

LITIGATION BETWEEN SHAREHOLDERS IN CLOSELY-HELD CORPORATIONS: PROTECTING MINORITY SHAREHOLDERS FROM ABUSE AT THE HANDS OF MAJORITY OWNERS

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This article examines case law from Michigan and across the country that has considered shareholder oppression claims (including claims based on fiduciary obligations between shareholders in closely-held corporations) and distills from these cases common fact patterns that courts have found to either constitute, or state claims for, oppressive conduct.

I. Introduction

When opinions about business management and policy diverge, owners of minority shareholding interests in closely-held corporations who are not part of a control group often find themselves at the mercy of controlling shareholders. If mere disagreements become heated disputes (or if self-interest wins out over the combined interests of all shareholders), controlling shareholders sometimes exercise their power over corporate affairs to marginalize or “freeze out” minority owners. Under such circumstances, when the minority owner has been a victim of abuse and overreaching by those in control, shareholder oppression claims can be important tools for owners of minority (non-controlling) interests.^{1, 2}

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¹ The controlling shareholder (or shareholder group) typically owns more than 50% of the stock in a corporation. However, some states recognize that the heart of oppression is the unfair exercise of control, which is not always limited to situations in which one individual or group owns the majority of stock or exercises superior voting power. Thus, even where corporate owners are equal shareholders, the controlling shareholder may be liable for oppression. *See Kirila v. Kirila Contrs., Inc.*, No. 2015-T-0108, 2016 WL 4426409, ¶ 31, 148 Ohio St. 3d 1444, 72 N.E.3d 657 (Ohio Ct. App. Aug. 22, 2016) (“The critical question is not whether one shareholder is a minority and the other a majority, but rather whether one owner so dominated the corporation that he or she can be said to have been in control to the exclusion of the other.” (citation omitted)); *see also Harris v. Carter*, 582 A.2d 222, 234 (Del. Ch. 1990) (providing an example in Delaware where shareholders who own majority interests or exercise control over a company’s business affairs owe the same fiduciary duties as a corporate director to other shareholders).

² This article is intended as an overview of oppression actions across the country, though it is not a survey of every state’s oppression laws. As such, it discusses cases that are unpublished and cases

Minority shareholders typically do not control the affairs of the company, and are unable to prevent controlling shareholders from taking unfair or oppressive actions against them. With no liquid or easily accessible market for shares in closely-held companies, minority shareholders cannot easily escape oppressive behavior by selling their shares.³ Oppressed minority shareholders in closely-held corporations are often left with no recourse other than to seek judicial relief through a lawsuit asserting shareholder oppression.⁴

A prefatory explanation about nomenclature is in order. Several jurisdictions expressly provide a cause of action for minority shareholder oppression. Other jurisdictions permit recovery for oppressive actions but style the cause of action as one for breach of a fiduciary duty (owed by the majority or controlling shareholders to the minority owners).⁵ Regardless of the cause of action asserted, courts tend to take similar approaches when determining whether actions by those in control of corporations are potentially oppressive against those who are not in control.

However, there is no consensus in the United States as to the precise definition of oppressive conduct. Even in states with statutes authorizing remedies for oppression, a surprising number of these statutes fail to specifically define oppressive conduct,⁶ with some exceptions.⁷ Michigan's shareholder

that may not be cited as precedential under operative court rules. The reader is expressly advised to consider this issue before citing any case discussed herein as precedential.

³ See, e.g., *Muellenberg v. Bikon Corp.*, 669 A.2d 1382, 1386-87 (N.J. 1996); see also *Schimke v. Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723, at *5 (Mich. Ct. App. Sept. 24, 2009) (affirming the trial court's order for the defendant company to redeem the plaintiff's shares, "in a closely held corporation, such as this one, 'a shareholder . . . is unable to escape an oppressive situation by dispensing of his shares of ownership in the public arena[.]' . . . [As such, MCL] "§ 489(1)(e) specifically authorizes a court to order the purchase of a plaintiff's shares," and, "[i]f necessary . . . to order '[t]he dissolution and liquidation of the assets and business of the corporation.'" (citations omitted)).

⁴ *Estes v. Idea Eng'g & Fabricating, Inc.*, 250 Mich App 270, 280-81 (2002); see also *Walker v. Pope*, No. 3:15-CV-359-WHA, 2015 WL 4715082, at *4 (M.D. Ala. Aug. 7, 2015) ("[C]orporate governance in a close corporation presents a distinct risk that a controlling shareholder will manipulate the corporate structure to harm minority interests without necessarily harming the corporation itself."); O'NEAL AND THOMPSON'S CLOSE CORPS. AND LLCs: LAW AND PRACTICE § 9:32 (Rev. 3d ed.), Westlaw (database updated July 2017) ("Most modern courts . . . see the oppression statutes as intended to expand shareholder remedies."); Douglas K. Moll, *Reasonable Expectations v Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1018 (2001) ("The breadth of remedies for shareholder oppression provides the courts with great flexibility to choose a remedial scheme that most appropriately responds to the aggrieved shareholder's harm.")

⁵ See *Wallack v. Idexx Labs., Inc.*, No. 11CV2996-GPC KSC, 2013 WL 5206190, at *13 (S.D. Cal. Sept. 12, 2013) ("California law clearly recognizes that . . . controlling stockholders owe a fiduciary duty to minority stockholders"); see also *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, No. CV 10557-VCg, 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016) ("A stockholder is controlling, and owes fiduciary duties to the other stockholders, 'if it owns a majority interest in or exercises control over the business affairs of the corporation.'" (citation omitted)).

⁶ See, e.g., IOWA CODE ANN. § 490.1430(2)(b) (West 2018); WIS. STAT. ANN. § 180.1430 (West 2018); 805 ILL. COMP. STAT. ANN. 5/12.56(a)(3) (West 2018); MD. CODE ANN., CORPS. & ASS'NS § 3-413 (West 2018).

⁷ See, e.g., *Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 783, 582 N.W.2d 98, 107 (1998)

oppression statute defines “willfully unfair and oppressive conduct” as “a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder.”⁸

Despite the lack of uniformity in defining oppression or what constitutes oppressive acts, case law reveals substantial similarity across a variety of definitions. Some courts have defined actionable minority shareholder oppression as “burdensome, harsh and wrongful conduct . . . or a visible departure from the standards of fair dealing and violation of fair play” on which a shareholder is entitled to rely.⁹ Other courts have simply equated oppression with the violation of fiduciary duties of good faith and loyalty owed by shareholders of close corporations to each other.¹⁰ The “reasonable expectations” test, which is often simply defined as “frustration of the reasonable expectations of the corporations’ shareholders,” appears in several different jurisdictions.¹¹ A fourth definition finds oppression when a corporate director or manager abuses his authority over the corporation “with the intent

(“The definition of ‘oppressive conduct’ generally employed for the purpose of such a statute is: ‘burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.’”).

