

DANIEL M. HERRIGAN

2011 MAR 29 PM 3: 39

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

112

SUMMIT COUNTY
CHRISTINA M. BRASHEAR,
CLERK OF COURTS

CASE NO. CV-2008-04-2729

Plaintiff,

JUDGE CALLAHAN

v.

ELLORA'S CAVE PUBLISHING, INC.,
et al.

PLAINTIFF'S TRIAL BRIEF, WITNESS
LIST, AND EXHIBIT LIST FOR
DAMAGES HEARING

Defendants.

I. Introduction

Now comes Plaintiff Christina M. Brashear ("Brashear") and hereby submits her Trial Brief for the hearing on damages in this matter. The Court has previously dismissed Defendants' counterclaims and granted default judgment for Brashear against all Defendants as to Defendants' liability, leaving Brashear's damages as the only remaining issue for the Court to resolve. Therefore, this Trial Brief sets forth the law and facts that relate to the categories of damages set forth in the various causes of action in the Complaint.

II. Analysis of Damages

A. Background Facts

Defendant Ellora's Cave Publishing, Inc. ("EC") is an Ohio corporation, engaged in the publication of books. At all times relevant to this litigation, Defendant Tina Engler ("Engler") has held ninety percent (90%) of EC's shares, Defendant Patricia Marks ("Marks") has held five percent (5%) of EC's shares, and Brashear has held the remaining

five percent (5%) of EC's shares. All outstanding EC shares are of an identical class.

Engler and Marks have, at all relevant times, served as directors and officers of EC.

Brashear was an employee, officer, and director of EC until her termination on September 2, 2005.

Defendants Jasmine Jade Enterprises, LLC ("Jasmine Jade"), Brannon-Engler Properties, Ltd. ("Brannon-Engler"), Gothik Grounds, Inc. ("Gothik Grounds"), Lady Jaided, Inc. ("Lady Jaided"), and Awbridge, Hanwell & Hartley, Inc. ("AHH"), are all entities related with Engler.

Jasmine Jade is a publishing company owned by the following individuals in the identified amounts

<u>Member Name</u>	<u>Percentage of Ownership</u>
Tina Engler	75%
Patricia Marks	15%
Richard Darrel King	10%

Brannon-Engler owns the real property where EC and Jasmine Jade do business. Engler is the sole owner of Brannon-Engler. Gothik Grounds operated a coffee shop. Engler is the sole owner of Gothik Grounds. Lady Jaided published a magazine. Engler is the sole owner of Lady Jaided. AHH was created for the purpose of operating a book store. Engler is the sole owner of AHH.

The complaint set forth seven causes of action: (1) violation of shareholder rights to inspect corporate books and records, (2) violation of shareholder rights to make pro rata

distributions, (3) breach of a Buy-Sell Agreement, (4) breach of fiduciary duty owed to a minority shareholder, (5) unjust enrichment, (6) defamation, and (7) wrongful termination.

B. Shareholder Inspection Rights

Brashear requested injunctive relief and attorneys fees for violation of her right to inspect the books of EC. Through the Agreed Judgment Entry Resolving Motion for Preliminary Injunction dated June 20, 2008, Brashear effectively regained her rights as a shareholder to inspect the records of EC. The only remaining issue on this claim is Brashear's attorneys' fees, which are discussed in Section II.I below.

C. Unpaid Shareholder Distributions

Brashear is entitled to all sums that should have been made to her as a shareholder. [Complaint at ¶ 16] "The general rule is that the declaration [of a dividend] creates the relation of debtor-creditor between the corporation and the shareholder, and this debt runs to each shareholder in his or her individual capacity. Hence, a shareholder may maintain an action in his or her own name against the corporation for a proportionate part of the dividend if it is not paid after the declaration. This right of action exists even though no specific fund is set aside by the directors." 12 Ohio Jur. 3d Business Relationships § 715; *see also* R.C. 1701.33(I)(corporation is indebted to shareholder on dividend or distribution, which is at parity with other general unsecured creditors of corporation unless subordinated by agreement). When money becomes due upon a written instrument, where an interest rate is not specified in the instrument, interest is due at the statutory rate established by the tax commissioner. R.C.1343.03(A).

