SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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RUSSELL KAYE,

Plaintiff,

- v -

MERCHANT FACTORS CORP., NEVILLE GRUSD, STEVEN KAYE, BONNIE ROBBINS, ADAM WINTERS, RICHARD WOLLMAN

Defendant.

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INDEX NO. 650974/2024

MOTION DATE 06/10/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISS.

In this action over the governance of a closely held corporation, plaintiff, who was removed from the Board of Directors of defendant Merchant Factors Corp. by the Board members, seeks a declaratory judgment reinstating him to the Board, and an order compelling defendants to comply with plaintiff's request for books and records. Defendants move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7) with prejudice and without leave to replead. Plaintiff opposes the motion as inappropriate because it is unsupported and improperly based on extrinsic evidence. For the reasons below, defendants' motion is granted.

Facts

Defendant Merchant Factors Corp. (Merchant, or the Company) is a New York corporation founded in the 1980s by non-party Walter Kaye and three other members pursuant to a Shareholder Agreement (ShA) dated October 1, 1984 (NYSCEF # 8, ShA). It is not clear if there were also Articles of Incorporation or any other founding documents. Regardless, at the time, the four directors were also the only shareholders of the company. Over the years, Merchant's shareholders increased from the initial four to seven, who own shares in the following amounts:

Name	*Relationship to Founders or Company*	*Shares Held*	*In This Case*	*Residence*
Russell Kaye	Son of Walter Kaye	11.8%	Plaintiff	New York
Steven Kaye	Son of Walter Kaye	11.8%	Defendant	Connecticut
The Crossing 18 Trust (The Trust)	Trust was controlled by Bernice Kaye (Walter Kaye's wife) until her passing. Trust is now controlled by Russell and Steven as co-trustees	42.6%	Non-party	* The Trust Agreement was not submitted
Adam Winters	Current CEO of Merchant	12%	Defendant	New Jersey
Richard Wollman	Son of founding member Edward Wollman	9.5%	Defendant	New York
Bonnie Robbins	Daughter of founding member Manual Gordon	5.7%	Defendant	New York
Neville Grusd	None stated	6.6%	Defendant	New York

(NYSCEF # 9 – shareholder schedule of Merchant)

All shareholders—except the Trust—also serve as Directors (NYSCEF # 27, Amended Complaint [AC] ¶ 25). Pursuant to the ShA, "[e]ach Shareholder shall have the right to appoint one (1) Director" to the Board of Directors (NYSCEF # 65, ShA § 3 [a]). With exception of the Trust, each shareholder has consistently appointed themselves to the Board. The Trust has not appointed a director since the death of Bernice Kaye in 2018 (AC ¶ 24). Because the shareholders are also the directors, "the Company has not held a shareholder meeting or voted on Directors in years" (*id.* ¶ 25).

Corporate Documents

There are three documents that the parties believe are important. First is the ShA. Significant to this case is § 3 [a] of the ShA, which provides that "[e]ach Shareholder shall have the right to appoint one (1) Director" to the Board of Directors (ShA § 3 [a]).

The next important document is the "Original Bylaws," which were the Bylaws passed by the original Board of Directors and, by extension, all of the shareholders in the 1980s (*see* NYSCEF # 63, Original Bylaws). The most relevant provision is Article III.5, which states:

> "Any or all of the directors may be removed for cause by vote of the shareholders or by action of the board. Directors may be removed without cause only by vote of the shareholders"

(*id.* at Art III.5). The document does not define "cause" or provide any further guidance on removal of officers.