⁸ MICH. COMP. LAWS ANN. § 450.1489(3) (West 2018) (“[W]illfully unfair and oppressive conduct” means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.”) Such definitions leave substantial room for interpretation, and some courts examine allegations of oppressive conduct by reference to traditional fiduciary duties. *See Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875 at *5 (E.D. Mich. Oct. 4, 2006) (“[I]t is reasonable to conclude that the type of conduct amounting to a breach of fiduciary duties in close corporations is the type of conduct prohibited by [MICH. COMP. LAWS ANN.] § 450.1489 [(West 2018)]”).

⁹ *Buar v. Buar Farms, Inc.*, 832 N.W.2d 663, 670 (Iowa 2013) (discussing various approaches in other jurisdictions); *See, e.g., Booth v. Waltz*, No. HHDX04CV106011749S, 2012 WL 6846552, at *22 (Conn. Super. Ct. Dec. 14, 2012) (noting that neither Connecticut’s supreme court nor its appellate court have defined “oppression” under the state statute, but its superior courts have found decisions from other states persuasive, the court concluded “[o]ppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled to rely.”).

¹⁰ *Buar*, 832 N.W.2d at 670; *see also Calesa Assocs.*, 2016 WL 770251, at *10-12; *Wallack*, 2013 WL 5206190, at *13.

¹¹ *Buar*, 832 N.W.2d at 670-71 (citations omitted). *See, e.g., Kaible v. Gropack*, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) (“To determine whether a particular course of conduct has oppressed a minority shareholder in violation of [New Jersey’s oppression statute], courts should examine the understanding of the parties concerning their roles in corporate affairs. After determining the parties’ initial understanding of the shareholders’ roles, the court can then decide whether the shareholders acted oppressively. Oppressive conduct includes ‘that which frustrates the reasonable expectations of the minority shareholder.’”).

to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.”¹²

Delaware, though lacking a statutory approach to shareholder oppression, has through case law adopted two tests in defining “oppression.”¹³ In 1992, the Delaware Court of Chancery considered the definition of “oppression” for the first time, and applied two separate, but familiar, tests.¹⁴ The Court first applied the “reasonable expectations” test, defining oppression as a violation of the “reasonable expectations” of the minority.¹⁵ The Court then applied a second test, which defines oppressive conduct as “burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”¹⁶

Regardless of the test applied, most courts recognize that actionable “oppression” encompasses a wide variety of improper conduct, which can be—but is not necessarily—illegal or fraudulent.¹⁷ Here, the focus is on Michigan case law and various other jurisdictions that analyze shareholder oppression claims (including claims based on fiduciary obligations between shareholders in closely-held corporations), in order to distill from these cases common behavior that many courts are likely to find oppressive. Because courts typically have broad discretion in finding and remedying shareholder oppression, however, behavior that states a claim for oppression under one set of facts may not be deemed oppressive in every case.¹⁸

Given the case-by-case manner in which courts apply the concept of shareholder oppression, this article addresses general categories of oppressive

¹² *Ritchie v. Rupe*, 443 S.W.3d 856, 871 (Tex. 2014).

¹³ Under Delaware law, evidence of unfair or oppressive conduct may support a claim for breach of fiduciary duty. *See, e.g.*, *Delaware Open MRI Radiology Assocs. v. Kessler*, 898 A.2d 290, 344 (Del. Ch. 2006) (explaining the squeeze-out merger was unfair to minority shareholders, and thus amounted to a breach of fiduciary duty by majority shareholders).

¹⁴ *Little v. Waters*, No. CIV. A. 12155, 1992 WL 25758, at *7-8 (Del. Ch. Feb. 11, 1992).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See, e.g.*, *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987); *see also* *Herrmann v. Rain Link, Inc.*, No. 11-1123-RDR, 2014 WL 1641973, at *16 (D. Kan. Apr. 24, 2014) (showing oppressive “conduct usually occurs where the majority shareholder engages in a series of otherwise legal acts, which effectively prevent the non-controlling shareholder from participating in the operation and management of the corporation”); *AW Power Holdings, LLC v. First Light Waterbury Holdings, LLC*, No. CV146047836S, 2015 WL 897785, at *4 (Conn. Super. Ct. Feb. 17, 2015) (“Minority shareholder oppression . . . is not synonymous with the statutory terms ‘illegal’ or ‘fraudulent.’ The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders[.]”).

¹⁸ *See* *Schimke v. Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723 at *5 (Mich. Ct. App. Sept. 24, 2009) (explaining MCL § 450.1489 “grants a court broad discretion to fashion a remedy it ‘considers appropriate.’”).

actions in topical fashion. But oppressive actions seldom occur in isolation. Individual oppressive acts are often part of a series of actions deliberately perpetrated by the majority against the minority.¹⁹ Indeed, a plaintiff who can provide evidence of multiple acts of oppression will likely be in a stronger position to establish liability.²⁰

Oppressive schemes by controlling parties to cut off a minority shareholder's access to the benefits of ownership are frequently described as a "squeeze out" or "freeze out" of the minority shareholder. Which specific actions combine to constitute a squeeze out or freeze out can vary widely from case to case, though common themes emerge that are discussed below.²¹ What does not vary is the motivation driving the oppressive actions: a conscious and deliberate attempt to deprive the minority shareholder from participation in the operation of, and benefits from, a closely held corporation.²²

II. Common Indicia of Oppression

¹⁹ See, e.g., *Kirkiades v. Atlas Food Sys. & Servs, Inc.*, 541 S.E.2d 257, 267 (S.C. 2001).

²⁰ See, e.g., *Juliano v. Smith*, No. 308296, 2013 WL 6670838, at *7 (Mich. Ct. App. Dec. 17, 2013) (explaining a shareholder may face more difficulty establishing liability under MCL § 450.1489 "based on one instance of misconduct; rather, a shareholder who would be likely to prevail under this statute is one who presented an ongoing pattern of oppressive misconduct."); see also MICH. COMP. LAWS ANN § 450.1489(3) (West 2018) (defining willfully unfair and oppressive conduct as conduct that includes "a significant action . . . that substantially interferes with the interests of the shareholder as a shareholder.").

²¹ See, e.g., *Balvik*, 411 N.W.2d at 387 ("A variety of freeze-out techniques exist, with the withholding of dividends being by far the most commonly applied technique. This technique is often combined with the discharge of the minority shareholder from employment and removal of the minority shareholder from the board of directors...The controlling shareholders may effectively deprive the minority shareholder of every economic benefit that she derives from the corporation. Meanwhile, the controlling shareholders may continue to receive a substantial return based on their continuing employment with the corporation."). See also *McCann v. McCann*, 152 Idaho 809, 816, 275 P.3d 824, 830 (2012) ("The squeezers may cut off the flow of income to the minority by refusing to declare dividends or they may deprive minority shareholders of corporate offices and of employment by the company. At the same time, the squeezers can protect their own income stream from the business by exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, by high rental payments for property the corporation leases from majority shareholders, or by unreasonable payments under contracts between the corporation and majority shareholders"); F. Hodge O'Neal, *Problems of Minority Shareholders in Michigan Close Corporations*, 14 WAYNE L. REV. 723, 732 (1969) ("The oppression of minority shareholders and 'squeeze plays' designed to eliminate them from the business are serious problems in close corporations. Even in a family company discord is common. As a matter of fact, dissension and squeeze plays occur more often in family corporations than in other close corporations.").

