

2016

**Joseph Edwards Plaintiff I Respondent, vs. Michael Carey and Wendy Carey, and Seirus Innovative Accessories, Inc. Defendants I Appellants.**

Utah Court of Appeals

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## IN THE UTAH COURT OF APPEALS

JOSEPH EDWARDS,  
Plaintiff/Appellee,  
v.

MICHAEL CAREY, WENDY CAREY,  
and SEIRUS INNOVATIVE  
ACCESSORIES, INC.,

Defendants/Appellants.

Appellate Docket No. 20151096

## BRIEF OF APPELLEE

On Appeal from the Third District, Salt Lake County,  
Honorable Mark S. Kouris, Case No. 150905215

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FILED  
UTAH APPELLATE COURTS

MAY 04 2016





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## **STATEMENT OF JURISDICTION**

Appellants have appealed from an order denying a motion to compel arbitration as authorized by UTAH CODE ANN. §78B-11-129(1)(a). This Court has jurisdiction pursuant to UTAH CODE ANN. §78A-4-103(2)(j).

## **STATEMENT OF CENTRAL AUTHORITIES**

Copies of the following statutes are included in the Addendum:

UTAH CODE ANN. § 16-10a-630;

UTAH CODE ANN. § 16-10a-809; and

UTAH CODE ANN. § 16-10a-850.

## **STATEMENT OF THE CASE**

### **Nature of the Case and Procedural History**

On July 29, 2015, Joseph Edwards (“**Edwards**”) filed the Complaint. (R. 1.) The First Amended Complaint and Jury Demand was filed on August 21, 2015 (the “**Complaint**”), reflecting the operative pleading in the case. (R. 310-24.) The Complaint sets forth five claims against defendants, Michael Carey and Wendy Carey (together the “**Careys**”), for (1) Conflicting Interest Transactions, (2) Breach of Fiduciary Duty, (3) Removal of Directors Pursuant to Utah Code § 16-10a-809, (4) Deprivation of Preemptive Rights, and (5) Declaratory Relief. Defendant Seirus Innovative Accessories, Inc. (“**Seirus**”) was also named as a defendant, as a formality, because § 16-10a-809(3) requires the naming of the affected corporation.

On September 21, 2015, the Careys moved the trial court to compel arbitration and stay proceedings pending arbitration. (R. 331.) The district court denied the motion to compel arbitration and issued its memorandum decision on December 11, 2015. (R. 567.) By this appeal, the Careys appeal the district court's decision denying the motion to compel arbitration. (R. 572.)

### **Statement of Relevant Facts**

Most of the "facts" presented in the Careys' "Summary of Facts" are not relevant to the issues on appeal, and many are not true. However, for the sake of economy, Edwards addresses only the relevant facts. The relevant facts are very simple.

In 1985 Joe Edwards and Michael Carey founded Seirus. (R. 58.) Because the Bylaws adopted by the Company in 1985 required three directors, Michael Carey's wife, Wendy Carey, was named the third director. Since 1985, Joe Edwards, Michael Carey, and Wendy Carey have continuously served as the three directors of the company. (R. 59.) For decades Michael Carey and Edwards governed the company as 50/50 shareholders and the board voted unanimously. (R. 58-75) However, more recently the working relationship started to disintegrate, and an open and substantial disagreement emerged in the spring of 2015. (R. 62.) Michael Carey responded with an aggressive attempt to take control of the company, despite the parties' historic 50/50 split and unanimous decision-making. (R. 86-106.) Exploiting their formal majority on the board of directors, Michael Carey and Wendy Carey caused the board to adopt, on a 2 to 1 vote, two board resolutions to give Michael Carey a majority of the shares and to strip Edwards of any authority in the company. (*Id.*)



These two board resolutions, taken at the Special Meeting of the Board of Directors on July 27, 2015 (the “**July 27 Board Meeting**”), are at the center of the current lawsuit. (The minutes of the July 27 Board Meeting are at R. 86-106.) Despite the pervasive conflict of interest, which should have caused each of the Careys to recuse themselves from votes on such issues, the Careys voted as a 2-1 majority to adopt two pivotal resolutions: (1) adopting a slanted debt-to-equity plan for the obvious purpose of allowing Michael Carey to obtain a majority of the shares of common stock (because Michael Carey had a significantly higher amount of debt that Michael Carey claimed was owed to him) and (2) removing Edwards as an officer of the company. (R. 86-106.)

First, during the July 27 Board Meeting, the Careys caused the board to adopt the following resolution (the “**Equity Exchange Resolution**”):

RESOLVED, that the Corporation shall make an Equity Exchange Offering to its shareholders on the terms and conditions contained in the Notice of Equity Exchange Offering letter, dated July 27, 2015, attached as Exhibit “A” hereto and incorporated herein by this reference.

(R. 102.)

Second, also during the July 27 Board Meeting, the Careys caused the board to adopt the following resolutions (the “**Removal Resolutions**”):

RESOLVED, that Joseph Edwards is removed from all offices of the Corporation he currently holds including, without limitation, Co-President and Secretary, provided, however, that Joseph Edwards shall remain a duly appointed director and member of the Board of Directors until he shall resign, be removed, or otherwise be disqualified to serve, or until his successor be elected and qualified; and

RESOLVED, FURTHER, that any and all authority Joseph Edwards has to act on behalf of the Corporation (other than in his limited capacity as a director), including, without limitation, in connection with the

Corporation's intellectual property and all ongoing litigation to which the Corporation is a party, is hereby terminated.

(R. 94.) (Together, the Removal Resolutions and the Equity Exchange Resolution are referred to herein as the “**Board Resolutions.**”)

Promptly after the July 27 Board Meeting, Edwards filed suit to contest the Board Resolutions. (R. 1.) Edwards contends that the resolutions are void, or at least voidable, due to the Careys' conflict of interest and also, with respect to the debt-to-equity plan, inconsistent with the preemptive rights afforded Edwards under the Articles of Seirus.

(R. 310-24.)

While not relevant to the claims in the Complaint, the employment agreements of Michael Carey and Wendy Carey are obviously relevant to the Careys' motion to compel arbitration. The Careys contend that arbitration provisions in these employment agreements, between the Careys and Seirus, somehow apply to the claims in the Complaint. (R. 361-78.) Edwards is not a party to any of these agreements. (R. 420; R. 468.) More importantly, Edwards is not seeking to enforce any term or provision of these agreements. Indeed, Edwards has not even referenced these agreements in making his claims. (R. 310-24.) Significantly, Michael Carey's employment agreement expressly provides that “Employee's duties as CEO are *independent* and *in addition to* any other position Michael J. Carey may hold with Employer from time to time.” (R. 421 (emphasis added).)

