

## NOTE

### ***STORETRAX.COM, INC. V. GURLAND: KEEP TRAX OF YOUR BOARD OF DIRECTORS***

JAMES R. HART III\*

In *Storetrax.com, Inc. v. Gurland*,<sup>1</sup> the Maryland Court of Appeals considered whether a corporate director breached his fiduciary duty to the corporation by filing suit against the corporation, pursuing summary judgment by default, and executing the default judgment by garnishing the corporation's bank account, despite the corporation's obvious ignorance of the lawsuit.<sup>2</sup> The court held that a director does not breach his fiduciary duty by filing suit and enforcing a judgment against the corporation, so long as the director makes a full disclosure, giving the corporation fair notice of the conflicting personal interest.<sup>3</sup> In so holding, the court sounded a wake-up call to boards of directors to exercise greater caution in their termination of potentially disgruntled directors and to be diligent in the selection and retention of a qualified and interested resident agent.<sup>4</sup>

#### I. THE CASE

Joshua A. Gurland ("Gurland") founded Storetrax.com, Inc. ("Storetrax") in 1997 and incorporated it as an Internet-based commercial real estate listing service in January 1998.<sup>5</sup> On October 25, 1999, Gurland sold a majority interest in Storetrax's stock to a group of investors.<sup>6</sup> Gurland retained membership on the board of directors and was named President and Chief Executive Officer ("CEO") of the corporation.<sup>7</sup>

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1. 397 Md. 37, 915 A.2d 991 (2007).
2. *Id.* at 42–43, 915 A.2d at 994.
3. *Id.* at 59, 61, 63, 66–67, 915 A.2d at 1004–06, 1008–09.
4. *See infra* Part IV.
5. *Storetrax.com*, 397 Md. at 43, 915 A.2d at 994.
6. *Id.*
7. *Id.*

Gurland entered into an employment agreement, which included a termination clause that allowed Storetrax to terminate the agreement, with or without cause, at any time, with ten days' written notice, and entitled him to severance pay for termination without cause.<sup>8</sup>

Following a series of changes in Storetrax's senior management, during which Gurland surrendered the title of President and was named Senior Vice President of Technology and Strategy, Storetrax terminated Gurland's employment in November 2001.<sup>9</sup> Shortly thereafter, Gurland hired an attorney and attempted to negotiate his severance payment.<sup>10</sup> Gurland continued to serve on the board of directors until December 5, 2002.<sup>11</sup>

Gurland and Storetrax senior management disputed whether Gurland was entitled to the severance payment provided by the termination clause in Gurland's employment agreement.<sup>12</sup> In January 2002, a member of Storetrax's board made a settlement offer to Gurland, which Gurland agreed to consider.<sup>13</sup> No further negotiations took place, however, and on January 21, 2002, Gurland sued Storetrax for breach of contract, asking for \$150,000 in severance pay due under the termination clause of the parties' employment agreement.<sup>14</sup>

Service of process was properly made upon Storetrax's resident agent on February 1, 2002.<sup>15</sup> The resident agent, however, failed to deliver the summons, complaint, and motion for summary judgment to Storetrax.<sup>16</sup>

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8. *Id.* at 43–44, 915 A.2d at 994–95.

9. *Id.* at 43 n.1, 915 A.2d at 994 n.1. In January 2000, Gurland relinquished the CEO position to Robert Rosenfeld, one of the corporation's investors and co-chair of the board of directors. *Id.* In April 2001, the company hired Thomas McCabe to replace Rosenfeld as CEO and Gurland as President. *Id.* Gurland was named Senior Vice President of Technology and Strategy. *Id.* Shortly thereafter, Elizabeth Stewart replaced McCabe as CEO and President of Storetrax, and she terminated Gurland in November 2001. *Id.*

10. *Id.* at 44, 915 A.2d at 995.

11. *Id.*

12. *Id.* While Gurland believed he was entitled to twelve months' severance pay, the Storetrax board responded that he was not entitled to the payment because he was terminated "for cause." *Id.* at 45, 915 A.2d at 995. Storetrax's board cited several instances where Storetrax senior management had questioned Gurland's job performance. *Id.* at 45 n.2, 915 A.2d at 995 n.2.

