the director has a conflicting interest in the transaction. Directors are considered to be interested if they either appear on both sides of a transaction ... or expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.' [Citation omitted.]" *Matter of Seidman,* 37 F.3d 911, 934 (3d Cir.1994).
>
> Once the business judgment rule is rebutted, "the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was *entirely fair* to the corporation and its shareholders." (Emphasis added.) *In re Walt Disney Co. Derivative Litigation,* 906 A.2d 27, 52 (Del.2006). "If the [plaintiff is able to rebut the business judgment presumption], the burden shifts to the defendant ... to prove *the 'entire fairness'* of the transaction to the ... plaintiff. [Citations omitted.]" (Emphasis added.) *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 361 (Del.1993).

239 P.3d 830, 834–35 (Kan. 2010).

In granting the Defendants' Rule 41.02 dismissal of the Plaintiffs' conflict of interest transaction claims, the Court applied the burden-shifting procedure explained in the foregoing case law. The reference in the December 13, 2017 *Memorandum And*

Order to the Plaintiffs' failure to carry its burden in the Rule 41.02 dismissal was a reference to the Plaintiffs' *prima facie* burden. As per the cited case law, in dismissing the conflict of interest transaction, the Court concluded that evidence did not "exist," *supra* at p. 4 quoting *Becker v. Knoll*, for the Plaintiffs to meet their *prima facie* burden to demonstrate that the Defendants had entered into a conflicting interest transaction with respect to the February 2016 Resolution.

The sampling of deficiencies in Plaintiffs' evidence, listed in the *Memorandum And Order Granting In Part Defendants' Rule 41.02 Motion For Involuntary Dismissal*, was provided to show that evidence does not exist. As stated in the *Becker v. Knoll*, the *prima facie* showing required to shift the burden must be "evidence sufficient to sustain a verdict in favor of the issue it supports, even though it may be contradicted by other evidence." 239 P.3d 830, 833 (Kan. 2010). In evaluating this evidence, the Court, much like summary judgment, "does not *weigh* the evidence to find the more meritorious position, but merely determines whether the evidence *exists* to establish the position in the first place." *Id.* Even though the Court does not weigh the Plaintiffs' evidence, the Plaintiffs' proof must still be "more than a bald allegation of impropriety" and "[t]he mere allegation of a conflicts of interest is not sufficient." *Id.* at 834; *In re Gordon Properties, LLC*, 515 B.R. 454, 467 (Bankr. E.D. Va. 2013).

Thus, the burden-shifting never came into play in this case because the Plaintiffs failed to meet the initial *prima facie* showing of a breach of fiduciary duty which is required as a prerequisite to shifting the burden of proof to the Defendant Directors.

Under these circumstances, dismissal is appropriate, and the burden of proof does not shift to the Defendant directors.

Plaintiffs' Bootstrap Of Summary Judgment Ruling Does Not Establish A *Prima Facie* Case

In arguing that the burden of proof rested on the Defendant Directors at trial on the conflict of interest issues surrounding the February 2016 Resolution, the Plaintiffs conflated a February 2, 2017 order denying Defendants summary judgment with Plaintiffs carrying their *prima facie* burden.

The context for this issue is that the Defendants sought summary judgment in February of 2017 to dismiss the Plaintiffs' claim that the 2016 Resolution constituted a conflict of interest. The Defendants argued in part that the Directors had no choice on the Resolution, that it was required by law. The Defendants' argument was that adoption of the Resolution was a "proactive" plan, made upon advice of counsel and financial consultants, to make reasonable provision for a known claim of the Corporation as it determines to sell off assets. The Defendants' assertion was that the Board had no choice and that adoption of the Resolution was necessary for the Board to fulfill its statutory duty under Tennessee Code Annotated section 48-24-109.

Significant to the Plaintiffs' *prima facie* burden at trial is that the Court concluded on summary judgment as a matter of law in Defendants' favor that the SERP was an unsecured obligation of Sanders Manufacturing subject to any other claims of the employer's creditors in the event of insolvency or bankruptcy. As stated by the Court, in

the summary judgment ruling, these types of plans remain part of the general assets of the company subject to the claims of general unsecured creditors and there is no guarantee that the SERP will actually be funded and available in the event of insolvency. On summary judgment, the Court concluded as a matter of law that the SERP was a unilateral contract that vested immediately upon performance by the participants of the plan making the SERP a fixed and accrued obligation of the Company. The fact that funding of the SERP was subject to certain risks, like insolvency of the company, did not render the SERP any less fixed, accrued or vested for purposes of being an unsecured obligation of the company. *See Memorandum And Order: (1) Granting In Part And Denying In Part Defendants' Motion For Summary Judgment, And Denying Plaintiffs' Request For Judgment As A Matter Of Law; (2) Denying Defendants' 11/30/16 Motion To Recover Subpoena Costs; And (3) Setting 2/10/17 Deadline To Schedule Telephone Conference*, pp. 25-30 (Feb. 2, 2017).

