

Circuit Court for Howard County
Case No. C-13-CV-21-000008

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 61

September Term, 2024

DIANA GAITHER-PETERSON

v.

6E, INC., ET AL.

Nazarian,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: September 19, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case tasks us to consider, among the questions posed, whether a minority shareholder in a Maryland close corporation (without a board of directors) must make a futile demand on the very shareholders accused of diluting her ownership equity position through an unauthorized issuance of additional stock. Co-founder of 6e Inc. (“6e”), Diana Gaither-Peterson (“appellant”), appeals from a judgment of the Circuit Court for Howard County dismissing, with prejudice, all six counts of her amended complaint. Appellant filed suit against William Young and 6e co-founder Michael Joseph (collectively, “appellees” and defendants below), alleging that Joseph’s unauthorized stock issuance diluted her ownership interest in 6e and that appellees diverted corporate funds to themselves through excessive compensation.

Appellant presents two issues¹ for our review, which we rephrase as follows:

1. Whether stock dilution claims must be pursued derivatively, even when the misconduct alleged targeted a specific shareholder?
2. Whether the circuit court erred in requiring pre-suit demand to the alleged wrongdoers themselves in a close corporation operating without a board of directors?

For the reasons to be explained, appellant’s stock dilution claims must be pursued derivatively. Based on the allegations in appellant’s amended complaint (if proven),

¹ Appellant phrased her questions presented as follows:

- I. Did the Circuit Court err in holding that Appellant did not have a direct shareholder action?
- II. Did the Circuit Court err in holding that the futility exception did not apply to the requirement of a demand on a company’s board of directors?

however, a triable claim was presented whether requiring the usual pre-suit demand would have been futile under the circumstances. Thus, we shall affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The distinction between individual and derivative corporate shareholder claims has been, of late it seems, a frequent topic of appellate litigation. The dispute here revolves around a shareholder conflict in 6e, a Maryland close corporation. When formed, 6e was authorized to issue 1,000 shares of stock allocated to only two shareholders. Appellant held 490 shares (49%) and her co-founder, Joseph, held 510 shares (51%). According to appellant's amended complaint, Joseph created and issued unilaterally 5,000 additional shares, distributing them to himself and Young (without consideration), without appellant's knowledge. Joseph issued to himself 2,040 shares, thus maintaining his majority control, and Young received 1,460 shares. This issuance reduced appellant's ownership position from 49% to approximately 9.8%.

In addition to her dilution claim, appellant alleged that Joseph and Young diverted systematically to themselves corporate funds through several mechanisms. She pleaded that Joseph and Young paid themselves excessive salaries that exceeded 6e's financial capacity, established retirement accounts for their sole benefit, structured 6e's compensation to ensure that profits would never reach appellant, and required appellant to

pay flow-through taxes² on 6e’s profits without receiving any income distributions. Appellant claimed these actions violated Maryland’s close corporation statute, Md. Code, CORPS. & ASS’NS (“CA”) § 4-501, which requires unanimous shareholder consent for stock issuances in close corporations.

Appellant filed suit originally in December 2020, advancing only an individual shareholder claim and seeking only direct relief through a complaint for a declaratory judgment. Appellees moved to dismiss. The circuit court dismissed the complaint, without prejudice, in June 2022, concluding that appellant lacked standing to pursue direct claims for derivative injuries. The court granted appellant thirty days to amend her complaint.

Appellant filed an amended complaint containing six counts:

- Count I: direct declaratory judgment against 6e, Joseph, and Young
- Count II: derivative declaratory judgment, on behalf of 6e, against Joseph and Young
- Count III: direct breach of fiduciary duty against Joseph and Young
- Count IV: derivative breach of fiduciary duty, on behalf of 6e, against Joseph and Young
- Count V: derivative fraud, on behalf of 6e, against Joseph and Young
- Count VI: direct fraud against Joseph and Young

² In pass-through entities, shareholders realize income on corporate profits regardless of distribution, creating potential tax liability without cash and creating a phenomenon known as “phantom income.” *E.g.*, 26 U.S.C. § 1366(a)(1) (requiring S corporation shareholders to report their pro rata share of corporate income).

Appellees moved again to dismiss, raising the same arguments about appellant’s standing to assert her direct claims. Appellees added that appellant failed to satisfy the pre-suit demand requirement for derivative actions under Maryland law.

After a hearing, the circuit court granted appellees’ motion and dismissed all counts, with prejudice. The court explained that appellant’s direct claims in Counts I and III failed because the alleged injury from stock dilution was not sufficiently separate and distinct from the harm to 6e. As to the derivative claims, the court determined that appellant failed to satisfy Maryland’s pre-suit demand requirement and failed to establish demand futility under *Werbowsky v. Collomb*, 362 Md. 581 (2001). Lastly, the court dismissed Count VI, the direct fraud claim, for failure to plead fraud with sufficient particularity.