Finally, there are the Amended Bylaws. On January 21, 2022, Merchant's Board passed a resolution adopting Amended Bylaws over plaintiff's objection (AC ¶ 26; *see also* NYSCEF # 64, Amended Bylaws). Article III.4 added significantly more detail to the power to remove directors:

> (a) Any director may be removed for Cause (as defined in these by-laws) by vote of the holders of a majority of the shares then entitled to vote in the election of any directors ("Shareholder Vote"). **Subject to the approval of these by-laws by Shareholder Vote,** a director may also be removed for Cause by resolution adopted by the affirmative vote of two-thirds of the Board members present at a meeting called for such purpose. At least 10 days' notice of such action shall be given to all shareholders and directors, including the affected Board member.
>
> (b) As used herein, "Cause" means any of the following:

(i) willful misconduct (including, without limitation, fraud, theft or embezzlement) that results in harm to the reputation, business or business relationships of the corporation;

(ii) **inappropriate behavior** or misconduct that is detrimental to the corporation and/or the proper functioning of the Board, including but not limited to 1. threats and/or personal attacks on other directors, whether verbal, written, by email or in social media; 2. continual disruption of Board meetings; and/or 3. engaging in persistent inappropriate, abusive, or destructive behavior.

(Amended Bylaws, Art III.4 [a]–[b] [emphasis added]).[1]

Notably, "cause" is defined to include "inappropriate behavior," under the Amended Bylaws, and the Board may vote to remove directors only after the shareholders vote to approve the Amended Bylaws. But, as plaintiff claims, "[n]o shareholders meeting was ever called to approve the Amended Bylaws, and there has never been a shareholder vote on the amendments" (AC ¶ 27).

Indeed, even if a shareholder vote were called, the vote would have likely failed because, between both plaintiff and the Trust, over 50% of the shares would either vote against or abstain from the vote. Plaintiff owns 11.8% of the Company's shares and voted against the Amended Bylaws at the Board level (*see id.* ¶¶ 9, 26). Meanwhile, the Trust controls 42.6% of the shares (*id.* ¶ 16) but cannot act unless both co-trustees (plaintiff and Steven) agree. It is heavily implied that Steven voted for the Amended Bylaws (*see id.* ¶ 26 [bylaws amended "over Russell's objection"]), so the Trust would be deadlocked and unable to act. Therefore, plaintiff alleges that per the text of Article III.4(a), the Board did not have the power to remove fellow directors under the Amended Bylaws (*id.* ¶ 27).

Plaintiff is Denied Books and Records

Plaintiff alleges that years earlier, "the Company issued subordinated debt notes to its shareholders to increase its liquidity" (the Subordinated Debt) (*id.* ¶ 31). Plaintiff adds that the interest rates varied per shareholder at different times, and the Trust consistently had lower rates than everyone else (*id.* ¶ 33). According to plaintiff, despite his repeatedly offers to refinance all the debt himself "[i]n an effort to save the Company money," the Company and the Board repeatedly refused and did not "seriously evaluate[] his offers" (*id.* ¶¶ 34-35, 41, 45). Plaintiff posits that the Board does not want him to refinance the debt because the other Board members like the interest rate they have (*id.* ¶¶ 36, 45).

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[1] The Amended Bylaws also add two other grounds of "cause" and specify specific procedures for notice and opportunity to respond to charges.

On May 19, 2023, plaintiff's lawyers requested the company provide the following documents:

> "Correspondence since 2016 between or among any of the stockholders, directors or other insiders and the Company's counsel, accountants and/or any member of management regarding the creation or repayment of any indebtedness of the Company with stockholders, directors or other insiders and/or their affiliates"

(*id.* ¶ 37). Plaintiff offers the following purposes to his request:"(i) to ensure that the Director Defendants were placing their fiduciary duties to the Company above their own personal interests; and (ii) to have a more complete understanding of why different shareholders/noteholders received disparate interest rates" (*id.* ¶ 38).

Plaintiff was initially told by company counsel Marc Leaf that he could receive such records and was asked to narrow the request (*id.* ¶¶ 39-40). However, in the fall of 2023, the Company fired Leaf and replaced him with new counsel, David Kaufman (*id.* ¶¶ 42, 44). Kaufman reversed course and refused to produce documents to plaintiff without a court order, even after plaintiff re-raised his request in January 2024 (*id.* ¶¶ 44, 46-49).

