FILED: APPELLATE DIVISION - 1ST DEPT 02/21/2023 05:25 PM 2023-00535
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 02/21/2023

To be Argued by:
ROBERT L. WEIGEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

NW MEDIA HOLDINGS CORP., NEWSWEEK LLC, NEWSWEEK DIGITAL LLC, NEWSWEEK MAGAZINE LLC, NEWSWEEK PUBLISHING LLC, NW DIGITAL LLC and NW MAGAZINE LLC,

Plaintiffs-Appellants,

– against –

IBT MEDIA INC.,

Defendant-Respondent,

– and –

OLIVET UNIVERSITY, WORLD OLIVET ASSEMBLY, INC., ETIENNE UZAC, DAVID JANG and YOUNSEOK CHOI,

Defendants.

Appellate Case No.: 2023-00535

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New York County Clerk's Index No. 652344/22

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Plaintiffs-Appellants NW Media Holdings Corp., Newsweek LLC, Newsweek Digital LLC, Newsweek Magazine LLC, Newsweek Publishing LLC, NW Digital LLC, and NW Magazine LLC (collectively, "Plaintiffs") respectfully submit this brief in support of their appeal of the Decision and Order on Motion of the Honorable Melissa A. Crane, Justice of the Supreme Court of the State of New York (the "IAS Court"), dated December 28, 2022, which granted Defendant IBT Media Inc.'s ("IBT") motion to dismiss the complaint pursuant to CPLR 3211(a)(3).

PRELIMINARY STATEMENT

Throughout the five years that IBT owned and controlled the iconic American magazine Newsweek, IBT grossly mismanaged the company, incurred multimillion-dollar losses and significant debts, and interfered with the editorial independence of Newsweek reporters and editors in attempts to stop investigations into IBT's fraudulent activities and its ties to the charismatic religious leader David Jang and his church. It is undisputed that during the time it owned Newsweek, IBT engaged in a multimillion-dollar bank fraud, involving a made-up accounting firm (including a fake website) and fraudulent financial statements that resulted in felony pleas by IBT, its president, and other individuals and entities affiliated with Jang. Similar misconduct continued after IBT sold Newsweek in 2018, as Jang directed the destruction of Newsweek records that might subject IBT to liability, and IBT—

through Jonathan Davis, a co-owner of both IBT and NW Media—misappropriated NW Media's confidential and proprietary information.

In 2018, shortly before the indictments for IBT's fraud were announced, IBT sold Newsweek to a new company, NW Media. NW Media is owned by Dev Pragad and Jonathan Davis. Davis is also a 50% owner of IBT and became IBT's Chief Executive Officer after IBT's former CEO Etienne Uzac pled guilty to two counts of bank fraud. The sale from IBT to NW Media was pursuant to a written contract, the Membership Interest Purchase Agreement ("Purchase Agreement"), that required IBT to indemnify NW Media for any damages Newsweek suffered by reason of IBT's prior ownership. The Purchase Agreement between IBT and NW Media expressly provided for all disputes arising out of the sale of Newsweek, including any indemnification claims, to be resolved pursuant to New York law and selected New York County or the Southern District of New York (as applicable) as the venue for any necessary litigation. The Purchase Agreement was expressly approved by NW Media's board and signed by both shareholders, including Davis.

As the allegations of the complaint make clear, Plaintiffs have incurred millions in losses and costs, including for rent payments that Plaintiffs were forced to make on IBT's behalf, payments to the Internal Revenue Service ("IRS") and financing of the IRS cash payments, IRS levies on Plaintiffs' revenue related to IBT's debts, legal costs relating to IBT's mismanagement, payroll and employee

health insurance payments, and payments to vendors like Getty Images or Google. Pursuant to the Purchase Agreement, IBT is obligated to indemnify NW Media for all losses, damages, claims, obligations, liabilities, costs and expenses of any kind arising out of or in connection with IBT's management of the Company before the sale closed.

This lawsuit seeks to enforce IBT's contractual obligations through the mechanisms agreed to by the parties and unanimously approved by both of NW Media's directors and shareholders as the method to resolve disputes—a lawsuit filed in New York State court. Despite the fact that all parties and their respective boards of directors unanimously agreed on the terms of the contract and the method for resolving disputes under it, IBT now argues that NW Media lacked authority to bring this direct action in this court and that NW Media President Dev Pragad should instead have brought this action derivatively.

IBT's argument fails for several reasons. *First*, IBT lacks standing to contest NW Media's filing of this lawsuit. Only stockholders, officers, and directors of the corporate plaintiff can challenge acts undertaken by the corporation's officers and directors. IBT is none of those; it is a "stranger" to NW Media.

Second, under New York law, the president of a corporation is empowered to bring claims on behalf of the corporation, absent an express prohibition on doing so in the by-laws or by formal resolution of the board of directors. Here, there was no

stockholder vote or other restraint on Pragad's presumptive authority to bring legal claims to enforce NW Media's rights under the Purchase Agreement that had been unanimously approved by NW Media's board. In addition to Pragad's implied authority as president to authorize NW Media to bring this lawsuit, NW Media has already been authorized, under the Purchase Agreement (and the related Unanimous Written Consent) to cause NW Media, to pursue legal claims against IBT. New York law is clear: When a contract contemplates that one party indemnify the other for losses, the indemnified party may initiate a direct action to enforce that contract without the need for further authorization by the board of directors. *See, e.g.*, *Paloma Frocks, Inc. v. Shamokin Sportswear Corp.*, 3 N.Y.2d 572 (1958).

Third, to the extent that IBT is arguing that Davis's apparent objection to this lawsuit amounts to a revocation of the authority conferred by the Purchase Agreement, Davis, as an officer and co-owner of IBT, is a conflicted director of NW Media and may not revoke NW Media's authority to assert its rights against IBT.