Nevertheless, as the Court explained, it could not grant the Defendants' summary judgment because the record did not provide the Court information about the Company's financial position and their creditors. If, for example, the Company was unable to pay creditors, the passage of the 2016 Resolution possibly could have been a device to prefer payment of the SERP. This lack of information about the Company's finances and creditors at the summary judgment stage required the Court to deny summary judgment.

The Plaintiffs have tried to bootstrap the foregoing denial of the Defendants' motion for summary judgment due to a lack of information into a ruling that the Plaintiffs

established a *prima facie* case of a conflicting interest transaction. This is incorrect as a matter of law.

Under the above case law, the summary judgment ruling only provided a forecast to the Plaintiffs of the necessary *prima facie* proof needed to satisfy their initial burden of establishing a conflict of interest. From the summary judgment ruling, it was incumbent on the Plaintiffs to come forward at trial with some proof of insolvency or inability to pay creditors to show that the timing of the passage of the 2016 Resolution constituted a preferential payment or other scheme in contradiction to the Defendant Company's statutory obligation under Tennessee Code Annotated section 48-24-109. This type of evidence was never presented by the Plaintiffs in their case. With no proof by the Plaintiffs of any improper timing or preferential payment by the Directors based on proof of insolvency, the Plaintiffs failed to meet their initial *prima facie* case for breach of fiduciary duty through a conflicting interest transaction, and as a result the burden of proof never shifted to the Defendant Directors.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
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Appendix 1

- The business judgment rule "is a presumption that in making a business decision the directors [and officers] of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *Aronson v. Lewis,* 473 A.2d 805, 812 (Del.1984) *accord Lewis,* 838 S.W.2d at 220-21. The protections of the rule will not apply when the director or officer is interested, did not actually make a decision, made an uninformed decision, or was grossly negligent. *Aronson,* 473 A.2d at 812; *see* 3A Fletcher § 1036; 18B Am.Jur.2d *Corporations* § 1703 (1985); 19 C.J.S. *Corporations* § 482 (1990). Once the plaintiff has shown that the business judgment rule does not apply, the burden shifts to the director or officer to establish that the act at issue satisfied the ordinary care standard. 3A Fletcher § 1031.

  Hall v. Tennessee Dressed Beef Co., No. 01A-01-9510-CH-00430, 1996 WL 355074, at *7 (Tenn. Ct. App. June 28, 1996), *aff'd in part, rev'd in part,* 957 S.W.2d 536 (Tenn. 1997) (footnotes omitted).

- The business judgment rule "operates as both a procedural guide for litigants *917 and a substantive rule of law." Procedurally, the initial burden is on the shareholder plaintiff to rebut the presumption of the business judgment rule. To meet that burden, the shareholder plaintiff must effectively provide evidence that the defendant board of directors, in reaching its challenged decision, breached any *one* of its "triad of fiduciary duties, loyalty, good faith or due care." Substantively, "if the shareholder plaintiff fails to meet that evidentiary burden, the business judgment rule attaches" and operates to protect the individual director-defendants from personal liability for making the board decision at issue.

  "Burden shifting does not create *per se* liability on the part of the directors." It is a procedure by which the Delaware judiciary determines the standard of review that is applicable to measure the board of directors' conduct. If the shareholder plaintiff succeeds in rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the "entire fairness" of the transaction.

  McMullin v. Beran, 765 A.2d 910, 916–17 (Del. 2000) (footnotes omitted).

- In arriving at its decision, the trial court stated that the burden of proof was on the plaintiff, Ms. Murray, to show that Mrs. Smith's actions in cashing the CDS were in breach of her fiduciary duty. The court found that Ms. Murray failed to carry her burden of proof. This was a misallocation of the burden of proof. In a transaction involving a fiduciary relationship, a presumption of invalidity attaches to the transaction once it is shown that the fiduciary benefitted from the transaction. *Lanius v. Donnell,* 222 Tenn. 58, 76, 432 S.W.2d 659, 667

(Tenn.1968) (quoting *Roberts v. Chase,* 25 Tenn.App. 636, 650-51, 166 S.W.2d 641, 650-51 (1942)). In *Lanius,* the Court stated:

> "While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity; and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption."

