

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C. Castro
Deputy

ROBERT BROZ, et al.

NICOLE GOODWIN
LAUREN ELLIOTT STINE

v.

WESTERN COMPETITIVE SOLUTIONS INC,
et al.

JONATHAN ALBERT COURY

JOHN M DESTEFANO III
TODD FELTUS
ROBERT C HACKETT
THOMAS M QUIGLEY
JAMES A RYAN

UNDER ADVISEMENT RULING

On December 30, 2010, Defendants Western Competitive Solutions Inc. (“WCS”) and Mohave Cooperative Services, Inc. (“MCS”) filed their motion for Order to Show Cause Why Robert Broz Should [Not] Be Removed as a Director or, in the Alternative, Why a Receiver should Be Appointed. An evidential hearing, originally estimated by the parties to last two (2) days, was held on the following nine (9) days: May 17, 2011, May 18, 2011, June 6, 2011, July 20, 2011, July 21, 2011, August 24, 2011, August 30, 2011, and September 1, 2011. Following closing arguments, the parties agreed to lodge proposed supplemental findings of fact and conclusions of law by September 8, 2011, at which time it was intended that the matter was to be taken under advisement.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

The parties timely lodged their post-trial submissions on September 8, 2011. On that date, however, Plaintiffs also filed their Rule 37(C) Motion to Exclude and Objection to Defendants' Proposed Findings of Fact and Conclusions of Law. The subsequent briefing on that Motion finally concluded on October 11, 2011, at which time all pending matters were deemed under advisement.

The Court has now reviewed and considered all the admitted evidence including hearing exhibits, testimony, lodged transcript excerpts, memoranda and proposed findings submitted by the parties and arguments of counsel.

While the parties presented evidence on a wide variety of issues related to this corporate governance dispute, the Court deems the following findings of facts and conclusions of law sufficient to resolve the pending motion.

All parties to this action agree that, pursuant to Ariz. Rev. Stat. §10-809(A), a corporation may seek judicial removal of a director if the Court finds that the director engaged in fraudulent conduct or intentional criminal conduct with respect to the corporation and removal is in the best interest of the corporation.

The parties also agree that if an injunction is not entered enjoining Plaintiff Robert Broz from acting as a director, a receiver should be appointed to conduct the affairs of Defendants Western Competitive Solutions, Inc. and Mohave Cooperative Services, Inc.

FINDINGS OF FACT

1. Mohave Electric Cooperative, Inc. ("MEC") is an Arizona corporation, which was originally organized in 1947 as a not-for-profit electrical utility to provide electrical services to customers in its rural service area, located generally in northwest Arizona.
2. Robert Broz ("Broz") was hired as the general manager of MEC, beginning his employment on November 1, 1990. His job title with MEC ultimately changed to Chief Executive Officer.
3. On September 30, 1992, MEC became a charter member under the National Rural Telecommunications Cooperative ("NRTC") Member Agreement for Marketing and Distribution of DBS Services, which permitted, among other things, MEC to make available to anticipated subscribers in MEC's certificated area DirecTV satellite, cable, internet, and telecommunications services.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

4. In 1994, through its membership in the NRTC, MEC began offering satellite television programming services to its members through the acquisition of a DirecTV franchise (the "Franchise").
5. MEC paid \$700,000 in consideration for rights to the Franchise.
6. In December 1994, MEC created MCS as a wholly-owned subsidiary of MEC, with the intent that MCS would provide satellite television services under the terms of the Franchise.
7. MCS thereafter began on a for-profit basis acquiring equipment and, as necessary, began construction of infrastructure and other improvements so as to provide services to subscribers/customers.
8. The MEC board decided that MEC board members Lyn Opalka ("Opalka") and John Nelssen ("Nelssen") would serve as two of the MCS board members with Broz, the then Chief Executive Officer of MEC, as the third MCS board member.
9. MEC's board and Broz agreed that Broz would be the President of MCS.
10. At some time prior to April 1998, MEC decided to "spin off" MCS, because questions were raised regarding the ability of MEC to maintain its not-for-profit income tax status if it received revenue of more than 15.0% in any one year from its for profit businesses, including the business of MCS.
11. Based upon this information, MEC decided to separate all control, ownership and other benefits of its then wholly-owned subsidiary, MCS, including cable and satellite television, telecommunications, and related services provided, or to be provided, by MCS to its subscribers/customers.
12. In April of 1998, WCS was formed as an Arizona corporation for the purpose of acting as a holding company for MCS stock.
13. WCS was created with two classes of shares.
14. The Trustees of the Western Competitive Solutions Business Trust dated April 27, 1998 hold the Class B shares of WCS in trust for the benefit of the members of MEC. Class B shares have no voting interest.
15. In April 1998, the directors of both MCS and WCS were Broz, Opalka, and Nelssen.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