The IAS Court, recognizing that there are "two distinct lines of cases that lead to opposite results," wrongly analogized this action to cases where (a) there was no contract conferring actual authority and (b) the board of directors affirmatively voted against the filing of the lawsuit, thereby curbing the implied authority of a corporate president. Here, there was no such negative vote and, in any event, the Purchase Agreement separately conferred actual authority that Davis did not, and could not,

revoke. For all these reasons, the decision of the court below should be reversed and the case permitted to proceed.

STATEMENT OF QUESTIONS PRESENTED

1. Does IBT lack standing to challenge Plaintiffs' authority to bring this lawsuit?

Yes. Only stockholders, officers, and directors of the corporate plaintiff may question the validity of acts undertaken by the corporation's officers and directors. IBT is not a shareholder, director, or officer of any Plaintiff. Accordingly, it has no authority to challenge the filing of the instant action.

2. Are Plaintiffs within their rights to assert contract and tort claims against IBT?

Yes. The president of a corporation is presumptively empowered to initiate lawsuits, absent any interdiction by the board or contrary provision in the by-laws. Davis, who has been absent from NW Media, has permitted Pragad to manage the corporation's affairs on his own and to hold himself out to third parties as empowered to act on NW Media's behalf. Further, Davis and Pragad, the two directors of NW Media, consented to the Purchase Agreement requiring IBT to indemnify NW Media; Davis further consented to Pragad's authority to enforce NW Media's rights under the Purchase Agreement by consenting to the enforcement provisions of the contract; and Pragad, as president of Newsweek, authorized this

claim to enforce NW Media's contractual rights. Accordingly, NW Media had both implied and actual authority to initiate claims, at the direction of its president, to assert its own interests.

3. Is Davis an interested director, such that he could not have voted to rescind the authorization given by the NW Media board to enforce the terms of the Purchase Agreement?

Yes. Because Davis is an officer and 50% shareholder in IBT, as well as a 50% shareholder in NW Media, he has a clear conflict of interest with respect to NW Media's enforcement of the Purchase Agreement against IBT. Accordingly, he could not vote on whether to rescind or modify the Purchase Agreement, and may not withhold his consent to enforce that Agreement.

STATEMENT OF THE CASE

I. IBT's Damaging Ownership of Newsweek

IBT is one component of a larger network of entities (the "Community") associated with the church of South Korean-American pastor David Jang. *See* R. 23 ¶ 4, R. 30 ¶ 31, R. 35 ¶ 48, R. 37-43 ¶¶ 53-74. Jang is a deity-like figure within the Community and, over the past 30 years, has established a worldwide network of enterprises that operate "as a single entity" to serve the Community (the "Network" or "Community Network"). *See* R. 23 ¶¶ 4-5, R. 29 ¶ 29, R. 37 ¶¶ 55-56. Jang uses the various Network entities, including IBT, to fund the Community Network as a

whole, often at the expense of those entities' own obligations and creditors. R. 23 ¶ 5, R. 38 ¶ 57, R. 39-40 ¶ 64, R. 41-42 ¶¶ 70-72. He also encourages them to perpetrate fraud for the financial benefit of the Community. *See* R. 23 ¶ 5, R. 45 ¶ 85. In addition to the commingling of assets, there is significant board, ownership, and employee overlap among entities in the Network. *See* R. 39-40 ¶¶ 64, 66.

IBT is part of the Network's "media news wing." R. 39 ¶ 63. It was founded in 2006 at Jang's direction by Community members Etienne Uzac and Johnathan Davis with funding from the Community. *See* R. 29-30 ¶¶ 30-31, R. 32-33 ¶¶ 35, 37, 40, R. 40 ¶¶ 67-68, R. 43 ¶ 76. Uzac served as IBT's president and CEO for much of the company's history and now serves as the chairman of IBT's board. R. 29-30 ¶ 30. Davis served as IBT's chief content officer for many years and later became IBT's CEO after Uzac pled guilty to bank fraud. R. 22 ¶ 2, R. 29-30 ¶ 30, R. 32 ¶ 35. Like the other Network entities, IBT operates primarily to benefit the Community. R. 43 ¶ 76.

In August 2013, IBT acquired Newsweek with financial help from the Community. R. 35-36 ¶¶ 48-49. Founded in 1933 by a former Time editor, and later owned by The Washington Post for fifty years, Newsweek is a print and digital news publication with worldwide operations. R. 22 ¶ 2, R. 35 ¶¶ 46-47. Once in control, IBT repeatedly treated Newsweek's assets, accounts, and operations as if they were its own. R. 36 ¶ 50, R. 47 ¶ 90; *see also* R. 33 ¶ 37, R. 47 ¶ 91 (IBT personnel

managing Newsweek's finances as an extension of IBT's). IBT indiscriminately transferred funds to other Network entities Olivet University and World Olivet Assembly, despite IBT's obligations to creditors, R. 36 ¶ 50, R. 47 ¶ 90, and fraudulently funneled loan proceeds to Olivet University through IBT bank accounts controlled by Uzac, R. 24 ¶ 8, R. 45-46 ¶ 85. IBT, Uzac, Olivet University, and other members of the Community Network were eventually indicted and pled guilty to felonies associated with the fraud and money laundering conspiracy. R. 24 ¶ 8, R. 29-31 ¶¶ 30-33, R. 45-46 ¶ 85, R. 48-50 ¶¶ 95-103.[1] Meanwhile, media outlets reported on other fraudulent activity by IBT, including deceptive tactics to increase internet traffic, suspicious advertising arrangements, and questionable transfers between IBT and other Network entities. R. 46 ¶¶ 86-87, R. 48 ¶ 96.

IBT's fraudulent and criminal conduct, combined with its myriad poor management decisions, caused Newsweek to suffer a decline in readership and other financial and reputational harm. R. 36 ¶ 50.