13. *Id.* at 45, 915 A.2d at 995–96.

14. *Id.*, 915 A.2d at 996.

15. *Id.* at 46, 915 A.2d at 996.

16. *Id.* Storetrax did not receive notice of Gurland's lawsuit because of several errors made by the resident agent and an independent contractor hired by the resident agent to receive and forward service of process on the agent's behalf. *Id.* at 46 n.3, 915 A.2d 996 n.3. Initially, the independent contractor could not deliver the papers because it used an out-dated address for Storetrax. *Id.* When the papers were returned on February 4, 2002, the independent contractor attempted to have the resident agent forward the documents to Storetrax's correct address. *Id.* However, the resident agent's employee responsible for Storetrax's service of process "walked out" on her job around February 4, 2002, and the papers remained on her desk until March 20, 2002, when they were discovered and immediately mailed to Storetrax's correct address. *Id.*

Storetrax then failed to file a timely answer and response to Gurland's complaint and motion for summary judgment.<sup>17</sup> On March 8, 2002, the Circuit Court for Montgomery County, Maryland entered a default summary judgment against Storetrax for \$150,000.<sup>18</sup> Gurland petitioned the court for a writ of garnishment to attach Storetrax's bank account, which was issued on March 19, 2002.<sup>19</sup> Storetrax's bank garnished the account for \$150,000 the following day.<sup>20</sup>

Although Gurland visited Storetrax's offices on two separate occasions after filing suit, Storetrax did not become aware of the lawsuit until it received notice of the attachment of its bank account on March 19, 2002.<sup>21</sup> Immediately thereafter, Storetrax's counsel wrote a letter to Gurland requesting that Gurland set aside his default judgment and withdraw the garnishment on Storetrax's corporate bank account.<sup>22</sup> Gurland refused and, on April 3, 2002, Storetrax filed motions to set aside the default judgment and quash the writ of attachment.<sup>23</sup> The circuit court denied both motions and Storetrax appealed to the Maryland Court of Special Appeals.<sup>24</sup>

The Court of Special Appeals, in an unreported opinion, reversed the trial court's judgment and held that the circuit court abused its discretion by denying Storetrax's motion to set aside the default summary judgment.<sup>25</sup> The intermediate appellate court remanded the case to the circuit court and Gurland moved for partial summary judgment on the issue of whether the company had terminated his employment "for cause."<sup>26</sup> The circuit court granted Gurland's motion and a jury awarded Gurland \$150,000 on the remaining issues.<sup>27</sup>

Storetrax simultaneously noted its appeal from the breach of contract judgment and sued Gurland in the circuit court alleging that Gurland, as a director, breached his fiduciary duty to the corporation by pursuing his claim.<sup>28</sup> The court heard the breach of fiduciary duty claim in March 2004,

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17. *Id.* at 46, 915 A.2d at 996.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 45-46, 915 A.2d at 996.

22. *Id.* at 46-47, 915 A.2d at 996.

23. *Id.* at 47, 915 A.2d at 996.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*, 915 A.2d at 996-97.

28. *Id.* at 47, 915 A.2d at 997. Specifically, Storetrax alleged that Gurland breached his fiduciary duties by, among other things, suing the corporation, obtaining a default judgment when he knew the corporation opposed his claims, attaching the corporation's bank accounts to enforce the monetary judgment, and opposing the corporation's efforts to have that judgment and garnishment set aside. *Id.* at 47-48, 915 A.2d at 997.

and ruled in Gurland's favor.<sup>29</sup> Storetrax appealed the breach of fiduciary duty claim and the Court of Special Appeals consolidated this claim with Storetrax's appeal of the breach of contract claim for oral argument.<sup>30</sup> On March 31, 2006, the Court of Special Appeals reversed the circuit court's grant of partial summary judgment in the breach of contract case, finding that there was a triable question as to whether Gurland had been dismissed "for cause."<sup>31</sup> The court, however, affirmed the trial court's determination that Gurland had not breached his fiduciary duty to the corporation.<sup>32</sup>

