

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

MIRIAM V. CONWAY, and SHERRY  
McEWAN, in her capacity as trustee of  
the Miriam V. Conway Irrevocable  
Trust, established by Miriam Conway  
on August 7, 2007,

*Plaintiffs*

v.

DIALAMERICA MARKETING, INC,  
a Delaware corporation, ARTHUR W.  
CONWAY, individually and in his  
capacity as controlling shareholder and  
director of DialAmerica Marketing,  
Inc., JOHN DOES 1-10 (fictitiously  
named individuals),

*Defendants.*

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

BERGEN COUNTY

DOCKET No. BER-C-116-08

CIVIL ACTION

OPINION

**Argued: September 26<sup>th</sup>, 2008**

**Decided: September 30<sup>th</sup>, 2008**  
**Honorable Peter E. Doyne, P.J.Ch.**

Glenn R. Kazlow, Esq. and Susan M. Usatine, Esq. appearing on behalf of the  
Plaintiffs, Miriam V. Conway, and Sherry McEwan (Cole, Schotz, Meisel, Forman, &  
Leonard, P.A.).

Jeffrey M. Garrod, Esq. appearing on behalf of the Defendants, DialAmerica  
Marketing, Inc. and Arthur W. Conway (Orloff, Lowenbach, Stifelman, & Siegel, P.A.).

**Introduction**

Before the court is a notice of motion to dismiss the first count of the second  
amended complaint prosecuted on behalf of the defendants, DialAmerica Marketing, Inc.

and Arthur W. Conway (“DialAmerica” when referencing the corporate entity, “Arthur” when referencing the individual, and “defendants” when referenced collectively).

The motion is opposed by counsel on behalf of Miriam V. Conway and Sherry McEwan in her capacity as trustee of the Miriam V. Conway Irrevocable Trust (“Miriam” and “Sherry” when referenced individually, “plaintiffs” when referenced collectively, and “the Trust” when referencing the trust instrument established apparently by Miriam on August 7<sup>th</sup>, 2007.)

Counsel requested oral argument which request was granted and entertained on September 26, 2008.

### **Statement of Facts and Procedural History**

An earlier written decision was rendered in this matter on May 30, 2008. For purposes of this motion the same is incorporated herewith as if set forth at length.

On March 29<sup>th</sup>, 2008, a complaint was filed on plaintiffs’ behalf against the defendants alleging shareholder oppression pursuant to N.J.S.A. 14A:12-7(1)(c), breach of fiduciary duty, fraud and corporate waste.<sup>1</sup>

DialAmerica is a Delaware corporation with its principal place of business in Mahwah, New Jersey. It is a privately-held subchapter S corporation. According to its website DialAmerica is one of the largest direct marketing service organizations and the largest privately-held inbound/outbound teleservice company in the United States. Its annual revenues approximate \$220 million.

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<sup>1</sup> The complaint is not attached to the moving papers and, accordingly, the summary of the complaint is gleaned from the moving papers presented.

Arthur is, and has been, the controlling shareholder of DialAmerica owning 47,900 shares or 48.68% of DialAmerica's stock, consisting of 100% of the voting stock of DialAmerica. Arthur serves as DialAmerica's President, Chief Executive Officer, and is a member of the Board of Directors. Arthur's sister, Ann Conway ("Ann") owns 23.2% of the shares and the Trust owns the remaining 28.1%. Arthur owns the Class A voting shares; and Miriam the Class B non-voting stock shares.

Miriam is 80 years of age. She established the Trust on August 7<sup>th</sup>, 2007. The Trust res consists of the 27,650 shares in DialAmerica.

