

**STATE OF MICHIGAN**  
**SAGINAW COUNTY CIRCUIT COURT**

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JAMES BAILIE and  
VIDA CHADDAH,

Plaintiffs,

v

MAPLE HILL GOLF CLUB, INC,  
a Michigan non-profit corporation,

Defendant.

Case No. 15-026312-CK

Judge: M. Randall Jurrens (P27637)

**OPINION FOLLOWING  
BENCH TRIAL**

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Plaintiffs seek rescission of the sale of defendant's golf course and equipment to a third party on theories of breach of contract and violation of MCL 450.2753.

Having tried the case without a jury, the court concludes that, notwithstanding deficiencies in defendant's methodology, plaintiffs have failed to sufficiently justify the requested relief.

***Factual and Procedural Background***

From the testimony and exhibits admitted during a bench trial held over portions of August 13, 2015 and September 25, 2015 (including portions of the discovery deposition of Michael VanEck admitted by stipulation of counsel), the court finds the following facts to be true:

Defendant, Maple Hill Golf Club (the "Corporation") was incorporated on January 29, 1968, as a Michigan non-profit corporation, organized on a stock basis. As amended in 1974, the Articles of Incorporation authorize 300 shares of stock, with "[e]ach share [to] have one (1) vote" (Plaintiffs' Ex 1).

Subject to amendments adopted in 2013, the Corporation's bylaws include the following material provisions (Plaintiffs' Ex 3):

- two classes of shareholders (“members”):
  - *Class “A”* (comprised of subclasses for executive family membership, executive single membership, senior family membership, senior single membership, junior executive family, and junior executive single) (Art V, § 6)
  - *Class “B”* (comprised of subclasses for junior family membership, junior single membership, non-resident membership, youth membership, social membership, and promotional membership) (Art V, § 6 (sic))
- each Class “A” member entitled to 1 share of stock (Art XIII, § 2)
- voting limited to Class “A” members (Art V, § 6(E))
- each Class “A” member entitled to 1 vote (Art XI, § 2)
- directors composed of 9 Class “A” members, elected to 3-year, staggered terms (Art VII, §§ 1 and 2)
- annual election of new directors during last full week of August (Art VI, § 1)
- by July 1 each year, President to appoint Nominating Committee of 5 or more Class “A” members (Art VI, § 2)
- Nominating Committee to nominate 2 or more Class “A” members as candidates for each director to be elected (Art VI, § 3)
- “[t]he Board shall conduct voting for elections by mail” (Art XI, §§ 3 and 4)
- a Tellers Committee appointed by the President to tabulate votes and certify results (Art XI, §§ 1 and 4(D))
- new board formally seated at conclusion of annual stockholders’ meeting (Art VIII, § 3)
- annual membership meeting on third Sunday each October (Art IX, § 2(B))
- notice of annual membership meeting at least 15 days prior to meeting (Art IX, § 2(D))
- officers (President, Vice-President, Treasurer, and Secretary) appointed by Board for 1-year term (Art VIII)
- vacancies on Board filled by majority vote of Board (Art VII, § 5)
- 10% of Class “A” members constitute quorum at annual or special membership meetings (Art IX, §§ 2(F) and 3(C))
- special stockholders meeting to be held upon request of Board or 10% of Class “A” members, and 10-day written notice to each Class “A” member (Art IX, §§ 3(A) and (B))
- shareholder voting “in person or by absentee ballot on all questions other than elections when authorized in the bylaws” (Art XI, § 5)
- membership dues to be billed November 1<sup>st</sup> each year for the next 12 month period (generally payable within 30 days) (Art XII, § 1(B))
- bylaws may be amended by 60% of Class “A” members voting, provided a 10% quorum is present, and written notice of such amendment and meeting made to each Class “A” member at least 15 days prior to meeting (Art XVII)

For many years, the Corporation operated successfully (with approval of membership applications even being periodically delayed because too many golfers caused difficulties in getting playing time).

However, in recent years, with memberships (and revenue) declining, the Corporation struggled to pay its debts, and it had fallen into the practice of specially assessing shareholders annually to stay afloat. By 2012, the Corporation's financial condition had so deteriorated that there were doubts whether the course would open in 2013. The Corporation made its last mortgage payment to Chase Bank in October 2013.

In late 2013, to implement a new "pay to play" model, the Corporation's bylaws were amended (Plaintiffs' Ex 22) with ballots mailed to the approximately 170-180 then-existing Class "A" members (Art XI, §§ 5 and 6). Although the number of returned ballots is unknown, it is believed to have exceeded the 10% quorum requirement, with those voting unanimously approving the amendments (Art XVII). Notable amendments to the bylaws include:

- all memberships merged into a single class (Art V)
- all memberships became equal, except voting rights determined by number of rounds purchased: i.e. 100 or more rounds equal 1 vote and any number of rounds purchased less than 100 entitled to a prorated vote share (i.e. 20 rounds purchased equated to 20% of a vote) (Art V, § 5(F))<sup>1</sup>

However, notwithstanding merger of membership classes, the 2013 amendments left unaffected the requirement that Directors be "Class 'A'" members (Art VII, §§ 1 and 5(A))

In Spring 2014, Michael VanEck was appointed to the Corporation's board of directors to fill a vacancy, and was then appointed Treasurer.