## SUMMARY OF ARGUMENT

There is no agreement to arbitrate the claims at issue in this case. In the absence of an agreement to arbitrate, the Careys cannot force Edwards to waive his constitutional right to a jury trial.

The only agreement to arbitrate is contained in the employment agreements between the employer, Seirus, and two employees, Michael Carey and Wendy Carey. There is no agreement, let alone an agreement to arbitrate, between Edwards and the Careys. Thus, to be entitled to arbitration the Careys must establish that Edwards' claims are **both** (1) a "dispute...arising out of...any interpretation, construction, performance, or breach" of the employment agreements, (R. 424; 474), **and** (2) belong not to Edwards, but to the Company. The Careys cannot satisfy either, let alone both.

First, this litigation is not a dispute between an employer and two of its employees over the terms of their employment. It is a dispute between two 50% shareholders and a dispute between a shareholder and two directors, seeking to void the Board Resolutions and to recover damages. The Complaint<sup>1</sup> does not seek any relief against Michael and Wendy Carey for any actions taken as employees, let alone seek to enforce or modify the terms of their employment agreements. Instead, the Complaint seeks to void the Board Resolutions. In so doing, the Complaint seeks relief against the Careys *as directors*, specifically for actions they took at the July 27 Board Meeting, when they had a conflict of interest *as directors*. Furthermore, the relief sought in the third claim, for removal of directors under Utah Code is to remove Michael and Wendy Carey *as directors*, not as

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<sup>1</sup> The Amended Complaint is attached in the Addendum.



employees. There is absolutely nothing in the employment agreements respecting the Careys' role as a director and nothing guaranteeing that they remain directors. In fact, Michael Carey's employment agreement expressly provides that his duties as CEO are "independent" and in "addition" to other positions he may hold. In sum, none of the causes of action, and none of the relief sought, have anything to do with the employment agreements between the company and Michael and Wendy Carey.

Second, even if the Careys could somehow establish that Edwards' claims arose out of or related to the employment agreements, which they plainly do not, the Careys cannot satisfy the second requirement for arbitration. Since there is no arbitration agreement between Edwards and the Careys, the Careys must also show that Edwards' claims are derivative and do not belong to Edwards. As detailed below, the law in Utah is well settled that these are not derivative claims, but direct claims for individual harm suffered by Edwards and not the company. The Utah statute expressly authorizes a shareholder to bring the first, third and fourth claims. The second claim is for breach of fiduciary duty and Utah case law is clear that directors owe that duty to both the corporation and the shareholders. Moreover, Edwards has standing to bring all of his claims because he has alleged individual harm.

### **ARGUMENT**

It is fundamental that there must be an agreement to arbitrate before arbitration can be compelled, because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599 (quoting *United*

*Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)). As stated by the Utah Supreme Court, “a litigant’s constitutional rights are violated, however, if he is denied his day in court absent an express agreement to arbitrate.” *Duke v. Graham*, 2007 UT 31, ¶ 24 n.4. For these reasons, the Supreme Court has stated:

Finally, while the public policy of promoting speedy and inexpensive resolutions of controversies favor arbitration in some cases, these considerations cannot outweigh the constitutional right of access to the courts unless one waives that right. *See* Utah Const. Art. I, §§ 7, 11. The Legislature no doubt sought to protect that right by requiring that the waiver be in writing so that the waiver would be clear and knowing. Moreover, policies supporting liberal enforcement of arbitration agreements inhere only once the arbitration agreement is established.

*Jenkins v. Percival*, 962 P.2d 796, 799-800 (Utah 1998) (internal citations omitted).

Here, Edwards never agreed to arbitrate any controversy between him and the Careys. Therefore, to be entitled to arbitration, the Careys must establish that Edwards’ claims (1) invoke the terms and obligations of their employment agreements and (2) really belong to the Company. The Careys cannot establish either, let alone both.<sup>2</sup>

#### **I. EDWARDS’ CLAIMS HAVE NOTHING TO DO WITH THE CAREYS’ EMPLOYMENT AGREEMENTS WITH SEIRUS**

The district court was correct in concluding that “the employment agreements do not govern Edwards’ claims in this case.” (R. 570.) In the employment agreements the

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<sup>2</sup> The Careys’ Opening Brief does not expressly acknowledge that they must satisfy both, but rather says that there are “two reasons” why Edwards’ claims must be arbitrated. (Br. At 11) But it is clear that even if the Complaint was a dispute “arising under” the employment agreements, the arbitration provision would not be triggered since Edwards is not a party to those agreements, unless Edwards’ claims were derivative claims. Likewise, even if the claims were derivative, the arbitration clause would not be triggered unless the claims arose under the employment agreements.

Company and the Careys agreed to arbitrate “any dispute or controversy arising out of or relating to any interpretation, construction, performance, or breach” of the employment agreements. (R. 424; 474.) Even assuming that Edwards was also a party to the employment agreement, which he is not, Edwards’ complaint does not invoke arbitration. First, the Complaint does not allege any breach of the employment agreements or assert any claim requiring interpretation of the employment agreements. Second, all of the claims in the Complaint are focused on the wrongful conduct of the Careys *as directors* of Seirus and, specifically, the casting of a director’s vote, despite the obvious conflict of interest, at a special meeting of the board of directors on July 27, 2015. In short, Edwards’ claims are seeking to undo the Board Resolutions and leave untouched the Careys’ rights under their employment agreements.

The First Cause of Action, for a conflict of interest transaction, is expressly applicable, by statute, only to the actions of a director. In the relevant statutory section, “Conflicting interest” is specifically defined as “the interest a director has respecting a transaction effected or proposed to be effected by the corporation.” UTAH CODE ANN. § 16-10a-850(1) (emphasis added). Furthermore, a “Director’s conflicting interest transaction” is defined as “a transaction effected or proposed to be effected by the corporation, or by any entity controlled by the corporation respecting which a director has a conflicting interest.” *Id.* at § 16-10a-850(2) (emphasis added). The Complaint’s allegations are consistent with this statutory scheme. The Complaint directly references these terms and definitions, alleging when “a director has a ‘conflicting interest’ with respect to a transaction, (R. 318 at ¶ 39), and directly incorporating the definition of a



“director’s conflicting interest transaction.” (R. 318 at ¶ 40.) Most importantly, the Complaint clearly alleges that “Defendants Michael and Wendy Carey have engaged in numerous conflicting interest transactions as directors of the Company.” (R. 319 at ¶ 41 (emphasis added).)

The Second Cause of Action, for Breach of Fiduciary Duty, is likewise dependent on the actions taken by the directors of the company. In the key allegation for this claim, the Complaint alleges that “[a]s set forth above, Defendants Michael and Wendy Carey, breached their fiduciary duty to Edwards by repeatedly acting (in unison) in ways to intentionally damage Edwards, by actively utilizing their power on the Company’s board of directors to gain an advantage over Edwards, and by together, refusing to act honestly and fairly with Edwards.” (R. 320 at ¶ 49 (emphasis added).)