Since Brashear's termination, EC, under the direction of Engler and Marks, has made shareholder distributions to Engler and Marks but has failed to make pro rata distributions to Brashear. The following table, prepared by Mark Bober ("Bober"),

Brashear's damages expert, summarizes the distributions made to Engler and Marks, what Brashear's pro rata share should have been, and the calculation of interest on those missed distributions based on the statutory interest rate.

Current Value of Plaintiff's Portion of Ellora's Cave Distributions - - Calculated as of 1/31/2011					
Period ended	<u>12/31/2006</u>	<u>12/31/2007</u>	<u>12/31/2008</u>	<u>12/31/2009</u>	<u>5/17/2010</u>
Distribution	\$ 230,966	\$ 503,322	\$ 491,716	\$ 430,178	\$ 189,661
Plaintiff's Share (5%)	\$ 11,548	\$ 25,166	\$ 24,586	\$ 21,509	\$ 9,483
Interest Rate	6.00%	8.00%	8.00%	5.00%	4.0%
Damage Period	4.58	3.58	2.58	1.58	0.89
Current Value of Plaintiff's Share	\$ 15,084	\$ 33,158	\$ 29,994	\$ 23,236	\$ 9,822
Total of Plaintiff's Share of Distributions as of 1/31/2011					\$ 111,293

Brashear is also entitled to additional pre-judgment interest on these distributions from January 31, 2011, through the date of the hearing.

Defendants have not produced financial records for any time period after May 17, 2010. Brashear will introduce evidence showing that EC has continued to make distributions since May 17, 2010, to Engler and Marks without making pro rata distributions to Brashear. Assuming the most recent full year (2009) data is prorated over the period from May 17, 2010, to the date of the hearing, April 11, 2011, Brashear is entitled to an additional \$19,387.56, based on the following calculation:

$$(329 \text{ days}) / (365 \text{ days}) \times (\$21,509) = \$19,387.56$$

Brashear is entitled to interest at the statutory rate of 4% per annum from the date of the distribution for this sum as well.

D. Valuation of Brashear's Shares of Ellora's Cave

Brashear is entitled to have Defendants purchase her shares. [Complaint at ¶¶ 18, 22, 25] Brashear and Defendants have each employed expert witnesses to express an opinion as to the value of Brashear's shares. Bober will testify that Brashear's interest in EC is worth \$121,500. Defendants are expected to introduce expert testimony from Jason Bogniard ("Bogniard"). Bogniard is expected to testify that Brashear's interest in EC is worth \$51,700. Part of the difference in valuation is the result of disagreements between the expert witnesses with respect to valuation methodology, including methods employed to determine EC's future sustainable earnings base, weighted average cost of capital, and ability to obtain bank financing. The correctness of each expert's methodology in relation to these issues is appropriately determined by the jury. One issue, the application of lack of control and lack of marketability discounts, accounts for a large part of the disparity. Defendants' expert witness has applied control and marketability discounts in determining his valuation while Brashear's expert witness has not. It is appropriate for this court to exclude the application control and marketability discounts as a matter of law.

Application of control and marketability discounts is inconsistent with the remedies available to Brashear for the claims alleged in the Complaint. Majority shareholders in a close corporation owe fiduciary duties to minority shareholders. *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 109. "Control of the stock in a close corporation cannot be used to give the majority benefits which are not shared by the minority." *Id.* It is appropriate to disgorge any benefit a fiduciary receives as a result of a breach of fiduciary duty. *Biggins v. Garvey* (Ohio App. 11 Dist. 1993), 90 Ohio App.3d 584, 604.

Brashear has alleged breaches of statutory and fiduciary duties by Engler and Marks that have effectively resulted in Brashear being completely deprived of her rights as

an EC shareholder. Specifically, Brashear has been completely excluded from participating in the management and profitability of EC.¹ Engler and Marks have directly benefited from this deprivation by taking the value of Brashear's shares for their own benefit by redirecting Brashear's share of corporate distributions to themselves. This has resulted in Engler and Marks unjustly profiting from Brashear's interest in EC.

Applying marketability and control discounts would allow Engler and Marks to profit from their wrongdoing because Engler and Marks have appropriated the full intrinsic value, not just the market value, of Brashear's shares to themselves. Engler and Marks have effectively already acquired Brashear's interest by taking all of the benefits associated with the shares for themselves. Therefore, Engler and Marks should not be permitted to benefit from an alleged lack of a market for something they have already taken from Brashear. Further, Engler and Marks are in control of EC and, thus, Engler and Marks receive no less value from taking Brashear's interest because they maintain a controlling interest in EC.