In July 2005 Miriam and her then husband, William J. Conway, Sr. ("William, Sr.") began divorce proceedings. Plaintiffs assert Arthur exerted control over the proceedings, purportedly on behalf of his father. Miriam and William, Sr. married in 1968. William, Sr. had gifted shares of DialAmerica to his sons from his first marriage, Arthur and William Conway, Jr. ("Arthur" and "William, Jr.") as well as to Miriam. In conjunction with the divorce proceeding each party hired forensic accountants to place a value on Miriam's equity interest in DialAmerica. The forensic accountants were to determine the fair market value of Miriam's equity interest in DialAmerica (the "divorce asset assessment"). Miriam asserts during this valuation process unidentified DialAmerica "directors, managers and officers" made representations to Miriam's forensic accountants DialAmerica would continue to pay dividends to its shareholders to cover the cost of tax liabilities resulting from undistributed income under Subchapter S of the Internal Revenue Code. These dividends had been paid on a yearly basis continuously for the last twenty years. The purported misrepresentation was made on or about April 21<sup>st</sup>, 2006 during the divorce asset assessment. Plaintiffs asserts at the time

these representations were made defendants knew it had no intention of honoring the same, but rather, DialAmerica planned on paying “constructive dividends” in the form of excessive salary, bonuses and other perks to Arthur and other executives.

The final divorce decree was entered in October 2006.

In April 2007 Miriam’s accountant, Daniel Gibson (“Gibson”) contacted DialAmerica’s Vice-President and Controller, William A. Kirchner (“Kirchner”), who purportedly advised Gibson DialAmerica had insufficient cash flow to make a distribution to Miriam, even in an amount sufficient to reimburse Miriam her tax liability. As a result thereof, Miriam had to pay 2006 taxes totaling more than \$1.7 million on or about April 15<sup>th</sup>, 2007. Plaintiffs assert DialAmerica should have had sufficient capital to make a distribution in an amount at least equal to Miriam’s tax liability as had occurred in the twenty years proceeding 2007. Miriam asserts a fraudulent scheme to decrease available monies in DialAmerica by payment of excessive compensation and expenses paid to and on behalf of the corporation’s director and officers to her exclusion. Plaintiffs assert the approved salaries and/or bonuses to executives and management were 200-560% above reasonable salaries for comparable positions in comparable corporations, and far in excess of past practices. Further, plaintiffs point out in 2005 DialAmerica received a multi-million dollar judgment and was the beneficiary of life insurance policies carried on William Sr.’s son from his first marriage, William, Jr., who passed away in the late summer of 2006 for which DialAmerica received a multi-million dollar payout. Plaintiffs assert the excessive bonuses and salary were merely disguised or constructive dividends and constitute a waste of corporate assets. Plaintiffs further assert Arthur has participated in, ratified and/or condoned other acts of corporate waste/fraud as

detailed. By way of this purported fraudulent scheme plaintiffs urge defendants are attempting to deprive plaintiffs of their rightful distributions, defendants have sought to reduce the value of DialAmerica's stock knowing the Trust cannot sell the stock due to a stock restriction agreement signed in 1983 (which is not before the court), the Trust receives no value for its status as shareholder, but will be obligated to pay substantial taxes as the owner of DialAmerica shares. Plaintiffs aver DialAmerica, while asserting it was unable to pay any shareholder a dividend in April 2007, offered to purchase her shares in September 2007 for \$3.6 million. Miriam believes the offer is grossly inadequate as the book value of the company as of the year ending June 30<sup>th</sup>, 2005 was \$36.5 million.

After the filing of the complaint DialAmerica made a \$1 million distribution to the plaintiffs.

For purposes of this motion, plaintiffs also allege the following.

DialAmerica's principal place of business is in Mahwah, New Jersey. DialAmerica's headquarters consist of 115,000 square-foot office building on Macarthur Boulevard in Mahwah. Arthur, the controlling shareholder, a member of the Board, the company's president and chief executive officer, resides in Bergen County, New Jersey. Arthur's sister, Anne H. Conway, a minority shareholder of DialAmerica, is also a resident of New Jersey.