The Third Cause of Action, for Removal of Directors, is, by the very nature of relief requested, directly related to the Careys’ position as directors. The statute upon which this claim is based, UTAH CODE ANN. § 16-10a-809, expressly contemplates that the Court “may remove a director.” And the allegations in the Complaint again demonstrate the focus on the Careys’ conduct as directors: “As set forth above, Defendants Michael and Wendy Carey, as directors of the Company, have engaged in dishonest conduct and/or a gross abuse of discretion in regard to the Company and/or Edwards.” (R. 321 at ¶ 54 (emphasis added).) The Complaint does not seek to remove the Careys as employees or otherwise seek to alter the terms of their employment.

The Fourth Cause of Action, for Deprivation of Preemptive Rights, hinges, again, on the Careys’ role as directors. As stated in Section 16-10a-630, “Upon the decision of

the board of directors to issue shares, the shareholders of the corporation have a preemptive right, subject to any uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, to acquire a number of the shares proposed to be issued in an amount proportional to their percentage ownership of the corporation's outstanding shares." UTAH CODE ANN. § 16-10a-630(2)(a) (emphasis added). Again, the allegations in the Complaint reflect the role of directors in this claim: "the board of directors must provide shareholders possessing preemptive rights with 'a fair and reasonable opportunity' to exercise that right." (R. 321 at ¶60 (emphasis added).)

Finally, the Fifth Cause of Action, for Declaratory Judgment, not surprisingly given the relationship to the other claims, continues to focus exclusively on the board actions harming Edwards. Each of the requested declaratory judgments relate directly to unwinding the board actions harming Edwards and, again, removing the Careys as directors. (R. 322 at ¶65 (requesting judgment "declaring that: (a) The purported July 27, 2015 vote of the board of directors to oust Edwards as an officer and employee of the Company is of no force and effect; (b) The purported July 27, 2015 vote of the board of directors to approve the conversion of shareholder debt to equity is of no force and effect; (c) Any action taken by the Defendants to take ownership or control over more than fifty percent (50%) of the stock of the Company is of no force and effect; and (d) Michael and/or Wendy Carey are removed as Directors of the Company.").)

The Careys' efforts to mischaracterize Edwards' claims are not based on the actual allegations in the Complaint. In the proceedings below, the Careys repeatedly tried to

characterize their actions as the results of “recommendations” made by the Careys as officers, to the board of directors. On appeal, the Careys repeat this effort with an argument that Edwards’ claims somehow “arise out of” the performance of the Careys’ performance of their duties as officers. But Michael Carey’s employment agreement as CEO expressly provides that his duties as CEO are “independent” and “in addition” to other positions he may hold. But even without this express language, it does not matter what the Careys did as “officers.” What matters is what they did as directors. As detailed above, the gravamen of Edwards’ action is to have the Board Resolutions declared void. There is no “ambiguity.” The Careys are being sued as directors, not as officers.

This case centers *exclusively* on the propriety of the formal actions of the Board of Directors, the votes of Michael and Wendy Carey *as directors*, at the July 27 Board Meeting in adopting the Board Resolutions. The Careys did not even have the power to take such actions as officers. Only the Board had the power to adopt these resolutions.

On appeal, the Careys point to certain allegations in the Complaint that the Careys assert are related to their performance as officers. For example, the Careys argue that Edwards’ claims “concern his termination, which ‘arises out of’ Michael’s ‘performance’ of his duties as president and CEO.” (Appellant’s Br. at 19-20.) To support this argument, the Careys point to a list of allegations in the Complaint. (*Id.* at 19 (citing R. 313-322 ¶¶ 17, 43-45, 49, 53-54, 63, 65).) Looking at even one of these paragraphs is telling; for example, paragraph 17 of the Complaint states:

At the Company’s July 27<sup>th</sup> Board of Directors meeting, Defendants Michael and Wendy Carey proposed corporate action terminating Edwards as an employee and officer of the Company and called for a vote on that



item. Defendants Michael and Wendy Carey provided false reasons for terminating Edwards, including several purported reasons that were over fifteen years old and had never been raised or discussed with Edwards before. Using these false reasons and under the premise of what “is in the best interest of the company”, Defendants Michael and Wendy Carey voted in favor of terminating Edwards as an employee and officer of the Company. Edwards voted against the proposed corporate action.

(R. 313 at ¶ 17.) The paragraph discusses what happened at the July 27 meeting. The middle sentence references the “false reasons” articulated at the meeting. But it matters not whether Michael Carey voiced these false reasons as an officer, director, or in any other capacity. What matters, as this paragraph itself clearly alleges, is that the Careys “voted” to exercise the board’s power to adopt the Removal Resolutions. (R. 94.)

The minutes of the July 27 Board Meeting do not even suggest that Michael Carey in his capacity as CEO attempted to fire Joseph Edwards as an officer. Under the Bylaws, the Board clearly has the exclusive power and authority to appoint and remove officers. (R. 209.) When the Board voted to adopt a resolution “that Joseph Edwards is removed from all offices of the Corporation he currently holds including without limitation, Co-President and Secretary,” (R. 94.), it was the Board action that accomplished this objective.

The Careys make similar arguments regarding the Equity Exchange Offering, arguing that “the Carey’s efforts to develop and implement the Equity Exchange Offering arise from the performance of their duties as officers of Seirus.” (Appellants Br. at 20.) Whether or not the Careys, as officers, did work related to the Equity Exchange Offering is also irrelevant. This case will not decide whether or not it was a good idea for the CEO and CFO to recommend a plan for converting shareholder debt to equity. This case will

decide whether the actions taken by the board of directors to adopt such a plan, in a manner specifically designed to give Michael Carey majority shareholder control, will be upheld. This case will decide whether the Equity Exchange Resolution is void or not, based on whether it was the result of a vote by conflicted directors or contrary to the preemptive rights provided in the Seirus Articles. (R. 102; R 195.)

The Careys attempt to make hay of a few snippets from the district court's memorandum decision. But this attempt is misplaced. The district court's decision was well-reasoned. The district court made the general observation that "because of the Company's management structure and their overlapping roles as directors and officers, it may be difficult to precisely determine which hat they were wearing at different times." (*Id.*) But this general observation does not render the decisions of the Board of Directors subject to the Careys' employment agreements. The district court correctly held that "the claims for conflict of interest and removal of directors relate solely to the Careys' actions and roles as directors rather than officers. Likewise, all of the other alleged actions in questions, such as the debt-to-equity conversation and termination of Edwards' employment, were undertaken by the Careys *at a meeting of the board of directors*, rather than as part of their day to day activities as corporate officers." (R. 570 (emphasis in original).)