II. NW Media's Acquisition and Transformation of Newsweek

On September 13, 2018, shortly before it was indicted, IBT sold Newsweek and all of its assets to NW Media pursuant to a written Purchase Agreement. R. 116-

[1] The fraud included the creation of fictitious accounting firms and forged financial statements. During the investigation, prosecutors discovered that one of the defendants had deleted responsive records and forged exculpatory evidence at Jang's direction. R. 24 ¶ 8, R. 50 ¶¶ 102-03.

125; *see* R. 22 ¶ 3, R. 28 ¶ 22, R. 36 ¶ 51, R. 51-52 ¶¶ 106, 108. The boards of IBT and NW Media each approved the transaction, R. 52 ¶ 108, and Uzac, on behalf of IBT, executed an Assignment of Membership Interest transferring and assigning 100% of the membership interests in Newsweek LLC[2] to NW Media. *Id.*

NW Media is co-owned by Dev Pragad and Davis, who are the only two shareholders, officers, and directors of the corporation. R. 51 ¶ 107. By agreement, Pragad is president of NW Media and CEO of Newsweek, and Davis nominally holds the offices of NW Media secretary and treasurer. *Id.* Since the spin-off, Davis has not had an official role or title at Newsweek or participated in its operations. *Id.*, R. 36 ¶ 51. Davis has also been largely absent from NW Media, only recently asserting himself as a director in order to misappropriate confidential and proprietary information to help IBT replicate Newsweek's success. R. 65 ¶ 162.

In the Purchase Agreement, IBT agreed to indemnify NW Media with respect to a broad range of "Losses." R. 55 ¶¶ 119-20. Specifically, IBT agreed to:

> indemnify, defend, and hold harmless [NW Media]…from, against, and with respect to *any and all losses, damages, claims, obligations, liabilities, costs and expenses* (including, *without limitation*, reasonable attorneys' fees and costs and expenses incurred in investigating, preparing, defending against or prosecuting any litigation, claim, proceeding or demand), *of any kind or character whatsoever (collectively, "Losses")* arising out of or in connection with any of the following: (i) any inaccuracy or breach by [IBT] of any of the

[2] Newsweek LLC is the company through which IBT had owned Newsweek. R. 51 ¶ 106 n.6. In connection with the sale, Plaintiffs Newsweek Digital LLC, Newsweek Magazine LLC, Newsweek Publishing LLC, NW Digital LLC, and NW Magazine LLC were incorporated under the umbrella of NW Media. *Id.*

> representations or warranties made by [IBT] in this Agreement (including, without limitation, in Sections 5 and 6) . . . ; (ii) any breach by [IBT] of any of its covenants or agreements contained in this Agreement . . . ; (iii) [IBT's] ownership of the Membership Interest prior to the Closing; and/or (iv) [IBT's] management of the Company prior to the Closing.

R. 122 § 10 (emphases added). The Purchase Agreement also includes provisions addressing the conduct of any resulting litigation, including the applicable governing law (New York) and consents to jurisdiction in New York courts. R. 123 § 12(b).

Prior to signing the Purchase Agreement, both Davis and Pragad consented to the transaction in their capacity as directors of NW Media and signed a Unanimous Written Consent. R. 52 ¶ 108. Davis and Pragad agreed therein that they were "each authorized to execute the [Purchase] Agreement, and any and all instruments, writings and other documents necessary to carry out the transaction contemplated under the [Purchase] Agreement." R. 16; *see also* R. 301 ¶ 12; *IBT v. Pragad*, Index No. 652277/2022, NYSCEF Doc. No. 44.

After separating from IBT, Pragad and Newsweek began the difficult task of rehabilitating the iconic brand and overcoming the serious damage caused by IBT's mismanagement. Newsweek's post-IBT efforts have been enormously successful—resulting in historical increases in profits and readership. Starting from a financial deficit, Newsweek now has annual profits of over $20 million. R. 54 ¶ 116. Newsweek's monthly readership has ballooned from 8 million to 100 million—the highest in its 80-year history. R. 25 ¶ 11, R. 53 ¶ 113.

III. IBT's Post-Sale Enrichment and Bad Acts

Since the 2018 sale, Plaintiffs have been forced to pay millions of dollars of IBT's obligations to prevent IBT's creditors from attempting to execute against NW Media's own assets. R. 58-60 ¶¶ 131-39. Because of IBT's mismanagement, IBT's creditors have sought to recover IBT's debts directly from Plaintiffs. *See* R. 55-56 ¶ 122. Plaintiffs have been forced to make payments to IBT's landlord and have paid $1.8 million to the IRS on IBT's behalf. *See* R. 55-59 ¶¶ 121-28, 132-34. During the post-sale transition period, IBT's former Chief Financial Officer transferred money from Newsweek's accounts into IBT's without authorization and for no legitimate purpose. R. 59-60 ¶ 135. IBT has also received (and retained) revenues that were earned by Newsweek but misdirected to IBT as a result of its former association with Newsweek. R. 60 ¶ 136. In addition to the direct expenditures, Plaintiffs have also suffered approximately $2.8 million in losses because their employees were forced to spend time addressing IBT's liabilities and untangling Newsweek from IBT rather than developing the Newsweek business. R. 58 ¶ 129.

IBT refuses to repay Plaintiffs. R. 60-61 ¶¶ 139-40. Indeed, IBT and the other Defendants have gone to great lengths to avoid IBT's obligations and impede Plaintiffs' ability to recover the millions of dollars owed to them by stealing and destroying potential evidence. *Id.* In August 2020, Jang, Davis, Uzac, and

Younseok "Titus" Choi (an employee in IBT's computer programming department) conspired to download and delete hundreds of email accounts and data equivalent to millions of pages of documents from Newsweek's online data repository, a Google Workspace. R. 26 ¶ 15-16. Davis and his co-conspirators knew that the data was designated for indefinite retention and subject to a litigation hold. R. 61 ¶ 143.[3] They nevertheless destroyed the data so that the records would not incriminate them. R. 61-64 ¶¶ 144-54.