*3 *Id.* (quoting *Roberts,* 25 Tenn.App. at 651, 166 S.W.2d at 650-51 (quoting 3 *Pomeroy's Equity Jurisprudence* 790 (5th ed.1941))). This presumption extends to all interactions between persons in fiduciary and confidential relationships, embracing gifts, contracts, sales, releases, mortgages, and other transactions by which the dominant party acquires a benefit from the other party. *Id.* (quoting *Roberts,* 25 Tenn.App. at 651, 166 S.W.2d at 651).

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Accordingly, Ms. Murray had the initial burden of showing that Mrs. Smith obtained a benefit by redeeming the CDs. This initial burden was met by demonstrating that the value of the redeemed CDS in the Conservatorship Account went to Mr. Smith's estate and that Mr. Smith's will devised one half of his estate to Mrs. Smith. Once the benefit to the fiduciary from the transaction had been demonstrated, the burden then shifted to the fiduciary, Mrs. Smith, to prove the validity of the transaction.
In re Estate of Smith, No. 02A01-9503-CH-00055, 1996 WL 363591, at *2–3 (Tenn. Ct. App. July 2, 1996).

- "[T]he general rule remains that directors carry the burden of showing that a transaction is fair and in the best interests of shareholders only *after* the plaintiff has made a prima facie case showing that the directors have acted in bad faith or without requisite objectivity. *Norlin Corp. v. Rooney, Pace Inc.,* 744 F.2d 255, 264 (2d Cir.1984); ALI, Principles of Corporate Governance: Analysis and Recommendations, § 4.01 at 6, 11 (Tent.Draft No. 4, April 12, 1985) (protections of business judgment rule removed only if a challenging party can sustain his burden of showing the director was not acting in good faith or with disinterest, or was not informed as to the subject of his business judgment).

  Radol v. Thomas, 772 F.2d 244, 257–58 (6th Cir. 1985).

- We think the proper solution presented by this and other business opportunity cases is as follows: A complainant seeking to impose a constructive trust upon a corporate fiduciary must bear the initial burden of establishing a prima facie case of a conflict of interest. See American Investment Co. v. Lichtenstein, 134 F.Supp. 857 (ED Mo.1955); Colorado & Utah Coal Co. v. Harris, 97 Colo. 309, 49 P.2d 429 (1935); Greer v. Stannard, 85 Mont. 78, 277 P. 622 (1929); Tierney v. United Pocahontas Coal Co., 85 W.Va. 545, 102 S.E. 249 (1920). As stated in Knox, supra, this may be done by showing "self-dealing," in which case the burden shifts to the fiduciary to absolve himself of liability by showing a ratification by disinterested board members, inherent fairness, or the like.

  Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1335 (Miss. 1979).

- Further, when a plaintiff "demonstrates that a director had an interest in the transaction at issue, the burden shifts to the director to prove that the transaction was fair and reasonable to the corporation." *Treadway Companies,* 638 F.2d at 382.

  Giannotti v. Hamway, 387 S.E.2d 725, 731 (Va. 1990).

- Under the business judgment rule, directors are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in self-dealing or fraud, or to have acted in bad faith. Once a plaintiff demonstrates that a director had an interest in the transaction at issue, the burden shifts to the director to prove that the transaction was fair and reasonable to the corporation. Daloisio v. Peninsula Land Co., supra, 43 N.J.Super. 79, 127 A.2d at 893; Geddes v. Anaconda Copper Co., 254 U.S. 590, 599, 41 S.Ct. 209, 212, 65 L.Ed. 425 (1921). Only if the director carries this burden will the transaction be upheld. The initial burden of proving the director's interest or bad faith, however, always rests with the plaintiff. Cf. Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del.1971); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del.Ch.1977).

  Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980).