²² See, e.g., *Bros. v. Winstead*, 129 So. 3d 906, 918 (Miss. 2014) ("In its most classic form, a freeze-out of the minority shareholders by the majority occurs when the majority purposefully denies the minority member from sharing proportionally in corporate earnings or gains."); *Goret v. H. Schultz & Sons, Inc.*, No. A-4281-10T1, 2013 WL 4792847, at *7 (N.J. Super. Ct. App. Div. Sept. 10, 2013) ("Shareholder 'freeze-out' has been defined as 'a manipulative use of corporate control or inside information to eliminate minority shareholders from the enterprise, or to reduce to relative insignificance their voting power or claims on corporate earnings and assets or otherwise deprive them of corporate income or advantages to which they are entitled.'").

A. Failing to Pay Dividends on a Pro Rata Basis to Both Majority and Minority Shareholders, Alike

1. Dividend Starvation

It is generally accepted that shareholders have a right to receive their pro rata share of corporate dividends.²³ One of the most frequent grounds for a shareholder oppression claim is dividend starvation: unreasonable withholding of corporate dividends from minority shareholders when the corporation has the financial means to make a dividend distribution.²⁴ Courts in Michigan and elsewhere recognize that a plaintiff can state a claim for oppression where the controlling shareholder withholds or refuses to declare dividends in such circumstances.²⁵

Not every corporate refusal to declare dividends constitutes actionable oppression, as directors must balance a corporation's future needs with their responsibility to maximize shareholder value. Defendants charged with oppression frequently claim that their decision not to pay dividends should be shielded by the business judgment rule.²⁶ There is a split of opinion among various jurisdictions over whether the business judgment rule should apply at all in the context of a shareholder oppression action in a closely-held

²³ See, e.g., *Franchino v. Franchino*, 263 Mich App 172, 184 (2004) (reasoning that shareholders' rights typically are "considered to include . . . receiving corporate dividends."); *Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 267–68 (Tex. App. 2012).

²⁴ See *Balvik*, 411 N.W.2d at 387 (exemplifying withholding dividends is the most commonly used technique used to freeze-out minority shareholders).

²⁵ See, e.g., *Schimke v. Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723, at *5 (Mich. Ct. App. Sept. 24, 2009) (upholding trial court finding that defendants engaged in "willfully unfair and oppressive conduct" under MCL § 450.1489(3) where majority shareholder "remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer"). Compare *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875, at *5 (E.D. Mich. Oct. 4, 2006) (listing examples of oppressive conduct, including "refusing to declare dividends"), and *Natale v. Espy Corp.*, No. CIV.A. 13-30008-MGM, 2015 WL 3632227, at *6–7 (D. Mass. June 2, 2015) (describing refusal to declare dividends for an improper purpose, as actionable breach of fiduciary duty claim), with *Berger v. Katz*, No. 291663, 2011 WL 3209217, at *4 (Mich. Ct. App. July 28, 2011) (affirming a buyout at fair value of the minority shareholder's stock where the defendants had cut off distributions to minority shareholder, cut off minority shareholder's salary, cut him out of rental payments, and diluted his shares by issuing an unnecessary capital call in an attempt to squeeze him out of the company; finding oppression, the court also held defendants were not shielded from liability even where the bylaws authorized their actions and that such corporate authorization "does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder.").

²⁶ See, e.g., *Hill v. State Farm Mut. Auto. Ins. Co.*, 166 Cal. App. 4th 1438, 1452 (2008) (explaining the business judgment rule, which "is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is one which is helpful to the conduct of corporate affairs," generally requires courts to presume that "directors' decisions are based on sound business judgment.").

corporation.²⁷ As a result, application of this rule is varied, and many courts apply modified versions of the rule.

For example, the Sixth Circuit Court of Appeals (applying Michigan law) recently stated, “[c]ourts will not interfere with the decision of management not to declare a dividend ‘unless it is clearly made to appear that [the directors] are guilty of fraud or misappropriation of the corporate funds, or refuse to declare dividends when the corporation has a surplus of net profits which it can without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute fraud, or breach of that good faith which [directors] are bound to exercise toward shareholders.’”²⁸

Thereafter, applying this specific articulation of the business judgment rule, the U.S. District Court for the Eastern District of Michigan found a question of fact in another case asserting oppression where the minority shareholder presented evidence that the corporation was financially able to distribute profits without detriment to its operations, and the company’s failure to distribute dividends had disproportionately affected the minority shareholder.²⁹ Thus, while some courts may apply the business judgment rule to a decision not to declare dividends, this defense may not be successful if the company has surplus cash and the directors do not have a valid reason for failing to pay dividends.

2. Paying a Majority Shareholder Compensation That Amounts to a *De Facto* Dividend (to the Exclusion of a Minority Shareholder)

²⁷ See, e.g., *Ritchie v. Rupe*, 443 S.W.3d 856, 903-04 (Tex. 2014) (recognizing view of commentator that business judgment rule should not apply to shareholder oppression cases because the shareholder oppression doctrine is “implicitly premised on the notation that the close corporation employment, management and dividend decisions require more than mere surface inquiry into the majority’s conduct.” (quoting Douglas K. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule Isn’t What It Used To Be*, 1 HOUS. BUS. & TAX. L.J. 12, 20 (2001)); *Kaible v. Gropack*, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) (explaining the business judgment rule has “only limited validity in small business corporations.”); *Grill v. Aversa*, No. 1:12-CV-120, 2014 WL 4672461, at *9 (M.D. Pa. Sept. 18, 2014) (reasoning business judgment rule “presupposes actions that are taken in good faith. As we view it, this issue of motive is precisely the factual question which lies at the heart” of the plaintiff’s oppression case, so trial is necessary to resolve “questions of motive, intent and of state of mind.”); *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, No. CV 10557-VCG, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016) (“[B]usiness judgment rule establishes a presumption in favor of the directors, which a plaintiff can overcome by adequately alleging facts to support a reasonable inference that (1) a controlling stockholder stands on both sides of a transaction or (2) at least half of the directors who approved the transaction were not disinterested or independent. Where the business judgment rule is rebutted, entire fairness is the applicable standard of review.”).

²⁸ *Wolding v. Clark*, 563 F. App’x 444, 453–54 (6th Cir. 2014) (quoting *Matter of Estate of Butterfield*, 418 Mich 241, 341 N.W.2d 453, 458 (1983)).

²⁹ *Blankenship v. Superior Controls, Inc.*, 135 F. Supp. 3d 608, 621 (E.D. Mich. 2015).