In sum, this case is about the validity of the Board Resolutions and the harm to Edwards caused by those resolutions. The employment agreements between Seirus and the Careys, and the arbitration provisions in those agreements, have no bearing on these claims.

## II. EDWARDS' CLAIMS ARE SHAREHOLDER DIRECT CLAIMS, NOT DERIVATIVE CLAIMS

Even if the arbitration provisions in the employment agreements were somehow implicated, it remains undisputed that Edwards is not a party to those agreements. Therefore, to establish a right to arbitration, the Careys must also show that Edwards has no right to bring these claims in his own right. Because the district court found that employment agreements were not invoked by Edwards' claims, the district court did not reach this issue. Likewise, this Court need not reach this issue. However, the law in Utah is clear that Edwards was entitled to bring these claims directly, and the claims are direct, not derivative, because of the direct harm to Edwards.

### a. Edwards Properly Brought the Claims Directly

Edwards has a personal right of action, giving him standing for each claim made, and he has elected to pursue his direct claims as such. First, Edwards is explicitly entitled by statute to bring the first, third, and fourth claims directly, as an individual shareholder. With respect to the first claim, the statute specifically contemplates possible judicial action with respect to "a proceeding by *a shareholder* or by or in the right of the corporation." UTAH CODE ANN. § 16-10a-851(2) (emphasis added). With respect to the third claim, the governing statute states that the Court "may remove a director in a proceeding commenced either by the corporation *or by its shareholders* holding at least 10% of the outstanding shares." UTAH CODE ANN. § 16-10a-809(1) (emphasis added). And with respect to the fourth claim, because preemptive rights are provided in the Articles of Incorporation, Utah statute provides that "upon the decision of the board of



directors to issue shares, *the shareholders of the corporation have a preemptive right*, subject to any uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right.” UTAH CODE ANN. § 16-10a-630 (emphasis added). Consequently, the statutes make Edwards’ standing conclusive as to first, third, and fourth claims.

With respect to the second claim, Utah law is clear that “[d]irectors and officers have a fiduciary duty of loyalty to their corporation and its *stockholders*.” *Bingham Consolidation Co. v. Groesbeck*, 2004 UT App 434, ¶ 22, 105 P.2d 365 (quoting *Nicholson v. Evans*, 642 P.2d 727, 730 (Utah 1982)) (emphasis added). Accordingly, the Careys, as directors, owed fiduciary duties to Edwards, as a shareholder, distinct from those duties owed to the company. Therefore, Edwards’ decision to bring a claim in his personal capacity is allowed.

Finally, with respect to the fifth claim, the claim for declaratory relief is based on the substantive law underlying the first through fourth claims. Consequently, the same analysis applies.

b. All of Edwards’ Claims Are Direct Claims Because of the Individual Nature of the Harm Suffered by Edwards.

All of the claims are properly regarded as direct claims because of the individualized harm to Edwards. Utah law recognizes the distinction between shareholder direct claims and derivative claims, which seek to enforce a “right of the corporation.” Utah R. Civ. P. 23A. As the Utah Supreme Court recently explained,

We have long acknowledged the right of shareholders to sue individually to remedy individual injuries. To qualify to sue on these grounds, a

**“shareholder need show only an injury to him- or herself that is distinct from that suffered by the corporation.”**

*Torian v. Craig*, 2012 UT 63, ¶ 16, 289 P.3d 479 (quoting *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273, 1280 (Utah 1998)) (internal footnote omitted) (emphasis added).

In discussing this standard, the Utah Supreme Court drew from a leading Delaware opinion, *Gentile v. Rossette*, 902 A.2d 91 (Del. 2006), to identify two key considerations in distinguishing shareholder direct and derivative claims. As explained by the Utah Supreme Court:

*Gentile* helpfully conceptualizes the circumstances in which a shareholder’s claim may be distinct from the corporation’s claim. It identifies the following considerations as key to this inquiry: “(1) who suffered the alleged harm (the corporation or the suing stockholders individually); and (2) who would receive the benefit of the recovery or other remedy (the corporation or the stockholders, individually)?”

*Torian*, 2012 UT 63 at ¶ 24 (quoting *Gentile*, 902 A.2d at 97). In application to the claims made, and relief sought, in the Complaint, these considerations demonstrate that Edwards’ claims are direct shareholder claims.

As to the first question, it is Edwards alone who suffered the harm. As alleged in the Complaint, at the July 27, 2015 meeting of the board of directors, the Careys used their majority position on the Board to adopt the Board Resolutions. These actions only harmed Edwards – not the Company. Moreover, the harm is unique to Edwards and does not harm the other shareholders. In fact, because Michael Carey is the only other shareholder of Seirus, he actually *benefits* from the actions causing harm to Edwards

(thus establishing the basis for the conflict of interest), because Michael Carey's percentage ownership is increased, giving him majority control of the company.

As to the second question, Edwards, not the company, will receive any benefit from the requested relief. The consequence of undoing the wrongful actions of the Careys is restoring Edwards to a 50% share of ownership. The company receives no benefit in re-establishing the 50/50 ownership split. The company is indifferent as to whether the ownership is 50/50 or 55/45. In addition, Edwards, not the company, will recover any monetary damage for the breach of fiduciary duty. The real beneficiary of any of the requested relief will be Edwards.

The specific allegations in this case, compared to the specific facts at issue in *Torian*, further illustrate this conclusion. In fact, improper dilution of shares was specifically at issue in *Torian*. There, the plaintiff became a shareholder of the subject company, receiving shares in lieu of compensation. 2012 UT 63 at ¶ 5. Plaintiff received 200,000 shares, which should have held a value of \$1.90 per share based upon the past due salary forgiven. *Id.* at ¶¶ 5-6. However, the board of directors also authorized a simultaneous issuance of an additional 6 million shares to a separate company owned by certain members of the board, which reduced the value of shares to only \$0.19 per share. *Id.* Plaintiff alleged that 97% of the ten million shares issued after he became a shareholder were issued to the defendants and their family members and that this harmed the interests of the company *and* the minority shareholders, including plaintiff. *Id.* at ¶ 17. The district court decided that the claims were derivative and granted the defendant's motion to dismiss, but the Utah Supreme Court reversed, holding that this dilution claim

could be brought as a direct shareholder claim. *Id.* at ¶ 2 (“We reverse. Because Torian’s alleged injury is an individual and not a collective one in common with all shareholders, we conclude that he is entitled to sue individually and not required to pursue his claim derivatively.”).

While the harm suffered in *Torian* was focused on the change in value per share, whereas the primary issue here is control of the company, Edwards has clearly suffered a loss in value of his shares because he is now a minority shareholder rather than a 50/50 shareholder in a two-shareholder corporation. That loss of value is suffered only by Edwards, not by company. Thus, the same basic principles apply to the harm of dilution. For the same reasons relied on by the Supreme Court, then, Edwards’ claims, like Torian’s claims, are direct.