DialAmerica has other substantial contacts with New Jersey. As of April 14, 2008, DialAmerica's directors were Arthur, Robert A. Fischer, H. Laurence Kyse, Mary Conway, and Christopher Conway; all are New Jersey residents. Since 1997, the company Board meetings have taken place in Mahwah. In addition, DialAmerica

maintains certain critical books and records in Mahwah including, but not limited to, the company's accounting database and vendor payment files. Moreover, the Mahwah address is used purportedly on certain federal filings. Plaintiffs do not believe DialAmerica has any Delaware offices.<sup>2</sup>

Plaintiff filed a first amended complaint, on July 7, 2008, which included new defendants and several causes of action, including a claim for minority oppression under N.J.S.A. 14A:12-7. Thereafter, by consent, on September 4, 2008, plaintiffs filed a second amended complaint, asserting the statutory minority oppression claim in the first count. Plaintiffs allege as a result of violations of N.J.S.A. 14A:12-7, the following should occur: (a) Arthur and DialAmerica should be enjoined from dissipating corporate funds, (b) one or more provisional directors should be appointed to the Board of Directors pursuant to N.J.S.A. 14A:12-7(3), or alternatively a fiscal agent should be appointed, (c) defendants should be declared as having acted oppressively towards plaintiffs, (d) compensatory damages should be awarded, (e) the Trust should receive from DialAmerica fair value in a buyout or DialAmerica should be dissolved, (f) fair value should be fixed pursuant to N.J.S.A. 14A:12-7, (g) DialAmerica should be compelled to make distributions retroactively and prospectively, and (h) plaintiffs' fees and costs should be awarded.

### **Analysis**

The standard governing analysis of a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is the complaint must be examined "in depth and with liberality to

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<sup>2</sup> At oral argument, defendants' counsel admitted, to his knowledge, there is no DialAmerica office located in Delaware. It appears from counsel's statements DialAmerica filed the certificate of incorporation in Delaware and likely has continued other pro forma activities to maintain incorporation in Delaware.

ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). At this preliminary stage of the litigation the court should not be concerned with the ability of plaintiff to prove the allegation contained in the complaint. Id. The plaintiff is entitled to every reasonable inference of fact. Id. Indeed, “[t]he examination of a complaint’s allegation of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.” Id. The motion should be based on the pleadings, with the court accepting as true the facts alleged in the complaint. Rieder v. State Dept. of Transportation, 221 N.J. Super. 547, 552 (App. Div. 1987). Thus, “[c]ourts should grant these motions with caution and in ‘the rarest instances.’” Ballinger v. Delaware River Port Auth., 311 N.J. Super. 317, 322 (App. Div. 1998)(quoting Printing Mart, supra, 116 N.J. at 772).

“[W]hen a suit involves the internal affairs of a foreign corporation a state court will usually apply the law of the state of incorporation.” Velasquez v. Franz, 123 N.J. 498 (1991)(quoted in Krzastek v. Global Resource Industrial and Power, Inc., No. A-1815-06T2 (N.J. App. Div. Sept. 11, 2008)). “However, the location of incorporation is not always dispositive.” Id.; see generally O’Connor v. Busch Gardens, 255 N.J. Super. 545, 548 (App. Div. 1992)(discussing choice of law and the governmental interest standard). In determining which law to apply, “New Jersey courts use a flexible ‘governmental-interest’ standard, which requires the application of the law of the state with the greater interest in resolving the particular issue that is raised in the underlying

litigation.” Id.; see also Gantes v. Kason Corp. 145 N.J. 478, 484 (1996)(applying the governmental interest analysis).<sup>3</sup>

In applying the analysis, the court must first determine whether or not a conflict exists between the states. See Mastondrea v. Occidental Hotels Management S.A., 391 N.J. Super. 261, 284 (App.Div. 2007)(applying choice of law analysis to a tort case); see also Krzastek, supra A-1815-06T2 at 10. If there is no conflict, the analysis ends there. Id. If, however, a conflict exists, the court analyzes each issue individually to determine “which state has the most significant relationship to the occurrence and the parties.” See Mastondrea supra, 391 N.J. Super. at 284. In so doing, courts look to seven factors set forth in Restatement (Second) Conflicts of Laws § 6(2)(a-g) (1971):

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

see also Krzastek, supra A-1815-06T2 at 10; see generally, Fu v. Fu, 160 N.J. 108, 122 (1999).