Another common tactic used by oppressors is to pay selective dividends only to majority shareholders, or to provide majority shareholders with other forms of compensation in a manner that suggests that the compensation is a de facto dividend made only to those in control of the company.³⁰ “[I]f a minority shareholder can show that another shareholder employed by the company is receiving compensation so far in excess of what is reasonable for his position and level of responsibility that he is, in actuality, receiving a de facto dividend to the exclusion of the minority shareholder, such an act may support a finding of minority shareholder oppression.”³¹

B. Majority Shareholder Treating Themselves Better Than They Treat Minority Shareholders

Case law provides various examples of actions that have been found to be oppressive when taken by and for the benefit of majority owners, when those same majority owners curtailed or denied the benefit of those same acts to minority shareholders.³²

Perhaps the most common oppressive actions of this type relate to salary and compensation in general. As Professors O’Neal and Thompson state:

In another commonly-used squeeze-out technique, majority shareholders siphon off corporate wealth by causing a corporation to pay its majority shareholders, and perhaps members of their immediate family or other relatives, excessively high compensation for services rendered as directors, officers or employees . . . Instead of treating all of the stock alike, and distributing the profits fairly and proportionately by way of dividends, the majority first elect themselves directors, then as directors elect themselves officers, and then distribute among themselves a substantial part of the profits in the way of excessive salaries, additional compensation and other

³⁰ See, e.g., *Tosciano v. Koopman*, 148 F. Supp. 3d 679, 682 (N.D. Ill. 2015) (finding that “consulting fees” of \$11,666 per month which were not disclosed to all shareholders, were not approved by the board of directors and for which majority shareholder performed no actual services, were “disguised dividend payments which should have been provided to all shareholders.”).

³¹ *Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 268 (Tex. App. 2012).

³² See *Edelman v. JELBS*, 2015-Ohio-5542, ¶ 30, 57 N.E.3d 246, 255–56, *appeal not allowed*, 2016-Ohio-3028, ¶ 30, 145 Ohio St. 3d 1471, 49 N.E.3d 1313 (“In a close corporation, a majority shareholder breaches a fiduciary duty when that shareholder manipulates his or her control over the close corporation in order to unfairly acquire personal benefits owing to or not otherwise available to minority shareholders of the close corporation.”).

devices.³³

Where those in control of corporations authorized substantial salary increases for majority shareholders, but not minority shareholders, courts have found evidence of oppression.³⁴ Likewise, the Michigan Court of Appeals found oppression where majority shareholders increased (or continued to increase) their own salaries while claiming that the company was losing money and could not afford to increase salaries or other compensation for minority shareholders.³⁵

Unfair valuation of a minority shareholder's interest in a corporation can provide a solid basis for finding oppression.³⁶ Offering to buy out the minority shareholder's interests on terms that are grossly disproportionate to more favorable terms proposed for majority shareholders has also been deemed oppressive.³⁷ In that same vein, orchestrating a merger which is based on an unfairly low valuation of the minority owner's shares can also constitute oppression.³⁸

Another tactic that courts have held to be oppressive is the issuance of a capital call when there is little or no financial reason for it. Capital calls – i.e., when majority or controlling shareholders cause a company to request additional *pro rata* infusions of capital from all shareholders – can present non-controlling shareholders with two equally bad options: (1) tie up more of their capital in a company over which they cannot exert control, or (2) refuse to contribute and see their ownership interest diluted.³⁹ In theory, companies

³³ O'NEAL AND THOMPSONS OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 3:7, Westlaw (database updated Nov. 2017).

³⁴ See, e.g., *Edelman*, 2015-Ohio-5542, at ¶ 30; *Colgate v. Disthene Grp.*, No. CL 10–158, 2013 WL 691105, at *3 (Va. Cir. Ct. Feb. 4, 2013) (holding unauthorized salaries and bonuses recoverable in conversion action); see also *Smith v. Roger Smith & Sons, Inc.*, No. 105,456, 2012 WL 2148173, at *4 (Kan. Ct. App. June 8, 2012) (asking the court to reverse the lower court's dismissal and find for plaintiff when defendants "siphoned off corporate assets in the form of excessive compensation and then negotiated the sale of the corporation at a reduced price augmented with substantial financial benefits flowing to them personally.").

³⁵ See *Berger v. Katz*, No. 291663, 2011 WL 3209217, at *5 (Mich. Ct. App. July 28, 2011) (holding that "the trial court did not clearly err in finding that defendants' use of their power as majority shareholders to pay themselves higher salaries, while at the same time claiming that the corporation was not profitable to justify their refusal to make any distributions to plaintiff, supported the jury determination that defendants engaged in willfully unfair and oppressive conduct.").

³⁶ See, e.g., *Etowah Envtl. Grp., LLC v. Walsh*, 333 Ga. App. 464, 468, 774 S.E.2d 220, 224 (2015) (discussing arbitrator's application of Delaware law, which applies an "entire fairness" standard to valuation and corporate fiduciary obligations generally).

³⁷ See, e.g., *Schimke v. Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723, at *3 (Mich. Ct. App. Sept. 24, 2009) (explaining that the discrepancy between price at which "defendants were willing to consider redeeming plaintiff's stock" and value of majority-held stock affected the value of plaintiff's shareholder interest in corporation was "indicative of substantial interference with plaintiff's rights as a shareholder").

³⁸ *Owen v. Cannon*, No. CV 8860-CB, 2015 WL 3819204, at *31–32 (Del. Ch. June 17, 2015).

³⁹ See, e.g., *Berger*, 2011 WL 3209217, at *4 (finding oppression based on, inter alia, the defendant's issuance of "a capital call when the corporation was doing fairly well, which diluted

exercise capital calls when additional resources are required to support operations. A capital call under circumstances where there is no legitimate financial need supports an inference that the action is driven not by economics, but rather by a desire to put pressure on the company's non-controlling shareholders.⁴⁰ When the generated cash is used in some fashion to benefit only those in control of the corporation, a capital call is even more likely to be deemed oppressive.

The payment of "bonuses" of various types, and the manner in which such bonuses are disclosed or approved by the board or the shareholders, has proven to be a fertile basis for oppression claims. In a recent New Mexico case, the majority shareholder was held to have acted improperly where he: (1) knowingly and intentionally paid himself bonuses to the economic detriment of the both the plaintiffs and to the corporation itself; (2) failed to inform plaintiff minority shareholders of these bonuses; (3) knowingly submitted false information about his bonuses to plaintiffs at shareholder meetings; and (4) failed to inform plaintiffs of other material facts generally relating to the corporation's business and financial affairs.⁴¹

C. Stealing or Misuse of Corporate Funds, and/or Misrepresenting the Financial Condition of the Company

Not surprisingly, where a majority or controlling owner uses corporate funds or other assets for his own benefit, such actions can constitute oppression.⁴² For example, various courts have held that using corporate funds to pay the personal expenses of controlling shareholders (or those of individuals related to such shareholders) constitutes oppression.⁴³

plaintiff's stock and shares and forced plaintiff to put his own money into the corporation.").

⁴⁰ *Id.*

⁴¹ Jones v. Auge, 2015-NMCA-016, ¶ 39, 344 P.3d 989, 1000 (analyzing under a theory of breach of fiduciary duty to a minority shareholder); *see also* Beale v. O'Shea, 319 Ga. App. 1, 6–7, 735 S.E.2d 29, 33-34 (2012) (holding that plaintiff stated facts sufficient to survive a summary judgment motion on his breach of fiduciary duty claim because there was evidence that a self-interested Change in Control Agreement executed by the defendant would cause a potential buyer of the company to pay less for the shares, which would damage plaintiff as a shareholder).