By May/June 2014, the Corporation was in "dire" financial condition, with delinquent ad valorem taxes, mounting chemical bills, and a mortgage debt in default. The Board began

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<sup>1</sup> This amendment appears to violate MCL 450.2303 which, until amended, effective January 15, 2015, provided "Each share shall have 1 vote", and which currently provides "Each share is equal to every other share of the same class".

This also appears contrary to the Corporation's articles of incorporation which provide in Article V(a), "Each share shall have one (1) vote" (Plaintiffs' Ex 1), thus violating the rule that bylaws may affect the affairs of a corporation only to the extent not inconsistent with the corporation's articles, *MCL 450.2231(2)*.

The amendment also appears inconsistent with other bylaws, including Art XIII, § 2 (one share/one vote) (Plaintiffs' Ex 22).

If implemented, the Corporation's adoption of ratable voting, while otherwise recognizing all members as equal stockholders, could produce interesting, presumably unintended, consequences. For example, if 24 stockholders, each with a 20% prorated voting right, and a single stockholder with a 100% voting right, attended a special meeting, they would constitute a quorum (10% of 245 members) but only aggregate 5.8 votes. Moreover, in the absence of a requirement for a greater plurality, if only needing "a majority of the votes cast by the holders of shares [] entitled to vote thereon", *MCL 450.2441(2)*, corporate action could be authorized upon the aggregation of only 3 votes.

investigating raising capital through a members' pledge drive in hopes of paying off Chase Bank and avoiding the threat of mortgage foreclosure.

Contrary to the Corporation's bylaws (Art VI, sec 2 and sec 3), then-President Eric Frost neglected to appoint a Nominating Committee by July 1, 2014.

As of July 15, 2014, the Corporation had 245 members, of which, under the amended bylaws, only 69 held "full" voting rights. The remaining 176 possessed various percentages of a vote based on the number of rounds purchased (Plaintiffs' Ex 2)<sup>2</sup>.

On July 25, 2014, the Corporation's business manager, Sandi Bailie (plaintiff Bailie's spouse), emailed President Frost inquiring if he was appointing a nominating committee because "[w]e will need to get the candidates lined up so we can vote towards the end of August". On July 27, Frost responded that "I think a nominating committee is kind of outdated. With internet and email seems unnecessary. I would think an email out to the membership would work much better than asking a handful of people to not really look for potential candidates. If there is some legal reason we have to do it then send an email to the board asking for everyone to find a few people. If not, send an email letting the membership know that they can let you know that they want to be a candidate. We can set a date they need to be in at next board meeting." The next day, July 28, 2014, Ms. Bailie replied: "If the bylaws equal a legal reason then yes there is a legal reason. Article VI – Elections on page 10 addresses the nominating committee and the election process. Let me know how you want to handle it." (Plaintiffs' Ex 4)

Contrary to the bylaws (Art VI, § 1), the annual election of three new directors did not take place in the last full week of August 2014.

On September 6, 2014, the Board held a meeting and Treasurer Van Eck reported that Chase Bank had rejected the Corporation's offer to pay \$204,000 in full satisfaction of the delinquent mortgage debt and, conversely, that, if foreclosure proceedings were to be avoided, the bank was requiring \$430,000. "The Board then discussed how we should approach the Membership with this latest development. It was decided that we would lay all the facts out to the membership and let them decide if we can save Maple Hill as the private club we all want". In addition to mortgage debt, the Board acknowledged owing approximately \$18,000 in property taxes and \$19,000 for chemicals, with requirements for an additional \$10,000 for normal operating expenses to remain open until November 1, 2014. "It is now up to the Membership as to what we do next. Do we move forward as the private Club we all want or do we formulate an exit strategy?" (Plaintiff's Ex 5).

Following the Board meeting, VanEck emailed the membership reporting \$239,500 in member pledges, Chase's rejection of the Corporation's \$204,000 pay-off offer, the bank's willingness to accept \$430,000 in satisfaction of the mortgage, the distressed financial condition of the Corporation, two options available to the Corporation (increase member pledges by \$200,000-\$250,000 to eliminate the mortgage debt or "create an exit strategy and make some immediate drastic changes in order to keep the club open for the remainder of the season"), attached "a

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<sup>2</sup> The court notes that, by its count, shareholders include 17 attorneys.

current balance sheet and profit & loss statement to show you our exact numbers”, and concluded with a request for additional member pledges by September 19 (Defendant’s Ex CC)

Having learned of the Corporation’s distress, Gregg Matekel (whose father is a longtime shareholder, and who himself worked for the Corporation for several years as a young man) and James Kruszynski (a longtime area golf pro) met with Board members (and business manager Sandi Bailie) on September 23, 2014 to convey interest in purchasing the Corporation’s property with the intention of maintaining it as a private, self-supporting, golf course. Matekel/Kruszynski also took the opportunity to request and receive financial information they desired to review before finalizing an offer. Matekel/Kruszynski concluded the Corporation owed over \$600,000, the mortgage was in default, and that it would take at least \$400,000 of stable annual income to operate a private course. Matekel/Kruszynski were not advised if there were any other potential purchasers.

On September 25, 2014, VanEck again emailed the shareholders, advising “The board has been contacted by two potential buyers”, and is “requesting member approval to sell the club”, so “submit your vote in a simple yes or no email to Sandi or by submitting in writing”, with “all responses [to be] returned by Wed. Oct. 1st” (Defendant’s Ex EE).