In their cursory discussion of Utah law governing whether a claim is derivative or not, the Careys completely ignore *Torian* and the two-part test commanded by that line of controlling law. The Careys’ arguments fail for this reason alone.

The Careys only attempt to address this underlying analysis is a half-hearted reference to two allegations in the Complaint, which reference “Company interests.” (Appellants Br. at 16.) But these allegations do nothing to change the analysis above. Even the language quoted by the Careys reflects that such allegations directly reference Edwards’ personal harm. These allegations focus on the Careys’ using their power “to their personal advantage.” (*Id.*; R. 312 at ¶ 14.) The allegations regarding the fact that the Careys were not acting in the Company’s best interest are nothing more than a refutation of the idea that the Careys’ actions were guided by the best interests of the



company. This is directly related to showing that the Careys were conflicted and should have recused themselves from the Board votes. Edwards' claims are not based on an allegation that the company is injured. Instead, Edwards' claims are buttressed by facts tending to show that Careys' actions were to the Careys' personal interest, rather than to the benefit of the company. But these allegations go to motivation for the Careys' actions. In short, Edwards does not need to prove that the Company was injured by these actions. Edwards needs to prove only that the Careys had a conflict of interest and that Edwards was injured by these actions. Edwards' evidence will be that his 45% interest is worth substantially less (not just 5% less) than his 50% interest because his interest must now be subject to a minority discount by virtue of the Board Resolutions giving Mr. Carey a controlling interest. This harm is undeniably individual to Edwards. The Company's value does not change. What changed was the value of Edwards' interest in the Company.

The Careys next make an argument based on UTAH CODE ANN. § 16-10a-622(3) arguing that "Edward's complaint does not seek to vindicate any personal right against the Careys or Seirus." (Appellants Br. at 16.) This argument is misleading. This referenced statutory section merely establishes the unremarkable proposition that "[a] shareholder of a corporation, when acting solely in the capacity of a shareholder, has no fiduciary duty or other similar duty to any other shareholder of the corporation." UTAH CODE ANN. § 16-10a-622(3). Edwards has never argued otherwise. Instead, Edwards is bringing his claims against the Careys, for their actions as directors, in purporting to adopt the Board Resolutions. Not surprisingly, as the statute expressly provides, the

statute does not disturb the “liability of a director or officer of a corporation for breach of a fiduciary duty or other similar duty to shareholders.” UTAH CODE ANN. § 16-10a-622(3)(c)(iii). In sum, this provision has no bearing on the current dispute.

Edwards has been individually harmed by the Board Resolutions. Likewise, Edwards, alone, stands to benefit from an order declaring the resolutions void. Therefore, his claims are properly brought as direct claims.

### **CONCLUSION**

For the reasons set forth above, Edwards requests that the judgment of the district court, denying the motion to compel arbitration, be affirmed.

DATED this 4<sup>th</sup> day of May, 2016.

/s/ Peter W. Billings

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the Brief of Appellee were mailed to the following on this 4<sup>th</sup> day of May, 2016:

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**CERTIFICATE OF COMPLIANCE**

Pursuant to U.R.A.P. 24(f), Counsel for Appellee Joseph Edwards, hereby certifies that the foregoing brief contains 5,470 words, as determined by an automatic word count feature in Microsoft Word, including headings and footnotes, and excluding the table of contents, table of authorities, certificates, and addendum.

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# ADDENDUM

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Attorneys for Plaintiff Joseph Edwards

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**IN THE THIRD JUDICIAL DISTRICT COURT IN AND  
FOR SALT LAKE COUNTY, STATE OF UTAH**

---

JOSEPH EDWARDS, a Utah resident,  
Plaintiff,

v.

MICHAEL CAREY, a California resident,  
WENDY CAREY, a California resident, and  
SEIRUS INNOVATIVE ACCESSORIES,  
INC., a Utah Corporation,  
Defendants.

**FIRST AMENDED COMPLAINT AND  
JURY DEMAND**

Case No. 150905215

Judge Kouris

**DISCOVERY TIER 3**

---

Plaintiff Joseph Edwards, by and through his undersigned counsel of record, hereby  
complains against Defendants Michael Carey, Wendy Carey and Seirus Innovative Accessories,  
Inc. as follows:

**PARTIES**

1. Plaintiff Joseph Edwards is an individual who resides in Salt Lake City, Utah.
2. Defendants Michael and Wendy Carey are husband and wife and reside in San Diego, California.

3. Defendant Seirus Innovative Accessories, Inc. is a Utah corporation with its principal place of business in San Diego, California.

### **JURISDICTION AND VENUE**

4. Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78A-5-102.

5. This Court has personal jurisdiction over Defendants because Defendants have transacted business in the State of Utah in connection with the subject matter of this Complaint and because they have caused harm to Edwards in the State of Utah. Defendant Seirus Innovative Accessories, Inc. is a Utah corporation registered to do business in the State of Utah and maintains a registered agent in Salt Lake County.

6. Defendants are thus subject to jurisdiction in this state pursuant to Utah's long arm statute, Utah Code Ann. § 78-27-24(1) and (3), and Defendants have sufficient minimum contacts to satisfy the due process clause of the United States Constitution.

7. Venue is proper in this Court pursuant to Utah Code Ann. §§ 78B-3-304, 306, and 307, and pursuant to Utah Code Ann. § 16-10a-809(1).

### **GENERAL ALLEGATIONS**

8. In August 1985, Edwards and Defendant Michael Carey formed Defendant Seirus Innovative Accessories, Inc. ("the Company") and registered the Company with the Utah Division of Corporations.

9. Since the Company was created in 1985, Edwards and Defendant Michael Carey have each owned fifty percent (50%) of the Company. There have been no other stockholders in

the Company at any time and, prior to the events described herein, no action had been discussed or proposed that would modify this 50-50 ownership structure.

10. Edwards, Defendant Michael Carey, and Defendant Wendy Carey have been the officers and directors of the Company since 1985. There have been no other officers or directors in the Company at any time.

11. The Company has grown over the past thirty years and now has approximately sixty-five employees and conducts business throughout the United States as well as internationally.

12. Edwards has been the Company's secretary, treasurer, and co-president (along with Defendant Michael Carey) since its inception.

13. Edwards has played a critical role in the Company's development, growth, and management, and his recent responsibilities as co-president included the management of marketing, product development, sales, and on-going litigation matters relating to the Company.

14. Defendants Michael and his spouse, Wendy Carey, have used the Company for their personal advantage rather than for the benefit of all shareholders, as required by statute/law, including engaging in unauthorized actions and self-dealing that placed their interests above the Company's interests, and that favored their own interests over Edwards' interests.