Plaintiff's Removal from the Board of Directors

On January 26, 2024, defendants sent a "Notice of Special Board Meeting" with a single agenda topic: "removal of Russell Kaye pursuant to Article III, Section 4" of the Amended Bylaws (the Notice) (AC ¶¶ 51-52; NYSCEF # 7, the Notice). The meeting was scheduled for March 13, 2024, and indicated that "[o]nly directors" would be allowed to vote (the Notice at *2). The Notice directly cited the "inappropriate behavior" definition of cause and stated that plaintiff's behavior had been unprofessional and even abusive for several years. The Notice referred to plaintiff's behavior as "aberrant . . . constitut[ing] persistent inappropriate abusive and destructive behavior" (*id.* at *2-*3) and detailed the charges, in six paragraphs, from December 21, 2023 to December 28, 2023, with attached examples of emails to and from plaintiff (*id.*). Those charges are summarized here as follows:

For several years, including the most recent Board meeting held on December 21, 2023, plaintiff threatened and verbally attacked each director, treated the directors and the Company's outside counsel in a condescending and unprofessional manner in emails if they disagreed with his demands; disrupted Board meetings; revisited previously discussed and decided issues; engaged in abusive behavior when his demands that other board members immediately respond to his calls and emails are not met; sent threatening emails to the CEO that he [plaintiff] would "be all over" the CEO with daily calls; threatened the Company's outside counsel with filing an unwarranted ethics complaint (including an email which listed solely as a subject line "Last chance to reconsider" and listed in the body an address of a

Grievance Committee in White Plains, New York) if counsel did not conform to plaintiff's desires; and called "an emergency shareholder meeting" the next day after his threatening email to outside counsel to discuss the "departure of Mr. Kaufman" (*id.*).

Plaintiff argues that the Board did not have the power to remove a fellow director. He first points out that the Amended Bylaws were never adopted by the shareholders, and therefore, per the text of Article III.4(a), the Board does not have the power to remove a fellow director (AC ¶¶ 54-56). He next argues that per Business Corporation Law § 706(a), the Board does not have the power to remove fellow directors unless granted that power in "[t]he certificate of incorporation or *the specific provisions of a by-law adopted by the shareholders*" (AC ¶ 57, quoting BCL 706 [a]). His third argument is that Article III.4(a) is inherently void because it conflicts with the ShA's provision allowing each shareholder to appoint a director (AC ¶¶ 59-62). Finally, he argues that Article III.4(a)'s "inappropriate behavior" provision is an expansion of the definition of "for cause" under the common law, and therefore Article III.4(a) is a "backdoor amendment of the [ShA]" that would "allow a majority of shareholders to strip another shareholder of its rights under the [ShA] without amending the [ShA] itself" (*id.* ¶¶ 63-67).

Plaintiff commenced this case on February 23, 2024, and simultaneously moved by Order to Show Cause (OSC) for a Temporary Restraining Order (TRO) and preliminary injunction to prevent the Board from holding the special meeting (NYSCEF # 1, Summons; NYSCEF # 4, OSC for TRO). But as plaintiff failed to show a likelihood of success or balance of equities in his favor, the TRO was denied (NYSCEF # 22, TRO Denial at 2). Specifically, the Board persuasively argued that they retained the power to remove him under the Original Bylaws, and therefore the fact that the shareholders had not approved the Amended Bylaws did not matter. Thus, at the meeting in March 2024, the Board removed plaintiff as a director (AC ¶ 7).

Subsequently, plaintiff withdrew the preliminary injunction motion and then filed the Amended Complaint for reinstatement to the Board and for books and records as a director (AC ¶¶ 68-84).