⁴² *See, e.g.*, Favila v. Souther, No. B230264, 2012 WL 5208482, at *11 (Cal. Ct. App. Oct. 23, 2012) (allowing corporate bonuses paid to defendant majority shareholders with the objective of reducing the amount of profit in the corporation that was available to be paid to minority shareholder to be an actionable as injury). *Compare* Arunski v. Pet Pool Prod., Inc., No. 1 CA-CV 11-0084, 2012 WL 893091 (Ariz. Ct. App. Mar. 15, 2012) (finding that defendants adequately supported breach of fiduciary duty counterclaim where plaintiff improperly took over \$300,000 from the company), *with* Bedi v. Dhaliwal, No. A135784, 2014 WL 280498, at *9 (Cal. Ct. App. Jan. 27, 2014) (finding for plaintiff minority shareholder when the majority shareholder breached his fiduciary duties due to misappropriation of the corporation's earnings to himself, instead of paying proper distributions to all shareholders).

⁴³ *See, e.g.*, Emmet v. Del Franco, No. 16-cv-11211, 2017 WL 697049, at *10 (E.D. Mich. Feb. 22, 2017) (finding plaintiff adequately pled a direct claim for oppression by alleging that the defendants

Causing or contributing to a false and artificially low valuation of the company as a whole can also constitute oppression. For example, a court found oppression where majority owners refused to cooperate with outside accountants hired to value the corporation and the defendant owners “instead supplied inaccurate and incomplete information with the intent of achieving” an artificially low valuation at a time when valuation was critical to the plaintiff’s future with the corporation.⁴⁴

Similarly, using (or diverting) corporate funds for the benefit of separate entities owned by, or benefitting only, the controlling shareholders also constitutes oppression.⁴⁵ Even where the corporate entities owned jointly by the majority and minority owners were profitable as to all shareholders, the Western District of Michigan held that the conduct of shareholders is still governed by their role as fiduciaries, thus, this did not excuse the majority shareholder’s self-dealing when he used the jointly owned entities’ funds to make interest-free loans to the majority shareholder’s separate wholly-owned entities.⁴⁶

Unfortunately, a majority shareholder may misuse or otherwise dissipate corporate funds so grossly that he diminishes the value of the entire corporation, which includes the minority shareholder’s interest, to zero or less. Such was the case in a Sixth Circuit case where the plaintiff alleged that the two controlling shareholders had conspired to devalue the corporation, eventually causing the corporation to entirely cease doing business.⁴⁷ Thus,

“misused their collective power over the corporations’ affairs to enrich themselves at the expense of the corporation and Plaintiff by funneling corporate funds to the Defendants to support their lavish lifestyles.”) *Compare* *Kayne v. Mense*, No. B254975, 2016 WL 1178671, at *2-3 (Cal. Ct. App. Mar. 25, 2016) (explaining the jury’s finding that defendant shareholder breached his fiduciary duties to plaintiff by engaging in a series of actions, including failure to pay plaintiff amounts due under the Operating Agreement, failure to eliminate plaintiff’s personal guaranty, failure to disclose distributions made to himself, and failure to provide financial information; jury also imposed punitive damages finding defendant acted “with oppression, fraud, or malice.”), *with* *Niloy & Rohan, LLC v. Sechler*, 335 Ga. App. 507, 782 S.E.2d 293 (2016) (holding there was a breach of fiduciary duty when 50% member sued other 50% member for paying himself profits from the company, instead of paying the company’s debts, as the parties agreed (Georgia law recognizes a fiduciary duty flowing from a managing member of a limited liability company to the other members)).

⁴⁴ *Toscano v. Koopman*, 148 F. Supp. 3d 679, 683 (N.D. Ill. 2015).

⁴⁵ *See, e.g.,* *Pertuis v. Front Roe Restaurants, Inc.*, No. 2013-002257, 2016 WL 757503, at *5 (S.C. Ct. App. Feb. 24, 2016) (affirming a finding of oppression where defendants, inter alia, unilaterally financed a new venture by borrowing funds from corporations in which plaintiff was a minority owner, without obtaining plaintiff’s approval of the loans and without inviting plaintiff to participate in the venture); *see also* *Lozowski v. Benedict*, No. 257219, 2006 WL 287406, at *3 (Mich. Ct. App. Feb. 7, 2006) (finding an oppression claim against defendants who collectively controlled 60% of corporation, plaintiff alleged that they enriched themselves at the expense of the minority shareholder and the corporation “by funneling corporate funds to two other corporations that defendants controlled.”).

⁴⁶ *Weiner v. Weiner*, No. 1:06-CV-642, 2008 WL 746960, at *5-9 (W.D. Mich. Mar. 18, 2008).

⁴⁷ *Meathe v. Ret*, 547 F. App’x 683, 689-90 (6th Cir. 2013) (“[Plaintiff’s] allegations simply do not establish with any plausibility that were it not for [the two defendants] allegedly oppressive actions the nearly \$40 million gap between obligations and assets would have been covered by additional

as a practical matter, it is almost always wise to assert an oppression claim promptly, and in any event before the corporation ceases functioning.

Finally, where a minority shareholder knowingly participates with those controlling the corporation in improper or illegal conduct, courts are unlikely to grant relief if the minority shareholder complains of oppression. The Rhode Island Supreme Court made this clear in a case in which the plaintiff and two others formed a closely-held corporation to buy and renovate a horserace track. The plaintiff ultimately lost his investment and sued the two other shareholders for a variety of wrongs including breach of fiduciary duty. The Supreme Court affirmed the trial court's finding that plaintiff's fiduciary duty claim was not actionable, reasoning as follows:

In his twenty-one-page decision, the trial justice acknowledged that [the corporation] "was extremely poorly run, without adhering to common reasonable business practices of accounting, tax filing and reporting, etc.," but found that [plaintiff] was "well aware of the business venture and its pitfalls and possible reward." The trial justice also found as fact that [plaintiff] had visited the racetrack more frequently than he admitted, and that he "was well aware of the situation involving the extent of the project of developing, rehabilitating and operating the race track facility." Further, the trial justice found that [plaintiff] was aware that standards of corporate accountability were not being met, that [one of the defendants] was signing [plaintiff's] name on checks drawn from the [corporate] account, and that payments were being made to other third parties. While the trial justice was "dismayed at the lack of recordkeeping, accountancy and travel of the funds from the ledger book and checkbook," he was "not convinced by a fair preponderance of the evidence that these funds were misappropriated and put into anyone's pocket." Ultimately, the trial justice noted that while he was "aware of the corporate duties and the fiduciary duty of officers of corporations to their stockholders and shareholders, * * * in this particular instance * * * all three of these stockholders and directors were pretty much in the same boat * * * ." 48

Although the Court did not raise or address any equitable doctrines such as *in pari delicto* or unclean hands, which are often used to deny plaintiffs relief when they have themselves participated in wrongful conduct, neither the trial judge nor the Rhode Island Supreme Court made any effort to assist the plaintiff.⁴⁹

corporate value. Since the company was so far under water, [plaintiff's] shares were in all likelihood totally worthless and [he] was entitled to no shareholder distribution whether or not [defendants] actually conspired to devalue the company.").