New Jersey courts have applied domestic law to companies incorporated in foreign states. In Francis v. United Jersey Bank, the Supreme Court held New Jersey law applied to a suit regarding director liability, where the corporation was incorporated in New York. 87 N.J. 15, 27 (1981). In so deciding, the Court acknowledged the trial court’s finding “New Jersey had more significant relationships to the parties and the transactions than New York.” Id. In particular, “[t]he shareholder, officers and directors

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<sup>3</sup> It should be noted at oral argument defendants’ counsel indicated choice of law analysis had not been applied in a case addressing N.J.S.A. 14A:12-7. Regardless, the modern approach seems to enable, indeed compel, the conflicts analysis.

were New Jersey residents. . . . Virtually all transactions took place in New Jersey. Although many of the creditors [were] located outside the state, all had contacts with [the corporation] in New Jersey.” Id. at 27-28.

In addition, the Appellate Division recently held New Jersey law applied to a Massachusetts corporation. See Krzastek v. Global Resource Industrial and Power, Inc., et al., No. A-1815-06T2 (App. Div. Sept. 11, 2008). In Krzastek, the Appellate Division in an unpublished decision affirmed this court’s determination a minority shareholder was entitled to a buyout of his shares pursuant to New Jersey law despite no such statutory authority in Massachusetts. Id. The court determined under the laws of both states shareholders in a close corporation owe one another a duty of utmost good faith and loyalty. Id. The Appellate Division noted although “New Jersey’s statutory remedies for an oppressed minority shareholder provide broader remedies [than Massachusetts common law,]” the court was not persuaded “there is a substantive difference between the two state’s laws.” Id.

New Jersey Business Corporations Act (“NJBCA”), N.J.S.A. 14A:1-1 to 14A:16-4, applies to foreign corporations. See N.J.S.A. 14A:13-2(2). According to the NJBCA, foreign corporations “enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued.” Id. Likewise, foreign corporations “shall be subject to the same duties, restrictions, penalties and liabilities” imposed on domestic corporations. Id.

This provision concerning foreign corporations is “virtually identical” to the provision in Model Business Corporations Act (“Model Act”) in effect at the time of

enactment, except this State did not incorporate the internal affairs doctrine. See 1968 Commissioners' Comment to NJBCA § 14A:13-2; see also Mod. Bus. Corp. Act § 106 (1969). In fact, "the Commission intentionally departed from the 'hands off' approach of [the Model Act] which ... might have appeared to deny any authority whatever to this State ... to regulate the internal affairs of a foreign corporation." See Comment to § 14A:13-2. In addition, the Commissioners provided the following insight on the provision:

[New Jersey] courts remain free ... to retain jurisdiction in cases involving the internal affairs of a foreign corporation and to grant relief on equitable principles wherever indicated, even to the extent of applying to a foreign corporation in a proper case certain substantive features of this Revision. [citations omitted] **There are modern choice of law doctrines developing in this field, which the Commission did not wish to restrict** by adopting the approach in [the Model Act] ...

Id.

This omission, which the comments note was deliberate, seems to allow the courts to apply domestic law to foreign corporations in the appropriate circumstances. See Krzastek, supra A-1815-06T2, see also Francis, supra, 87 N.J. 15. A leading commentator on the subject, Stuart L. Pachman, found the same to be true, remarking:

Although jurisdiction over the dissolution of a corporation was once limited to the courts of its state of incorporation, that is no longer an absolute rule. This is particularly true where the corporation has close contacts with the foreign state and where, though nominally the relief sought in the complaint is dissolution, the court in the foreign state may afford relief short of full dissolution.

Stuart L. Pachman, Title 14A: Corporations 538 (GANN 2007).

New Jersey and Delaware both impose fiduciary duties on majority shareholders to protect the interests of minority shareholders. See N.J.S.A. 14A:12-7(1)(c)(setting

forth remedies for oppressed minority shareholders); see also Muellenberg v. Bikon Corp., 143 N.J. 168, 179 (1996)(applying N.J.S.A. 14A:12-7 to protect an oppressed minority shareholder); see Kahn v. Lynch Communication Sys., 638 A.2d 1110, 1114 (Del. 1994)(“[A] shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.”); see also In re Primedia Inc., Derivative Litig., 910 A.2d 248, 257 (Del. Ch. 2006)(holding “only a ‘controlling stockholder’ owes fiduciary duties to other stockholders”).