The next day, September 26, 2014, business manager Bailie emailed VanEck indicating receipt of “35 yes votes and 1 no vote” regarding the Board’s proposition to sell the club (Defendant’s Ex Z).

On September 30, 2014, Matekel/Kruszynski, in anticipation of “[a] new LLC to be formed prior to closing”, submitted a written offer to purchase the Corporation’s real property and equipment for \$325,000 (Plaintiffs’ Ex 14). The offer was --

- “subject to Board of Directors approval on or before 10/10/14”
- “ subject to 3rd party (Chase Bank) approval on or before 11/15/14”
- silent regarding buyers’ future use of the property

In late September 2014, the Board conducted the annual election of new directors by mail (Art VI, §§ 1, 2, and 3; Art VII, §§ 1 and 2; and Art XI, § 3).

On October, 1, 2014, President Frost and Treasurer VanEck accepted the Matekel/Kruszynski purchase agreement “as written” (which was contingent on “Board of Directors approval on or before 10/10/14” and “Chase Bank approval on or before 11/15/14”) (Plaintiffs’ Ex 14).

Also on October 1, 2014, the Board emailed all shareholders a summary of two possible sale options:

Option 1 [ i.e. Brian Ballard ]

- Plans to make it a Public Golf Course with some preferred tee times to those people who purchase a membership
- Cashing in investments and borrowing money from private individual with a balloon payment due in 7 years to purchase the club and do improvements

- Stated would make upgrades to facilities
- Will eliminate pay to play memberships and only have Single and Family Membership
- Would have to find and rent equipment to get course winterized

Option 2 [ i.e. Matekel/Kruszynski ]

- Plans on it being a Private Club
- Paying in cash for purchase and any other expenses that will arise
- Stated will put money into course as required
- Wants to retain the current membership and very much understands that cost is a big factor
- Plans on having a Maple Hill Golf Club Advisory Board
- Has equipment and ability to winterized and prepare golf course immediately
- Has offered a reciprocal agreement to play Bay City Country Club when MHGC may be unavailable because of a tournament or an outing for no more than a cart fee. Offer may be extended for entire golf season

The Board reported its intention to accept Option 2 (i.e. keeping the course “private”), and that there would be “a board meeting on Friday October 10 at 6:00 pm to officially vote to agree on the purchase agreement that is contingent of (sic) the board’s approval that has been forwarded to us” (Defendant’s Ex BB).

At VanEck’s request, business manager Sandi Bailie prepared a table entitled “Comparative Analysis of Potential Buyers” for the Board’s consideration (Defendant’s Ex E), which included:

	<b>Matekel Group</b>	<b>Ballard</b>
What happens if unprofitable	Give it a year or 2, then sell. Don't want to own a public golf course.	Knows it will take a couple of years to become profitable.

Similarly, at VanEck’s request, Ms. Bailie prepared a summary of “Meetings with Potential Buyers of MHGC”, including several negatives for each suitor:

**Matekel Group**

1. Talked in circles when asked how they could succeed as a private club when we couldn’t
4. Did not say what they would do to increase revenue other than raising dues
5. When asked what they would do if we didn’t turn a profit in the first year or so, said they would sell it
6. Members only will not get the course the exposure needed to sustain it

**Brian Ballard**

2. Is it wise to invest so much money in a venture that may not succeed?
3. Did not provide a specific answer as to why he no longer owned Bay Valley Course
4. Hedged his answer about taking care of our outstanding liabilities

Bailie concluded, “Both parties are “selling” themselves to us as the best option. What is there to prevent either party from changing their mind about any of this once title is in their name?” (Defendant’s Ex F).

On October 10, 2014, the Board held a meeting attended by 8 of 9 directors, chaired by President Frost, with as few as 17 but perhaps “at least 35” interested members present (depending on witness’ version). According to minutes prepared by Secretary Casey, the meeting focused on “two purposes: 1) To vote on the approval of the Purchase Agreement submitted to the . . . Board of Directors by Gregg Matekel and 2) to vote on whether or not to allow the . . . buyers . . . to negotiate with Chase Bank. After a lengthy discussion with the membership representatives [present] [(which became “emotional” and “chaotic”, with plaintiff Bailie eventually urging the Board to “let’s move on” because “we’ve got to get this done”)] and the Board of Directors on the current status of the Club, the membership gave their approval to the Board to continue to carry on business with the best interest of the Golf Club. \* \* \* There was a motion made to approve the Purchase Agreement with the [] following modification[]: \* \* \* That Maple Hill Golf Club is being purchased for the sole purpose of remainingg (sic) an 18 hole Golf Course. The motion was seconded and approved unanimously by the Board”. The Board also voted unanimously to authorize Matekel/Kruszynki to enter into discussions with Chase Bank (Plaintiffs’ Ex 8).

Following the meeting, VanEck telephoned Matekel to convey the Board’s approval of the purchase agreement, but with the added term that the property was being sold for the purpose remaining an 18-hole golf course.

On October 15, 2014, Brian Ballard submitted a “non-legally binding nor enforceable” Letter of Intent to Purchase to purchase the Corporation’s property for \$400,000 (but without committing to operate a golf course) (Defendant’s Ex G).