In moving to dismiss the amended complaint, defendants argue that plaintiff's reinstatement claim fails regardless of whether the Amended Bylaws were adopted by shareholders, because the Board retained its power to remove directors for cause under the Original Bylaws. The shareholders had adopted the Original Bylaw at the time of the Company's founding (NYSCEF # 31, defts' mol at 10-12). Citing *Fox v Cody* (141 Misc 552, 554 [Sup Ct, NY County 1930]), and *Republic Corp. v Carter* (22 AD2d 29, 33 [1st Dept 1964]), defendants claim that under both BCL § 706 and New York case law, shareholders have the power to "delegate to the board their inherent power to remove directors" (*id.* at 10-11). The Board could not remove that delegation of power by adopting the Amended Bylaws

without a shareholder vote. Defendants assert that the Amended Bylaws merely "clarif[ied] the definition of 'cause,'" and therefore did not need a shareholder vote (*id.* at 11). They argue that the Original Bylaws are consistent with the ShA and New York law because there is no universe where the ShA prohibits removal for cause (e.g., breach of fiduciary duties) (*id.* at 12). Defendants see no conflict between the Bylaws and ShA because a shareholder could always "appoint a substitute director" if their director is removed for cause under the Original Bylaws, which allow removal by other shareholders or the board (*id.*). Thus, defendants conclude that the Board retained the power to remove for cause.

As for books and records issue, defendants point out that because plaintiff is not currently a director, he has failed to follow the statutory requirements or assert proper (or truthful) purposes for his requests as a shareholder or former director (*id.* at 12-15). Moreover, plaintiff already has all the books and records requested because he was a fellow board member and had attended every meeting (*id.*).

Plaintiff argues[2] that the Original Bylaws do not provide authority to remove him because the Board's adoption of the Amended Bylaws rendered the Original Bylaws inoperative (NYSCEF # 67, plaintiff's mol at 8-9). Amended Bylaw Article III.4 does not provide authority because (1) it requires "approval of these by-laws by Shareholder Vote," and (2) BCL 706(a) also requires shareholders to approve bylaws giving the removal power, and there has been no shareholder vote (*id.* at 8-10). As for defendants' argument that the Amended Bylaws merely "clarify" the definition of cause, plaintiff argues that adding "inappropriate behavior" is actually an expansion of "cause" beyond the common law (*id.* at 11-12, citing *Petition of Holmes*, 286 AD 500, 502 [1st Dept 1955]).[3] Plaintiff adds that nothing in defendants' cases gives the Board "carte blanche" to expand the definition of "cause" without shareholder vote (*id.*). Plaintiff claims that the Amended Bylaws contradict the ShA and argues that the ShA should be treated like articles of incorporation, so that only shareholders should be able to remove their own directors (*id.* at 12-13 n 6 citing § 706(c).

Finally, plaintiff raises a new theory of liability not mentioned in his Amended Complaint: even if the Board had the power to remove him, there is a question of fact whether they had "cause" to do so, requiring denial at the motion to dismiss stage (*id.* at 13-14).

As for books and records, plaintiff notes that if he wins this case, he will be a current director with unfettered right to books and records (*id.* at 14-17). He also argues that he has stated a proper purpose for inspection as a shareholder, and that

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[2] Plaintiff also argues that it was inappropriate for the Board to file so many emails or rely on their lawyer's descriptions that are not based in personal knowledge (NYSCEF # 67 at 6-7).

[3] Plaintiff also claims he will argue that Amended Bylaw Article III.4(b)(ii) (the "inappropriate behavior" definition of cause) is "unlawful in its entirety," but claims "that is of no moment here" (*id.* at 13).

defendants' only argument – that he may already have some of the documents – is not a basis for denial (*id.* at 16-17).

Rebutting plaintiff's argument, defendants note that one of plaintiff's cited cases, *Raub v Gerken* (127 AD 32 [2d Dept 1908]) is distinguishable. In *Raub*, the Second Department held that absent original authority to remove directors, the board cannot now delegate removal authority to itself but require shareholder approval. But unlike *Raub*, the Merchant Board case has the authority to remove directors from the Original Bylaws and the Amended Bylaws could not remove that power without shareholder vote (NYSCEF # 68, reply at 3-4). Defendants also argue that the ShA does not contradict or prohibit the removal power because, even in plaintiff's cited cases, courts found shareholders had the inherent authority to remove directors for cause (*id.* at 4-5, discussing *Springut v Don & Bob Rests. Of Am., Inc.*, 57 AD2d 302 [4th Dept 1977])—and by extension can grant that power to directors. Defendants dispute BCL 706(c)'s relevance since that subparagraph only applies when there are classes of shares; there are none here (*id.* at 5).