This timely appeal followed. In this appeal, appellant does not challenge the dismissal of Count VI.

STANDARD OF REVIEW

To determine whether the grant of a motion to dismiss was legally correct,³ we review the circuit court’s ruling without deference. *Oliveira v. Sugarman*, 451 Md. 208, 219 (2017). When evaluating a motion to dismiss, courts must assume the truth of and reasonable inferences drawable from all well-pleaded relevant, material facts. *Wheeling v.*

³ Although appellees moved to dismiss or in the alternative for summary judgment, we review this as a motion to dismiss because the circuit court decided the motion based solely on the pleadings. *E.g.*, *Parker v. Hamilton*, 453 Md. 127, 132-33 (2017). Notably, appellant’s amended complaint conceded effectively that no demand was made, stating that “6e does not have a board of directors” and that “it is not possible to make a demand to [6e’s] board of directors[.]” While we disagree that the absence of a board necessarily makes demands impossible, appellant’s allegation in her amended complaint that demand “would be futile” frames adequately the issue here as to demand futility.

Selene Fin. LP, 473 Md. 356, 374 (2021). An action should be dismissed when “the allegations and permissible inferences, if true, still fail” to establish that the plaintiff is entitled to relief. *Oliveira*, 451 Md. at 220.

ANALYSIS

I.

Appellant seeks to vindicate her dilution claim as direct actions, arguing that the targeted nature of the harm here distinguishes her case from typical dilution claims. She contends that she suffered individualized harm separate and distinct from other shareholders because the dilution affected her alone, while Joseph maintained his majority control by issuing himself sufficient additional shares to that end. Thus, according to appellant, the court erred in dismissing her direct actions against appellees.

Corporate law draws a fundamental distinction between direct and derivative actions. Direct actions require a distinct injury separate from any harm to the corporation. *Id.* at 231. Indeed, the remedy for a direct action must benefit the shareholder individually. *Id.* “[A] shareholder may bring a direct action . . . against alleged corporate wrongdoers when the shareholder suffers the harm directly or a duty is owed directly to the shareholder, though such harm also may be a violation of a duty owing to the corporation.” *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 345 (2009) (superseded by statute on other grounds).

In contrast, a derivative action “permits an individual shareholder to bring ‘suit to enforce a *corporate* cause of action against officers, directors, and third parties.’” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970)). “Any recovery in a shareholder’s derivative suit is in favor of the

corporation, not the individual shareholder (or shareholders) who brought the derivative action.” *Mona v. Mona Elec. Grp., Inc.*, 176 Md. App. 672, 698 (2007).

The targeted nature of unauthorized stock dilution does not transform the resulting action from a derivative claim to an individual and direct one. Maryland law has long held that unauthorized stock issuances injure the corporation. The seminal case to that effect is *Waller v. Waller*, 187 Md. 185 (1946). In *Waller*, the Court held that claims of unauthorized stock dilution are derivative actions: “a stockholder cannot maintain an action at law against an officer or director of the corporation to recover damages for fraud, embezzlement, or other breach of trust which depreciated the capital stock or rendered it valueless.” *Id.* at 190. Even when

conspirators ruin a person financially by forcing into receivership a corporation in which he was a large stockholder, in order to eliminate him as an officer and to acquire control of the corporation, the wrongs are suffered by the injured person in his capacity as a stockholder, and the action to recover for resulting injuries should be brought by the receiver.

Id. at 191.

More modern application of *Waller* confirm its continued vitality. In *Danielewicz v. Arnold*, 137 Md. App. 601 (2001), we confronted facts like those here. *Danielewicz* held remainder interests in a close corporation’s shares when the board issued new shares to her father, changing her future majority interest into a minority interest. *Id.* at 609-10. *Danielewicz* discovered the stock dilution years later when her interests became possessory. *Id.* at 610. She claimed that the unauthorized stock issuance justified her pursuit of a direct action because it diluted her controlling interest in the corporation. *Id.* at 613-14. We rejected this argument, holding that the facts were “*not* distinguishable from

those of *Waller*” and that her dilution claim could not be brought as a direct action, regardless of whether she lost her majority control. *Id.* at 621.

Appellant’s position is weaker than Danielewicz’s because Danielewicz had a colorable claim to future majority control through her remainder interest. Appellant, by contrast, was never a controlling shareholder. The fact that Joseph maintained control by issuing himself additional shares does not transform the nature of the injury suffered from a corporate one to an individual one.

Her additional arguments fail to save appellant’s direct claims. First, she asserts that the new stock issuance was intended specifically to harm only her. Second, she notes that the stock issuance violated Maryland’s close corporation statute requiring unanimous consent for stock issuance. Accepting her allegations as true, as we must when considering the propriety of action on a motion to dismiss, they do not transform a corporate injury into an individual one. The alleged violation of CA § 4-501 injured the corporate entity by creating arguably invalid shares. Any harm to appellant flowed necessarily from this injury to the corporation.