IBT and its principals have also conspired to steal and exploit Newsweek's proprietary information and business strategies, to the detriment of Newsweek. *See* R. 65-67 ¶¶ 160-70. A recording of a conversation between Uzac and another IBT employee confirms that Davis has shared Newsweek's confidential and proprietary information and trade secrets with Uzac and others associated with IBT and the Community. R. 66 ¶ 163.

IV. Relevant Procedural History

On June 24, 2022, counsel for Plaintiffs sent a draft complaint to Davis's counsel outlining claims against Davis, IBT and other Network entities. R. 129-93. This prompted Davis's counsel to send two letters in response on June 30, 2022—including a letter to Gibson Dunn that counsel has no record of having received—

[3] After the 2018 sale, Newsweek continued to maintain digital records for both companies in Newsweek's Google Workspace. R. 61 ¶ 141. Many of Newsweek's pre-separation records were maintained in IBT user accounts. *Id.* ¶ 142.

asking that NW Media not file the draft complaint provided to Davis. R. 194-99. The letters also ask for an investigation into IBT's multimillion-dollar obligations to NW Media. *Id.* In light of Davis's objection, Plaintiffs did not proceed against Davis, and instead brought this action solely against IBT and other individual defendants.

On July 6, 2022, Plaintiffs filed this lawsuit to recover against IBT for the multimillion-dollar losses incurred as a result of IBT's mismanagement of Newsweek, for the obligations and debts covered by Plaintiffs in recent years on IBT's behalf, and for the damage caused by Defendants' misconduct. *See* R. 21-82. On July 29, 2022, Plaintiffs moved for a temporary restraining order and preliminary injunction to prevent IBT, Uzac, and Choi from further destroying evidence and misappropriating their trade secrets and confidential information while the Newsweek lawsuits are pending. *See* Index No. 652344/2022, NYSCEF Doc. No. 18. After a hearing, those Defendants stipulated to "preserve all materials in their possession, custody, or control that could be relevant to this litigation" and "not [to] request, seek access to, review, or use any of Plaintiffs' non-public financial information, data, reports, and business strategies, including information about advertising, operations, performance, future products, and client and vendor lists, provided to or obtained by Johnathan Davis." Index No. 652344/2022, NYSCEF

Doc. No. 45 at 2. On September 9, 2022, IBT moved to dismiss the Plaintiffs' complaint under CPLR 3211(a)(1), (a)(3), and (a)(7). *See* R. 83-84.

After oral argument on December 15, 2022, Justice Melissa Crane of the New York Supreme Court granted IBT's motion to dismiss based on lack of capacity on December 29, 2022. R. 8-18. The IAS Court recognized that "IBT may have a separate duty to NW Media." R. 18. Nonetheless, describing the motion as "legally fascinating because there appear to be two distinct lines of cases that lead to opposite results," the IAS Court situated this case in "the *Sterling* line of cases" and held that Pragad's sole recourse was through a derivative suit. R. 9, 15, 18. The IAS Court did not address IBT's motion to dismiss for failure to state a claim. The Plaintiffs filed a Notice of Appeal on January 25, 2023. R. 3.

STANDARD OF REVIEW

A decision on a motion to dismiss reflects legal conclusions that are reviewed by this Court de novo. CPLR 5501(c); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 91 (1st Dep't 2022) ("Since this is a pre-answer motion to dismiss under CPLR 3211(a)(1) and (7), our review is de novo.").

Motions to dismiss pursuant to CPLR 3211(a)(3) must be denied where the party has standing to sue. *See GSCP VI EdgeMarc Holdings, L.L.C. v. ETC Ne. Pipeline, LLC*, 192 A.D.3d 454, 455 (1st Dep't 2021); *Wiener v. Spahn*, 60 A.D.3d 586, 587 (1st Dep't 2009). The "burden lies with the defendant to establish prima

facie that plaintiff has no standing to sue." *Credit Suisse Fin. Corp. v. Reskakis*, 139 A.D.3d 509, 510 (1st Dep't 2016). The existence of an issue of fact as to standing is sufficient to deny the motion. *See DLJ Mortg. Capital v. Mahadeo*, 166 A.D.3d 512, 513 (1st Dep't 2018); *Deutsche Bank Tr. Co. Americas v. Vitellas*, 131 A.D.3d 52, 60-61 (2d Dep't 2015).

ARGUMENT

I. IBT Cannot Challenge Plaintiffs' Capacity to Sue

IBT lacks standing to challenge Plaintiffs' authority to bring this lawsuit. New York law provides that "the business of a corporation shall be managed under the direction of its board of directors." N.Y. Bus. Corp. L. § 701. In accordance with this foundational principle, "[o]nly a stockholder, officer or director of the corporate plaintiff may question the validity of the action of its directors or officers." *A.B.C. Publ'ns v. N.Y. Times Co.*, 103 N.Y.S.2d 693, 694 (Sup. Ct. N.Y. Cnty. 1951).

Third parties have "no standing to question the validity of the acts and conduct of the corporation's executive committee with respect to its authority to act." 14A N.Y. Jur. 2d Business Relationships § 594; *see id*. § 658 (The "general rule [is that] a defendant in an action brought by a corporation, who is neither a stockholder, an officer, nor a director of the corporation, has no right to question the validity of the action of the officers of a corporation in authorizing maintenance of the action."); *see also Grand Allen Holding Corp. v. M. & S. Circuit, Inc.*, 236 A.D. 2 (1st Dep't

1932), *aff'd*, 261 N.Y. 516 (1933) ("[T]he defendant, being a stranger to the assignment and having notice thereof . . . cannot question or attack the authority of the person making the assignment."); *Rothman & Schneider, Inc. v. Beckerman*, 2 N.Y.2d 493, 499 (1957) (describing the defendants, one of whom was formerly an employee of the plaintiff corporation and a relative of its president, as "complete strangers to the corporation" who "should not be permitted to question [the president's] authority and thereby frustrate the action"); *City of Batavia v. Howland*, 43 A.D.2d 787, 788 (4th Dep't 1973) ("Being neither officers nor shareholders of the corporation, the town board had no authority to . . . examine the internal organization of the corporation and challenge its action.").