⁴⁸ Wilby v. Savoie, 86 A.3d 362, 376 (R.I. 2014).

⁴⁹ See generally Wilby v. Savoie, 86 A.3d 362 (R.I. 2014); see also Ammori v. Nafso, No. 312498, 2014 WL 308845 (Mich. Ct. App. Jan. 28, 2014); Karpiuk v. Myers, No. 266570, 2006 WL 2271177

D. Majority Shareholder Causing Corporation to Engage in Self-Interested Transaction, or Directly Usurping Corporate Opportunity

A common form of oppression arises when those in control of the corporation commit the corporation to engage in transactions that benefit the controlling shareholder, whether directly or indirectly.⁵⁰ This can include causing the corporation to buy from specific vendors in which the controlling shareholder is financially interested,⁵¹ as well as standard usurpation of corporate opportunities by those in control of a corporation.⁵²

In addition, once a self-interested transaction is in place, failure to modify the terms when later circumstances viewed objectively would dictate such a change can also constitute oppression. This concept is exemplified by a Delaware Chancery decision in which the controlling shareholder made a substantial loan to the corporation, and thereafter refused to refinance the loan, even when it became apparent that the interest rate was “exorbitantly above-market” and there was evidence that “financing was available at significantly lower rates.”⁵³

E. Terminating the Employment of a Minority Shareholder

Termination of a minority shareholder from her employment in a closely-held corporation raises a number of unique considerations. Unlike shareholders in publicly-held corporations, a shareholder in a close corporation often considers herself as a co-owner of the business and expects to exercise “the privileges and powers that go with ownership.”⁵⁴ “Employment by the

(Mich. Ct. App. Aug. 8, 2006) (finding the trial court correctly denied plaintiff equitable relief for breach of fiduciary duty and oppression claims due to plaintiff’s own unclean hands).

⁵⁰ See, e.g., *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875, at *6 (E.D. Mich. Oct. 4, 2006) (finding unfair and oppressive conduct when majority shareholder caused corporation “to expend exorbitant amounts of money in transactions to which he had an interest” and thereafter superficially ratifying these deals as majority shareholder).

⁵¹ See, e.g., *Inca Materials, Inc. v. Indigo Const. Servs., Inc.*, 2015 Ill. App. Ct. (1st) 141345-U, ¶¶ 37-40 (affirming trial court’s finding that defendant usurped a corporate opportunity when she caused the corporation to purchase materials at marked-up prices from a second “middleman” company that defendant controlled).

⁵² See, e.g., *In re Mandel*, 578 F. App’x 376, 387 (5th Cir. 2014) (interpreting Texas’ usurpation and shareholder oppression law); see also *Scafidi v. Hille*, 180 So. 3d 634, 643-44 (Miss. 2015) (affirming the trial court’s finding that the plaintiff adequately pled breach of fiduciary duty and oppression, based on the defendant’s actions, specifically, defendant purchased shares of the other minority shareholders during litigation, with money in which the plaintiff had equal interest, to obtain further control over company and then tried to vote plaintiff off the board of the directors).

⁵³ *Caspian Select Credit Master Fund Ltd. v. Gohl*, C.A. No. 10244-VCN, 2015 WL 5718592, at *9 (Del. Ch. Sept. 28, 2015).

⁵⁴ *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987) (citations omitted).

corporation is often the shareholder's principal or sole source of income . . . [and] providing for employment may have been the principal reason why the shareholder participated in organizing the corporation.”⁵⁵ Firing a minority shareholder can thus effectively defeat the minority shareholder’s purpose in becoming a shareholder.⁵⁶

1. Some States Hold That Termination Can be Actionable Oppression

In light of the realities of closely-held corporations, many states recognize that termination of a minority shareholder from such employment can constitute actionable oppression.⁵⁷ “Depending on the facts, denying salaried employment in a close corporation could be a form of minority shareholder oppression, which in turn is a breach of fiduciary duty.”⁵⁸

In states that recognize termination of employment as oppression, actual termination may not be necessary; intentional withholding of salary can also constitute oppression.⁵⁹ However, the mere fact that a minority

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* Knights’ Piping, Inc. v. Knight, 123 So. 3d 451, 458 (Miss. Ct. App. 2012) (terminating a minority shareholder's employment can be “especially pernicious” given that a “minority stockholder typically depends on his salary as the principal return on his investment, since the earnings of a close corporation are distributed in major part in salaries, bonuses, and retirement benefits.” Therefore, . . . terminating a minority stockholder's employment . . . effectively frustrate[s] the minority stockholder's purposes in entering on the corporate venture” and deny him a return on his investment (citations omitted)); *see also* Folie v. Aging Joyfully, Inc., No. A14-0793, 2015 WL 1959854, at *4 (Minn. Ct. App. May 4, 2015) (“Shareholder-employees of a closely held corporation commonly have an expectation of continuing employment and, therefore, discharge of a shareholder-employee may be grounds for equitable relief.”).

⁵⁷ Since a 2006 statutory amendment, Michigan permits a minority shareholder to assert a claim for willfully unfair and oppressive conduct, including “termination of employment or limitations on employment benefits to the extent the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.” MICH. COMP. LAWS ANN. § 450.1489(3) (West 2018); *see also* Berger v. Katz, No. 291663, 2011 WL 3209217, at *5 (Mich. Ct. App. July 28, 2011) (“MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits.”); Kirila v. Kirila Contrs., Inc., 2016-Ohio-5469, ¶ 33, *appeal not allowed*, 2017-Ohio-1427, ¶ 33, 148 Ohio St. 3d 1444, 72 N.E.3d 657 (“[A] minority shareholder's employment in a close corporation often constitutes the major return on the shareholder's investment. Without the employment, the minority shareholder is denied an equal return on the investment. Accordingly, [m]ajority shareholders in a close corporation may not terminate minority shareholders without a legitimate business purpose.” (citations omitted)).

⁵⁸ De-Chu Christopher Tang v. Vaxin, Inc., No. 2:13-CV-401-SLB, 2015 WL 1487063, at *8 (N.D. Ala. Mar. 31, 2015); *see also* Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 539, 5 N.E.3d 923, 935 (2014) (presenting ample evidence that defendants’ termination of plaintiff “violated the duty of utmost good faith and loyalty owed to [plaintiff] as a minority” shareholder, where plaintiff had worked for six years and given up profits to which he was entitled to enable the company to make necessary payments to the company’s former owner, where there was no evidence of plaintiff’s poor performance, and where he was terminated just prior to the date on which he would have had opportunity to convert his stock to ownership in a new entity).