Storetrax petitioned the Court of Appeals of Maryland for a writ of certiorari.<sup>33</sup> The Court of Appeals granted certiorari to consider whether the Court of Special Appeals erred in finding that Gurland did not breach his fiduciary duties when he sued the corporation, obtained a default summary judgment against the corporation, executed the judgment, and opposed the corporation's attempts to set aside the judgment and garnishment.<sup>34</sup>

## II. LEGAL BACKGROUND

The fiduciary duties that a director owes to a corporation and its shareholders are universally well-settled.<sup>35</sup> Many courts have further clarified that a director does not breach these duties by filing a complaint and motion for default summary judgment against the corporation.<sup>36</sup> A few courts have examined whether a director breaches his fiduciary duty by pursuing default summary judgment without the corporation's actual notice of the lawsuit.<sup>37</sup> Only a single court has held that a director who obtained a judgment against the corporation did not breach his fiduciary duty by refusing to accede to the corporation's demands that he not execute the judgment.<sup>38</sup>

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29. *Id.* at 48, 915 A.2d at 997.

30. *Id.*

31. *See Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 67, 75, 895 A.2d 355, 365, 370 (2006).

32. *Id.* at 88, 895 A.2d at 377.

33. *Storetrax.com*, 397 Md. at 48, 915 A.2d at 997.

34. *Id.* at 48–49, 915 A.2d at 997–98.

35. *See, e.g., infra* note 40 and accompanying text.

36. *See infra* Part II.A.

37. *See infra* Part II.B. Courts are split on what facts and circumstances constitute "actual notice." *See infra* Part II.B.

38. *See infra* Part II.C.

A. *A Director May Hold an Interest Adverse to the Corporation Only if He Does Not Receive an Unfair Advantage as a Result of His Insider Position*

Corporate directors owe a corporation and its shareholders an unceasing fiduciary duty to act with the utmost due care and loyalty, in good faith, and in the best interests of the corporation, as an ordinarily prudent person would under similar circumstances.<sup>39</sup> Despite this high standard, a director may have interests that conflict with the corporation's interests without necessarily breaching his duty to the corporation if those interests are fully disclosed to and approved by the corporation.<sup>40</sup> A director with interests that conflict with the corporation's may protect against breach of his fiduciary duty by giving notice to the corporation and fully disclosing his conflicting interests.<sup>41</sup>

In 1968, the Maryland Court of Appeals stated that directors have a duty to reveal to the corporation "all facts material to the corporate transactions."<sup>42</sup> In *Parish v. Maryland & Virginia Milk Producers Association*, several members of the Maryland and Virginia Milk Producers Association (the "Association") sued the Association's directors for fraud and breach of fiduciary duty.<sup>43</sup> The *Parish* court found an actionable claim that the directors had breached their fiduciary duty to the Association and its members by intentionally distributing false and misleading annual reports and recklessly mismanaging the Association's financial interests.<sup>44</sup> Specifically, the court noted that a director's sale of corporate assets

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39. MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(a) (LEXISNEXIS 1999); see *Booth v. Robinson*, 55 Md. 419, 436-37 (1881) (stating that directors hold powers that are only "to be exercised for the common and general interest of the corporation," while maintaining a "strict and faithful" duty to the corporation and its shareholders); *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598, 605-06 (1875) (stating that directors must exercise their "best efforts to promote the interest of the shareholders"); see also *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (summarizing the "fundamental principle of Delaware law" that directors of a corporation are presumed to act "on an informed basis . . . in good faith and in the honest belief that the action taken was in the best interest of the company." (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. Super. Ct. 1989))); *Maldonado v. Flynn*, 413 A.2d 1251, 1256 (Del. Ch. 1980) (stating that the business judgment rule "requires utmost loyalty" from directors to the corporation and its interests).

40. *Cf. Shapiro v. Greenfield*, 136 Md. App. 1, 13-15, 764 A.2d 270, 276-77 (2000) (discussing interested director transactions).

41. MD. CODE ANN., CORPS. & ASS'NS § 2-419(a)-(b) (LEXISNEXIS 2007).

42. *Parrish v. Md. & Va. Milk Prod. Ass'n*, 250 Md. 24, 74, 242 A.2d 512, 539 (1968), *aff'd on reh'g*, 261 Md. 618, 277 A.2d 19, *cert. denied*, 404 U.S. 940 (1971).

43. *Id.* at 32, 39, 242 A.2d at 516, 520.

44. *Id.* at 74, 242 A.2d at 540. For instance, the directors continued to violate federal antitrust laws following a federal district court order; falsely reported to the Association's members a capital gain of \$450,000, which had in fact been a capital loss; and conspired among themselves to withhold vital information from the members of the Association. *Id.* at 39-41, 242 A.2d at 520-21.

without notifying the corporation would violate the director's duty to fully disclose all facts material to the corporation.<sup>45</sup>

Most recently, in *Shapiro v. Greenfield*,<sup>46</sup> the Maryland Court of Special Appeals stated that a director could fulfill his statutory fiduciary duties by fully disclosing any conflicting interest to the corporation's shareholders or board of directors, thus giving the corporation an opportunity to approve the transaction or take other action.<sup>47</sup> In *Shapiro*, two minority shareholders of a Maryland corporation sued the corporation's officers and directors, alleging that the officers and directors usurped a corporate opportunity and breached their fiduciary duty to the corporation and its shareholders by approving an interested director transaction that transferred control of the corporation's shopping center to a limited partnership as part of a redevelopment project.<sup>48</sup> The *Shapiro* court remanded the case to determine whether the directors were interested and had thus violated Section 2-419 of the Maryland Code.<sup>49</sup>

*B. Some Jurisdictions Permit Directors to File Suit Against the Corporation Only if the Director Notifies the Corporation and Does Not Have an Unfair Advantage as the Corporation's Creditor*

Although, until *Storetrax.com*, Maryland courts had not addressed the extent to which directors could act as adverse parties in legal proceedings against the corporations they serve as directors, courts outside of Maryland have held that corporate officers and directors are not precluded from filing suit against the corporation merely because of their positions as officers or directors.<sup>50</sup> Underpinning many courts' scrutiny of a director becoming a corporate creditor and enforcing a judgment is the concern that the director-creditor may have an unfair advantage in obtaining or satisfying the

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45. *Id.* at 74, 242 A.2d at 540.

46. 136 Md. App. 1, 764 A.2d 270 (2000).

47. *Id.* at 14–15, 764 A.2d at 277. Section 2-419 of the Corporations and Associations Article provides that an interested director transaction is not void or voidable merely because of a conflict of interest. MD. CODE. ANN., CORPS. & ASS'NS § 2-419(a)–(b) (LEXISNEXIS 2007). Instead, as the court pointed out, the statute creates a "safe harbor" for certain transactions under the Code. *Shapiro*, 136 Md. App. at 14, 764 A.2d at 277 (citing § 2-419).

48. *Id.* at 4–7, 764 A.2d at 271–73.

49. *Id.* at 24, 764 A.2d at 282. The court clarified that the transaction itself did not violate the corporate opportunity doctrine because the transaction was entered into on behalf of the corporation and not on behalf of the individual directors, even though the directors had, or potentially had, a direct financial interest in the limited partnership co-development project. *Id.* at 17, 764 A.2d at 278.

50. *See, e.g., Hutchinson v. Phila. & Gulf S.S. Co.*, 216 F. 795, 798 (E.D. Pa. 1914) (stating that "no rule of law or equity . . . prohibits a creditor of a corporation from bringing suit because he is also a director"); *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128–29 (Del. Ch. 1969) (holding, in a suit filed by a director against his corporation, that a director has the right to inspect the corporation's books and records).

judgment.<sup>51</sup> To dispel this unfair advantage, courts frequently require a director to give actual notice to a corporation before acting adversely to the corporation's interests.<sup>52</sup>

For example, in *Marr v. Marr*,<sup>53</sup> the Court of Errors and Appeals of New Jersey held that a director-creditor must give the corporation fair notice, as determined by the circumstances, of legal proceedings to collect a judgment.<sup>54</sup> Applying this subjective test, the court found that, here, the director-creditor's general threat to the other shareholders that he would litigate his claims and liquidate the corporation's assets did not constitute fair notice of his legal proceedings.<sup>55</sup> Rather, the court stated that the director-creditor was obligated to give the corporation specific notice of the precise steps he planned to take to imminently liquidate the corporation's assets.<sup>56</sup>

Similarly, the Supreme Court of Pennsylvania held in *Union Ice Company of Philadelphia v. Hulton*<sup>57</sup> that an officer or director who sues a corporation must give the corporation adequate notice to enable the corporation to take steps to protect its best interests.<sup>58</sup> The Union Ice president sued his corporation to recover \$33,000 that he had loaned to the corporation, and then liquidated the corporation's assets at a sheriff's sale for a nominal price.<sup>59</sup> The only notice the corporation received of the president's actions came from the vice president of the corporation, who, acting as the president's personal attorney, told several directors that if the president's debts were not paid, the president would have to execute his judgment and sell the company's assets.<sup>60</sup> The court held that this notice was "vague and indefinite" and that the directors were entitled to know the time and place of the sheriff's sale so that they could protect the corporation's best interests.<sup>61</sup> While a director may enforce a claim against his corporation, the court said, he must employ the same methods available

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51. See, e.g., *infra* notes 57–63 and accompanying text.

52. See, e.g., *infra* notes 55–63 and accompanying text.

53. 70 A. 375 (1908).

54. *Id.* at 378. Here, one of the corporation's directors, William A. Marr, executed a judgment against the corporation and liquidated the corporation's assets at a sheriff's sale without notifying the corporation. *Id.* at 376. Marr brought his action without the knowledge of anyone representing the corporation, except perhaps the resident agent who may not have received service of process. *Id.* at 379.

55. *Id.* Marr gave the other shareholders this "general notice" at two different shareholders' meetings in 1897 and 1898. *Id.*

56. *Id.*

57. 140 A. 514 (Pa. 1928).

58. *Id.* at 514–15.

59. *Id.* at 514.

60. *Id.*

61. *Id.* at 514–15 (citing *Gilmore v. W. J. Gilmore Drug Co.*, 123 A. 730 (Pa. 1924)).

to other creditors and may not take any unfair advantage of the corporation in doing so.<sup>62</sup>

Alternatively, one court has found that there is no impermissible unfair advantage created when a director acts with “the utmost good faith” and there is no evidence of conspiracy to defraud the corporation. In *Beaver Park Co. v. Hobson*,<sup>63</sup> the Colorado Supreme Court upheld the district court’s finding that a director did not breach his fiduciary duty to the company when he became the company’s creditor by making a personal loan to the insolvent corporation following a devastating flood that ruined the company’s properties.<sup>64</sup> The court reasoned that the director was entitled to preferential reimbursement from the corporation because he was likely to provide future financial assistance to the distressed corporation.<sup>65</sup> Because the director acted at all times with the “utmost good faith” and there was no evidence of any conspiracy to defraud the company, the court held that it would be “neither legal nor equitable” to use the director’s corporate role to prevent him from recovering his personal investment in the company.<sup>66</sup>

*C. Under Maryland Law, a Director is Not Legally Obligated to Concede to a Corporation’s Request to Not Exercise a Judgment Against the Corporation*

Only one court has addressed whether a director or officer may exercise a judgment against a corporation despite the corporation’s requests to the contrary. In *Waterfall Farm Systems, Inc. v. Craig*,<sup>67</sup> the United States District Court for the District of Maryland stated that a director does not have “a legal obligation to accede to demands of the Corporation” merely because he holds the position of director when the corporation’s demands are contrary to the director’s personal financial interests.<sup>68</sup> *Waterfall Farm Systems*, a closely-held hydroponic<sup>69</sup> farming corporation, sued two of its directors, Allan and Carol Craig (the “Craigs”), claiming that the Craigs breached their duties of loyalty and fair dealing by attempting to take over the hydroponic business after evicting the corporation and terminating its at-will verbal lease.<sup>70</sup> Because the Craigs

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62. *Id.* at 515 (citations omitted).

63. 283 P. 772 (Colo. 1929).

64. *Id.* at 775.

65. *Id.* at 776.

66. *See id.* at 775–76.

67. 914 F. Supp. 1213 (D. Md. 1995).

68. *Id.* at 1228.

69. Hydroponics involves growing plants without soil. *Id.* at 1216.

70. *Id.* at 1228.

were the lessors of the corporation's greenhouse and the principal owners of essential equipment in the greenhouse, the court stated that, absent a binding lease, the Craigs had the legal right to assume full possession of the greenhouse and equipment.<sup>71</sup> The court found no unfairness or breach of fiduciary duty by the Craigs when they terminated the corporation's tenancy-at-will lease and refused to accede to the corporation's demands.<sup>72</sup>

### III. THE COURT'S REASONING

In *Storetrax.com, Inc. v. Gurland*, the Court of Appeals of Maryland held that Joshua Gurland did not breach his fiduciary duties as a member of the corporation's board of directors by pursuing his severance claims against the corporation in court, through and including execution of judgment.<sup>73</sup> Writing for the majority, Judge Harrell reiterated the well-settled notion that a director of a corporation has a fiduciary relationship with the corporation and its shareholders and must perform his duties in the corporation's best interests, exercising good faith and reasonable care as an ordinarily prudent person would under similar circumstances.<sup>74</sup> The court noted that a director must perform his duties and exercise his powers for the collective benefit of the corporation and not for personal gain, although situations may arise where a director has interests that diverge from those of the corporation on whose board he sits.<sup>75</sup> Where such conflicting interests exist, the court acknowledged, courts in other jurisdictions have held that a corporate officer or director is not precluded from bringing a claim against the corporation merely because of his corporate role.<sup>76</sup>

Focusing on whether Gurland breached his fiduciary duty by pursuing summary judgment by default, the court noted that the issue was one of first impression.<sup>77</sup> Applying Maryland law,<sup>78</sup> the court followed the reasoning of the Court of Special Appeals and analogized the conflicts of interest that arise when a director sues his corporation with those that arise when a corporation and one of its directors enter into a contract that involves a

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71. *Id.*

72. *Id.*

73. *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 42–43, 915 A.2d 991, 994 (2007).

74. *Id.* at 53, 915 A.2d at 1000–01.

75. *Id.* at 54–55, 915 A.2d at 1001.

76. *Id.* at 55, 915 A.2d at 1001.

77. *See id.* at 56, 915 A.2d at 1002 (noting that there was no authority directly on point from Maryland or any other jurisdiction).

78. Following a lengthy discussion of choice of law principles, the court concluded that, although the “internal affairs doctrine” recognizes Delaware as the controlling authority for this case, the duties owed by a director to the corporate members were the same under Maryland and Delaware law. *Id.* at 51–53, 915 A.2d at 999–1000.

conflicting financial interest.<sup>79</sup> The court noted that, while this analogy was not perfect, it balanced Gurland's fiduciary duties and obligations as a director against his conflicting personal interest in seeking \$150,000 in severance pay from Storetrax, which was not in the corporation's best interest.<sup>80</sup>

The court also concluded that a director should receive "safe harbor" by disclosing all relevant conflicts of interest and all surrounding relevant facts, so that the remaining disinterested shareholders or directors could act to protect the corporation's financial interests.<sup>81</sup> Here, the court held that Gurland had sufficiently disclosed to Storetrax the imminence of his lawsuit such that he could claim the "safe harbor" protection.<sup>82</sup>

Last, the court addressed whether Gurland breached his fiduciary duty to the corporation by seeking a writ of attachment, garnishing Storetrax's bank account, and refusing to relinquish the writ of attachment.<sup>83</sup> The court noted that no binding rule of law existed with respect to whether fiduciary duties prohibited a director from enforcing his claim against the corporation, and that most jurisdictions permitted a director to become a creditor against his own corporation, absent bad faith or fraud.<sup>84</sup> Thus, the court found that once Gurland became a creditor of the corporation, "he had the same rights as any other creditor to enforce the judgment."<sup>85</sup> The court reiterated that Gurland received no unfair advantage in receiving and enforcing his default judgment because Storetrax had notice of the default judgment given that the parties' lawsuit was public record.<sup>86</sup> The Court of Appeals agreed with the Court of Special Appeals' finding that Gurland had no fiduciary duty to notify Storetrax prior to requesting or executing a writ

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79. *Id.* at 56, 915 A.2d at 1002.

80. *Id.* at 58–59, 915 A.2d at 1003–04.

81. *Id.* at 56–57, 915 A.2d at 1002.

82. *Id.* at 59, 915 A.2d at 1004. Specifically, the court found that Gurland's December 11, 2001 letter outlining his severance pay claim put Storetrax on notice that Gurland believed the agreement was valid and set a "clear and reasonable" deadline for when Gurland would file suit. *Id.* Because Storetrax's December 20, 2001 letter to Gurland indicated that the corporation anticipated and was preparing for litigation, the court found no evidence that Gurland knew that Storetrax did not know of the breach of contract action at the time Gurland moved for summary judgment. *Id.* at 59–60, 915 A.2d at 1004–05. Gurland moved for summary judgment within the requirements set forth in Maryland Rule 2-124 and did not "act[] to conceal the pendency of the lawsuit" or use any insider knowledge or confidential information. *Id.* at 60–61, 915 A.2d at 1005. Additionally, Storetrax failed to ask Gurland whether he had filed suit during his two post-filing visits to Storetrax's offices. *Id.* at 61, 915 A.2d at 1005.

83. *Id.* at 61, 915 A.2d at 1005.

84. *Id.* (citing *Beaver Park Co. v. Hobson*, 283 P. 772, 775–76 (Colo. 1930)).

85. *Id.* at 62–63, 915 A.2d at 1006.

86. *Id.* at 63, 915 A.2d at 1006. The court explained that it was reasonable for Gurland to assume that a copy of the judgment had been delivered to Storetrax pursuant to Maryland law. *Id.*

of garnishment against the company,<sup>87</sup> and held that Gurland had no fiduciary obligation to not enforce the default judgment against Storetrax merely because Storetrax asked him to.<sup>88</sup>

#### IV. PRACTICAL IMPLICATIONS

While *Storetrax.com, Inc. v. Gurland* is noteworthy as a case of first impression in the United States, it is a far more important warning to private companies to exercise greater diligence in their executive employment decisions and selection of resident agents for service of process. This case illustrates the importance of timely resolving executive employment termination disputes and hiring and maintaining constant communication with a diligent and interested resident agent. As a result of Storetrax's mistakes in terminating Gurland and hiring a negligent resident agent, it can fault only itself for Gurland's judgment against the corporation.

*Storetrax.com* is a particularly cautionary tale because the events leading up to litigation could have been easily avoided. It appears that Gurland initially parted ways with Storetrax on amicable terms with the board of directors, at least in the eyes of the board.<sup>89</sup> However, regardless of the terms under which Gurland was terminated, the board should have anticipated that Gurland would not be pleased to lose his position and \$150,000 salary with the company he founded only four years earlier. In fact, the board was on notice that Gurland expected to be paid severance and was prepared to seek "every possible remedy in the event of a dispute."<sup>90</sup> Gurland filed a breach of contract claim against Storetrax only after the parties attempted to resolve the dispute amicably.<sup>91</sup>

First, Storetrax's board should have operated with a heightened awareness of the possibility that Gurland would file suit from the time Gurland was fired until he failed to respond to Storetrax's settlement offer. Storetrax's board irresponsibly failed to communicate regularly with

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87. *Id.* The Court of Appeals distinguished the *Storetrax.com* facts from those in *Marr* and *Union Ice*, stressing that the notice given to the corporations in *Marr* and *Union Ice* did not amount to "a direct threat of imminent litigation," as did Gurland's notice to Storetrax. *Id.* at 66–67, 915 A.2d at 1008. Gurland's notice, unlike the notices given in *Marr* and *Union Ice*, was sufficiently specific to enable Storetrax to act in its best interests in preparing for Gurland's impending litigation. *Id.* at 67, 915 A.2d at 1008–09.

88. *Id.*, 915 A.2d at 1009.

89. See *Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 61–62, 895 A.2d 355, 362 (2006). On November 19, 2001, the CEO wrote Gurland a letter, noting that she "look[ed] forward to seeing [Gurland] at the next Board meeting . . ." *Id.* at 62, 895 A.2d at 362. Storetrax only later justified Gurland's termination by citing several instances that called into question Gurland's job performance. *Storetrax.com*, 397 Md. at 45 n.2, 915 A.2d at 995 n.2.

90. *Storetrax.com*, 168 Md. App. at 63, 895 A.2d at 363.

91. *Storetrax.com*, 397 Md. at 45, 915 A.2d at 995–96.

Gurland and his counsel, particularly after making its settlement offer.<sup>92</sup> Moreover, on Gurland's two visits to Storetrax's offices after filing suit, no Storetrax employee or board member spoke with Gurland regarding the status of his severance dispute with the corporation.<sup>93</sup>

Second, Storetrax should have taken immediate steps to mitigate the damage Gurland was likely to cause to the corporation. While it may not have been clear to Storetrax's board how displeased Gurland was over his termination and how determined he was to recover severance pay, it is now very clear that Storetrax should have taken greater precautions to ensure that the ultimate result, albeit an unusual one, would not occur. Storetrax should have immediately worked with its counsel to resolve any potential disputes with Gurland over his termination, particularly because Gurland held a unique position with the company as its founder and a board member. Storetrax should also have immediately removed Gurland from the board of directors to avoid any conflicts of interest or concerns over fiduciary loyalties to the corporation that may have resulted from his termination. A small legal bill and reasonable severance settlement at the time could have saved the corporation countless hours and likely thousands of dollars in legal fees.

Third, Storetrax should have retained an experienced local resident agent and maintained a constant line of communication with its resident agent. Storetrax did not receive notice of Gurland's lawsuit because of several errors made by the resident agent and an independent contractor hired by its resident agent to receive and forward service of process on behalf of the resident agent.<sup>94</sup> At the time, Storetrax's resident agent was Corporate America, one of the largest resident agent companies in the country,<sup>95</sup> which may help to explain why the resident agent did not give Storetrax the most diligent personal attention and instead hired an independent contractor to handle the routine day-to-day receiving and forwarding of service of process. Storetrax could have eliminated many of the opportunities for miscommunication that resulted in untimely notice and a default judgment in this case by retaining local counsel with a personal interest in protecting its client. At the very least, the *Storetrax.com* decision is a wake-up call to every private company to carefully select a resident agent that is both meticulously well-organized and incentivized to protect

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92. *See id.* (noting that after Gurland stated he would consider the settlement offer, the parties failed to correspond).

93. *Id.* at 45–46, 915 A.2d at 996; *Storetrax.com*, 168 Md. App. at 65, 895 A.2d at 364.

94. *Storetrax.com*, 397 Md. at 46 & n.3, 915 A.2d at 996 & n.3; *see also supra* note 16 and accompanying text.

95. Telephone Interview with Ronald L. Early, Senior Partner, Lerch, Early & Brewer, Chtd. (Aug. 11, 2008). Corporate America was purchased in 2003 by Corporation Service Company, one of the “Big Four” resident agent companies. *Id.*

its corporate client's best interests. Small private companies, such as Storetrax, may be better protected by utilizing their local counsel as resident agent, the counsel who organized and supported the business since incorporation.<sup>96</sup>

#### V. CONCLUSION

In *Storetrax.com, Inc. v. Gurland*, the Court of Appeals of Maryland held that Joshua Gurland did not breach his fiduciary duty to Storetrax by filing suit against the corporation, pursuing summary judgment by default, or enforcing his default judgment by garnishing the corporation's bank account, despite the corporation's obvious ignorance of the lawsuit.<sup>97</sup> The Court of Appeals had no mandatory authority on which to rely and very little persuasive authority, but nevertheless properly held that Gurland never breached his fiduciary duty to the corporation.<sup>98</sup> The court's decision sounds a wake-up call to directors of private companies to take caution with the termination of potentially disgruntled employees and to select a resident agent whose incentives are aligned with the corporation's best interests.<sup>99</sup>

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96. In this scenario, the resident agent's and the corporation's interests are aligned because the corporation is fearful of suit from third parties and the resident agent is fearful of a malpractice suit from the corporation, its client, for failure to deliver service of process in a timely fashion. Only when the two parties' interests are aligned will the corporation and its counsel be fully incentivized to protect their respective best interests.

97. *See supra* Part III.

98. *See supra* Part III.

99. *See supra* Part IV.