To be sure, there are instances where applying control and marketability discounts in appraising stocks is appropriate. For example, in a dissenting shareholder action, the statutory definition of "fair cash value" has been interpreted to include control and marketability discounts. *E.g., Akron Standard Meats & Foods Co. v. Calle* (Ohio App. 1981), 9th Dist. No. 10130, 1981 WL 4185, at *1. But, Brashear has not brought this suit as a dissenting shareholder action. In a dissenting shareholder action, wrongdoing by the shareholders approving a major corporate change is not required to be shown for the dissenting shareholder to receive fair cash value. *See R.C. § 1701.84*. In such cases, it

¹ Defendants have nevertheless continued to impose the liabilities of share ownership on to Brashear by reporting pass-through income to the Internal Revenue Service, resulting in tax liability for Brashear.

would not be unreasonable to limit the minority shareholder to the value of her shares adjusted for lack of control and marketability because there is no competing interest in ensuring the majority does not unfairly benefit from its non-wrongful actions. But, the remedy in a breach of fiduciary duty case must assure that the defendants receive no benefit from their wrongdoing, and applying control and marketability discounts would give Engler and Marks a substantial benefit and encourage other majority shareholders to similarly violate the rights of minority shareholders. Therefore, the Court should rule as a matter of law that control and marketability discounts should not be applied.

E. Transfer of EC Assets to Other Defendants

Brashear is entitled to damages from Defendants for breaches of fiduciary duties and unjust enrichment for transfer of EC's assets, at the direction of Marks and Engler, to Engler, Marks, and the other entity Defendants. [Complaint at ¶¶ 25, 28] These actions directly reduced the value of Brashear's interest in EC and unjustly enriched the recipients of the transferred assets.

For a breach of fiduciary duty claim, a plaintiff may recover all damages proximately caused by the breach of fiduciary duty. *Modic v. Modic* (Ohio App. 8 Dist. 1993), 91 Ohio App.3d 775, 785. The measure of damages for unjust enrichment is the reasonable value of the benefit conferred. *Saber Healthcare Group, L.L.C. v. Starkey*, 6th Dist. No. H-09-022, 2010-Ohio-1778, ¶15. EC has transferred assets to the other Defendants in two primary ways. First, EC made low interest loans to the other Defendants. Second, EC paid above market rent to Brannon-Engler for use of the real property where EC has its principal place of business.

Without any business justification, EC borrowed money through commercial loans and lines of credit from Fifth Third Bank and Charter One Bank and then subsequently

used the proceeds of these loans and other cash generated by EC to make loans to Engler, Marks, and the other entity Defendants at interest rates substantially below the rates on the Fifth Third and Charter One loans. This difference in interest rates resulted in a substantial net interest expense, reflecting an outflow of cash from EC. These loans constituted a breach of fiduciary duty by EC, Engler, and Marks and resulted in unjust enrichment of the recipients. The net outflow and Brashear's damages were as follows:

<u>Year</u>	<u>Net Interest Expense</u>	<u>Brashear's Share (5%)</u>
2005	\$19,039	\$951.95
2006	\$24,070	\$1,203.50
2007	\$47,745	\$2,387.25
2008	\$67,176	\$3,358.80
2009	\$66,845	\$3,342.25
Total:		\$11,243.75

EC has not provided full-year financial records for 2010 or part-year financial records for 2011. Utilizing 2009 data to approximate 2010 and 2011 damages, Brashear is entitled to an additional \$3,342.25 for 2010 and \$924.84 for 2011 through the scheduled date of the damages trial. In total, Brashear is entitled to \$15,510.84 for damages relating to EC's improper diversion of interest to Marks, Engler, and the other entity Defendants.