⁵⁹ *See Tang*, 2015 WL 1487063, at *8 (“Plaintiff is right: holding salary hostage for years is

shareholder may have been “demoted” may not be sufficient if he was not terminated from employment or otherwise deprived of income.⁶⁰

Note, however, that even in states where termination may constitute oppression, termination of a minority shareholder’s employment may be justified when it is related to the advancement of a general corporate interest:

What distinguishes a proper corporate purpose from an improper one is that, with the former, removal of the minority shareholders furthers the objective of conferring some general gain on the corporation. The benefit need not be great, but it must be for the corporation. Only then will the fiduciary duty of good and prudent management of the corporation serve to override the concurrent duty to treat all shareholders fairly.⁶¹

2. Other States Do Not View Termination as Oppression

Other states, particularly those that recognize at-will employment, do not recognize that shareholders in a closely held corporation have any “fiduciary-rooted entitlements to their jobs.”⁶² Thus, unless there is an operating agreement or shareholder agreement guaranteeing a plaintiff employment with the closely-held corporation, termination in such states is unlikely to constitute actionable oppression. Furthermore, even where a minority shareholder is a party to an employment agreement, liability for breach of its terms in those states may be limited to contract-based claims and not oppression.⁶³

3. Post-Termination Issues

What the parties do or do not do after a minority shareholder is terminated can also be relevant to oppression claims. Thus, even where a majority shareholder is justified in terminating a minority shareholder, the fact of termination does not justify excluding that individual from participation in other aspects of the corporation; such a person has “two separate interests,

effective to oppress a minority shareholder whether or not it is finally released.”).

⁶⁰ See *Iversen v. C.J.C. Auto Parts & Tires, Inc.*, No. 2–13–0706, 2014 WL 2812849, ¶ 34 (Ill. App. Ct. June 17, 2014).

⁶¹ *Federico v. Brancato*, No. 3133-12, *9 (N.Y. Sup. Ct. June 9, 2014).

⁶² See, e.g., *Bros. v. Winstead*, 129 So. 3d 906, 920 (Miss. 2014) (citing *Hollis v. Hill*, 232 F.3d 460, 470 (5th Cir.2000)); see also *Bontempo v. Lare*, 444 Md. 344, 371-74, 119 A.3d 791, 807-09 (2015) (finding minority shareholders’ “reasonable expectation” of future employment at the time he became a shareholder insufficient to supersede his at-will employment status).

⁶³ See, e.g., *Federico*, slip op. at 9 (“In order to be actionable, a claim for breach of fiduciary duty must be separate, distinct, and independent of the contract itself. Thus, a shareholder of a closely held corporation who is also an employee cannot recover for breach of fiduciary duty when the claim is essentially an employment dispute.”).

one as an owner and the other as an employee.”⁶⁴ Thus, excluding a terminated employee who remains a minority shareholder from shareholder meetings and precluding him from participating in other corporate management decisions violated his “reasonable expectation to manage the company as a shareholder,” even though his termination had been entirely appropriate.⁶⁵

Finally, the fact that a minority shareholder’s employment relationship has been terminated in a demonstrably oppressive manner (or otherwise frozen out) does not grant that individual license to compete with the corporate entity or to otherwise violate his own fiduciary obligations to the corporation.⁶⁶

F. Withholding Corporate Information

Not every form of oppression involves money.⁶⁷ There are a wide variety of ways to oppress a minority shareholder by denying that individual access to essential information about either the corporation or the shareholder’s interest in the corporation.

It is commonly understood that the right to examine corporate financial books and records is a key shareholder right.⁶⁸ Thus, failing to provide copies of financial statements and other corporate information to which a shareholder is entitled can be actionable.⁶⁹ The likelihood of a finding oppression increases when a defendant majority shareholder’s refusal to produce financial records is combined with other actions, such the case in which the defendant responded to a minority owner’s request for financial records by dissolving the corporation.⁷⁰

⁶⁴ Piche v. Braaten, No. A13-0406, 2014 WL 349712, at *5 (Minn. Ct. App. Feb. 3, 2014).

⁶⁵ *Id.*

⁶⁶ See Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 551–53, 5 N.E.3d 923, 943–44 (2014) (asserting since plaintiff/counter-defendant was squeezed out, fired, and frozen out, his fiduciary obligations to the company were extinguished and he therefore could compete freely with his former company; rejecting this argument, the court explained “shareholders in close corporations owe fiduciary duties not only to one another, but to the corporation as well” and that “[a]llowing a party who has suffered harm within a close corporation to seek retribution by disregarding its own duties has no basis in our laws and would undermine fundamental and long-standing fiduciary principles that are essential to corporate governance . . . [i]f shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase.”).

⁶⁷ See, e.g., Kaible v. Gropack, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) (“Ordinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds, but that is not always the case.”).

⁶⁸ See, e.g., Franchino v. Franchino, 263 Mich App 172, 184 (2004) (“Shareholder’s rights are typically considered to include . . . examining the corporate books.”).

⁶⁹ See Baker v. Baker, No. A-10-901, 2011 WL 3505500, at *5 (Neb. Ct. App. Aug. 9, 2011) (“failure to provide financial statements to plaintiffs between 2004 and 2007 . . . creates an issue of fact . . . as to whether defendants have engaged in oppressive conduct against plaintiffs”).

⁷⁰ See McConnell v. Bare Label Prods., Inc., 2015-Ohio-1206, slip op. at ¶ 50 (Ohio Ct. App. Mar. 31, 2015) (affirming an award of *punitive* damages, upon uncontradicted testimony establishing that plaintiff never received a single payment in salary or dividend, and after defendant dissolved the

In similar vein, a majority owner's failure to provide all documents necessary for a minority shareholder to evaluate his interests in a proposed corporate merger can also state a claim for oppression.⁷¹ Indeed, in a 2013 California decision, a plaintiff premised an oppression claim on, *inter alia*, allegations that the oppressor concealed important corporate information.⁷² In support of his claim, plaintiff alleged that the defendant majority shareholders failed to: (1) disclose the company's "true financial condition" for the period after one of the defendants had taken control of the books and accounting; (2) reveal the results of communications and work product received from the corporate accountants; (3) hold properly noticed board of directors meetings (instead conducting at least 16 secret meetings); (4) provide reliable financial documents; (5) insure that the person who handles accounting responds truthfully to inquiries about the condition of the corporation; (6) provide copies of *revised* financial records and statements after they were altered to reflect information that was inconsistent with prior published financials; and (7) document proposed (and actual) transfers of corporate assets/funds to other companies.⁷³

G. Failing to Satisfy Dictates of Internal Corporate Agreements

When those in charge of the corporation breach the terms of the governing corporate documents (bylaws, operating agreements, shareholder agreements, etc.) such action is universally recognized as a breach of contract. Courts in some states go further and recognize that such action can also constitute actionable oppression, when the challenged breaches satisfy the jurisdiction's standards to prove oppression or a breach of fiduciary duty claim.

The Michigan Supreme Court recently so held, recognizing that a majority shareholder's breach of express terms contained in a shareholder agreement could constitute conduct that "substantially interferes with the interests of the shareholder as a shareholder"⁷⁴ and thus such a breach could

corporation, she was able to acquire the corporation's real estate for a price that was less than its tax value).

⁷¹ See *Bull v. BGK Holdings, LLC*, 859 F. Supp. 2d 1238, 1245–46 (D.N.M. 2012) (alleging that plaintiff was not provided all necessary documents "to independently evaluate his interest in considering" a specific merger was sufficient to withstand a motion to dismiss).