15. Edwards objected to Defendant Michael and Wendy Carey's wrongful actions and, as a result, Defendants Michael and Wendy Carey, engaged in efforts to remove Edwards from the Company's management and to minimize his ownership position in the Company.



16. As part of these wrongful efforts, late in the afternoon on Friday, July 24, 2015, Defendant Michael and Wendy Carey called a special meeting of the Company's Board of Directors and set said meeting for Monday, July 27, 2015, at 9:30 a.m. at the offices of Defendants Michael and Wendy Carey's personal attorneys.

17. At the Company's July 27<sup>th</sup> Board of Directors meeting, Defendants Michael and Wendy Carey proposed corporate action terminating Edwards as an employee and officer of the Company and called for a vote on that item. Defendants Michael and Wendy Carey provided false reasons for terminating Edwards, including several purported reasons that were over fifteen years old and had never been raised or discussed with Edwards before. Using these false reasons and under the premise of what "is in the best interest of the company", Defendants Michael and Wendy Carey voted in favor of terminating Edwards as an employee and officer of the Company. Edwards voted against the proposed corporate action.

18. Defendants Michael and Wendy Carey then told Edwards he was no longer allowed on Company property, and Edwards' email account was immediately terminated.

19. Defendants Michael and Wendy Carey also proposed corporate action in which additional stock would be issued to Defendant Michael Carey and Edwards through conversion of certain Company debt (which is owed to Defendant Michael Carey and Edwards as shareholders) into equity with a decision deadline of only five business days. Defendant Michael and Wendy Carey voted in favor of converting this shareholder debt to equity. Edwards voted against the proposed corporate action.

20. At the time of the July 27<sup>th</sup> vote, the Company owed money via promissory notes to both Defendant Michael Carey and Edwards. While Michael Carey contended generally that the Company would benefit in the event of conversion of the promissory notes, no specifics were presented, there was no minimum conversion required, and Edwards was required to disclose the amount he wanted to convert before Defendant Michael Carey was required to identify the amount he wanted to convert. This allowed Defendant Michael Carey to commit as little or as much of his promissory notes as he chose, potentially even acquiring control of the Company for the price of one share more than Edwards could acquire or would commit to acquiring.

21. The terms of conversion also permitted Defendant Michael Carey, and only Defendant Michael Carey, to gain control of the Company. The terms specifically prohibited Edwards from acquiring shares that would lead to more than a 50% ownership but explicitly permitted Michael Carey to do so. In the event that Edwards attempted to maintain his 50% interest, he was purportedly required to pay more than an additional \$762,534 by August 6, 2015 in cash to equal the maximum debt that Defendant Michael Carey could convert.

22. Defendant Michael Carey did not demonstrate that the Company had, nor did it actually have, a pressing need for an equity infusion.

23. Nor did Michael Carey offer any explanation or analysis as to why the conversion could not be proposed or carried out in a manner that would allow Edwards to retain his 50 percent ownership without being forced to come up with \$762,534 in a matter of one week.

24. Because Michael Carey likely knew or should have known that it would be difficult for Edwards to come up with that amount of cash, particularly in an extremely short

period of time, he also knew that the conversion plan was unfair to Edwards and would not allow him a fair and reasonable opportunity to exercise his pre-emptive rights.

25. Michael Carey offered no explanation as to why the conversion had to be structured in this manner.

26. The Company had never exchanged debt owed to shareholders for additional equity at any time prior to the filing of this Complaint in spite of the fact that it had endured and fully recovered from difficult financial times a few years earlier.

27. Upon information and belief, Defendants Michael and Wendy Carey failed to retain any independent professionals to conduct an analysis regarding how much debt, if any, the Company needed to retire.

28. Upon information and belief, Defendants Michael and Wendy Carey conducted no analysis regarding whether the debt to equity conversion could be accomplished in a manner that would maintain both Edwards and Defendant Michael Carey's respective fifty percent ownership positions nor did they present any such analysis in the July 27<sup>th</sup> Board of Directors meeting.

29. The conversion amounted to an offering of securities by the Company and no information regarding the Company has been provided. The Company has undergone a material change with the purported removal of Edwards and no information has been provided regarding the Company's plans. To offer securities of the Company, where Defendant Michael Carey potentially holds material information not known to Edwards, could amount to securities fraud.

30. Defendants Michael and Wendy Carey did not propose or approve the acts described herein to benefit the Company, but to benefit themselves exclusively. The true motivations for these actions included seizing control over the Company and retaliating against Edwards for, among other things: (1) insisting that Michael Carey bring to the Board for approval any proposed business opportunities that were significantly different than what the company had previously done; (2) suspending work on a “special project”, initiated by Michael Carey, the details of which he refused to disclose or discuss , and which Michael Carey further ordered employees involved in the project not to discuss with Edwards; (3) demanding that Michael Carey’s salary (which was more than three times higher than Edwards’ salary and also several times higher than the industry average) be reasonable and in line with what executives in similarly situated companies were paid; (4) suggesting that, as per company policy, all executives (including Edwards) should be treated equally with respect to bonuses, and questioning whether the decision to pay Mike a bonus of nearly a million dollars in 2014 was appropriate, particularly where Edwards had received no bonus and Wendy had failed to undertake or commission an independent analysis of Mike’s bonus structure; (5) suggesting that the compensation paid to Mike and Wendy’s daughter be independently evaluated to ensure it was fair and reasonable to the Company and to insulate the Company from the threat of a discrimination suit; and (6) questioning Wendy Carey’s independence and suitability as a board member.

31. All of Edwards’ acts for which Mike and Wendy retaliated against him were entirely appropriate actions for Edwards as an executive, Board member, and shareholder. If

Mike and Wendy Carey were acting in the best interests of the Company, rather than in their own interests, they would have, among other things, welcomed an independent review of executive compensation to ensure the Company was not over-paying for executive services.

32. The equity exchange proposal that Michael Carey made, and that Wendy Carey supported, was so hastily conceived of and carried out that the initial “Notice of Equity Exchange Offering” Michael Carey authored and distributed significantly miscalculated the number of shares outstanding and the value of those shares. Specifically, the original notice, dated July 28, 2015, claimed the value of each share was \$31,000, based on the assumption that there were 1,000 shares outstanding. Two days later, on July 30, 2015, Wendy Carey sent an email to Mike and Edwards stating, in pertinent part: “we discovered that an additional 125 shares had been authorized for issuance to each of you as a part of the 1997 merger, which brings the total number of issued and outstanding shares to 1,250 (rather than 1,000 as previously indicated). The correct value per share is therefore \$24,800 per share.” Thus, at the time Mike and Wendy Carey voted to approve the equity conversion, they had apparently miscalculated the number of shares outstanding and the value of each share by 25 percent.