Contrary to the bylaws (Art VII, § 2 and Art IX, § 2(B)), an annual meeting of membership was not held on the 3rd Sunday of October 2014 (and, similarly, shareholders did not receive a formal meeting notice, agenda, or financial statement as required by Art IX, § 2(D)).

On October 30, 2014, Ballard submitted a “legally binding and enforceable” revised Letter of Intent to Purchase the Corporation’s property for \$500,000 (but without committing to operate a golf course) (Defendant’s Ex H).

Although dues were historically billed on November 1 each year, it was deemed “pointless” in 2014 and no dues were billed for the upcoming year.

On November 1, 2014, VanEck and fellow board member Dan Hughes conducted an open meeting to update concerned shareholders (with upwards of 70 attending), and confirmed that the golf course was in the process of being sold, albeit leaving the impression the sale would be to Ballard rather than to Matekel/Kruszynski.

In early November 2014, shareholders’ ballots from September were finally counted, resulting in election of three new Board members (Steve Collins, Pat McCarthy, and Zach Schmid). On

November 11, 2014, the new Board was seated, with VanEck appointed President and John Casey re-appointed Secretary.

At some point, one shareholder, attorney Bob Chasnis, advised VanEck that there should be a shareholders' vote before any sale of the golf course occurred, but VanEck operated under the belief that, as provided in the bylaws, "[t]he control and management of the Club and its officers and property [were] entrusted to the Board of Directors" (Article IV, § 1).

Although initially resistant to a "short sale" proposed by Matekel/Kruszynski, Chase Bank eventually relented and, on November 20, 2014, issued a letter accepting the Corporation's offer of \$325,000 in full satisfaction of the \$545,836 outstanding mortgage debt (Plaintiffs' Ex 15).

Although the exact date is uncertain, at some point Matekel submitted to VanEck a "Final, Approved Amended MHGC Board Meeting Minutes" for the October 10, 2014 meeting, prepared by Matekel's attorney at the urging of Chase Bank and the title insurance company. These minutes purported to document not only Board approval, but also formal shareholder approval of the Matekel/Kruszynski purchase agreement with an "intent to run the property as a private golf club so long as it [is] financially feasible". All 9 directors eventually signed written consents approving the "amended" minutes (Plaintiffs' Ex 12).

On November 24, 2014, the Corporation, through President VanEck and Secretary Casey, executed and delivered a warranty deed (subsequently recorded on December 11, 2014 in Liber 2796, Page 622, Saginaw County Records) conveying the Corporation's real property to Maple Hill Club, LLC ("MHC LLC"), a Michigan limited liability company organized by Matekel and Kruszynski (Plaintiffs' Ex 13). The deed did not include any provision regarding the property's future use.

Also on November 24, 2014, VanEck emailed the shareholders advising that the sale to Matekel/Kruszynski had been consummated.

On December 9, 2014, VanEck, on behalf of the Corporation, and Chase Bank entered into a Settlement Agreement whereby the bank agreed to accept \$301,163 in full satisfaction of the \$618,940 otherwise due, and to discharge the mortgage (Plaintiffs' Ex 17).

In mid-December 2014, Matekel/Kruszynski held two meetings with potential members (with perhaps 90 people total attending) invited to hear their plans to maintain a private "no frills" golf course. In turn, they received input from attendees regarding possible dues structure. Concluding \$2,000 per member was feasible (i.e. which, assuming 200 members, would satisfy the projected \$400,000 budget), Matekel/Kruszynski commenced a membership drive (e.g. direct solicitation to the Corporation's shareholders, advertising in "Strikes and Strokes", etc.), began taking deposits, and emailed a weekly progress report to members. After some initial success, the membership drive began to flounder by mid-January as departing "snow birds" depleted the potential sales market. Ultimately, the membership campaign failed by the self-imposed March 1 deadline, and Matekel/Kruszynski returned all deposits.

On April 10, 2015, plaintiffs filed the present action naming Matekel, Kruszynski, MHC LLC, and the Corporation as party-defendants to causes of action for Count I, *Breach of Contract Against MHGC*, Count II, *Violation of MCL 450.2753*, Count III, *Fraudulent Inducement and Misrepresentation Against Matekel, Kruszynski, and MHC [LLC]*, and Count IV, *Tortious Interference Against Matekel, Kruszynski, and MHC [LLC]*.

The court denied plaintiffs' threshold request for an ex parte temporary restraining order. However, a hearing on April 16, 2015 to determine whether a preliminary injunction should issue resulted in a May 14, 2015 Consent Order that (1) allowed an impending auction of the Corporation's personal property to proceed (with net proceeds to be held in trust, subject to minimum monthly interest payments on Matekel/Kruszynski/MHC LLC loans), and (2) enjoined destroying, encumbering, transferring, selling and/or otherwise disposing of real property purchased from the Corporation.

Following the filing of a motion, with notice, and hearing, the court entered an Order Granting Defendants' Summary Disposition on May 26, 2015, dismissing Count III, *Fraudulent Inducement and Misrepresentation*, and, to the extent it implicated Matekel, Kruszynski, and/or MHC LLC, Count II, *Violation of MCL 450.2753*.

On August 5, 2015, plaintiffs' counsel voluntarily dismissed Count IV, *Tortious Interference*, on the record, thus removing the last pending claim against Matekel/Kruszynski/MHC LLC.