⁷² *Wallack v. Idexx Labs., Inc.*, No. 11CV2996-GPC KSC, 2013 WL 5206190, at *14 (S.D. Cal. Sept. 12, 2013).

⁷³ *Id.*

⁷⁴ MICH. COMP. LAWS ANN. § 450.1489(3) (West 2018) (Michigan's Oppression Statute) (providing "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that *substantially interferes with the interests of the shareholder as a shareholder*. Willfully unfair and oppressive conduct may include the termination of employment

be used to establish statutory shareholder oppression.⁷⁵

H. Denying Minority Shareholders/Members Involvement in the Corporation

Denying a minority shareholder the right to participate in management of the corporation or denying her a voice in decision-making can also constitute oppression.⁷⁶ This is especially likely to be oppressive where it represents a change in the status quo, such as where a plaintiff is arbitrarily assigned to a different position within the company or excluded from participation in management or decision-making.⁷⁷

Unilateral changes to number or identity of the corporation's board of directors can also constitute oppression where such actions adversely impact the minority shareholder. Typical of this form of oppression is the Michigan case in which the defendant decided to reduce the number of directors from seven to four (thereby excluding the plaintiff minority shareholders), and then immediately after plaintiffs were eliminated from the board, increasing the number of directors back to seven and placing three new directors on the board who were selected and controlled by the majority shareholder.⁷⁸

or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.” (emphasis added)).

⁷⁵ *Madugula v. Taub*, 496 Mich 685, 717–20 (2014) (reasoning, with little difficulty: (1) that Michigan statutes permit shareholders to modify several of their statutory rights and interests; (2) that the shareholder agreement at issue had in fact modified certain of the plaintiff shareholder's rights in a manner that was effective among all shareholders; so (3) violation of this agreement could be evidence of shareholder oppression because its terms violated the minority shareholder's interests as a shareholder).

⁷⁶ *See, e.g., In re Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1176, 941 N.Y.S.2d 777 (2012) (“We hold that petitioner's admitted conduct in operating the company to the exclusion of respondent substantially defeated the estate's reasonable expectations for cooperation and disclosure of relevant business information between the parties.”); *see also Villalobos v. Villalobos*, No. 32,973, 2015 WL 8676440 (N.M. Ct. App. Nov. 24, 2015) (finding oppression where majority shareholder froze minority shareholder out of important decisions concerning the company and prohibited minority shareholder from participating in corporate affairs).

⁷⁷ *Kaible v. Gropack*, No. A-5666-11T3, 2013 WL 2660995, at *4 (N.J. Super. Ct. App. Div. June 14, 2013); *see also Madugula v. Taub*, Case No. 2008-537-CK (MI Washtenaw Cir. Ct., May 26, 2016) (holding, on remand from the Michigan Supreme Court, that there was clear evidence of shareholder oppression where defendant cut plaintiff out of management of the company and violated the parties' Stockholders' Agreement: “[t]he Court finds that Taub's cutting off and freezing out Madugula from Dataspace's decision-making and involvement in Dataspace's operations constituted “illegal, fraudulent, or willfully unfair and oppressive” conduct under MCL § 450.1489. The Court finds that Taub's denial of access to and withholding from Madugula information regarding Dataspace's operations constituted “illegal, fraudulent, or willfully unfair and oppressive” conduct under MCL 450.1489.”); *Ballard v. Roberson*, 399 S.C. 588, 597, 733 S.E.2d 107, 112 (2012) (finding oppression where there was clear intent by defendants to “freeze-out” plaintiff and “exclude him from involvement [in the company], and from the benefits of ownership.”).

⁷⁸ *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875, at *3 (E.D. Mich. Oct. 4, 2006).

Modification of by-laws by those in control of the corporation can be undertaken in an oppressive manner, even where the changes made are in fact permitted under state law, if the changes are made for the *purpose* of allowing the majority owner to control matters and preclude minority owners from participating in corporate affairs.⁷⁹ For example, in a Michigan federal case, the majority member changed the attendance policy for shareholder meetings to require in-person attendance (thereby preventing plaintiffs from participating via telephone), and amended the bylaws to: (1) allow meetings to be adjourned without providing notice to persons not in attendance; (2) permit notification of shareholders ten days before the meetings despite the fact that this was the same day that shareholders had to tender their proxies; (3) increase the number of directors from four to seven; (4) permit the corporation to issue stock for promises to provide services evidenced by a written contract; (5) permit the company to issue promissory notes as dividends; (6) allow directors to issue options and warrants for company stock; and (7) provide for the indemnification of parties affiliated with the corporation in the event of litigation (including other companies controlled by the majority owner).⁸⁰ The Court there held:

When read together and in light of the timing and other circumstances of the case, the amendments give the appearance that Defendants are using their majority and control position to keep Plaintiffs out of corporate affairs. Individually, the amendments are legal, yet collectively they could be used oppressively. This substantially affects Plaintiffs' rights as shareholders.⁸¹

It may be important to examine how the corporation has conducted its business over a number of years when considering oppression claims. While “[t]he absence of regular meetings does not give rise to oppression if the company's past practices indicate that infrequent meetings were the norm” where the corporation regularly held shareholder meetings during periods “when profits diminished and/or dividends ceased,” and then failed to hold such meetings without explanation, this pattern may be relevant to oppression claims.⁸²

⁷⁹ See, e.g., *Sterling Laurel Realty, LLC v. Laurel Gardens Co-Op, Inc.*, 444 N.J. Super. 470, 472, 134 A.3d 27, 28-29 (App. Div. 2016) (denying the majority shareholders attempt to amend the company's by-laws to change the “definition of a quorum (for purposes of shareholder meetings) from a majority of the shareholders to twenty percent of the shareholders,” the court held that, because permitting “the Board to change the quorum definition by amending the bylaws would allow it to reduce the rights of the shareholders without their involvement, . . . the bylaw amendment was invalid.”).

⁸⁰ *Bromley*, 2006 WL 2861875, at *3, 6-7.

⁸¹ *Id.* at *6 (showing changes to the bylaws *after* the oppression lawsuit was filed was still relevant in the court's analysis).

⁸² *Goret v. H. Schultz & Sons, Inc.*, No. A-4281-10T1, 2013 WL 4792847, at *5 (N.J. Super. Ct. App. Div. Sept. 10, 2013).

III. Conclusion

The definitions of conduct necessary to establish actionable minority shareholder oppression and actionable breach of fiduciary duty obligations by majority shareholders vary from jurisdiction to jurisdiction, but fact patterns found in case law reflect a significant degree of uniformity across the country regarding the actions that courts seem willing to accept as actionable oppressive conduct. Perhaps, like Justice Potter Stewart and obscenity, judges experienced in business matters tend to know oppressive acts when they see them.⁸³ Even in jurisdictions that do not recognize a separate cause of action for shareholder oppression, minority shareholders can usually bring suit for a different cause of action (typically breach of fiduciary duty) and obtain relief when faced with oppressive behavior by those in control of a closely-held corporation.

⁸³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.” (emphasis added)).