The IAS Court erred in holding that IBT is not a stranger or third party. R. 18. IBT is not a shareholder, director, or officer of any Plaintiff, nor does it have an interest in NW Media or Newsweek following the 2018 sale. *See* R. 51-52 ¶¶ 106-09. Following the transfer of Newsweek to NW Media, IBT "no longer had any control over Newsweek." R. 52 ¶ 109. This lack of interest or position makes IBT a third party or "stranger" to NW Media, whose "internal affairs and management . . . are none of [IBT's] concern." *A.B.C. Publ'ns*, 103 N.Y.S.2d at 694.

In treating IBT as an insider, the IAS Court erroneously conflated Davis's potential standing to challenge acts of NW Media as that company's 50% shareholder with the standing (or lack thereof) of IBT. But whatever rights Davis

might have as an owner of NW Media to object to NW Media's assertion of its claims against IBT—and, as discussed *infra*, there are none here—those rights cannot be asserted by IBT.

Since IBT has no interest or position in NW Media, it is a stranger or third party to the corporation and lacks standing to question the acts of its officers. *See A.B.C. Publ'ns*, 103 N.Y.S.2d at 694; 14A N.Y. Jur. 2d Business Relationships § 658.

II. Plaintiffs May Enforce Their Legal Rights Against IBT

A. Pragad, as President, Has Implied Authority to Authorize the Filing of This Lawsuit

Under New York law, the president of a corporation is presumptively authorized to take legal action on behalf of the corporation to assert its rights. As the New York Court of Appeals has held: "Absent a provision in the by-laws or action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act." *West View Hills, Inc. v. Lizau Realty Corp.*, 6 N.Y.2d 344, 348 (1959); *accord, e.g.*, *Polish-American Media, Inc. v. Jozwiak*, 29 A.D.3d 663, 664 (2d Dep't 2006). Notably, any prohibition by the board of directors must be "direct"; otherwise, "the president has presumptive authority, in the discharge of his duties, to . . . prosecute suits in the

name of the corporation." *Rothman*, 2 N.Y.2d at 497 (1957); *accord Matter of Paloma Frocks*, 3 N.Y.2d 572, 575-76 (1958).

The IAS Court's decision flipped that presumption on its head. In place of the rule that the president has presumptive power to act, absent an express prohibition on doing so in the by-laws or formal resolution of the board of directors, the IAS Court looked to the fact that NW Media's by-laws do not expressly "confer a right on the president to commence litigation," and concluded that the president therefore lacked such a right.[4] R. 15. That decision runs contrary to clear New York case law.

To be sure, the authority of a 50% owner to bring suit directly against another 50% owner may be limited at times. *See, e.g.*, *Executive Leasing Co. v. Leder*, 191 A.D.2d 199 (1st Dep't 1993) (holding that "where there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs," and instead "the proper remedy is a stockholder's derivative

[4] As the IAS Court noted, the by-laws technically provide for a shareholder vote in the event of deadlock among the board of directors, but, because NW Media has only two shareholders, "there is no way, as a practical matter, to break the tie." R. 17. That fact, however, favors *Plaintiffs*, not IBT. First, the default presumption under New York law is that the president of a corporation has the authority to bring suit; a vote would be needed to upset that default. *See, e.g.*, *Paloma*, 3 N.Y.2d at 575. Second, because Davis is conflicted, he would not be permitted to vote on whether NW Media should sue IBT in any event. *See infra* Section III.

action"); *Stone v. Frederick*, 245 A.D.2d 742 (3d Dep't 1997) (same); *Sterling*, 298 N.Y. at 487, 490-91 (plaintiff lacked authority to sue, where half of the plaintiff corporation's board was "nominated by" the defendant corporation, such that the defendant corporation had "equal control" over the plaintiff corporation). But there are no such constraints on a corporate president's authority to bring suit against another corporation that, like IBT viz-à-viz NW Media, is an "outsider." *Compare Paloma*, 3 N.Y.2d at 574-75 (holding that corporate president was authorized to commence a proceeding against another corporation whose stock was controlled by his coequal director), *with Tidy-House Paper Corp. of N.Y. v. Adlman*, 4 A.D.2d 619, 621 (1st Dep't 1957) (holding that corporate president was not permitted "to sue his coequal director *individually*" and contrasting that with suits against another "*corporation*") (emphases in original).

That Davis might have opposed the initiation of this lawsuit had there been a meeting of the NW Media board is of no moment. As only a 50% owner, he could not have single-handedly voted to withdraw the authority conferred on NW Media in the manner provided for in the Purchase Agreement, previously unanimously approved by NW Media's board of directors, to assert its legal rights against IBT. A single director cannot undo the prior unanimous vote of the NW Media board to enter into the contract to buy Newsweek subject to certain indemnification rights. Davis could not unilaterally force NW Media to give up its indemnification rights.

See infra Section II.B. As an interested director, Davis had no authority to retroactively rescind NW Media's authorization of the Purchase Agreement. *See infra* Section III. But more fundamentally, there was no board meeting or other formal revocation of Pragad's authority. In *Sterling*, the court held that any "authority which [Sterling's president] may have had . . . to commence this action was terminated when a majority of the board of directors at the special meeting refused to sanction it." *Sterling*, 298 N.Y. at 490. That formal termination was critical to the holding, as the Court of Appeals clarified in *West View Hills*: "Our holding in *Sterling* . . . was dictated by the circumstances of that case," since any authority the president had "was effectively 'terminated when . . . the board . . . refused to sanction it.'" *W. View Hills*, 6 N.Y.2d at 348. Likewise, in *Crane, A.G. v. 206 West 41st Street Hotel Associates, L.P.*, the stockholder agreement required unanimous approval for "[a]ll action," a meeting of the stockholders occurred, and "the stockholders refused unanimously to sanction it," thus terminating the corporate president's authority to defend against a foreclosure action. 87 A.D.3d 174, 178 (1st Dep't 2011). No such provision exists in NW Media's by-laws.