Defendants adds that the Board has the power to clarify (not expand) the definition of "cause" under the Amended Bylaws because New York only requires a Board to give directors "notice" of "specific charges" and an opportunity to be heard. This is exactly what the Amended Bylaws are meant to memorialize (*id.* at 5, citing *Auer v Dressel*, 306 NY 427, 432-433 [1954]). Finally, citing *Davidson v James*, 175 AD2d 323, 324 [1st Dept 1991]), defendants assert that the question of "cause" is not actually a fact question because the business judgment rule and internal affairs doctrines prohibit the court from "second-guess[ing]" the Board's removal decision absent indication of "fraud or other wrongdoing" (*id.* at 6).

Discussion

This is a motion to dismiss under both CPLR 3211(a)(1) and (a)(7). On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Most importantly, where evidence is submitted in support of a CPLR 3211(a)(7) motion, the inquiry "changes . . . from whether the pleader has stated a cause of action to whether the pleader *has* a cause of action amenable to relief" (*Holder v Jacob*, 231 AD3d 78, 87[1st Dept 2024] [emphasis in original]).

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not

presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under CPLR 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it' " (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

On the reinstatement to the Board cause of action, the Amended Complaint's single claim is that defendants did not have the power to remove him for cause. Plaintiff raises arguments regarding the Amended Bylaws Article III · § 4 and BCL §706(a).

Under BCL 706(a), the board of directors may remove directors for cause pursuant to "a by-law adopted by the shareholders" (BCL § 706 [a]). Similarly, the text of Amended Bylaw Art. III.4(a) requires "approval of these by-laws by Shareholder Vote" before the Board can remove directors for "Cause" as defined in the Amended Bylaws (NYSCEF # 64 at Art. III.4 [a]). There was never a shareholder vote on the Amended Bylaws, and therefore the Board did not have the power to remove directors under Article III.4(a). Moreover, defendants' argument that Article III.4(a) merely "clarified" the definition of "clause" is an attempt to get around these facts. Article III.4(a) simply does not give the board power to remove anyone unless and until it is approved by shareholders.

However, this does not end the inquiry. The Original Bylaws indisputably gave the Board the power to remove directors for cause (NYSCEF # 63 at Art. III.5). Plaintiff does not dispute that those bylaws were approved by the shareholders at the time they were introduced. The question left by this scenario is whether the Board maintains the removal power under the Original Bylaws when the Amended Bylaws were never approved by shareholders?

The answer has to be yes. While there is little case law speaking to this question, the text of the relevant statute and case law are instructive. Under BCL 706(a), a board of directors may remove directors for cause pursuant to "a by-law adopted by the shareholders" (BCL § 706 [a]). Moreover, "[a] bylaw is 'a contract among shareholders' and becomes a law of the corporation unless it violates some provision of law" (*ALP, Inc. v Adam Max*, 2021 NY Slip Op 30061[U], 9 [Sup Ct, NY County 2021] [Bannon, J.], citing *Matter of Silver v Farrell*, 113 Misc 2d 443, 444 [Sup Ct, Monroe County 1982], and *Matter of Weisblum v Li Falco Mfg. Co.*, 193

Misc 473 [Sup Ct, Herkimer County 1947]). Additionally, where stockholders-approved bylaws allowing directors to remove any officer except the chairman of the board, the board of directors could not unilaterally amend the bylaws to allow themselves the ability to remove any officer including the Chairman (*Petition of Buckley*, 183 Misc 189, 191 [Sup Ct 1944]).[4]

These authorities stand for the proposition that shareholders can delegate their power to remove directors for cause to the board. Logically, that power should stay with the board unless and until the shareholders say otherwise. It would undermine the statute and the concept of bylaws-as-law-of-corporation if the board could then rid itself of that power by adopting new bylaws that the shareholders are never asked to approve. While unlikely, the alternative would allow situations where the shareholders delegate power and the board immediately rebukes it only for the shareholders to delegate it again. It must therefore be the case in these situations that the prior shareholder-approved-bylaw remains in effect even though the new bylaws were adopted by the board. Moreover, in *Buckley*, even though the board of directors adopted an amendment to the bylaws, the prior shareholder-approved-bylaws remained in effect (*Buckley*, 183 Misc at 191).