- In an action for breach of fiduciary duties, "New York's business judgment rule creates a presumption that a corporation's directors act in good faith and in the best interests of the corporation." *Patrick v. Allen,* 355 F.Supp.2d 704, 710 (S.D.N.Y.2005) (collecting cases). However, "[i]t is black-letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply." *Croton River Club, Inc. v. Half Moon Bay Homeowners Ass'n (In re Croton River Club, Inc.),* 52 F.3d 41, 44 (2d Cir.1995). The basis for this rule has been explained as follows:

> When the directors and majority shareholders of each corporation are independent and negotiate at arm's length, it is more likely that the negotiations will reflect the full exertion of each party's bargaining power and the final terms of the transaction will be the best attainable. When, however, there is a common directorship or majority ownership, the inherent conflict of interest and the potential for self-dealing requires careful scrutiny of the transaction. *Alpert v. 28 Williams St. Corp.,* 63 N.Y.2d 557, 483 N.Y.S.2d 667, 473 N.E.2d 19, 26 (1984). Therefore, "[o]nce a prima facie showing is made that directors have a self-interest in a particular corporate transaction, the burden shifts to them to demonstrate that the transaction is fair and serves the best interests of the corporation and its shareholders." *Norlin Corp. v. Rooney, Pace Inc.,* 744 F.2d 255, 264 (2d Cir.1984).

In re Bridgeview Aerosol, LLC, 538 B.R. 477, 497 (Bankr. N.D. Ill. 2015).

- The second restriction traditionally imposed, the duty of loyalty, derives from the prohibition against self-dealing that inheres in the fiduciary relationship. *See Pepper v. Litton,* 308 U.S. 295, 306–07, 60 S.Ct. 238, 245–46, 84 L.Ed. 281 (1939). Once a prima facie showing is made that directors have a self-interest in a particular corporate transaction, the burden shifts to them to demonstrate that the transaction is fair and serves the best interests of the corporation and its shareholders. *See* NYBCL § 713(a)(3); *Schwartz v. Marien,* 37 N.Y.2d 487, 493, 373 N.Y.S.2d 122, 127, 335 N.E.2d 334 (1975); *Limmer v. Medallion Group, Inc.,* 75 A.D.2d 299, 428 N.Y.S.2d 961, 963 (1980); *see also* Marsh, Are Directors Trustees?, 22 *Bus.Law.* 35, 43–48 (1966).

  In applying these principles in the context of battles for corporate control, we begin with the business judgment rule, which affords directors wide latitude in devising strategies to resist unfriendly advances. *See, e.g., Treadway Companies, *265 Inc. v. Care Corp.,* 638 F.2d 357, 380–84 (2d Cir.1980); *Crouse-Hinds Co. v. Internorth, Inc.,* 634 F.2d 690, 701–04 (2d Cir.1980). As Judge Kearse made clear in those cases, however, the business judgment rule governs only where the directors are not shown to have a self-interest in the transaction at issue. *Treadway,* 638 F.2d at 382. Once self-dealing or bad faith is demonstrated, the duty of loyalty supersedes the duty of care, and the burden shifts to the directors to "prove that the transaction was fair and reasonable to the corporation." *Id.; Crouse-Hinds,* 634 F.2d at 702; *Panter v. Marshall Field & Co.,* 646 F.2d 271, 301 (7th Cir.1981) (Cudahy, J., concurring and dissenting), *cert. denied,* 454 U.S. 1092, 102 S.Ct. 658, 70 L.Ed.2d 631 (1981); *Johnson v. Trueblood,* 629 F.2d 287, 300 (3d Cir.1980) (Rosenn, J.,

concurring and dissenting), *cert. denied,* 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981); *see Klaus v. Hi-Shear Corp.,* 528 F.2d 225, 233–34 (9th Cir.1975); *Mobil Corp. v. Marathon Oil Co.,* [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 98,375 (S.D.Ohio), *rev'd on other grounds,* 669 F.2d 366 (6th Cir.1981); *cf. Bennett v. Propp,* 41 Del.Ch. 14, 187 A.2d 405, 409 (1962).

Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264–65 (2d Cir. 1984).

- The plaintiff must first make a prima facie showing that the defendants acted in self-interest before the burden shifts to them to prove fair dealing. *Saginaw Products Corp. v. Cavallo,* Superior Court, judicial district of New Haven, Docket No. CV 92 0326329 (August 10, 1994, Burns, J.), aff'd, 40 Conn.App. 771, 673 A.2d 120 (1996). See also *Cadle Co. v. D'Addario, supra,* 268 Conn. at 457 (when breach of fiduciary duty is alleged and allegations concern fraud, self-dealing or conflict of interest, burden of proof shifts to the fiduciary to prove fair dealing); *Mangiante v. Niemiec, supra,* 82 Conn.App. at 284 (when complaint against fiduciary alleges self-dealing, fiduciary carries burden of proving fair dealing).

Hennessey v. McManus, No. CV106001205S, 2010 WL 5030103, at *6 (Conn. Super. Ct. Nov. 8, 2010).