The next day, however, plaintiffs filed an Emergency Motion to Amend Complaint to Include Maple Hill Club, LLC [("MHC LLC")] as a Nominal Defendant and/or to Request the Court Order [MHC LLC] to Appear at Trial as a Party in Interest Pursuant to MCR 2.105 and 2.107. Subsequently, at the August 13, 2015 hearing, plaintiffs' counsel professed that MHC LLC was not a necessary party to the remaining claims (to which counsel for Matekel/Kruszynski/MHC LLC concurred) and, accordingly, the court denied the motion.

The remaining case against the Corporation, being Count I, *Breach of Contract*, and Count II, *Violation of MCL 450.2753*, was tried without a jury on August 13, 2015 and September 25, 2015.

### *Analysis*

#### *Breach of Contract*

Count I of the plaintiffs' complaint, *Breach of Contract Against MHGC*, alleges:

- bylaws constitute a contract between a corporation and its shareholders (¶ 69)
- the Corporation breached its contract with plaintiffs when it established a new Board of Directors on November 1, 2014 through an unauthorized elective process, including the absence of a Nominating Committee, failing to use official ballots, failing to conduct timely directors' election, failing to hold an

- annual shareholders' meeting, failing to timely seat a new board, failing to timely count ballots, and failing to utilize Tellers (§ 70)
- the Corporation breached its contract with plaintiffs when its Board of Directors voted to sell assets in violation of its bylaws, including by advising members they could vote by email (rather than appearing and voting in person or by absentee ballot), and by failing to hold a special meeting of stockholders and obtain their approval (§ 71)

In Michigan, the organization and operation of nonprofit corporations is governed by the nonprofit corporation act, *MCL 450.2101 et seq.* (the "Act").

Pursuant to MCL 450.2231(2), a nonprofit corporation may adopt bylaws "for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation".

Bylaws are a contract between a corporation and its shareholders. *Cole v Southern Michigan Fruit Assn*, 260 Mich 617, 621-622; 245 NW 534 (1931).

Here, the Corporation's bylaws (Plaintiffs' Ex 22) affecting election of directors required:

- annual election of new directors during last full week of August (Art VI, § 1)
- by July 1 each year, President to appoint Nominating Committee of 5 or more members (Art VI, § 2)
- Nominating Committee to nominate 2 or more members as candidates for each director to be elected (Art VI, § 3)
- voting rights to be determined by number of rounds purchased (Art V, § 5(F))
- notwithstanding adoption of ratable voting (based on number of rounds purchased), all members receive 1 share of stock (Art XIII, § 2)
- notwithstanding adoption of ratable voting, one shareholder/one vote (Art XI, § 2)
- members to receive voting package by mail with completed ballot to be returned by mail (Art XI, §§ 3 and 4)
- Tellers Committee appointed by the President to tabulate votes and certify results (Art XI, §§ 1 and 4(D))
- new board formally seated at conclusion of October annual shareholders' meeting (Art VII, § 3)

Unfortunately, then-president Frost failed to appoint a Nominating Committee by July 1, 2014, and there was no annual shareholders' meeting in October.

Beyond that, there is insufficient evidence to determine whether the process for electing and seating 3 new directors outlined in the bylaws was observed in 2014. It is known, however, that ballots mailed and returned in September were finally counted on or about November 1, 2014, resulting in election of three new Board members and, in turn, the newly established 9-member board appointing VanEck as president and re-appointing Casey as secretary.

In any event, the new Board (comprised of 3 new directors and 6 mid-term directors) was elected after the October 10, 2014 meeting in which the then-Board (with a significant number of shareholders present and participating) resolved to sell the Corporation's assets to Matekel/Kruszynski. Fortunately, the new board took no known action other than appointing VanEck president and re-appointing Casey secretary (who were each already directors and officers) and who subsequently acted consistent with the previous Board's unanimous resolution. So even if the new board had no authority, it took no material action; and, assuming the pre-existing directors continued in office "until a successor is elected or appointed and qualified", *MCL 450.2505(4)*, they took no inconsistent action.

Plaintiffs also complain that the Corporation breached its bylaws by allowing members to authorize sale of corporate assets by voting via email, and by failing to submit the proposed sale to a special meeting of shareholders. In this regard, relevant bylaws (Plaintiffs' Ex 22) provide:

- special stockholders' meetings must be called by the President when requested by the Board, or upon written request of 10% of members, with the meeting to take place within 20 days of such request and upon 10 days' notice (Art IX, § 3)
- shareholders may vote "in person or by absentee ballot on all questions other than elections when authorized in the bylaws" (Art XI, § 5)

Importantly, while providing a mechanism for calling special meetings generally, the bylaws do not specify or limit the issues that may prompt or require stockholder action – including the proposed sale of all, or substantially all, of the Corporation's assets – only that one "must be called by the President when requested by the Board, or upon written request of [] 10% of members" (Art IX, § 3).

On the other hand, when a meeting is called, the parties' bylaw contract requires voting to be conducted "in person or by absentee ballot on all questions other than elections when authorized in the bylaws" (Art XI, § 5). Unfortunately, unlike the formal procedures for voting by mail in elections (Art XI, § 4), the bylaws do not specify the form or process of absentee ballot voting that must be utilized in all other matters (including sale of the Corporation's assets).