Where, as here, "the board has taken no action," the president has authority to act. *W. View Hills*, 6 N.Y.2d at 348. That is so even in the face of known opposition to the filing of the lawsuit. *See, e.g.*, *328 E. 56 St. Rest. v. Polldon Rest.*, 39 A.D.2d 689, 691 (1st Dep't 1972) (affirming denial of motion to dismiss for lack of authority

to institute the action, even where the motion to dismiss was "supported by a joint affidavit" of two individuals "who allege[d] they [we]re sole officers and directors of plaintiff and did not authorize the instant action or application"); *Cicero Ind. Dev. Corp. v. Robert*, 63 Misc. 2d 565, 568-70 (Sup. Ct. Onondaga Cnty. 1970) (noting that "an appropriate officer may institute corporate action to protect the corporation's assets without board approval and without the necessity of resorting to a derivative action with its drawbacks," and holding that "[t]he corporation may maintain the action," even where the controlling stockholders had sought to meet to dissolve the corporation); Roger J. Goebel, *The Authority of the President Over Corporate Litigation: A Study in Inherent Authority*, 37 St. John's L. Rev. 29, 76 (1962) ("The effect of *West View Hills* should make it clear in New York that a president may sue in a tacit deadlock under any circumstances—crisis or not, prior suit or none, insider or outsider suit.").

And it is so even when the president deliberately opts not to call a board meeting for the express purpose of being able to act. *See Berma Mgmt. Corp. v. 140 W. 42nd St. Realty, Inc*., 21 Misc. 2d 571, 572-73 (Sup. Ct. N.Y. Cnty. 1960) ("fact that the president . . . knew that two of the four directors opposed this action and deliberately failed to call a meeting to pass upon the question does not preclude him from instituting [it]"); *Hellman v. Hellman*, 31 Misc. 3d 265, 269-70 (Sup. Ct. Monroe Cnty.), *aff'd* 79 A.D.3d 1813 (4th Dep't 2010) (rejecting argument that

"formal refusal by the board was unnecessary" where it was known that one member of a "two-man board . . . was opposed to action," emphasizing "the distinction between . . . informal deadlock" and "actual[] refus[al]" by the board, and holding that the circumstance where the director opposing action was "unable to convene a board meeting" was insufficient to overcome the president's presumptive power to act on behalf of the corporation); *see also* Goebel, *Authority of the President*, *supra*, at 76 ("proper[]" for president's presumptive powers to prevail absent formal interdiction, "even when the president deliberately refrained from calling a board meeting because he knew a deadlock would result").

Indeed, in *Paloma*, the Toffel brothers almost certainly would have voted not to initiate legal proceedings against the company of which Harry Toffel was president, yet that was of no concern to the court, which required the board to have actually and "direct[ly]" prohibited doing so. *Paloma*, 3 N.Y.2d at 575. The *Paloma* court thus distinguished *Sterling* on the basis that, in *Sterling*, there was a board vote at which permission to bring suit was denied, while no such vote occurred in *Paloma*. *Id.* The Court of Appeals reaffirmed the need for an express and formal prohibition in *West View Hills*. There, the dissent maintained that the "presumptive authority" of the president could be overcome "where the president has actual knowledge that a *majority* of the board of directors oppose the suit," and that treating "the absence of direct prohibition" as "decisive would be to exalt form over substance." *W. View*

Hills, 6 N.Y.2d at 349 (emphasis in original). The majority, however, rejected that view, holding that the president of the plaintiff corporation was empowered to initiate the lawsuit on behalf of the corporation, regardless of the board's known opposition. *Id.* at 346-47.

The logic of these cases applies with particular force here, where (a) Pragad is the president of NW Media, and is active as the CEO of the thriving Newsweek enterprise, *compare* R. 25 ¶¶ 10-11, R. 33 ¶ 38, *with Rothman*, 2 N.Y.2d at 498 (secretary-treasurer authorized to initiate lawsuit); *328 E. 56 St. Rest.*, 39 A.D.2d at 690-91 (affirming denial of motion to dismiss based on lack of authority to sue where the person initiating lawsuit was allegedly no longer an officer or director); *W. View Hills*, 6 N.Y.2d at 346, 348-49 (affirming denial of motion to dismiss based on lack of authority to sue, where the plaintiff corporation had "been inactive for some four years"); and (b) Davis has not participated in Newsweek operations or otherwise been involved in NW Media since Newsweek spun off from IBT, *see* R. 36 ¶ 51, R. 51 ¶ 107. Where an officer of a closely held corporation has been absent from managing the corporation's affairs, the absentee officer "should not be permitted to question [an active officer's] authority and thereby frustrate the action" against other parties—including those "charged with converting a portion of [the corporation's] assets." *Rothman*, 2 N.Y.2d at 499; *see Happy Banana, Ltd. v. Tishman Const. Corp. of N.Y.*, 179 A.D.2d 562, 563 (1st Dep't 1992) (where officer "was apparently alone

conducting its business affairs, there is no reason why he should not be able to institute an action on the corporation's behalf against an outsider"). Davis, having left Pragad to conduct NW Media's business affairs alone, cannot thwart Pragad from taking legal action against IBT.

In short, as NW Media's President and CEO, Pragad had implied authority to authorize the filing of this lawsuit against outsider IBT, and nothing in the by-laws or in the formal actions of the NW Media board undermines that authority.