Brannon-Engler is the owner of the real property where EC has its principal place of business. Engler is the sole owner of Brannon-Engler. EC pays rent to Brannon-Engler properties at a rate that is substantially above the market rate for rent at comparable

properties. Bober will testify as to the market rents and actual rents charged by Brannon-Engler. These rents are:

<u>Year</u>	<u>Actual Rent</u>	<u>Market Rent</u>	<u>Rent Differential</u>	<u>Brashear's Share (5%)</u>
2006	\$83,200	\$40,131	\$43,129	\$2,156.45
2007	\$97,200	\$40,131	\$57,069	\$2,853.45
2008	\$103,268	\$40,131	\$63,137	\$3,156.85
2009	\$97,200	\$40,131	\$57,069	\$2,853.45
Total:				\$11,020.20

EC has not provided full-year financial records for 2010 or part-year financial records for 2011. Utilizing 2009 data to approximate 2010 and 2011 damages, Brashear is entitled to an additional \$2,853.45 for 2010 and \$789.58 for 2011 through the scheduled date of the damages trial. In total, Brashear is entitled to \$14,663.23 for damages relating to EC's improper diversion of EC funds to Brannon-Engler in the form of exorbitant rent.

F. Defamation

Brashear is entitled to damages for defamation. [Complaint at ¶ 30]. Defamatory statements injurious to one's reputation to conduct business are defamatory per se.

Dunnigan v. City of Lorain, Ninth Dist. No. 02CA008010, 2002-Ohio-5548, ¶ 35. A plaintiff is entitled to presumed damages when she has established defamation per se.

Gilbert v. WNIR 100 FM (Ohio App. 9 Dist. 2001), 142 Ohio App.3d 725, 744. Brashear set forth a claim for defamation per se in that the Complaint alleged defamatory statements injurious to Brashear's reputation to conduct business. Therefore, Brashear is entitled to presumed damages to her reputation.

The evidence will show Engler made the following defamatory statements about

Brashear:

- Statements on the "ec_biz" Yahoo! Group:

One author, along with a former EC employee, are being investigated for criminal activity by a prosecutor in Ohio. A prosecutor doesn't take up these cases on whims or as crap shoots. The fact they are even investigating, whether or not these people are charged, should tell you that there is a good amount of evidence.

...

If you want an uneducated, high school dropout with zero experience at running a major business (but who reads romance novels) running the publishing company you write for than you *can* go write for her.

...

CRIS BRASHEAR WAS NOT FIRED BECAUSE OF SOMETHING SIMPLE LIKE A PERSONALITY CONFLICT. SHE WAS FIRED FOR INSUBORDINATION, INCOMPETENCE AND SABOTAGE

...

A few (on many) offenses that led to her termination:

a. Against direct orders to the contrary, she obligated EC to hundreds of thousands of dollars at Lightning Source right before she was fired, knowing it would put a financial strain on us for some time. This screwed up the print schedule (as many of you are painfully aware) and took a year to straighten totally out. LSI is not the only "for instance" of this bleed-em-dry tactic. . . .

b. She had a habit of fraternizing where she shouldn't. A case in point: Brashear was instructed not to have EC editor Heather Osbourne over to her house unless all staff editors were invited, but she defied that instruction time and time again. There is a reason everyone from the military to Fortune 500 companies discourage fraternizing. Not only did her inappropriate contact with Heather Osbourne leave other editors feeling disenfranchised, but it diluted Raelene's power. In other words, as the editors then managing editor, Raelene was finding out about decisions that her then-

superior (Brashear) had made from the mouth of her subordinate (Osbourne).

c. Brashear made repeated, demeaning sexist remarks to the men who work at EC. Because of that, and the fact that she made work a living hell for our sole wheelchair-bound employee and fired our sole African-American employee at the time, we came to view her as an EEOC trainwreck waiting to happen.

d. I've lost several good people over the years because they couldn't stand dealing with Brashear. This last time I had to make a choice: she had to go or some key people were going to walk. By this point I knew what had to be done.

e. Toward the end, she started telling authors that she only did what I told her to do. To that I say, what an utter crock of pure shit. When a situation arises and you tell the publisher to "deal with it", most publishers don't construe "deal with it" as an invitation to castigate authors on the business loop. There's this little thing called social savvy that would keep most people from contemplating as much.

- Engler's response to "Jane's" question on the DearAuthor.com website,

Jane: Why did you go to twice a week release? The perception is that you can't possibly provide quality editing when it seems like there is such a huge quantity of books being released

[Engler]: And, Jane, I'm sure that perception was generated from people whose motives you should really hold suspect. For instance, I know who the "inside source: is at 2 of the blogs. This person was *never* an insider. (That would be akin to saying everyone who cooks food at McDonalds is an insider.) The only employees with any sort of insider knowledge whatsoever are department VPs, period. Nobody else has access to the inner workings of the company. To suggest otherwise makes for great blog fodder, but it simply isn't true.