Viewed differently, suppose the shareholders voted to reject the Amended Bylaws, rather than simply never having a vote, then the Original Bylaws would remain operative, rather than having no bylaws at all. Similarly, if an Amended Bylaw provides that it is not effective unless the shareholders vote on the bylaws, and the shareholders never vote on the bylaws, then the Original Bylaw should be operative.

While this will be confusing for businesses looking for clarity, the alternative is to allow boards of directors to unilaterally pass bylaws effectively giving up rights given to them by shareholders. As applied here, the Board retained the power to remove directors for cause under the Original Bylaws even though the Amended Bylaws were not approved by shareholders. Therefore, it matters not what the Amended Bylaws say. All that matters is that the Original Bylaws granted the power to remove.

Plaintiff offers three reasons why the Board did not have the power to remove directors for cause. He first argues that the Board adopted the Amended Bylaws, and those bylaws were not adopted by the shareholders as required under both the text of Article III.4(a) or BCL § 706(a) (NYSCEF # 27 ¶¶ 56-57). The implicit assumption in this argument is that the Amended Bylaws make the Original Bylaws inoperative. However, as just explained, this argument fails because the

[4] The court in *Buckley* found it extremely relevant that the board tried to amend bylaws to remove a *limitation* on their power. Here, the Amended Bylaws either expand the Board's power (and thus *Buckley* would apply) or clarify (i.e., limit) their power (meaning *Buckley* would be inapposite).

Amended Bylaws cannot displace the Original Bylaws without shareholder approval, at least as far as they respect removal.

Plaintiff next argues that giving the Board the power to remove for cause violates the ShA's provision allowing each shareholder to appoint a director (NYSCEF # 27 ¶¶ 59-62; NYSCEF # 67 at 12-13). He also references BCL § 706(c)(2), which states that

> "When by the provisions of the certificate of incorporation the holders of the shares of any class or series, or holders of bonds, voting as a class, are entitled to elect one or more directors, any director so elected may be removed only by the applicable vote of the holders of the shares of that class or series, or the holders of such bonds, voting as a class."

(BCL § 706[c][2]; *see also* NYSCEF # 67 at 13 n 6 [discussing § 706[c][2]). Plaintiff argues the ShA should be treated like articles of incorporation because it is "similarly a founding and binding corporate document" (NYSCEF # 67 at 13 n 6). Plaintiff does not fully lay out his argument, but his argument is incongruous. First, the ShA is not an article of incorporation, so BCL § 706(c)(2) does not apply. Moreover, trying to read the ShA to create classes of shares is a stretch. Finally, the Original Bylaws gave the shareholders and board the power to remove for cause, strongly suggesting that the founders of the company saw no inconsistency between the two documents. Therefore, plaintiff's argument on this point fails.

Finally, plaintiff argues that Amended Bylaw Article III.4(a)'s "inappropriate behavior" provision is an expansion of the definition of "for cause" under the common law. Such amendment either requires shareholder approval under BCL § 706(a) (NYSCEF # 67 at 11-12, citing *Holmes*, 286 AD at 502), or is a "backdoor amendment of the [ShA]" that would "allow a majority of shareholders to strip another shareholder of its rights under the [ShA] without amending the [ShA] itself" (NYSCEF # 27 ¶¶ 63-67).

Either way, plaintiff's argument fails because it matters not what the Amended Bylaws provide regarding cause; defendants have the authority to remove for cause under the Original Bylaws. As discussed, the ShA does not contradict that authority.