B. Plaintiffs Had Actual Authority to Bring This Suit Under the Purchase Agreement

In addition to Pragad's implied authority to authorize this litigation by virtue of his role as president of NW Media, there was also actual authority to bring suit pursuant to the Purchase Agreement between NW Media and IBT.

The Court of Appeals' decision in *Matter of Paloma Frocks* is on all fours. In that case, Paloma Frocks, Inc. hired Shamokin Sportswear to help manufacture dresses. 3 N.Y.2d at 574. The agreement was signed for Paloma by Harry Toffel, the president of Paloma who was also an officer and director of Shamokin and, along with his brother (another one of the four Shamokin directors), owner of half of Shamokin's stock. *Id.* When Paloma allegedly failed to pay the amount owed, Shamokin's president served a demand on Paloma, to which Paloma objected on the ground that Shamokin's president's actions had not been authorized by Shamokin's directors. *Id.* The Court of Appeals, in deciding the case, pointed to a critical

difference between *Paloma* and its earlier decision in *Sterling Industries v. Ball Bearing Pen Corp.*, 298 N.Y. 483 (1949): In *Paloma*, unlike in *Sterling*, the president initiating legal action was "merely carrying out an existing agreement," whereby Shamokin's directors had "agreed in advance" to certain terms, and the initiation of legal action "was a routine step in the performance of an authorized contract." 3 N.Y.3d at 575.[5] And, again, the *Paloma* court stressed that there had been "no direct prohibition by the board," *id.*—even though the Toffel brothers would presumably have voted against the action, resulting in a tie had the issue been put to a vote.

So too, here, non-party Jonathan Davis is, along with Dev Pragad, a 50% owner of NW Media, and is also, along with defendant Etienne Uzac, a co-owner of IBT. *See* R. 30 ¶ 31, R. 32 ¶ 35, R. 33 ¶ 38. In September 2018, IBT and NW Media entered into a written Purchase Agreement, unanimously approved by the boards of

[5] In *Paloma*, the prior agreement contained an arbitration provision. But nothing in the logic of *Paloma* suggests that any other previously-agreed contractual provision is any less entitled to enforcement by the president. To the contrary, *Paloma* disclaimed any suggestion that its holding rested on anything arbitration-specific, holding that "*[e]ven as to lawsuits,* '[w]here there has been no direct prohibition by the board the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation.'" *Paloma*, 3 N.Y.2d at 576 (emphasis added). And, here, the Purchase Agreement clearly envisions the possibility of litigation given its language concerning choice of law and the jurisdiction of New York courts to hear any dispute. R. 123 § 12(b).

both IBT and NW Media. *See* R. 52 ¶ 108. That Purchase Agreement contained a broad indemnification provision, whereby IBT agreed to indemnify NW Media for:

> any and all losses, damages, claims, obligations, liabilities, costs and expenses (including, without limitation, reasonable attorneys' fees and costs and expenses incurred in investigating, preparing, defending against or prosecuting any litigation, claim, proceeding or demand), of any kind or character whatsoever (collectively, "Losses") arising out of or in connection with any of the following: (i) any inaccuracy or breach by [IBT] of any of the representations or warranties made by [IBT] in this Agreement (including, without limitation, in Sections 5 and 6) . . . ; (ii) any breach by [IBT] of any of its covenants or agreements contained in this Agreement . . . ; (iii) [IBT's] ownership of the Membership Interest prior to the Closing; and/or (iv) [IBT's] management of the Company prior to the Closing.

R. 122; *see also* R. 55 ¶¶ 119-20. Further, in connection with that Purchase Agreement, Davis and Pragad signed a Unanimous Written Consent, whereby Davis "authorized" Pragad "to execute the [Purchase Agreement]." R. 16.

In other words, Jonathan Davis "agreed in advance," *Paloma*, 3 N.Y.3d at 575, to a contractual provision authorizing NW Media to engage in litigation and "prosecut[e] . . . claim[s]" arising out of IBT's misrepresentations, contractual breaches, or its ownership or "[mis-]management of [Newsweek] prior to the Closing." He also agreed to a contractual provision providing that any disputes under the Purchase Agreement would be "governed by New York law" and that:

> the state and federal courts located in New York County or the Southern District of New York (as applicable) shall have exclusive jurisdiction over this Agreement and any controversies arising out of, relating to, or referring to this Agreement, the formation of this Agreement, and actions undertaken by the Parties as a result of this Agreement, whether such controversies sound in tort law, contract law or otherwise.

R. 122-23. In initiating this lawsuit to recover for the consequences of IBT's mis-management of Newsweek prior to the sale, Pragad was, like the president of Shamokin in *Paloma*, "merely carrying out an existing agreement." *Paloma*, 3 N.Y.3d at 575. NW Media's actual authority to initiate suit pursuant to the Purchase Agreement (and to the Unanimous Written Consent) is an independent basis to sustain this lawsuit.

III. Jonathan Davis Cannot Void Plaintiffs' Right to Sue IBT

Finally, even if there *had* been a formal vote of the board of directors and Davis had sought to revoke NW Media's authority to bring this lawsuit, his status as an interested director would have precluded him from doing so.

An interested director is one who has a "self-interest" in the outcome of decisions made on behalf of a corporation—typically that the director would "receive a personal financial benefit." *Marx v. Akers*, 88 N.Y.2d 189, 202 (1996); *Park Riv. Owners Corp. v. Bangser Klein Rocca & Blum*, 269 A.D.2d 313, 313 (1st Dep't 2000). Such personal interests need not be at the expense of the corporation or the shareholders. *See Simon v. Becherer*, 7 A.D.3d 66, 72 (1st Dep't 2004) (explaining that, under Delaware's similar conflicted director rules, "[d]irectorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders"). The chief concern is that "the director cannot be expected to exercise his or her independent

business judgment without being influenced by the adverse personal consequences resulting from the decision." *Id*.[6]

Interested directors are routinely precluded from making corporate decisions, or have their decisions voided on that basis. *See, e.g.*, *Amfesco Industries, Inc. v. Greenblatt*, 172 A.D.2d 261, 264 (1st Dep't 1991) (holding that that directors with a "conflict of interest" are precluded from all "corporate decisions" or else those decisions lack the protections of the business judgment rule); *Carr v. Kimball*, 153 A.D. 825, 837 (1st Dep't 1912) ("A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case."). *Cf.* N.Y. Bus. Corp. L. § 713(b) (providing that corporations may, in certain circumstances, avoid "a contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest").

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[6] While the concept of interested directors most commonly arises in the context of shareholder derivative suits—because the issue generally arises only when an interested director improperly fails to recuse from a board vote, an action rarely challenged by the company directly—it applies with equal force in direct actions relating to the validity of certain corporate decisions. *See, e.g.*, *Park Riv. Owners Corp.*, 269 A.D.2d at 313 (holding that "[d]irector interest . . . invalidated the vote of at least two, if not all three, of the directors who voted to terminate defendant's retainer").

Davis is an archetypal example of an interested director. As CEO and a 50% shareholder of IBT, Davis's financial interests are directly tied to the value of IBT. Should the Plaintiffs succeed in their action to enforce the Purchase Agreement's indemnification clause, IBT, and by extension Davis, clearly stands to take a financial hit. Thus, Davis has an interest in NW Media's decision whether to pursue litigation that is separate from—and indeed, at odds with—NW Media's own best interests: His dueling fiduciary obligations present obvious conflicts of interest. *See In re Kenneth Cole Productions, Inc.*, 27 N.Y.3d 268 (2016) (recognizing that "where there are common directors or majority ownership" between two parties, there is an "inherent conflict of interest."). Accordingly, Davis is an "interested" director for the purposes of pursuing litigation against IBT. *See Park Riv. Owners Corp.*, 269 A.D.2d at 313 (finding that a "principal, employee and tenant" of a party that is subjected to a lawsuit are all interested for the purpose of the plaintiff corporation's decisions to bring and rescind that lawsuit.).

As an interested director, Davis is incapable of stripping Pragad of his authority to bring this action on behalf of NW Media. Again, it is hornbook law that "interested directors must be excluded" from decisions that implicate their interests "while the remaining members of the board proceed to consideration and action." *Auerbach v. Bennett*, 47 N.Y.2d 619, 632 (1979); *see also Carr*, 153 A.D. at 837. Any objection Davis might have made to the enforcement of the indemnification

agreement does not count in the board's consideration. And given that Pragad is the only other member of the board, a theoretical vote of the board of directors, excluding Davis, would have resulted in a unanimous decision in favor of enforcing the indemnification clause of the Purchase Agreement.

Sterling is not to the contrary. In *Sterling*, the Court of Appeals rejected arguments that the two directors in the plaintiff corporation who were appointed by the defendant corporation were "disqualified to vote" at the shareholder meeting for three reasons—none of which is applicable here. *Sterling Indus.*, 298 N.Y. at 491. *First*, *Sterling* noted that, at the board meeting, the directors in question were treated as "fully qualified," and the president of the corporation "asked their vote to authorize him to institute [the] action." *Id.* Here, Pragad has never treated Davis as "qualified" to bless or proscribe this action.

Second, *Sterling* pointed to language in the corporation's charter stating that "the interest of its directors in another contracting corporation should not constitute disqualification to vote by reason of interest . . . ." *Id.* No such comparable language effectively waiving conflicts exists here.

Third, and perhaps most critically, *Sterling* relied on a presumption that the two directors there "acted properly and in the interest of plaintiff," as there were "no facts alleged indicating that they [we]re not acting in the best interests of plaintiff." *Id.* Here, in marked contrast, Plaintiffs' complaint is riddled with allegations that

Davis acted contrary to NW Media's best interests. For example, Davis conspired with Jang and others to hack into and delete valuable Newsweek data and materials. R. 26 ¶ 15, R. 61-62 ¶¶ 143, 145. He later assisted in the location and deletion of former IBT CFO Marion Kim's data from the Newsweek workspace. R. 62 ¶¶ 147-48. Plainly, accepting all of the well-pled facts as true, Davis does not enjoy any presumption of acting in Plaintiffs' best interest.

Because Davis, as an interested director, would not have been permitted to vote on whether to initiate this action, his views, whatever they may be, cannot vitiate Pragad's authority to initiate litigation on NW Media's behalf.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the IAS Court granting IBT's motion to dismiss and remand for further proceedings.

Dated: New York, New York
February 21, 2023

Respectfully submitted,

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PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point Size: 14 pts

Line Spacing: Doubled

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 7,908.

Dated: February 21, 2023

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division— First Department

NW MEDIA HOLDINGS CORP., NEWSWEEK LLC, NEWSWEEK DIGITAL LLC, NEWSWEEK MAGAZINE LLC, NEWSWEEK PUBLISHING LLC, NW DIGITAL LLC and NW MAGAZINE LLC,

Plaintiffs-Appellants,

– against –

IBT MEDIA INC.,

Defendant-Respondent,

– and –

OLIVET UNIVERSITY, WORLD OLIVET ASSEMBLY, INC., ETIENNE UZAC, DAVID JANG and YOUNSEOK CHOI,

Defendants.

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1. The index number of the case in the court below is 652344/22.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about July 6, 2022 by the filing of a Summons and Complaint. Issue has not yet been joined.

5. The nature and object of the action is for alleged breach of contract.

6. This appeal is from the Decision and Order of the Honorable Melissa A. Crane, dated December 28, 2022, which granted Defendant IBT Media Inc.'s Motion to Dismiss.

7. This appeal is on the full reproduced record.