In determining whether plaintiffs have brought an appropriate claim under N.J.S.A. 14A:12-7, the court must decide whether New Jersey law should be applied to DialAmerica, a company incorporated in Delaware. Although, traditionally, there is a presumption the law of the incorporating state applies to issues of incorporation, the modern approach is to apply a choice of law analysis. As such, this court will apply the analysis.

Defendants’ counsel favors a strict textual approach analyzing the definitions of “corporation” and “foreign corporation” under N.J.S.A. 14A:1-3. This is simply not in line with the contemporary approach. The caselaw and legislation of this state indicate it is prepared to follow the modern trend. See Francis, supra, 87 N.J. 15; see also 1968 Commissioners’ Comment to NJBCA § 14A:13-2 (embracing a modern choice of law analysis); see also N.J.S.A. 14A:13-2(2)(applying NJBCA to foreign corporations and omitting the internal affairs doctrine from the statute).

In applying the flexible governmental interest analysis, this court must first determine whether a conflict exists. It appears both Delaware and New Jersey provide protection for minority shareholders. See N.J.S.A. 14A:12-7(1)(c); see also Muellenberg

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v. Bikon Corp., 143 N.J. 168, 179 (1996)(applying N.J.S.A. 14A:12-7 to protect an oppressed minority shareholder); see Kahn v. Lynch Communication Sys., 638 A.2d 1110, 1114 (Del. 1994). Therefore, it does not appear there is conflict with the substantive law. Nonetheless, because New Jersey substantive law is broader arguably than Delaware law, the choice of law analysis should continue. Compare Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993)(court would not impose a buy out of the shares of the oppressed minority shareholders where the parties had not so contracted) with Balsamides v. Protameen Chems., 160 N.J. 352 (1999)(reviewing a fair value determination in a buy out pursuant to N.J.S.A. 14A:12-7).

In analyzing all of the Restatement factors, it appears qualitatively New Jersey “has the most significant relationship to the occurrence and the parties.” See Restatement (Second) Conflicts of Laws § 6(2)(a-g); see also Mastondrea supra, 391 N.J. Super. at 284.<sup>4</sup> Specifically, New Jersey is the home to the corporation’s principal place of business and corporate headquarters. The entirety of the Board of Directors as well as the corporation’s chief executive officer and president all reside in New Jersey. Likewise, it appears from plaintiffs’ papers DialAmerica maintains critical books and records in New Jersey. The Mahwah location may also be used for certain federal filings. In addition, although Delaware is the state of incorporation, that is its sole tie to DialAmerica. Furthermore, through legislation, New Jersey, as the forum state, has demonstrated a commitment to protecting minority shareholders rights. See N.J.S.A. 14A:12-7(1)(c); see also Muellenberg, supra, 143 N.J. at 179. As such, the relevant policies of the forum

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<sup>4</sup> At oral argument, counsel for defendants referenced the “Francis factors.” In Francis v. United Jersey Bank, 162 N.J. Super. 355 (Law Div. 1978), the Court did not apply the Restatement factors in deciding the choice of law analysis. Nonetheless, counsel applied correctly the factors used by this state in determining choice of law as set forth in the Restatement.

would best be served by applying its law to DialAmerica, which is operating out of this state.<sup>5</sup>

In sum, in applying the modern choice of law analysis, it appears New Jersey has the most significant contacts with DialAmerica. As such, this state's laws should be applied to the issue at hand. Therefore, plaintiffs may plead appropriately a claim under N.J.S.A. 14A:12-7.

For the reasons set forth above, defendants' motion to dismiss is denied. Plaintiffs' counsel shall prepare and submit the appropriate order in conformity with the above pursuant to the five day rule.

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<sup>5</sup> Defendants' counsel argues the policy of the state should not be implemented, as Miriam now lives in California. The court finds this argument less than compelling. Miriam was a resident of New Jersey when she acquired the shares and for the majority of the time she owned the shares. Furthermore, the other shareholders still reside in this state. Regardless, the state maintains an interest in this corporation, as the majority of the corporation's activities and main situs are within the state.