However, the assumption implicit in plaintiff's argument is that the "inappropriate behavior" charges levied against him could *only* be "cause" under the Amended Bylaws' definition and not under the Original Bylaws. This is based on plaintiff's argument that there was no cause to remove him, or more to plaintiff's point, defendants did not have cause *as a matter of law*.

Defendants invoke the business judgment rule to support the Board's decision to remove plaintiff. Defendants, relying on *Davidson v James* (172 AD2d

323, 324 [1st Dept 1999]), respond that they do not need to prove cause as a matter of law because their cause is unreviewable under the business judgment rule or internal affairs doctrine absent allegations of fraud or other bad reasons (NYSCEF # 68 at 6). But *Davidson* is about a not-for-profit corporation which is not subject to the BCL. And defendants omit the fact that the *Davidson* court specifically cited to the Not-For-Profit Corporation law in applying the internal affairs doctrine (*see Davidson*, 172 AD2d at 324 ["Petitioners have failed to make a showing warranting court intervention into the internal affairs of respondent [not-for-profit organization] pursuant to section 618 of the Not-For-Profit Corporation Law where there is no indication that the petitioners' removal was tainted by fraud or other wrongdoing"]). It is not clear that *Davidson* applies, but it is analogous in that the petitioners – former members of respondent organization's board of governors – sought reinstatement and to set aside the board of governors' election of new officers and directors. The board had removed petitioners after they instituted personal injury actions against the organization, which is in breach of the petitioners' fiduciary duties (*id*).

What is clear is that the business judgment rule bars judicial review into the internal affairs when there are no allegations of fraud or bad faith or tortious acts by the board members. Because courts are ill-equipped to assess business decisions and determine what actions will promote a business's interest, "courts will defer to those determinations if they were made in good faith (*In re Kenneth Cole Productions, Inc.*, 27 NY3d 268, 274 [2016]). The business judgment rule would not apply if the acts do not further legitimate of the company (*see Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990], especially when the directors have a personal state in the transaction (*see Marx v Akers*, 88 NY2d 189, 195 [1996]).

Here, none of the 67 paragraphs of general allegations in the complaint mentions fraud, bad faith, or any tortious acts in the defendant board members' act in removing plaintiff from the board. And none of the additional nine allegations in the only cause of action related to the removal speaks to cause for the removal. The focus of these allegations was on the board's authority to remove. There are no factual allegations as to cause except to assert that there was no cause for removal.

The Board's authority to remove a board member, as addressed above, comes from the Original Bylaws. And under the business judgment rule, this court will not venture a guess as to the propriety of the Board's decision when no fraud or bad faith or tortious acts alleged in the board's removal actions (*see e.g. Board of Mgrs. of Honto Condominium v Red Apple Child Dev. Ctr.*, 160 AD3d 580, 582 [1st Dept 2018] [dismissing fiduciary duty cause of action as board members were protected by business judgment rule where complaint was devoid of factual allegations supporting the claim]; *Avramides v Moussa*, 158 AD3d 499, 499-500 [1st Dept 2018] dismissing of amended complaint for, among other defects, absence of allegations that the directors committed tortious acts that the business judgment rule would

not apply]). Notably, the only arguments on cause is in the plaintiff's brief, but there are no allegations to show that the Board's actions were motivated by bad faith or self-dealing or are counter to the company's interest. Thus, the business judgment rule applies. And plaintiff's cause of action for reinstatement is dismissed.

As such, plaintiff's cause of action for the books and records, plaintiff, as a shareholder, has a right to books and records under BCL § 624. But, as plaintiff is requesting books and records as a director, this cause of action is also dismissed.

As both causes of action are denied, the complaint is dismissed with prejudice. Thus, it is

ORDERED that defendants motion to dismiss plaintiff's complaint is granted; and it is further

ORDERED that defendants are to file a copy of this Decision and Order on the Clerk of the Court and plaintiff Russell Kaye within 10 days of this order.

This constitutes the Decision and Order of the court.

July 07, 2025
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE