

**Litigation Between Shareholders In Closely-Held Corporations:
Protecting Minority Shareholders From Abuse at the Hands of Majority Owners**

By Gerard V. Mantese and Ian M. Williamson^[1]

This article examines case law from both 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.²

¹ Mr. Mantese is the senior partner at Mantese Honigman, P.C., a firm with extensive experience litigating shareholder oppression and related business disputes in Michigan and across the country. Mr. Williamson is also a partner at Mantese Honigman, and has litigated disputes among owners of closely held businesses with Mr. Mantese for the past 12 years. Mantese Honigman maintains offices in Troy, Michigan and St. Louis, Missouri; its lawyers are admitted to a variety of state and federal courts across the country.

² 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 cannot always be limited to a situation 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. “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.” *Kirila v. Kirila Contrs., Inc.*, 2016-Ohio-5469, ¶ 31, 2016 WL 4426409. For example, in Delaware, shareholders owe fiduciary duties to

Because minority shareholders do not control the affairs of the company, they are unable to prevent controlling shareholders from taking unfair or oppressive actions against them. Furthermore, 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 Often, oppressed minority shareholders in closely-held corporations are 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

other shareholders if they either own a majority interest in the company, or exercise control over the company's business affairs. *See e.g., Harris v. Carter*, 582 A.2d 222, 234 (Del. Ch. 1990).

³ *See, e.g., Muellenberg v. Bikon Corp.*, 669 A.2d 1382, 1386 (N.J. 1996). As explained in *Schimke v Liquid Dustlayer, Inc.*, 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[.]'" No. 282421, 2009 WL 3049723, at *6-7 (Mich.Ct.App. Sept 24, 2009) As such, "§ 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.'" *Id.*

⁴ *Estes v. Idea Eng'g & Fabrications, Inc.*, 250 Mich.App. 270, 281, 649 N.W.2d 84, 90–91 (2002). "[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." *Walker v. Pope*, No. 3:15-CV-359-WHA, 2015 WL 4715082, at *4 (M.D. Ala. Aug. 7, 2015). ⁴ "Most modern courts . . . see the oppression statutes as intended to expand shareholder remedies." O'Neal & Thompson, 2 *Close Corp and LLCs: Law and Practice* § 9:32 (Rev 3d ed). *See also Moll, Reasonable Expectations v Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 BC 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.").

(owed by the majority or controlling shareholders to the minority owners).⁵ Regardless of the cause of action asserted, the actions that courts accept by those in control of corporations as potentially oppressive against those who are not in control tend to be similar from state to state.

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

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 Associates, 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.'") (Emphasis in original).

⁶ See, e.g., Iowa Code § 490.1430(2)(b) (2014); Wis. Stat. §180.1430 (2016); 805 IL CS 5/12.56(a)(3) (West 2016); Maryland Code Annotated § 3-413 (2016).

⁷ See, e.g., *Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 783; 582 N.W.2d 98, 107 (Wisc.Ct.App. 1998) ("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 §450.1489(2016) ("'[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 many courts examine such allegations by reference to traditional fiduciary duties. See *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875 at *5 (E.D. Mich, Oct. 4,

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 to harm the interests of one or more of the

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 §450.1489”).

⁹ See *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, concluding that “[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 Associates, L.P. v. Am. Capital, Ltd.*, 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016); *Wallack v. Idexx Labs., Inc.*, No. 11CV2996-GPC KSC, 2013 WL 5206190, at *13 (S.D. Cal. Sept. 12, 2013).

¹¹ *Buar*, 832 N.W.2d at 670-671, citing *inter alia*, See 2 F. Hodge O’Neal & Robert B. Thompson, *Oppression of Minority Shareholders and LLC Members* § 7:11, at 7–105 to 7–108 (rev. 2d ed. 2012). 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.’”) (citations omitted).

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. 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.”

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.¹⁵ Here, the focus is on Michigan case law and various other jurisdictions that

¹² *Ritchie v. Rupe*, 443 S.W.3d 856, 871 (Tex. 2014), *reh'g denied* (Oct. 24, 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 Associates, P.A. v. Kessler*, 898 A.2d 290, 344 (2006) (squeeze-out merger was unfair to minority shareholders, and thus amounted to a breach of fiduciary duty by majority shareholders).

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

¹⁵ *See, e.g., Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987); *Herrmann v. Rain Link, Inc.*, No. 11-1123-RDR, 2014 WL 1641973, at *16 (D. Kan. Apr. 24, 2014) (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. FirstLight Waterbury Holdings, LLC*, No. CV146047836S, 2015 WL 897785 (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.”).

analyze shareholder oppression claims (including claims based on fiduciary obligations between shareholders in closely-held corporations), and distills from these cases common behavior that most courts are likely to find oppressive.¹⁶ No attempt is made here to survey every state's oppression laws. Because courts 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.¹⁷

Given the case-by-case manner in which courts apply the concept of shareholder oppression, this article addresses general categories of oppressive 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.¹⁸ Indeed, at least one Michigan court has found that an oppression claim is more compelling when there are multiple acts of oppression, as opposed to just one.¹⁹

¹⁶ This article is intended as an overview of oppression actions across the country. As such, it discusses cases that are unpublished and cases 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.

¹⁷ *Schimke v Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723 at *13 (Mich. Ct. App. Sept. 24, 2009) (MCL 450.1489 “grants a court broad discretion to fashion a remedy it ‘considers appropriate.’”).

¹⁸ *See, e.g., Kirkiades v. Atlas Food Systems & Services, Inc.*, 541 S.E.2d 257, 267 (S.C. 2001), citing Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L.Rev. 749, 757-758 (April 2000).

¹⁹ *See Juliano v. Smith*, No. 308296, 2013 WL 6670838 (Mich. Ct. App. Dec. 17, 2013) (A shareholder will not necessarily be successful under the 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.”).

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.²⁰ 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.²¹

²⁰ See, e.g., *Balvik v. Sylvester*, 411 N.W.2d 383, 387 (N.D. 1987). ("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. If the minority shareholder is employed by the corporation full time, as is typical, and if she relies on her salary as her primary means of obtaining a return on her investment, as is typical, she is suddenly left with little or no income and little or no return on her investment. 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," *Wayne Law Review*, Vol 14, No. 3, pg. 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.") Citing *Stott Realty Co v Orloff*, 262 Mich. 375 (1933); *Wabunga Land Co v Schwanbeck*, 245 Mich. 505 (1929)(emphasis added).

²¹ 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

II. Common Indicia of Oppression

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

1. Dividend Starvation

It is axiomatic that shareholders have a right to receive corporate dividends.²² One of the most frequent grounds for a shareholder oppression claim is dividend starvation: withholding of corporate dividends from minority shareholders when the corporation has the financial means to make a dividend distribution.²³ Courts in Michigan and elsewhere recognize that a plaintiff can state a claim for oppression where the majority shareholder withholds or refuses to declare dividends in such circumstances.²⁴

corporate earnings and assets or otherwise deprive them of corporate income or advantages to which they are entitled.”).

²² See, e.g., *Franchino v. Franchino*, 263 Mich.App. 172, 184; 687 N.W.2d 620 (2004) (Michigan Court of Appeals held that shareholder rights include “receiving corporate dividends.”); *Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 267–68 (Tex. App. 2012).

²³ See *Balvik v. Sylvester*, 411 N.W.2d 383, 387 (N.D. 1987) (withholding of dividends is the most commonly used technique used to freeze-out minority shareholders).

²⁴ 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”); *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”); *Natale v. Espy Corp.*, No. CIV.A. 13-30008-MGM, 2015 WL 3632227, at *6–7 (D. Mass. June 2, 2015) (refusal to declare dividends for an improper purpose, is actionable as a breach of fiduciary duty). See *Berger v Katz*, No. 291663, 2011 WL 3209217 (Mich. Ct. App. July 28, 2011). In *Berger*, the Michigan Court of Appeals ordered a redemption of the minority shareholder’s stock where the defendants had cut off distributions to a minority shareholder. The court affirmed the trial court’s finding of oppression where the defendants stopped making distributions to plaintiff and stopped consulting with him on matters involving the company. *Id.* at *4. In finding oppression, the Court also held that the defendants were not shielded from liability even where the bylaws actually authorized their actions, holding that such

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.²⁵ 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 corporation.²⁶ 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

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.” *Id.*

²⁵ 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. *See, e.g., Hill v. State Farm Mut. Auto. Ins. Co.*, 166 CalApp. 4th 1438, 1452, 83 Cal. Rptr. 3d 651, 659 (2008).

²⁶ *See, e.g., Ritchie v. Rupe*, 443 S.W.3d 856, 903–04 (Tex. 2014), reh'g denied (Oct. 24, 2014), citing commentators who observe that the 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.” *See also Kaible v. Gropack*, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) (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) (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). *But see Calesa Assocs., L.P. v. Am. Capital, Ltd.*, No. CV 10557-VCG, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016) (business 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.).

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.”²⁷

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.²⁸ 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)

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.²⁹ “[I]f a minority shareholder can show that another shareholder employed by the

²⁷ *Wolding v. Clark*, 563 F. App’x 444, 453–54 (6th Cir. 2014) (brackets in original) quoting *Matter of Estate of Butterfield*, 418 Mich. 241, 341 N.W.2d 453, 458 (1983).

²⁸ *Blankenship v. Superior Controls, Inc.*, 135 F. Supp. 3d 608, 621 (E.D. Mich. 2015).

²⁹ *See, e. g., Toscano 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

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.”³⁰

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.³¹

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 devices.³²

services, were “disguised dividend payments which should have been provided to all shareholders.”).

³⁰ *Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 268 (Tex. App. 2012).

³¹ *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.”)

³² *O’Neal and Thompson’s Oppression of Minority Shareholders and LLC Members* § 3:7 (rev.2d ed. 2012).

Where those in control of corporations authorized substantial salary increases for majority shareholders, but not minority shareholders, courts have found evidence of oppression.³³ 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.³⁴

Unfair valuation of a minority shareholder's interest in a corporation can provide a solid basis for finding oppression.³⁵ 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.³⁶ 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.³⁷

³³ See, e.g., *Edelman*, 2015-Ohio-5542, ¶ 30; *Colgate v. Disthene Grp.*, 85 Va. Cir. 286, 2013 WL 691105, at *15 (Aug. 30, 2012); *Smith v. Roger Smith & Sons, Inc.*, 277 P.3d 1193 (Kan.Ct.App. 2012) (plaintiff alleged that 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").

³⁴ 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.

³⁵ See, e.g., *Etowah Envtl. Grp., LLC v. Walsh*, 333 Ga. App. 464, 468, 774 S.E.2d 220, 224 (2015), *reconsideration denied* (July 29, 2015), *cert. denied* (Jan. 11, 2016) (discussing arbitrator's application of Delaware law, which applies an "entire fairness" standard to valuation and corporate fiduciary obligations generally).

³⁶ See, e.g., *Schimke v. Liquid Dustlayer, Inc.*, No. 282421, 2009 WL 3049723, at *3 (Mich. Ct. App. Sept. 24, 2009) (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 and was indicative of substantial interference with plaintiff's rights as a shareholder).

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. A capital call under these circumstances supports the inference that the primary reason for the action was not economic need, but instead a desire to dilute a minority shareholder's interest in the corporation.³⁸ 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.³⁹

³⁷ Owen v. Cannon, No. CV 8860-CB, 2015 WL 3819204, at *31–32 (Del. Ch. June 17, 2015).

³⁸ See, e.g., Berger v. Katz, No. 291663, 2011 WL 3209217, at *4 (Mich. Ct. App. July 28, 2011) (finding oppression based on, inter alia, the defendant's issuance of "a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation").

³⁹ Jones v. Auge, 344 P.3d 989, 1000 (N.M. App. 2014), *cert. denied*, 345 P.3d 341 (N.M. 2015). The case was analyzed under a theory for breach of fiduciary duty to a minority shareholder. See also Beale v. O'Shea, 735 S.E.2d 29 (Ga. App. 2012) (Shareholder sued controlling shareholder for breach of fiduciary duty based on defendant's execution of a Change in Control Agreement which promised a payout of \$800,000 to two corporate officers if the company is sold to anyone other than the defendant. Court held that plaintiff stated facts sufficient to survive a summary judgment motion on his breach of fiduciary duty claim because there was evidence that such a provision would cause a potential buyer of the company to pay less for the shares, which would damage plaintiff as a shareholder.).

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.⁴⁰ 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.⁴¹

Causing or contributing to a false and artificially low valuation of the company as a whole can also constitute oppression, such as where majority owners refused to cooperate with outside accountants hired to value the corporation; the defendant owners instead supplied

⁴⁰ See, e.g., *Favila v. Souther*, 2012 WL 5208482, at *11 (Cal. App. Oct. 23, 2012) (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, was actionable as injury); *Arunski v. Pet Pool Prod., Inc.*, No. 1 CA-CV 11-0084, 2012 WL 893091 (Ariz. Ct. App. Mar. 15, 2012) (court found that defendants adequately supported breach of fiduciary duty counterclaim where plaintiff improperly took over \$300,000 from the company); *Bedi v. Dhaliwal*, No. A135784, 2014 WL 280498 (Cal. App. 1st Dist. Jan. 27, 2014), *reh'g denied* (Feb. 21, 2014), *review denied* (Apr. 16, 2014) (plaintiff minority shareholder sued majority shareholder for breach of fiduciary duties due to the defendant's misappropriation of the corporation's earnings to himself, instead of paying proper distributions to all shareholders).

⁴¹ See, e.g., *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875, at *6 (E.D. Mich. Oct. 4, 2006) ("The record in the case thus far reveals ample evidence of unfair and oppressive conduct. In his position as majority shareholder, Randall Bromley has caused National to expend exorbitant amounts of money in transactions to which he had an interest. Further, Mr. Bromley has superficially ratified these deals as the majority shareholder."); *Kayne v. Mense*, No. B254975, 2016 WL 1178671 (Cal. Ct. App. Mar. 25, 2016), *review denied* (June 22, 2016) (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. The jury also imposed punitive damages because it found that defendant acted "with oppression, fraud, or malice."); *Niloy & Rohan, LLC v. Sechler*, 782 S.E.2d 293 (Ga. Ct. App. 2016) (50% shareholder sued other 50% shareholder for paying himself profits from the company, instead of paying the company's debts, as the parties had agreed. The court found that this was a breach of fiduciary duty).

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.⁴²

Similarly, using (or diverting) corporate funds for the benefit of separate entities owned by, or benefitting only, the controlling shareholders also constitutes oppression.⁴³ 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 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.⁴⁴

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.⁴⁵ Thus, as a practical matter,

⁴² *Toscano v. Koopman*, 148 F. Supp. 3d 679, 683 (N.D. Ill. 2015).

⁴³ *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 App Feb. 7, 2006) (plaintiff stated oppression claim against defendants who collectively controlled 60% of corporation, by alleging that they enriched themselves at the expense of plaintiff and the corporation "by funneling corporate funds to two other corporations that defendants controlled.")

⁴⁴ *Weiner v. Weiner*, No. 1:06-CV-642, 2008 WL 746960, at *9 (W.D. Mich. Mar. 18, 2008).

⁴⁵ *Meathe v. Ret*, 547 F. App'x 683, 686 (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 corporate value. Since the company was so far under water, [plaintiff's]

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 * * *."⁴⁶

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.")

⁴⁶ Wilby v. Savoie, 86 A.3d 362, 376 (R.I. 2014).

Although the Court did not address any of the doctrines of *in pari delicto*, wrongful conduct, or unclean hands, neither the trial justice nor the Rhode Island Supreme Court made any effort to assist the plaintiff.⁴⁷

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.⁴⁸ This can include causing the corporation to buy from specific vendors in which the controlling shareholder is financially interested,⁴⁹ as well as standard usurpation of corporate opportunities by those in control of a corporation.⁵⁰

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

⁴⁷ See also *Ammori v. Nafso*, 2014 WL 308845 (Mich. Ct. App Jan. 28, 2014); *Karpiuk v. Myers*, 2006 WL 2271177 (Mich. Ct.App Aug. 8, 2006) (Trial court correctly denied plaintiff equitable relief for breach of fiduciary duty and oppression claims due to plaintiff's own unclean hands.)

⁴⁸ See, e.g., *Bromley v. Bromley*, No. 05-71798, 2006 WL 2861875, at *6 (E.D. Mich. Oct. 4, 2006) (majority shareholder caused corporation to expend exorbitant amounts of money in transactions to which he had an interest and thereafter he "superficially ratified" these deals as the majority shareholder).

⁴⁹ See, e.g., *Inca Materials, Inc. v. Indigo Const. Servs., Inc.*, 2015 Ill. App. Ct. (1st) 141345-U, ¶ 38. (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).

⁵⁰ See, e.g., *In re Mandel*, 578 F. App'x 376, 387 (5th Cir. 2014) (Tex. law); *Scafidi v. Hille*, 180 So. 3d 634 (Miss. 2015) (Court affirmed the trial court's finding that the plaintiff adequately pled breach of fiduciary duty and oppression, based on the defendant's actions. Specifically, the defendant had purchased shares of the other minority shareholders during litigation, with money in which the plaintiff had an equal interest, in order to obtain further control over the company and then tried to vote the plaintiff off the board of the directors.)

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.⁵¹

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 himself or herself as a co-owner of the business and expects to exercise the privileges and powers that go with ownership.⁵² “Employment by the 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.”⁵³ Firing a minority shareholder can thus effectively defeat the minority shareholder’s purpose in becoming a shareholder.⁵⁴

1. Some States Hold That Termination Can Be Actionable Oppression

⁵¹ *Caspian Select Credit Master Fund Ltd. v. Gohl*, No. CV 10244-VCN, 2015 WL 5718592, at *9 (Del. Ch. Sept. 28, 2015).

⁵² *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987), quoting 1 F. O’Neal and R. Thompson, *O’Neal’s Close Corporations* § 1.07 (3d ed. 1987).

⁵³ *Balvik*, 411 N.W.2d at 386.

⁵⁴ *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. Thus, terminating a minority stockholder's employment effectively frustrates the minority stockholder's purposes in entering on the corporate venture and deny him a return on his investment); *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.”) (internal quote omitted).

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.⁵⁵ “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.”⁵⁶

In states that recognize termination of employment as oppression, actual termination may not be necessary; intentional withholding of salary can also constitute oppression.⁵⁷ However, the mere fact that a minority shareholder may have been “demoted” may not be sufficient if he was not terminated from employment or otherwise deprived of income.⁵⁸

⁵⁵ 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.” MCL § 450.1489(3); *See Berger v. Katz*, 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.”). *See also Kirila v. Kirila Contrs., Inc.*, 2016-Ohio-5469, ¶ 33, 2016 WL 4426409 (“[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).

⁵⁶ *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 Associates, Inc. v. Ehrlich*, 467 Mass. 525, 539, 5 N.E.3d 923, 935 (2014) (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).

⁵⁷ *De-Chu Christopher Tang*, No. 2:13-CV-401-SLB, 2015 WL 1487063, at *8 (N.D. Ala. Mar. 31, 2015). (“Plaintiff is right: holding salary hostage for years is effective to oppress a minority shareholder whether or not it is finally released.”)

⁵⁸ *Iversen v. C.J.C. Auto Parts & Tires, Inc.*, 2014 IL App (2d) 130706-U, ¶ 34, 2014 WL 2812849, *appeal denied*, 21 N.E.3d 714 (Ill. 2014).

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.⁵⁹

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."⁶⁰ 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.⁶¹

3. Post-Termination Issues

⁵⁹ *Federico v. Brancato*, 43 Misc. 3d 1231(A), 993 N.Y.S.2d 644 (N.Y. Sup. Ct. 2014) (citations omitted).

⁶⁰ *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, 119 A.3d 791, 807 (Md.2015) (minority shareholders' "reasonable expectation" of future employment at the time he became a shareholder insufficient to supersede his at-will employment status).

⁶¹ *See, e.g., Federico v. Brancato*, 43 Misc. 3d 1231(A), 993 N.Y.S.2d 644 (Sup. Ct. 2014) ("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.")

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, one as an owner and the other as an employee.”⁶² Thus, excluding a terminated 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.⁶³

Finally, the fact that a minority shareholder 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.⁶⁴

F. Withholding Corporate Information

⁶² *Piche v. Braaten* No. A13-0406, 2014 WL 349712, at *5 (Minn. Ct. App. Feb. 3, 2014), *review denied* (Apr. 15, 2014).

⁶³ *Id.*

⁶⁴ *See Selmark Assocs., Inc. v. Ehrlich*, 467 Mass. 525, 551–53, 5 N.E.3d 923, 943–44 (2014), where the squeezed out plaintiff/counter-defendant asserted that because he was fired and frozen out, his fiduciary obligations to the company were extinguished and he therefore could compete freely with his former company. The Court rejected this argument, reiterating that “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.”