16. From inception until at least March 15, 2010, Broz served as President of both MCS and WCS and managed both entities.

17. By mid 2002, MEC and Broz were advised that the increasing revenue being generated by MCS through its use of the Franchise might be imputed to MEC and might jeopardize MEC's not-for-profit tax status, and that more restrictive regulation of its operations by the Arizona Corporation Commission (the "ACC") could occur unless the Franchise itself was transferred or sold.

18. Prior to this time, MCS was, with MEC's approval, continuing to operate and use the Franchise which was still owned by MEC, in MCS's business operations.

19. In mid to late 2002, the MEC board began discussions regarding the potential sale of the Franchise to WCS.

20. At this time, WCS was still only a holding company for MCS stock, which was its only substantial asset.

21. In December 2002, MEC sold the Franchise to WCS for \$4 million, payable with \$200,000 annual payments over 20 years pursuant to the terms of a promissory Note Secured by Franchise (the "WCS Note").

22. Broz executed the WCS Note on behalf of WCS as its President.

23. WCS has paid MEC \$200,000 per year since signing the Note.

24. MEC's documents from the early 2000s reflect the ongoing "disputes among NRTC, Hughes [DirecTV]."

25. These disputes were embodied in Class Action Lawsuit litigation that had been pending since 1999, and predated WCS's purchase of the Franchise from MEC.

26. In August 2003, NRTC and DirecTV reached a settlement in the Class Action Lawsuits, subject to court approval, that would give the NRTC members a variety of options for compensation from DirecTV.

27. Sometime after June 1, 2004, Broz executed a Member Offer Agreement (the "DirecTV Agreement"), as the Chairman of the Board/President of both WCS and MCS, agreeing to convey the Franchise for more than \$20 million, which would be paid out at approximately \$245,000 per month for a number of years.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

28. In executing the DirecTV Agreement, Broz never presented the agreement to the MCS or WCS boards for approval.
29. At a November 2004 MEC board meeting, Broz told the board about the sale, but he did not inform them of any of the terms.
30. Broz never provided the MEC board with the Member Offer Agreement or provided any other documentation related to the sale of the MEC board for its review. He also did not provide the Member Offer Agreement to Opalka.
31. Despite having board of director meetings before 2004, Broz did not call any formal board meetings for either MCS or WCS after 2004. Even at the meetings that WCS and MCS held, no board material was provided.
32. Following the execution of the Member Offer Agreement and subsequent receipt of funds as a result of the Franchise sale, Broz directed substantial investments of WCS and MCS funds in several ventures at Laughlin Ranch and Las Vegas, Nevada. These ventures required millions of dollars of capital expenditures which were undertaken without board approval.
33. In 2006, Robert Broz entered into a lucrative employment agreement with his son, Shawn Broz, offering his son the CEO position with MCS.
34. Shawn Broz started work in the summer of 2007 at a salary of \$165,000 per year. In subsequent amendments to his employment agreement, Shawn Broz received a \$20,000 raise and a three-year notice clause.
35. As amended, Shawn Broz's employment agreements do not permit MCS to terminate Shawn Broz's employment unless he is convicted of a crime in the state of Arizona.
36. Even in the event that Shawn Broz is convicted of a crime in Arizona, MCS would owe Shawn Broz 156 weeks of severance pay. In addition, MCS must provide three years written notice to Shawn Broz of the termination.
37. Shawn Broz's employment agreement and amendments were never discussed with or approved by the MCS board.
38. In addition to his employment compensation, WCS loaned Shawn Broz \$100,000. This loan was to be repaid solely through bonuses to Shawn Broz. Those bonuses were determined by Robert Broz.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

39. Broz did not discuss Shawn Broz's loan with Opalka or the WCS board prior to execution.

40. In 2009 Opalka approached Broz about using WCS and MCS to purchase power through a membership in AEPCO and sell it to benefit the MEC members. Broz insisted that Opalka's plan was not feasible because WCS and MCS were not "active."