#### *Violation of MCL 450.2753*

Perhaps better placed, plaintiffs also argue that the Corporation violated *MCL 450.2753*, which, although expressly authorizing the sale "of all, or substantially all, the property and assets, with or without goodwill, of a [nonprofit] corporation", requires, in addition to obtaining the board of directors support<sup>3</sup>,

[i]n the case of a stock [] corporation, the proposed transaction shall be submitted for approval at a meeting of shareholders []. Notice of the meeting shall be given

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<sup>3</sup> Until January 15, 2015, *MCL 450.2753(2)* required the board "approve" a proposed sale, lease, exchange, or other disposition of all, or substantially all, of a nonprofit corporation's assets. Effective January 15, 2015, *MCL 450.2753(2)* was amended to require the board "recommend" the proposed transaction (subject to two specified exceptions).

to each shareholder [] of record whether or not entitled to vote at the meeting, not less than 20 days before the meeting, in the manner provided in [the nonprofit corporation act] for the giving of notice of meetings of shareholders []. The notice shall include or be accompanied by a statement summarizing the principal terms of the proposed transaction or a copy of any documents containing the principal terms. [MCL 450.2753(3)<sup>4</sup>]

It is undisputed that these statutory requirements were not strictly observed in this case. Arguably, for some, this concludes the matter in the plaintiffs' favor. However, with due respect, the court feels obliged to consider other important factors in deciding whether to exercise its discretionary equitable powers.

#### *Mandatory or Directory*

Although MCL 450.2753 establishes a statutory procedure that, if followed, confirms a corporation's authority to sell assets, it does not necessarily follow that every transaction that fails to strictly conform to statutory procedure is void. Rather, there are authorities holding that,

failure to follow statutory formalities for obtaining shareholders' approval will not vitiate corporate transactions where in fact the requisite number of shareholders have consented; that such statutes are mandatory in requiring shareholders' consent, but only directory, in specifying the procedure for obtaining consent; that a stranger dealing with the corporation in good faith is not put to the necessity of confirming the directors' compliance with internal notification procedures. [*McDermott v Bear Film Co*, 219 Cal App 2d 607; 33 Cal Rptr 486 1963), quoted by *Ward v Idsinga*, unpublished opinion per curiam of the Court of Appeals, issued August 15, 2013 (Docket No. 302731)]

Similarly, citing *Phillips Petroleum Co v Rock Creek Min Co*, 449 F2d 664, 666 (CA 9 1971), the *Ward* court observed that "because state statutes requiring shareholder ratification for the transfer of assets are designed for the protection of the shareholders, if the shareholders waive formalities or acquiesce to a transfer made without ratification, they cannot later challenge the transfer."

#### *The Meeting*

Notwithstanding the failure to comply with MCL 450.2753, the October 10, 2014 Board meeting is nonetheless significant.

Following a September 6, 2015 email to the stockholders outlining the Corporation's desperate financial condition (with an attached current balance sheet and profit/loss statement) (Defendant's Ex CC), and in response to then-treasurer VanEck's solicitation for input (Defendant's Ex EE), at least 35 shareholders had already voted in favor of a general proposition to sell (Defendant's Ex Z). The Board had emailed the shareholders a summary of both the

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<sup>4</sup> Effective January 15, 2015, MCL 450.2753(3) was nominally amended and renumbered as MCL 450.2753(5).

Matekel/Kruszynski and the Ballard options, stating the Board's intention to accept the Matekel/Kruszynski proposal, and providing notice that a meeting was being held on October 10, 2014 to officially vote on the purchase agreement (Defendant's Ex BB). At the meeting, in addition to 8 Board members, 17 to 35 shareholders (constituting, in any case, a 10% quorum of 245 members), including plaintiff Bailie, actively participated in "a lengthy discussion" and "gave their approval to the Board to continue to carry on business with the best interest of the [Corporation]" (without any objection to the lack of formal shareholder approval) (Plaintiffs' Ex 8).

Although imperfect, the meeting arguably demonstrates substantial participation in the decision-making process by a majority of shareholders attending a meeting at which a quorum was present, following notice of the meeting accompanied by a summary of principal terms of the proposed transaction.

#### *Mutuality of Agreement*

Although not previously pled, plaintiffs' counsel asserted during closing arguments that Matekel/Kruszynski never accepted the Board's [counter-]offer, as manifested by its adopted resolution, to sell for the "sole purpose of remaining[] an 18 hole Golf Course" (Plaintiffs' Ex 8) and, therefore, there was no valid contract.

It is true that for a valid contract to exist there must be mutuality of agreement, a meeting of the minds, upon all essential points. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006).

Here, although eschewing the possibility of a permanent restraint on use of the land, both Matekel and Kruszynski testified at trial that, at the time of contracting, they intended to operate the property as a private golf course, albeit with "no frills". This is consistent with the Board's agreement to sell for the purpose of "remaining an 18 hole golf course". Indeed, as characterized by Kruszynski, "They [(i.e. the shareholders)] lost the club. We were going to give them a second chance".

Moreover, the transaction has been fully consummated by the contracting parties, and neither, not the Corporation nor Matekel/Kruszynski/MHC LLC, has asserted a lack of mutuality of agreement.

#### *Rescission*

Both Count I and Count II of plaintiffs' complaint conclude with a "request [that] this Court rescind the sale of MHGC"<sup>5</sup>.