33. On July 30, 2015, Defendant Michael Carey allegedly elected to exchange the entirety of the debt owed to him personally for equity in the Company.

34. Defendant Michael Carey asserts that he cancelled promissory notes from the Company to himself and, in return, was issued 152.54 additional shares of common stock in the Company. Because of how the conversion plan—proposed and approved exclusively by Mike



and Wendy Carey—was structured, Michael Carey purportedly obtained the 152.54 additional shares without having to come up with any money whatsoever.

35. Conversely, the structure of the conversion plan—which Edwards was not involved in creating and did not approve—required Edwards to come up with \$762,534 in a matter of days in order to retain his 30-year, fifty percent ownership stake.

36. Edwards did not have available to him the funds that would be required to purchase the shares he would need to retain his fifty percent stake in the Company.

37. Defendant Michael Carey has asserted that, on August 6, 2015, his ownership of the Company's stock increased from 50% to 55.44% and that Edwards ownership of the Company's stock decreased from 50% to 44.56%.

#### **FIRST CAUSE OF ACTION**

##### **(Conflict of Interest Transactions by Defendants Michael and Wendy Carey)**

38. Edwards re-alleges and incorporates the foregoing allegations.

39. Utah Code § 16-10a-850(a) states that a director has a “conflicting interest” with respect to a transaction effected (or proposed to be effected) if the director has a beneficial financial interest in the transaction and the transaction is financially significant enough to the director that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called to vote on the transaction.

40. Utah Code § 16-10a-851(2) provides that the Court can enjoin, set aside, and/or award damages and sanctions for a director's conflicting interest transaction if the transaction, at the time of commitment, is established to have been not fair to the corporation.

41. Defendants Michael and Wendy Carey have engaged in numerous conflicting interest transactions as directors of the Company, including (but not limited to) their unilateral and unjustifiable decision not to honor the legal note contracts due and payable to Edwards, the vote to remove Edwards as an employee and officer of the Company and the vote to allow the Company's debt to the shareholder to be converted to equity, thereby engaging in efforts that allowed Defendant Michael Carey to become (at his sole discretion) the majority owner of the Company and thereby alter—for the first time—the 50-50 ownership structure that has existed for the past thirty years.

42. Moreover, by becoming the majority owner, Defendant Michael Carey would put himself in a position to control the appointment of the entire Board of Directors, thereby virtually eliminating Edwards' ability to have any transparency into the Company's operations and assuring that Defendants Michael and Wendy Carey exercise exclusive control over all Board of Director decisions.

43. By ousting Edwards as an officer of the Company, Defendant Michael and his spouse, Wendy Carey, have left the Company in a position where they—and only they—are officers of the Company, thereby assuring that they control all of the Company's day-to-day decisions.

44. Edwards therefore requests that the Court void the July 27, 2015 corporate actions in regard to: (a) the termination of Edwards as an officer and employee of the Company; and (b) the approval of the conversion of shareholder debt to shareholder equity program or the issuance of any other equity to alter the 50-50 ownership structure.

**SECOND CAUSE OF ACTION**  
**(Breach of Fiduciary Duty Against Defendants Michael and Wendy Carey)**

45. Edwards re-alleges and incorporates the foregoing allegations.

46. Defendants Michael and Wendy Carey, as the Company's only officers and as directors, owe a fiduciary duty to the Company and its shareholders.

47. As part of their fiduciary duty, no director or officer can place himself or herself in a position that would subject him to conflicting duties or engage in self-dealing.

48. Defendants Michael and Wendy Carey's fiduciary duty required them to exercise the utmost good faith, integrity, honesty and fidelity in their dealings with Edwards.

49. As set forth above, Defendants Michael and Wendy Carey, breached their fiduciary duty to Edwards by repeatedly acting (in unison) in ways to intentionally damage Edwards, by actively utilizing their power on the Company's board of directors to gain an advantage over Edwards, and by together, refusing to act honestly and fairly with Edwards.

50. Defendants Michael and Wendy Carey's acts constitute willful misconduct and intentional infliction of harm on Edwards.

51. As a direct and proximate result of Defendant Michael and Wendy Carey's breaches of their fiduciary duty, Edwards has been damaged in an amount to be determined at trial plus pre- and post-judgment interest and attorney fees.

52. Additionally, Defendant Michael and his spouse, Wendy Carey's willful, wanton, and malicious breach of fiduciary duties justifies the imposition of punitive damages in an amount to be determined at trial.

**THIRD CAUSE OF ACTION**  
**(Removal of Directors Pursuant to Utah Code § 16-10a-809 Against All Defendants)**

53. Edwards re-alleges and incorporates the foregoing allegations.

54. As set forth above, Defendants Michael and Wendy Carey, as directors of the Company, have engaged in dishonest conduct and/or a gross abuse of discretion in regard to the Company and/or Edwards.

55. The removal of Defendant Michael Carey and his spouse, Wendy Carey, as directors of the Company is in the best interest of the Company.

56. Accordingly, the Court should enter an order removing Defendant Wendy Carey from her role as director for the Company.

57. Furthermore, the Court should enter an order removing Defendant Michael Carey from his role as director for the Company.

**FOURTH CAUSE OF ACTION**  
**(Deprivation of Preemptive Rights)**

58. Edwards re-alleges and incorporates the foregoing allegations.

59. The Company's Articles of Incorporation provided Edwards with preemptive rights.

60. Utah Code § 16-10a-630 states that in making the determination to issue shares, the board of directors must provide shareholders possessing preemptive rights with "a fair and reasonable opportunity" to exercise that right.

61. As set forth above, Defendants Michael Carey and Wendy Carey did not provide Edwards with "a fair and reasonable opportunity" to exercise his preemptive rights to acquire a

number of the shares proposed to be issued in an amount proportional to his percentage ownership of the Company's outstanding shares.

62. Accordingly, Edwards requests that the Court declare Defendant Michael Carey's purported acquisition of shares on August 6, 2015 null and void, and that Edwards be provided with any other damages suffered or incurred.

**FIFTH CAUSE OF ACTION**  
**(Request for Declaratory Judgment Against All Defendants)**

63. Edwards re-alleges and incorporates the foregoing allegations.

64. The facts set forth above demonstrate that there is a justiciable dispute between Edwards and all Defendants concerning their respective rights.

65. Based upon the foregoing, Edwards prays for judgment pursuant to Utah Code § 78B-6-401, *et. seq.*, and Utah R. Civ. P. 57, declaring that:

- a. The purported July 27, 2015 vote of the board of directors to oust Edwards as an officer and employee of the Company is of no force and effect;
- b. The purported July 27, 2015 vote of the board of directors to approve the conversion of shareholder debt to equity is of no force and effect;
- c. Any action taken by the Defendants to take ownership or control over more than fifty percent (50%) of the stock of the Company is of no force and effect;  
and
- d. Michael and/or Wendy Carey are removed as Directors of the Company.