For all these reasons, the circuit court dismissed properly Counts I and III for lack of standing.

II.

The derivative claims present a different question: whether appellant had to make a pre-suit demand on the very people accused of usurping her equity. The general rule requires shareholders to demand remedial corporate action before suing derivatively.

Under a narrow exception at issue here, the demand requirement may yield to practicality when a demand would be futile.

Maryland follows the two-pronged test for demand futility adopted in *Werbowsky v. Collomb*. Under *Werbowsky*, a demand is not required

when the allegations or evidence clearly demonstrate, in a very particular manner, either that (1) a demand, or a delay in awaiting a response to a demand, would cause irreparable harm to the corporation, or (2) a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.

362 Md. at 620. “Because a derivative lawsuit intrudes upon the board of directors’ managerial control of the corporation, shareholders are required to first make a demand that the board take action before initiating a derivative suit[.]” unless that requirement is lawfully excused. *Oliveira*, 451 Md. at 223 (citing *Werbowsky*, 362 Md. at 600). The purpose of the demand requirement “is to afford the directors an opportunity to exercise their reasonable business judgment” to decide whether the corporation should bring suit. *Id.* (quoting *Kamen*, 500 U.S. at 96).

Here, 6e is a close corporation, operating without a board of directors. Thus, the corporation vests management authority in its shareholders. Under CA § 4-303(1), when a close corporation elects expressly or implicitly to have no board of directors, “[t]he stockholders may exercise all powers of directors, and the business and affairs of the corporation shall be managed under their direction[.]” Under Maryland’s common law demand requirement, however, a shareholder must make generally demand upon the board

of directors before filing a derivative suit. The circuit court applied this requirement and found that appellant failed to plead adequately demand futility under *Werbowsky*.

In *Werbowsky*, the Court recognized that sometimes directors or controlling members are so “personally and directly conflicted . . . that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.” 362 Md. at 620. This seems to us a case that presents such a scenario. Unlike many derivative actions, which involve a board comprised of interested and disinterested directors, a demand here would have been a futile formality. Indeed, Joseph holds 51% of the legitimately issued shares, and together with Young, controls the allegedly invalid shares that spurred this lawsuit. If appellant had made a demand, Joseph and Young would have evaluated their own misconduct.

Our recent decision in *Nathanson v. Tortoise Capital Advisors, LLC*, ___ Md. App. ___, No. 370, Sept. Term, 2024 (filed Aug. 28, 2025), does not alter the outcome we reach here. There, we affirmed dismissal for failure to make a demand when the plaintiff challenged a transaction approved by a board of directors. More to the point, *Nathanson* involved a five-member board’s business judgment decisions on investment strategy and risk management of equity securities in the energy industry amid a petroleum pricing dispute between Russia and OPEC during the COVID-19 pandemic. *Id.* at ___, slip op. at 3-4.

By contrast here, and without opining on the merits of appellant’s claims, appellant’s lawsuit involves a close corporation with no board and the only persons to whom a demand could have been directed were Joseph, who caused the additional shares

to be issued and directed to whom the shares were to be given, and Young, the apparent beneficiary of Joseph's largess. Joseph violated, it is alleged, CA § 4-501's requirement of unanimous shareholder consent before the additional shares could be issued, issued shares to himself and Young without consideration, and reduced appellant's ownership from 49% to 9.8%. Demanding that Joseph and Young investigate their alleged conduct could be said reasonably to have been futile, under the circumstances of this closely-held corporation.

To be sure, appellant alleges that she made plain to appellees her dismay and objections to what they did; however, she did not elect to litigate in the circuit court whether her modality and content of complaining fulfilled the requirement of a demand, as understood under Maryland law. Rather, she chose the hill on which to fight the "life or death" battle below on the basis that the requirement of making a demand would have been futile.

CONCLUSION

The circuit court determined correctly that appellant's stock dilution claims must be pursued derivatively. The court erred, however, in faulting appellant for not making a pre-suit demand and failing to plead adequately the excuse of futility. Accordingly, we affirm the dismissal of the direct claims (Counts I and III); reverse the dismissal of the derivative

claims (Counts II, IV, and V); and, remand for further proceedings consistent with this opinion.⁴

**JUDGMENTS OF THE CIRCUIT COURT
FOR HOWARD COUNTY AFFIRMED IN
PART AND REVERSED IN PART. CASE
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID 50%
BY APPELLANT AND 50% BY APPELLEE
JOSEPH.**

⁴ Appellees raise additional arguments on appeal that the circuit court did not address, including the application of the statute of limitations, the viability of declaratory relief, and whether the complaint alleges adequately wrongdoing by Young. We express no opinion on these possible alternative grounds for dismissal. On remand, the court may consider the parties' arguments on those issues as appropriate.