Rescission is the abrogation, annulment, and undoing of a contract. *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984) (1984). Rescission "restore[s] the parties to the relative positions which they would have occupied if no such

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<sup>5</sup> Although plaintiffs' complaint also requests "damages in an amount exceeding \$25,000", this requested relief was expressly abandoned during trial on September 25, 2015.

contract had ever been made”. *Id.* Rescission does not stand on its own but, rather, it is a remedy that supports an independent cause of action. *Monroe Bank & Trust v Jessco Homes Of Ohio, LLC*, 652 F Supp 2d 834, 840 (ED Mich 2009). “Generally, rescission of a contract will not lie except for mutual mistake<sup>6</sup> or unilateral mistake induced by fraud”. *Goodwin, Inc v Coe*, 392 Mich 195, 218; 220 NW2d 664 (1974). However, judicially recognized grounds for rescission also include mutual agreement, fraud, failure of consideration, and material breach of contract. Trentacosta, *Michigan Contract Law* (2d ed), §§ 11.19-11.24, pp 458-461. But mere inadequacy of consideration, unless it is so gross as to shock the conscience, will not constitute grounds for rescission. *Rose v Lurvey*, 40 Mich App 230, 234; 198 NW2d 839 (1972).

A party seeking rescission must do so without unnecessary delay; otherwise the remedy may be lost by laches, *Wall v Zynda*, 283 Mich 260, 264; 278 NW2d 66 (1938). Generally, a party asserting rescission of a contract must restore the other party to substantially the same position that the other party occupied before the contract was created.<sup>7</sup> *Grabendike v Adix*, 335 Mich 128, 140-142; 55 NW2d 751 (1952). Ultimately, as an equitable remedy, rescission is granted only in the sound discretion of the court. *Lenawee County Bd Of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982).

Here, Count I, *Breach of Contract Against MHGC*, is premised on the legal principle that bylaws are a contract between a corporation and its shareholders. *Cole v Southern Michigan Fruit Assn*, 260 Mich 617, 621-622; 245 NW 534 (1931). However, plaintiffs are effectively requesting the court rescind a decidedly different contract between the Corporation and a third-party, MHC LLC. Even assuming the court’s avoidance power extends so far, plaintiffs have failed to persuasively demonstrate a material breach of the Corporation’s bylaws. *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).

More importantly, Count II, *Violation of MCL 450.2753*, alleges the Corporation failed to observe statutory requirements of the nonprofit corporation act when selling all, or substantially all, of its property and assets without formal stockholder approval upon notice and meeting.

During closing arguments, plaintiffs’ counsel asserted two bases for rescission due the Board’s failure to observe MCL 450.2753. First, plaintiffs argued for rescission of the Corporation’s asset sale as a matter of common law, contractual rescission. However, conceptually, contractual rescission contemplates an action between the parties to the contract. Here, plaintiffs are not parties to the contract between the Corporation and MHC LLC which they target for rescission<sup>8</sup>. Moreover, even if plaintiffs could pursue rescission of the

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<sup>6</sup> Although mistake (mutual or unilateral induced by fraud), can support rescission of a contract, the more appropriate relief is often reformation of the contract so that it conforms to the parties’ intention. Trentacosta, *Michigan Contract Law* (2d ed), § 8.10 et seq., p 314 et seq., and § 11.2 et seq, p 450 et seq.

<sup>7</sup> Here, during closing argument, plaintiffs’ counsel proposed that Matekel/Kruszynski/Maple Hill Club LLC be restored from proceeds of a second sale to presumably occur should the court order rescission of the 2014 transaction (i.e. rather than relying on Chase Bank’s disgorgement of purchase money it received in exchange for discharge of the mortgage on the Corporation’s property).

<sup>8</sup> Arguably, if they satisfied statutory requirements, plaintiffs might have pursued a derivative proceeding, *MCL 450.2491 et seq.*

Corporation's asset sale based on violation of MCL 450.2753, MHC LLC is not a party to this litigation.

Second, although not law when the transaction was consummated, and not pled in their complaint, plaintiffs argue that their "request [that] this Court rescind the sale of MHGC" is justified by MCL 450.2489<sup>9</sup>:

(1) \* \* \* [A] shareholder of a corporation that is organized on a stock basis . . . may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors, shareholders, [ ] or others in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the [ ] shareholder.

In turn, while "illegal" is not defined in the statute, the phrase "willfully, unfair and oppressive conduct" is defined by MCL 450.2489(2):

[A] continuing course of conduct or a significant action or series of actions that substantially interferes with the rights or interests of the [ ] shareholder as a [ ] shareholder. \* \* \*

Ultimately, as provided by MCL 450.2489(1):

If the [ ] shareholder establishes grounds for relief, the circuit court may make an order or grant relief s it considers appropriate including, but not limited to, an order that provides for any of the following:

\* \* \*

(c) The cancellation of, alteration of, or an injunction against a resolution or other act of the corporation

(d) The direction or prohibition of an act of the corporation or of shareholders, [ ] directors, officers, or other persons that are parties to the action. \* \* \*

While the legislative grant of authority to courts to fashion appropriate relief is virtually unlimited, effective exercise of the authority here assumes retroactive applicability of the statute<sup>10</sup> and, also, that the statute extends to persons other than "directors, shareholders, [ ] or others in control of the corporation".

### *Mistake*

During closing argument, plaintiffs asserted the transaction should be rescinded for the additional reason of mistake: i.e. VanEck testified that he believed the accuracy of the original

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<sup>9</sup> MCL 450.2489 was added by 2014 PA 557, effective January 15, 2015.