- Engler's statement in an e-mail,

There is also an unfortunate possibility that you just got caught in an attempt by a rival publisher to discredit EC, make us look bad to the readers. A former executive at EC was fired, and started an e-pub of her own. We've been embroiled in legal actions with her, and it has been strongly hinted (but not provable) that she or others in the situation are behind attacks like what is going on in this blog.

Brashear is seeking damages in an amount that reasonably and fairly compensates Brashear for her injuries.

G. Wrongful Termination

Brashear is entitled to damages for wrongful termination. [Complaint at ¶ 32]. Brashear will seek to recover damages for lost salary. In a wrongful termination case, the plaintiff is entitled to damages to place plaintiff in the position she would have occupied absent the wrongful termination. *See Mers v. Dispatch Printing Co.* (Ohio App. 10 Dist. 1988), 39 Ohio App.3d 99, 104. The evidence will show Brashear's annual salary at the time of her wrongful termination was \$50,000.

H. Punitive Damages

Brashear is seeking punitive damages on her breach of fiduciary duty and defamation claims. The evidence will show that Defendants maliciously sought to injure Brashear financially, personally, and professionally, and acted to enrich themselves at the expense of Brashear.

I. Attorneys' Fees

Brashear is entitled to reasonable attorneys' fees for the claims in her Complaint, [Complaint at ¶¶ 16, 22, 25, 30, 33,] and as a sanction for Defendants' conduct in these proceedings. [Orders dated November 25, 2009, and November 10, 2010]. Determination of attorneys' fees is appropriately a determination for the Court and not a jury. *See Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662.

Brashear intends to introduce evidence related to attorneys' fees at a separate hearing to the bench without jury. Brashear intends to introduce testimony either by

affidavit or through live testimony of Brashear's counsel, Irving Sugerman, as well as documentary evidence identifying the amount of fees Brashear has incurred.

III. Witness List

Brashear intends to call the following witnesses:

- Christina Brashear, Plaintiff
- Mark Bober, Plaintiff's Expert
- Tina Engler, Defendant
- Patricia Marks, Defendant
- Leslie Janikis, Accountant for Defendants

IV. Exhibit List

A list of Brashear's expected exhibits is attached as Exhibit 1.

V. Transcripts of Deposition Testimony

At this time, Brashear does not intend to introduce transcripts of any deposition testimony into evidence. Brashear will seek to introduce deposition testimony if necessary to impeach or contradict the testimony of any witness or if any witness becomes unavailable.

Respectfully submitted,

GOLDMAN & ROSEN, LTD.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the forgoing was served by ordinary mail on this 29th day of March, 2011, upon:

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Mark A. Riemer (0085178)

EXHIBIT 1

Plaintiff's Exhibit Index¹

<u>No.</u>	<u>Description</u>	<u>Plf's Depo. Ex. No</u>
1	Current Value of Plaintiff's Portion of EC Distributions (from Bober Addendum)	
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4	Normalized Net Income, EBITDA, EBIT, and Cash Flows (from Bober Addendum)	
5	Income Approach: Capitalization of Cash Flows (from Bober Addendum)	
6	Weighted Average Cost of Capital Calculation (from Bober Addendum)	
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¹ Plaintiff reserves all objections to the introduction of any of these exhibits into evidence by Defendants.

EXHIBIT 1

No.	Description	Plf's Depo. Ex. No
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43	2004 Engler Federal Tax Return	
44	2005 Engler Federal Tax Return	
45	2006 Engler Federal Tax Return	
46	2007 Engler Federal Tax Return	
47	2008 Engler Federal Tax Return	
48	2009 Engler Federal Tax Return	
49	2003 Marks Federal Tax Return	
50	2004 Marks Federal Tax Return	
51	2005 Marks Federal Tax Return	
52	2006 Marks Federal Tax Return	
53	2007 Marks Federal Tax Return	

EXHIBIT I

No.	Description	Plf's Depo. Ex. No
54	2008 Marks Federal Tax Return	
55	2009 Marks Federal Tax Return	
56	Letter dated October 16, 2007, from Carano to Hackenberg	
57	Borders Settlement Agreement	