

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

PROMAT TECHNICAL SERVICES, PVT. LTD., a company registered under the Indian Company Act,)	
)	
Plaintiff,)	Law No. LACV 152295
)	
vs.)	
)	RULING ON MOTION FOR SUMMARY JUDGMENT
FLSMIDTH, SIOUX CITY, INC., f/k/a PHILLIPS KILN SERVICES, LTD., an Iowa Corporation; FLSMIDTH, INC., d/b/a FLSMIDTH USA, a Delaware Corporation,)	
)	
Defendants.)	
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FLSMIDTH, USA, INC (successor-in-interest PHILLIPS KILN SERVICES, LTD.,)	
)	
Third Party Plaintiff,)	
)	
vs.)	
)	
MANI V. SUBRAMANIAN,)	
)	
Third Party Defendant)	

On the 13th day of May, 2015, Defendant’s Motion for Summary Judgment came on for hearing. Attorney Paul Lundburg represented Plaintiff Promat Technical Services, PVT, LTD and Third-Party Defendant Mani V. Subramanian. Attorney Michael Weston represented FLSmidth USA, Inc., (successor-in-interest to Phillips Kiln Services, LTD, and FLSmidth, Inc. After reviewing the entire record, examining the Briefs and the exhibits of the parties, and having considered the applicable law, the Court enters the following Ruling.

Plaintiff’s lawsuit arises out of a 2004 Agreement between PKS USA, Mani V. Subramanian (“Mani”), Promat Technical Services, PVT, LTD, (“Promat”) and PKS India. In 1992, PKS India was formed by Mani and Phillips Kiln Services, Ltd, (“PKS USA”). Under the 1992 Agreement, PKS India was equally owned with Mani holding 50 percent of the stock and

PKS USA holding the remaining 50 percent of the shares. Following the formation of PKS India, Mani formed Promat Technical Services, PVT, LTD (“Promat”). Mani then sought to transfer his 50 percent share of PKS India to Promat. In 2004, PKS, Mani, PKS India and Promat entered into a written Agreement that provided PKS USA’s written consent for Mani to transfer his 50 percent share of PKS India stock to Promat.

The 2004 Agreement provides that PKS USA and Promat are 50%-50% equal shareholders in PKS India, a joint venture company to provide rotator kiln services in India and the Middle East. The Agreement further states that Mani is the “managing director” of PKS India. The Agreement also provides that Mani “shall regularly consult with PKS USA and Promat regarding the operations and finances of the company . . . “

Paragraph 12 of the 2004 Agreement states:

12. CHANGE OF OWNERSHIP. Neither PKS USA nor Promat may transfer any beneficial ownership of the Company to a third party without the express written consent of the other. Such a proposal to sell to a third party shall be in writing. The seller shall disclose as much information regarding the prospective purchaser to the non-selling party as reasonably requested by the non-selling party. If consent by the non-selling party is not given within 60 days of a request for the same, then the non-selling party may by written notice to the other party trigger the provisions of this Agreement regarding liquidation of the Company. Any third party acquiring a beneficial ownership interest in the Company shall, as a condition precedent to becoming a beneficial owner, agree to be bound by this Agreement and any later amendments or revisions of it...

Pursuant to the 2004 Agreement, PKS India was jointly and equally owned by PKS USA and Promat.

In August 2011, FLSmidth, Inc. (hereinafter “FLS Inc.”), a subsidiary of FLSmidth A/S in Denmark, entered into a stock purchase agreement with PKS USA. The agreement transferred one hundred percent of PKS USA’s stock to FLS Inc. and provided FLS Inc. all ownership interest, profit interest, and other equity interests of the company. Neither FLS Inc. nor PKS

USA obtained Promat's consent prior to FLS Inc.'s acquisition of PKS USA. Following the acquisition, PKS USA became known as FLSmidth Sioux City ("FLS Sioux City").

FLS, Inc.'s parent company, FLSmidth A/S is located in Denmark. FLSmidth A/S owns FLSmidth India, which, for many years prior to the filing of this lawsuit, had been a competitor of PKS India. After the transfer of 100 percent of PKS USA's stock to FLS, Inc., FLS, Inc.'s parent company, FLSmidth A/S contacted Promat attempting to obtain Promat's 50 percent share in PKS India. The companies attempted to negotiate Promat's sale of PKS India to FLSmidth India but were unable to reach an agreement.

Plaintiff Promat initiated this action on December 18, 2012, alleging FLS, Inc.'s acquisition of PKS USA transferred the beneficial ownership of PKS USA's 50 percent of the shares in PKS India without Plaintiff's consent, in violation of the 2004 Agreement. Plaintiffs further assert the Defendants breached a fiduciary duty (Count III), a duty of loyalty (Count II) and an implied covenant of good faith and fair dealing (Count IV) a Defendant allegedly intentionally interfered with the business relations of PKS India by, among other things, hiring away a number of PKS India's employees, bad mouthing PKS India to its customers and undercutting PKS India in pricing, Plaintiffs assert that this intentional interference was done in retaliation for the unsuccessful negotiations over the failed attempts to purchase Plaintiff's 50 percent share of PKS India. Plaintiff seeks both compensatory and punitive damages as to each count.

Defendants assert Plaintiff's claims for breach of fiduciary duty (Count III) and breach of duty of loyalty (Count II) cannot survive because no such duties are owed between equal shareholders. Defendants argue that under Iowa law such duties only flow from minority shareholders or corporate officers and directors to the company itself or minority shareholders.

Defendants also assert that Plaintiff's claim for breach of an implied covenant of good faith and fair dealing (Count IV) cannot survive because the alleged intentional actions of PKS India were carried out by or on behalf of FLS India and not the entities at bar. Finally, Defendants assert "only PKS USA could possibly be held liable for Count IV because the cause of action is connected only to the parties to the 2004 Agreement."

MATERIAL FACTS

The Court has carefully reviewed Plaintiff's Statement of Material Facts and finds the facts set forth therein to be carefully supported by the record including references to depositions and exhibits which will be admitted at trial. The facts are as follows.

1. Movants FLSmidth Sioux City, Inc. and FLSmidth, Inc. were two of the original defendants in this case. (Petition Caption) The caption referred to FLSmidth, Inc. as FLSmidth USA, Inc. (Petition Caption) In early 2014, the two entities were merged into a new entity - FLSmidth USA.

2. Defendants admit that FLSmidth USA is the successor in interest to Phillips Kiln Services, Ltd. (PKS USA). (Amended Counterclaim par. 1)

3. Promat's Petition alleges that as a result of the August 18, 2011, Stock Purchase Agreement between FLSmidth, Inc., as buyer, and PKS USA, as seller, PKS USA transferred the beneficial ownership of its fifty percent shareholding in PKS India without Promat's consent. (Petition par. 9)

4. In its ruling of August 27, 2013, on defendants' previous Motion for Summary Judgment (prior to transfer to Business Court), the court held that genuine issues of fact precluded summary judgment for defendants on the allegation that PKS USA's fifty percent

shareholding in PKS India was transferred to either FLSmidth, Inc. and/or FLSmidth A/S (the Danish parent) without Promat's consent. (Appendix p. 67-68) The defendants do not challenge this prior ruling in their current Motion for Summary Judgment.

5. Exhibit 16 shows the ownership chain for the FLSmidth group after the August 2011 purchase of PKS USA. (Appendix p. 1)

6. Eric Bertness was the CEO of PKS USA at the time of the August 2011 stock sale to FLSmidth, Inc. (Appendix p. 19) Mr. Bertness remained CEO of FLSmidth Sioux City, Inc. after the sale. (Appendix p. 19)

7. In 1992, PKS USA formed a fifty percent joint venture with Mani to own and operate PKS India. (Appendix p. 20)

8. At the time of his deposition on June 17, 2013, Mr. Bertness maintained that FLSmidth Sioux City, Inc. controlled the fifty percent shareholding in PKS India. (Appendix p. 21) Mr. Bertness admitted that FLSmidth, Inc. controlled the Board of Directors of FLSmidth Sioux City, Inc. "because they own the shares". (Appendix p. 21) Mr. Bertness admitted that FLSmidth, Inc. controls who sits on the Board of FLSmidth Sioux City, Inc. (Appendix p. 22-23)

9. Eric Bertness received communications from Mani that FLS India was competing directly with PKS India for customer jobs. (Appendix p. 24-25) Mr. Bertness claims that he could not do anything about the complaints. (Appendix p. 25) He did pass on the complaints to Scott Baker of FLSmidth, Inc. and he does not know what Mr. Baker did with the complaints. (Appendix p. 25) Mr. Bertness did nothing about Mani's complaints other than talking to Scott Baker. (Appendix p. 26)

10. Mr. Bertness testified that FLSmidth Sioux City, Inc. wanted to transfer its fifty percent shareholding in PKS India to FLS India for tax purposes. (Appendix p. 27) Mani refused to consent to this transfer because FLS India was a direct competitor of PKS India. (Appendix p. 28)

11. Mr. Bertness was aware that FLSmidth A/S was having conversations with Mani concerning valuation of Promat's fifty percent share of PKS India. (Appendix p. 29) Mr. Bertness, as CEO of FLSmidth, Inc. was not privy to those discussions between FLSmidth A/S and Mani. (Appendix p. 29)

12. Mr. Bertness was present for negotiations in Denmark between FLSmidth A/S and Mani for purchase of Promat's fifty percent shareholding in PKS India. (Appendix p. 29) When asked if he was part of the discussions, Mr. Bertness responded that "I sat through them. I was not part of the negotiations". (Appendix p. 29) Mr. Bertness testified that during the negotiations an enterprise value for Promat's fifty percent shareholding in PKS India was established at \$5.2 million dollars. (Appendix p. 29-30)

13. When Mr. Bertness and Scott Baker went to Mumbai in December of 2011, they spent most of their time with Mani's senior engineer named Murali. (Appendix p. 32) Mr. Murali went to FLS India in 2012. (Appendix p. 32) Mr. Bertness denies that he and Mr. Baker talked to Murali about going to work for FLS India. (Appendix p. 33) However, R. Balachandran of FLS India told Ulrik Hartvig of FLSmidth A/S in an email of October 24, 2012, that FLS India employee Satya was instructed by Eric Bertness and Scott Baker to maintain a dialogue with Murali. (Appendix p. 14)

14. Mr. Bertness received emails from Mani in April 2013 about FLS India competition and interference with customers of PKS India. (Appendix p. 34) (Exhibit 19 at Appendix p. 2-9) Mr. Bertness testified he passed the complaints on to Scott Baker of FLSmidth, Inc. but does not know how Mr. Baker responded. (Appendix p. 34-35)

15. Mr. Bertness was on the Board of Directors of PKS India. (Appendix p. 35) Mr. Bertness agrees that as a member of the Board of Directors he owes a responsibility to the other owner to protect the value of the company. (Appendix p. 35)

16. During the negotiations in Copenhagen between FLSmidth A/S and Mani, Mr. Bertness testified that he could not recall whether Ulrik Hartvig made a statement to Mani that if FLS takes away PKS India's engineers, PKS India would have no value. (Appendix p. 36) Mr. Bertness testified at his deposition that this could have happened, he simply does not recall. (Appendix p. 36)

17. After the July 2012 meeting in Copenhagen, Mr. Bertness was aware that employees of FLS India were making phone calls to Mr. Murali at PKS India. (Appendix p. 37)

18. Scott Baker works for FLSmidth, Inc. in Bethlehem, Pennsylvania and reports to the CEO of FLSmidth, Inc. (Appendix 39-40) The CEO of FLSmidth, Inc. reports to FLSmidth A/S in Denmark. (Appendix 40)

19. FLSmidth A/S of Denmark owns FLS US Holdings, Inc. which owns FLSmidth, Inc. (Appendix 40) FLSmidth Sioux City, Inc. is a subsidiary of FLSmidth, Inc. which owns one hundred percent of its shares. (Appendix 41)

20. FLSmidth, Inc. determines who sits on the Board of Directors of FLSmidth Sioux City, Inc. (Appendix 42)

21. Before Kaspar Kristiansen of FLS A/S sent the letter of November 18, 2011 to Promat inviting negotiations, Scott Baker had told Mr. Kristiansen that the key elements of PKS India were the employees and leadership of the employees and that "it was important for us to have them secured or have them involved if an acquisition was made". (Appendix 43-44)

22. During a meeting in Mumbai in late 2011, Mani told Mr. Baker about bad mouthing of PKS India by FLS India personnel. (Appendix 46) Mr. Baker talked to the lead person at FLS India and encouraged him to avoid the bad mouthing. (Appendix 46) Mani continued to complain about bad mouthing or interference from PKS India. (Appendix 47) In response to the emails in Exhibit 19 from Mani to Eric Bertness, Mr. Baker was aware of those complaints and did nothing in response. (Appendix 48-49) Mr. Baker did no investigation to see if Mani's claims of interference as set forth in Exhibit 19 were accurate. (Appendix 50-51)

23. R. Balachandran was vice president of customer services for FLSmidth India at the time of his deposition on November 10, 2014. (Appendix 52-53)

24. An employee named Satya reported to Mr. Balachandran at FLS India. Mr. Satya was assistant general manager for plant services. (Appendix 54)

25. Mr. Murali, formerly of PKS India, works for FLSmidth India. When Mr. Murali joined FLS India he reported directly to Mr. Balachandran. (Appendix 54-55) Mr. Balachandran recruited Mr. Murali to work for FLSmidth India. (Appendix 55) Mr. Murali joined FLS India in October 2012. (Appendix 56-57)

26. At the time Mr. Murali joined FLS India in October 2012, Mr. Balachandran's direct supervisor was Ulrick Hartvig from Copenhagen. (Appendix 57)

27. Mr. Balachanran met with Eric Bertness in India and talked about Mr. Murali. Bertness told him that Murali was a key employee and good resource. (Appendix 58-59)

28. Mr. Balachanran was told by Scott Baker and Eric Bertness to maintain a dialogue with Murali. (Appendix 59-60) His employee, Mr. Satya, was also instructed by Eric Bertness and Scott Baker to maintain a dialogue with Murali. (Appendix 61)

29. Deposition Exhibit 209 is an email from Mr. Balachandran to Ulrick Hartvig of October 24, 2012. (Appendix 14) In the email, Mr. Balachandran states that "Satya was under instructions from Eric Bertness and Scott Baker to maintain a dialogue with Murali". (Appendix 14)

30. When asked at his deposition if he was aware that Satya was under instructions from Eric Bertness and Scott Baker to maintain a dialogue with Murali, Mr. Balachandran answered: "we all were aware that we should have a constant dialogue not only with Murali, but all the PKS employees." (Appendix 61)

31. In late 2012 and through 2013, FLS India was in competition with PKS India for customers. (Appendix 62) Mr. Balachandran testified there was not any cooperation between FLSmidth India and PKS India in 2012 and 2013. (Appendix 62) Mr. Balachandran acknowledged that the two companies would bid against each other for customer orders. (Appendix 62)

32. Mr. Balachandran does not recall that Scott Baker or Eric Bertness ever told him to have Satya stop contacting Murali. (Appendix 62)

33. Kaspar Kristiansen testified at his deposition that during the negotiations in Copenhagen in July 2012, there was a discussion about key employees of PKS India and their contribution to enterprise value. (Appendix 16) Mr. Kristiansen testified that "it's difficult to attach an enterprise value to key employees but it is clear this was a service business, so without any key employees, there would be no business, and hence the value of the business would be zero. So what we were buying here was the key employees and the customers they were serving, but without the key employees there was no business". (Appendix 16) Mr. Kristiansen acknowledged that if all the key employees of PKS India left the company, the value of the company would be zero. (Appendix 16-17)

34. In his deposition, the following question and answer appears:

Page 21, Line 4

Question: During the meetings in Copenhagen in July 2012, did Ulrick Hartvig make that statement to Mani, that if the key employees left, the value would be zero?

Page 21, Line 8

Answer: I don't know if he used those exact words but, yes, that was discussed that the main purpose, the main -- the main assets of PKS India were the key employees. (Appendix 17)

35. In an email to Kaspar Kristiansen of September 7, 2012, Mani told Mr. Kristiansen that Murali and the other engineers were being solicited by an FLS employee (Satya) and that Mani had been warning of this to Mr. Kristiansen, to Ulrik Hartvig, to Scott Baker, and to Eric Bertness. (Appendix 11) In a responsive email of September 8, 2012, Mr. Kristiansen stated that "if any FLS employees are talking to Murali, this is totally unacceptable. I would

very much like to know who this is so we can take appropriate means, which will be serious".

(Appendix 11) In that email, Mr. Kristiansen further stated that "Murali is an important part of our future plans". (Appendix 11)

36. In a letter to Eric Bertness in response to an email from Bertness of March 16, 2012, Mani told Bertness that Mr. Satya of FLS India was attempting to poach Mani's senior people and was under cutting PKS India quotes to customers. (Appendix 12) As set forth above, unknown to Mani, Mr. Bertness and Mr. Baker had instructed Mr. Satya to maintain a dialogue with Murali. (Appendix 14).

**Motion for Summary Judgment of
Defendant's FLSmidth Sioux City, Inc.**

This Defendant contends that under Iowa law it cannot owe Promat a duty of loyalty (Count II) or fiduciary duties (Count III) because Defendant and Promat were equal shareholders in PKS India. On Promat's claim for breach of the implied covenant of good faith and fair dealing (Count IV), Defendant contends that the claim cannot survive "because the alleged intentional actions of PKS India were carried out or on behalf of FLS India and not the entities at bar."

Defendants cite *Cookies Food Products, Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988) in support of the proposition that no fiduciary duty is owed until one acquires "majority control" of a company. *Cookies*, at 451. The Court has reviewed the Supreme Court's decision in *Cookies* and it is correct that the Iowa Supreme Court noted in passing that "before acquiring majority control" a minority shareholder owed no fiduciary duty to the company or other minority shareholders. However, this statement was dicta as the Court was dealing with a situation in which the majority shareholder was alleged to have breached his fiduciary duties. The situation in this case is considerably different with the parties being 50/50

shareholders and both being involved with management decisions affecting the company.

Defendants acknowledge that fiduciary duties are owed by directors and officers of a corporation to the corporation and its shareholders. See *Rowan v. Lamars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979); *Bump v. Stewart*, 336 N.W.2d 731 (Iowa 1973); *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517 (Iowa 1974); *Holden v. Construction Machine, Co.*, 202 N.W.2d 348 (Iowa 1972), *Cookies Food Products, Inc., Id.* Defendants also acknowledge that the Iowa Supreme Court has long recognized a fiduciary duty between a majority shareholder and a minority shareholder. *Linge v. Ralston Purina, Co.*, 293 N.W.2d 191, 194 (Iowa 1980).

In considering whether 50/50 shareholders owe a fiduciary duty, the Court also considers the following cases instructive. Before citing the case law, the Court notes that Defendant admits that PKS India was a 50/50 joint venture, first with Mani in 1991 and then with Promat under the 2004 Shareholder Agreement. (Appendix P. 20). The Iowa Supreme Court has held joint venturers “owe the duty of finest loyalty and such loyalty continues through the life of a venture and its dissolution.” *Greenberg v. Alter Company*, 124 N.W.2d 438, 440 (Iowa 1963). A fiduciary relationship exists between joint venturers. *Kurtz v. Trepp*, 375 N.W.2d 280, 283 (Iowa App. 1995). The status of FLSmidth Sioux City, Inc., and Promat as joint venturers, regardless of their respective share ownership in PKS India, gives rise to reciprocal duties of loyalty and fiduciary duty under Iowa law. The Iowa Supreme Court has also held that shareholders in closely held corporations “owe each other” the fiduciary duty “of utmost good faith and loyalty.” *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 670 (Iowa 2013). In *Baur*, the case actually involved not equal shareholders but a majority and minority shareholder, yet the Court held in that closely held corporation that the shareholders “owe each other” the fiduciary duty of utmost good faith and loyalty. *Id.*

In considering whether 50/50 shareholders owe each other fiduciary duties, it is also relevant to consider that Iowa law has long held that partners owe each other fiduciary duties. See *Joseph v. Mangos*, 185 N.W.2d 464, 495 (Iowa 1921) (“partnership involves fiduciary relations . . . this obligation of partners to exercise the utmost good faith towards one another applies not only during the life of the partnership, but extends to their settlements and transactions from the inception of the partnership to its dissolution . . .”). If equal partners, joint venturers and shareholders in closely held corporations owe each other a fiduciary duties, the Court sees little reason why those same duties should not be required of equal shareholders.

Poulsen v. Russell, 300 N.W.2d 289 (Iowa 1981), also supports a finding of a fiduciary duty between equal shareholders. In *Poulsen*, the two individuals entered into an agreement that made them co-owners of a business. The business was later incorporated and the individuals became the only two stockholders and each owned 50 percent. After the parties’ relationship deteriorated, one shareholder petitioned the court for damages resulting from the breach of fiduciary duty by the other shareholder. The shareholder who allegedly breached a fiduciary duty to his co-owner, conceded the parties were in a fiduciary relationship but denied having breached the duty. *Poulsen*, 300 N.W.2d at 293. While the issue of whether equal shareholders owed each other a fiduciary duty was not directly assessed on appeal because the shareholder had conceded that fact, the Iowa Supreme Court found the issue of whether the shareholder breached a fiduciary duty to the other shareholder was properly submitted to the jury. *Id.* Similarly, in *Dunning v. Bush*, 536 Fed. 3rd, 879, 86 (8th Circuit 2008), the Court found that equal shareholders of a closely held corporation owe each other fiduciary duties. Although the case was submitted under Minnesota law, it is nonetheless instructive. Based on the authorities cited above, the Court finds that equal shareholders owe each other a fiduciary duty.

Defendant's motion omits any discussion of the corporate defendant's liability for the actions of its CEO Eric Bertness. Mr. Bertness was also a member of the Board of Directors of PKS India. (Appendix p. 35) A director of a corporation owes the corporation and its shareholders complete loyalty, honesty and good faith. Midwest Management Corp. v. Stephens, 353 NW2d 76, 80 (1984). "That duty is owed the corporation and its shareholders whenever the actions of the director concern 'matters affecting the general well being of the corporation'". Id., quoting Yerke v. Batman, 176 Ind. App. 672, 676, 376 NE2d 1211, 1214 (1978). The corporate defendant FLSmidth Sioux City, Inc. is liable for any alleged wrongful acts of its officer Eric Bertness acting within the scope of his employment. Eric Bertness was the CEO of PKS USA at the time of the August 2011 stock sale to FLSmidth, Inc. and Mr. Bertness remained CEO of FLSmidth Sioux City, Inc. after the sale. (Appendix p. 19) The jury could find the following: when Mr. Bertness and Scott Baker went to Mumbai in December 2011, they spent most of their time with Mani's senior engineer, Mr. Murali. (Appendix p. 32) Mr. Murali went to work for FLS India in 2012. (Appendix p. 32) Mr. Bertness denies that he and Mr. Baker talked to Murali about going to work for FLS India. (Appendix p. 33) However, R. Balachandran of FLS India told his boss Ulrik Hartvig of FLSmidth A/S in an email of October 24, 2012, that FLS India employee Satya was instructed by Eric Bertness and Scott Baker to maintain a dialogue with Murali. (Appendix p. 14)

Mr. Bertness was on the Board of Directors of PKS India. (Appendix p. 35) Mr. Bertness agrees that as a member of the Board of Directors he owes a responsibility to the other owner to protect the value of the company. (Appendix p. 35) Mr. Bertness received emails from Mani in April 2013 about FLS India competition and interference with customers of PKS India. (Appendix p. 34) (Exhibit 19 at Appendix p. 2-9) Mr. Bertness claims he passed the complaints

on to Scott Baker of FLSmidth, Inc. but does not know how Mr. Baker responded. (Appendix p. 34-35) After the July 2012 meeting in Copenhagen, Mr. Bertness was aware that employees of FLS India were making phone calls to Mr. Murali at PKS India. (Appendix p. 37) Mr. Balachandran of FLS India was told by Scott Baker and Eric Bertness to maintain a dialogue with Murali. (Appendix p. 59-60) Mr. Balachandran's co-employee, Mr. Satya, was also instructed by Eric Bertness and Scott Baker to maintain a dialogue with Murali. (Appendix p. 61) When asked at his deposition if he was aware that Satya was under instructions from Eric Bertness and Scott Baker to maintain a dialogue with Murali, Mr. Balachandran answered: "we all were aware that we should have a constant dialogue, not only with Murali, but all the PKS employees". (Appendix p. 61) In a letter to Eric Bertness in response to an email from Bertness of March 16, 2012, Mani told Bertness that Mr. Satya of FLS India was attempting to poach Mani's senior people and was undercutting PKS India quotes to customers. (Appendix p. 12) There is no evidence Bertness took any action in response. It was unknown to Mani that Mr. Bertness and Mr. Baker had instructed Mr. Satya to maintain a dialogue with Murali. (Appendix p. 14).

The Court finds the foregoing facts present a jury question on whether FLSmidth Sioux City, Inc., through its CEO, Eric Bertness, either acted with FLS India or gave substantial assistance and encouragement to FLS India in FLS India soliciting away PKS India's senior personnel and engaging in competition with and interference with PKS India's customers.

In considering Defendant's Motion for Summary Judgment, the Court is not losing sight of the fact that FLS India, an entity that is not before the Court and not in a contractual or shareholder relationship with Plaintiff, was free to solicit PKS India's employees and customers. In the Court's view this freedom by FLS India to compete with PKS India does not stop simply

because FLSmidth USA acquired FLSmidth Sioux City, Inc. However, Plaintiff has put forth sufficient evidence to create a jury question as to whether FLSmidth Sioux City, Inc., through Mr. Bertness, gave substantial assistance or encouragement to FLSmidth, FLS A/S or its subsidiary FLS India in their efforts to damage the value of PKS India. Genuine issues of material fact exist as to whether Defendant FLSmidth Sioux City, Inc., through its CEO Eric Bertness, acted with FLS India or gave that entity substantial assistance in wrongful conduct directed toward PKS India. These fact issues preclude summary judgment.

With respect to Count IV of the Petition, which alleges a claim for breach of the implied covenant of good faith under the 2004 Shareholders Agreement, the Court concludes the facts as set forth above generate a jury question as to whether the conduct of FLSmidth Sioux City, Inc., through its CEO Eric Bertness, acted in concert with or gave substantial assistance to FLS A/S and/or FLS India. Defendants' Motion for Summary Judgment as to Counts II, III and IV of the Petition against Defendant FLSmidth Sioux City, Inc., is denied.

Motion for Summary Judgment of FLSmidth, Inc.

In the Court's previous Ruling on FLSmidth's First Motion for Summary Judgment, the Court held that "a reasonable juror could conclude from the parties' conduct in the terms of the purchase agreement that a beneficial interest transferred without Promat's consent." Thus, the Court has already held that fact issues preclude summary judgment on whether FLSmidth, Inc., became a beneficial owner of PKS India stock and whether it agreed to be bound by the 2004 Agreement. Plaintiff's Resistance to Defendant's Motion for Summary Judgment asserts that the Court should first have a jury make a factual finding as to whether beneficial ownership transferred. If the jury answers "no", Promat agrees that it cannot recover against Defendant

FLSmidth on its claims for breach of duty of loyalty, breach of fiduciary duty, and breach of the implied covenant of good faith under Counts II, III and IV of the Petition.

If FLSmidth, Inc., became a beneficial owner of the PKS India stock, the fiduciary duties of loyalty and good faith outlined above would be applicable to FLSmidth, Inc. The Court concludes that the facts set forth above generate a disputed issue of fact as to whether FLSmidth, Inc., through its corporate officer, Scott Baker, breached a fiduciary duty to Plaintiff or breached the implied covenant of good faith under the 2004 Shareholders Agreement. The Motion for Summary Judgment of Defendant FLSmidth, Inc., as to Counts II, III and IV of the Petition must be denied.

While Defendants' Motion for Summary Judgment as to Counts II, III and IV is denied, it does appear to the Court, and the parties essentially agreed during oral argument, that Counts II and III are duplicative. The Iowa Supreme Court held that fiduciary duty encompasses a duty of care and a duty of loyalty. *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013); see also *Cookies*, 430 N.W.2d at 451 (“the law commonly describes the fiduciary duties of corporate directors as two-fold, consisting of both a duty of care and a duty of loyalty”). The breach of fiduciary duty is occasionally referred to as the “breach of fiduciary duty of loyalty”. See *I.E. McGinisis, the Iowa Clinic, P.C.*, 209 WL 2424643, at 5. The Court finds Count II, the breach of duty of loyalty and Count III, the alleged breach of fiduciary duty, to be duplicative. At trial the breach of duty of loyalty and breach of fiduciary duty will be considered as one claim. In light of the Court's Ruling, Plaintiff requests that the issue be submitted to the jury as breach of duty of loyalty, which the Court deems appropriate.

Punitive Damages

Finally, Defendants argue there is no basis for Plaintiff's punitive damages claims. Iowa Code §668A.1(1)(a) provides punitive damages require a finding "by a preponderance of clear, convincing and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Punitive damages are recoverable on claims of breach of fiduciary duty. *Poulsen v. Russell*, 300 N.W.2d 289, 295-296 (Iowa 1981). In *Pogge v. Fullerton Lumber Company*, 277 N.W.2d 916 (Iowa 1979), the Iowa Supreme Court held:

"this rule (no punitive damages for breach of contract) does not obtain, however, in those exceptional cases where the breach amounts to an independent, willful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness, or oppression"

In *Pogge*, the Iowa Supreme Court held that punitive damages may be awarded upon proof of the requisite and wantonness of behavior in cases of breach of fiduciary duty. *Pogge*, 277 N.W.2d at 919. Plaintiffs correctly point out that in *Poulsen v. Russell*, the Court upheld an award of punitive damages on a claim of breach of fiduciary duty by one 50 percent owner of a company against another.

The standard of wrongful conduct required to support a claim of punitive damages is a high burden for Plaintiff to overcome. In this case, based on the facts available to the Court at this time, it appears that much if not most of the conduct of which Plaintiffs complain was by employees or agents of FLS India as opposed to Defendants. However, in view of the Court's denial of Defendant's Motion for Summary Judgment on the other claims, the Court concludes the wiser course of action is to evaluate the evidence at trial before determining if the punitive damages claims should be considered by the jury. Defendant's Motion for Summary Judgment as to Plaintiff's punitive damage claims is denied.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgement is DENIED.



State of Iowa Courts

Type: OTHER ORDER

Case Number LACV152295
Case Title PROMAT TECHNICAL SERVICES VS. FLSMIDTH, SIOUX CITY
ET AL

So Ordered



John Telleen, District Court Judge,
Seventh Judicial District of Iowa