<sup>10</sup> Statutes are presumed to operate prospectively, unless the legislature clearly manifests the intent for retroactive application, or unless the statute is remedial or procedural in nature. 22 *Mich Civ Jur*, Statutes, § 247 et seq.

minutes of the October 10, 2014 Board meeting (Plaintiffs' Ex 8), while Matekel/Kruszynski testified they accepted as true the "amended" minutes (Plaintiffs' Ex 12).

A contractual mistake is "a belief that is not in accord with the facts." Restatement Contracts (2d), § 151, p 383.

"[R]escission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties." *Lenawee County Bd Of Health v Messerly*, 417 Mich 17, 29; 331 NW2d 203 (1982).

Here, although the amended minutes erroneously document formal shareholder approval and gratuitously add "financially viable" to the purpose of selling, both minutes document the Board's resolution to sell the Corporation's property for the purpose, consistent with Matekel/Kruszynski's intent, of operating a private golf course. The mistake, to the extent one exists, did not materially affect the agreed performance of the parties. Moreover, neither party to the contract, now fully executed, asserts any mistake occurred.

#### *Laches*

During closing argument, the Corporation's counsel asserted (consistent with affirmative defenses attached to its answer) that plaintiffs' claims are barred by the doctrine of laches.

As observed in *Lothian v City of Detroit*, 414 Mich 160, 168-170; 324 NW2d 9 (1982):

Laches [(etymologically related to the word "lax")], . . . denotes "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." *Tray v. Whitney*, 35 Mich App 529, 536, 192 NW2d 628 (1971). The doctrine of laches reflects "the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust." Walsh, Equity, § 102, p. 472. Laches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time, *Smith v. Sprague*, 244 Mich 577, 222 NW 207 (1928); *Chamski v Wayne County Board of Auditors*, 288 Mich 238, 284 NW 711 (1939); *Chesnow v Nadell*, 330 Mich. 487, 47 NW2d 666 (1951). Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. As a general rule, "[w]here the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot \* \* \* be recognized." *Walker v Schultz*, 175 Mich 280, 293, 141 NW 543 (1913). Simply stated, "laches [is concerned] with the *effect* of delay", while "limitations are concerned with the *fact* of delay". *Sloan v Silberstein*, 2 Mich App 660, 676, 141 NW2d 332 (1966). Like its legal counterpart, laches is pled as an affirmative defense. *Chippewa County Board of Supervisors v Bennett*, 185 Mich 544, 152 NW 229, 153 NW 814 (1915).

Here, although shareholders were kept informed, and many shareholders attended and actively participated in a Board meeting that resulted in a unanimous resolution approving sale of the Corporation's real and personal property, they raised no objection that the process violated bylaws or statute, they failed to request a special shareholders' meeting, they took no preemptive legal action, the transaction proceeded unchallenged to consummation, title to all of the Corporation's assets has transferred to a third party, and the net sales proceeds were entirely consumed by mortgage debt.

Even at post-sale meetings conducted to solicit members for a continued private golf course (with upwards of 90 in attendance), no one questioned the manner in which MHC LLC obtained title to the Corporation's assets.<sup>11</sup>

With passage of time and changed circumstances, shareholders (including both plaintiffs) dispersed to other golf clubs, and the Corporation seemingly fell dormant with no known subsequent Board or shareholder actions.

### *Conclusion*

Plaintiffs, shareholders in a Michigan nonprofit corporation organized on a stock basis, request rescission of the Corporation's sale of assets to a third party due to alleged contractual and statutory violations.

For decades, the Corporation provided a wonderful source of recreation and relaxation for members and their families. In recent years, the Corporation became financially distressed and faced imminent mortgage foreclosure. Attempts to satisfy the mortgage obligation through shareholder pledges/financing were unsuccessful. Supported by a shareholders' poll, the Board undertook to sell the Corporation's assets in hopes of salvaging a private golf course. The Board received offers from only two prospective purchasers – one intending to convert to a public golf course and one intending to continue a private golf course – but, given the amount of mortgage debt, neither proposal would result in any shareholders' equity/distribution. The Corporation was managed by volunteer directors serving under challenging circumstances. There was no material breach of the Corporation's bylaws. While the process utilized to sell the Corporation's assets did not strictly conform to MCL 450.2753, shareholders did receive a summary of principal terms of the proposed transaction, as well as notice of the time/date/purpose of a critical Board meeting. A quorum of shareholders attended and actively participated in the meeting, and broadly "gave their approval to the Board to continue to carry on business with the best interest of the [Corporation]". The Board's resolution to sell the Corporation's assets for the stated "purpose of remaining[] an 18 hole Golf Course" was consistent with the purchasers' intent. Notwithstanding notice of the Board's plan to act without formal shareholder approval, there was no request for a special shareholders meeting, no formal shareholders' objection to the proposed sale, and no preemptive shareholder legal action. The purchase agreement was fully executed. The present litigation commenced only when insufficient interest was demonstrated from prospective members (including the Corporation's shareholders) to continue the private golf

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<sup>11</sup> It was only after Matekel/Kruszynski failed to obtain \$400,000 in membership commitments necessary to finance the upcoming golf season that 2 of 245 shareholders were moved to action. This belies any concern over the sale being processed without formal shareholder approval.