41. Broz and Nelssen had a similar discussion about the possibility of buying power in the same way that AES bought power. Nelssen suggested utilizing WCS for that purpose but Broz stated that it was not possible. Broz reiterated that WCS was not structured correctly and was unusable. He never stated that WCS was engaged in other business.

42. If the other directors of WCS and MCS did not specifically ask for information, Broz did not provide it.

43. Broz did not provide any MCS financial information to Opalka.

44. Shawn Broz instructed Sharron Sutton, Broz's administrative assistant, to remove MCS financial information from the MEC server.

45. Opalka did not discover that WCS and MCS were conducting business until 2010.

46. The WCS and MCS boards justifiably relied on Robert Broz's representations that MCS and WCS were dormant.

47. Based on statements made by Broz that the Companies were not doing anything, Nelssen reasonably believed that there was no board action that needed to be taken.

48. Based on statements made by Broz to Opalka, she reasonably believed that there was no need for board action.

49. Between July 2004 and June 30, 2010, the collective capital expenditures and operating losses of MCS and MC Services, LLC was over \$10.4 million. Of the over \$20 million in payments made by DirecTV, the Companies have just over \$7 million in remaining cash. The losses incurred by the Companies resulted from investments initiated by Broz without board approval or knowledge.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

CONCLUSIONS OF LAW

1. Under Arizona law, a corporation may seek judicial removal of a director if the Court finds both: (1) The director engaged in fraudulent conduct or intentional criminal conduct with respect to the corporation; and (2) Removal is in the best interest of the corporation. Ariz. Rev. Stat. §10-809(A).
2. The Arizona statute for judicial removal is based on the Model Business Corporation Act. The official comment to the Model Act makes it clear that “[w]here...the complaint concerns an ongoing course of conduct that is harmful to the corporation, the court may enjoin the director from continuing that conduct.” 2 Model Business Corporation Act Ann. at 8-92.
3. Arizona law holds that “[f]raud is generally classified under two major headings, actual and constructive.” *In re McDonnell’s Estate*, 65 Ariz. 248 (1947). Arizona’s broad definition of fraudulent conduct includes acts “to cheat or deceive one party to a transaction with respect to the situation or operations, or such as one which results to his damages or loss and to the advantage or gain of the other party.” *Eckert v. Miller*, 57 Ariz. 94, 101-02 (1941).
4. Fraud under Ariz. Rev. Stat. §10-809 “may be either actual or constructive.” *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 156 (App. 2009).
5. Constructive fraud is “a breach of legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences, or injures public interests.” *Dawson v. Withycombe*, 216 Ariz. 84, 107 (App. 2007) (quoting *Lasley v. Hems*, 179 Ariz. 589, 591 (App. 1994)).
6. In common law claim for fraud, a party must demonstrate nine elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Peery v. Hansen*, 120 Ariz. 266, 269 (App. 1978); *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520 (App. 1979).
7. Broz’s actions and non-disclosures, as set forth supra, constituted fraudulent conduct sufficient to meet the requirements of Ariz. Rev. Stat. §10-809(A) as both constructive and common law fraud under Arizona law.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010756

12/09/2011

8. Broz's removal as a director is in the best interests of MCS and WCS.
9. MCS and WCS have demonstrated a strong likelihood of success on the merits.
10. MCS and WCS have demonstrated the possibility of irreparable harm if the sought preliminary injunctive relief is not granted.
11. The balance of hardships favors MCS and WCS.

RULING

The December 30, 2010 Motion of WCS and MCS is granted and Robert Broz is removed as director of both companies effective immediately.

Plaintiffs' September 8, 2011 Motion is denied.

FILED: Exhibit Worksheet.

Dated: September 9, 2011

/ s / HON. JOHN A. BUTTRICK

JUDICIAL OFFICER OF THE SUPERIOR COURT