66. Pursuant to Utah R. Civ. P. 57, Edwards respectfully requests a speedy hearing on his request for declaratory judgment, and that the Court advance said hearing on the Court's calendar.

**JURY DEMAND**

Pursuant to Utah Rule of Civil Procedure 38, Edwards demands a trial by jury on any issue triable of right by a jury.

**PRAAYER FOR RELIEF**

WHEREFORE Plaintiff Joseph Edwards prays for the following relief:

- A. With respect to the first cause of action, an order from the Court declaring void the following conflicted corporate actions: (1) the termination of Edwards as an employee and officer of the Company; and (2) the plan to convert shareholder debt to additional shareholder equity (or any other stock issuances).
- B. With respect to the second cause of action, judgment against Defendants Michael and Wendy Carey in an amount to be determined at trial and punitive damages, plus pre-judgment interest at the statutory rate;
- C. With respect to the third cause of action, an order from the Court removing Defendant Michael Carey and Defendant Wendy Carey as directors of the Company;
- D. With respect to the fourth cause of action, a declaration of rights as set forth in paragraph 65 above; and
- E. All other relief which this Court deems just and proper.



DATED this 21st day of August 2015.

MICHAEL BEST & FRIEDRICH, LLP

/s/ Richard F. Ensor

Richard F. Ensor

*Attorneys for Plaintiff*

Plaintiff's Address:

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§ 16-10a-630. Shareholders' preemptive rights, UT ST § 16-10a-630

West's Utah Code Annotated

Title 16. Corporations

Chapter 10A. Utah Revised Business Corporation Act

Part 6. Shares and Distributions

U.C.A. 1953 § 16-10a-630

§ 16-10a-630. Shareholders' preemptive rights

Currentness

(1) Subject to the provisions of Subsection 16-10a-1704(3), the shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide.

(2) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights," or words of similar import, means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(a) Upon the decision of the board of directors to issue shares, the shareholders of the corporation have a preemptive right, subject to any uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, to acquire a number of the shares proposed to be issued in an amount proportional to their percentage ownership of the corporation's outstanding shares.

(b) A shareholder may waive a preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(c) There is no preemptive right with respect to:

(i) shares issued as compensation for services to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates;

(ii) shares issued to satisfy conversion or option rights created to provide compensation for services to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates;

(iii) shares issued within six months from the effective date of incorporation; or

**§ 16-10a-630. Shareholders' preemptive rights, UT ST § 16-10a-630**

---

(iv) shares sold otherwise than for cash.

(d) Holders of shares of any class without general voting rights but with preferential rights to distributions have no preemptive rights with respect to shares of any other class.

(e) Holders of shares of any class with general voting rights but without preferential rights to distributions have no preemptive rights with respect to shares of any class without general voting rights but with preferential rights to distributions unless the shares without general voting rights but with preferential rights are convertible into or carry a right to subscribe for or acquire shares with general voting rights or without preferential rights.

(f) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one year after being offered to shareholders pursuant to the preemptive rights, at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of the one year period is subject to the shareholders' preemptive rights.

(3) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

**Credits**

Laws 1992, c. 277, § 55.

**Notes of Decisions (1)**

U.C.A. 1953 § 16-10a-630, UT ST § 16-10a-630  
Current through 2015 First Special Session

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West's Utah Code Annotated

Title 16. Corporations

Chapter 10A. Utah Revised Business Corporation Act

Part 8. Directors and Officers

U.C.A. 1953 § 16-10a-809

§ 16-10a-809. Removal of directors by judicial proceeding

Currentness

(1) The district court of the county in this state where a corporation's principal office is located or, if it has no principal office in this state, the district court for Salt Lake County may remove a director in a proceeding commenced either by the corporation or by its shareholders holding at least 10% of the outstanding shares of any class if the court finds that:

(a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation; and

(b) removal is in the best interest of the corporation.

(2) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(3) If shareholders commence a proceeding under Subsection (1), they shall make the corporation a party defendant.

(4) A director who is removed pursuant to this section may deliver to the division for filing a statement to that effect pursuant to Section 16-10a-1608.

**Credits**

Laws 1992, c. 277, § 88; Laws 2008, c. 364, § 26, eff. May 5, 2008.

Notes of Decisions (1)

U.C.A. 1953 § 16-10a-809, UT ST § 16-10a-809

**§ 16-10a-809. Removal of directors by judicial proceeding, UT ST § 16-10a-809**

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**Current through 2015 First Special Session**

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West's Utah Code Annotated

Title 16. Corporations

Chapter 10A. Utah Revised Business Corporation Act

Part 8. Directors and Officers

U.C.A. 1953 § 16-10a-850

§ 16-10a-850. Definitions relating to conflicting interest transactions

Currentness

As used in Sections 16-10a-850 through 16-10a-853:

(1) "Conflicting interest" with respect to a corporation means the interest a director has respecting a transaction effected or proposed to be effected by the corporation or by any entity in which the corporation has a controlling interest if:

(a) whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that the director or a related person of the director is a party to the transaction or has a beneficial financial interest in or is so closely linked to, the transaction and the transaction is so financially significant to the director or a related person of the director that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction; or

(b) the transaction is brought, or is of a character and significance to the corporation that it would in the normal course be brought, before the board of directors for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in, or is so closely linked to, the transaction and the transaction is so financially significant to the person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction:

(i) an entity, other than the corporation, of which the director is a director, general partner, agent, or employee or an entity to which the director owes a fiduciary duty, other than a fiduciary duty arising because the director is a director of the corporation;

(ii) an individual who is a general partner, principal, or employer of the director or who is a beneficiary of a fiduciary duty owed by the director, other than a fiduciary duty arising because the director is a director of the corporation; or

(iii) a person that controls one or more of the entities specified in Subsection (1)(b)(i) or an entity that is controlled by, or is under common control with, one or more of the entities or individuals specified in Subsection (1)(b)(i) or (1)(b)(ii).



(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation, or by any entity controlled by the corporation respecting which a director has a conflicting interest.

(3) "Qualified director" means, with respect to a director's conflicting interest transaction, any director who does not have either a conflicting interest respecting the transaction, or a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction.

(4) "Required disclosure" means disclosure by the director who has a conflicting interest of:

(a) the existence and nature of the conflicting interest; and

(b) all facts known to the director respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the corporation or the entity controlled by the corporation becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage.

#### Credits

Laws 1992, c. 277, § 104.

Notes of Decisions (55)

U.C.A. 1953 § 16-10a-850, UT ST § 16-10a-850

Current through 2015 First Special Session

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