- This burden shifting only occurs though upon a prima facie showing by the beneficiary that the trustee engaged in self-dealing. *Barber v. Skip Barber Racing School, LLC,* 106 Conn.App. 59, 76, 940 A.2d 878 (2001).

Ratcliffe v. Schwerin, No. X04HHDCV126031111S, 2013 WL 1800368, at *5 (Conn. Super. Ct. Apr. 5, 2013).

- "Once a prima facie showing is made that directors have a self-interest in a particular corporate transaction, the burden shifts to them to demonstrate that the transaction is fair and serves the best interests of the corporation and its shareholders." *Norlin Corp. v. Rooney, Pace Inc.,* 744 F.2d 255, 264 (2d Cir.1984) (applying New York law); *see also Alpert v. 28 Williams St. Corp.,* 63 N.Y.2d 557, 570 (1984) ("when there is an inherent conflict of interest, the burden shifts to the interested directors or shareholders to prove good faith ....."). These rules, stemming from fiduciary obligations owed by corporate officers to shareholders, apply as well to closely held corporations. *See Global Minerals & Metals Corp. v. Holme,* 824 N.Y.S.2d 210, 2014 (1st Dept.2006) ("corporate officer and director" of "a closely held corporation" owed a fiduciary duty to the other shareholders).

Alphonse Hotel Corp. v. Nam Tran, No. 13 CIV. 7859 DLC, 2014 WL 3801230, at *9 (S.D.N.Y. Aug. 1, 2014), *aff'd sub nom. Alphonse Hotel Corp. v. Tran*, 828 F.3d 146 (2d Cir. 2016).

- The trial court in its conclusions of law found that the majority shareholders had the burden to prove the inherent fairness of the service fee structure and held that they failed to meet their burden. We will assume arguendo that the trial court's determination as to the membership of the class of majority shareholders was correct, i. e., those 34 shareholders paying the lowest rents. It is true that the majority of controlling shareholders in voting on extraordinary corporate matters have a fiduciary duty to refrain from abusing their control so as to give themselves a profit at the expense of the minority. Fix v. Fix Material Co., Inc., 538 S.W.2d 351 (Mo.App.1976); Henn, Law of Corporations s 240 (1970). It does not follow, however, that because majority shareholders under certain circumstances may assume the status of technical fiduciaries that plaintiffs by filing a suit for oppression are relieved of the burden of proving their case. See Jarvis v. Boatmen's Nat'l Bank of St. Louis, 478 S.W.2d 266 (Mo.1972); Kirtz v. Grossman, 463 S.W.2d 541 (Mo.App.1971). This court in Fix v. Fix Material Co., Inc., supra, held that in a suit under s 351.485 RSMo.1969 alleging oppression, the complaining shareholder has the burden of proving equitable grounds for relief. We believe that the same rule should be followed in non-statutory suits alleging oppression by the majority shareholders.

  Under plaintiffs' evidence, there was no showing of unfair dealing between the directors or majority of the shareholders and the corporation. If there had been proof of the existence of such personal transactions with the corporation, the directors or majority shareholders involved would have incurred the burden of proving that they had gained no unconscionable or secret profits as a result and that they had dealt with the corporation fairly, honestly and in good faith. Simpson v. Spellman, 522 S.W.2d 615 (Mo.App.1975). Before the burden shifts from the complaining shareholders, however, they must prove the existence of a transaction between the corporation and the director. Ramacciotti v. Joe Simpkins, Inc., 427 S.W.2d 425 (Mo.1968); Yax v. DIT-MCO, Inc., 366 S.W.2d 363 (Mo.1963). Under the facts of this case there were no such transactions. The agreement to pay a specified rent or service fee for a given apartment was a non-negotiable incident of owning a share of St. Regis stock. It was not a transaction entered into after the individual became a shareholder or director but was a prerequisite to becoming a shareholder. The complaining shareholders, having shown no transaction between the directors or majority shareholders after they became a part of the corporation, retain the burden of proving that the actions of the defendants amounted to oppression.

We believe that plaintiffs have failed to meet their burden of proof and hold as a matter of law that under the evidence in this case there has been no showing of oppression by any controlling group of shareholders. Plaintiffs do not point to any affirmative action undertaken by the majority which is oppressive. Their sole complaint is that the majority of the shareholders in the exercise of their judgment have refused to amend the rental or service charge structure which has been in effect since the corporation was formed. We do not find such refusal to be oppressive.

Jackson v. St. Regis Apartments, Inc., 565 S.W.2d 178, 182–83 (Mo. App. 1978).