Not every form of oppression involves money.⁶⁵ 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.⁶⁶ Thus, failing to provide copies of financial statements and other corporate information to which a shareholder is entitled can be actionable.⁶⁷ 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.⁶⁸

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.⁶⁹ Indeed, in a 2013 California decision, a plaintiff premised an oppression

⁶⁵ *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.”)

⁶⁶ *See, e.g., Franchino v. Franchino*, 263 Mich App 172, 184; 687 N.W.2d 620, 628 (2004) (“Shareholder’s rights are typically considered to include . . . examining the corporate books.”)

⁶⁷ *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).

⁶⁸ *See McConnell v. Bare Label Prods., Inc.*, 2015-Ohio-1206, 2015 WL 1432464, at *8 (Ohio Ct. App 2015), where the court affirmed an award of *punitive* damages, upon uncontradicted testimony establishing that plaintiff had never received a single payment in salary or dividend, and after the defendant dissolved the corporation, she was able to acquire the corporation's real estate for a price that was less than its tax value.

⁶⁹ *Bull v. BGK Holdings, LLC*, 859 F. Supp. 2d 1238, 1245–46 (D.N.M. 2012) (complaint alleging that plaintiff was not provided all necessary documents to independently

claim on, *inter alia*, allegations that the oppressor concealed important corporate information.⁷⁰ 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.⁷¹

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

evaluate his interest in considering a specific merger was sufficient to withstand a motion to dismiss).

⁷⁰ Wallack v. Idexx Labs., Inc., No. 11CV2996-GPC KSC, 2013 WL 5206190, at *14 (S.D. Cal. Sept. 12, 2013).

⁷¹ *Id.*

“substantially interferes with the interests of the shareholder as a shareholder”⁷² and thus such a breach could be used to establish statutory shareholder oppression.⁷³

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.⁷⁴ 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.⁷⁵

⁷² Michigan’s oppression statute, MCL §450.1489(3), provides that: “[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.” (Emphasis added).

⁷³ *Madugula v. Taub*, 496 Mich 685, 717–20, 853 N.W.2d 75, 92–94 (2014). The Court had no difficulty reaching this result there, reasoning: (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.

⁷⁴ *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), *cert. denied*, 370 P.3d 1213 (N.M. 2016) (Oppression found where majority shareholder froze minority shareholder out of important decisions concerning the company and prohibited minority shareholder from participating in corporate affairs).

⁷⁵ *Kaible v. Gropack*, No. A-5666-11T3, 2013 WL 2660995, at *4 (N.J. Super. Ct. App. Div. June 14, 2013). The recent case of *Madugula v. Taub*, Case No. 2008-537-CK (MI Washtenaw Cir. Ct., May 26, 2016) is illustrative. On remand from the Michigan Supreme Court, the trial court held that there was clear evidence of shareholder oppression where the

Unilateral changes to number or identity of the corporation's board of directors can also constitute oppression where such actions adversely impact the plaintiff. 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.⁷⁶

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.⁷⁷ 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

defendant cut the plaintiff out of management of the company and violated the parties' Stockholders' Agreement: "The 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." *See also* Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (S.C.2012) (Court found oppression where there was clear intent by defendants to "freeze-out" the plaintiff and exclude him from involvement in the company, and from the benefits of ownership).

⁷⁶ *Bromley*, 2006 WL 2861875, at *3.

⁷⁷ *See e.g.*, *Sterling Laurel Realty, LLC v. Laurel Gardens Co-Op, Inc.*, 444 N.J. Super. 470, 473, 134 A.3d 27, 28-29 (N.J. Super App. Div. 2016) (Majority shareholders attempted 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.).

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).⁷⁸ 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.⁷⁹

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 or dividends ceased, and then failed to hold such meetings without explanation, this pattern may be relevant to oppression claims.⁸⁰

III. Conclusions

⁷⁸ *Bromley*, 2006 WL 2861875, at *3, 6, 7.

⁷⁹ *Bromley*, 2006 WL 2861875, at *6. *Id.* at *6 Interestingly, the bylaw changes were made *after* the oppression lawsuit was filed.

⁸⁰ *Goret v. H. Schultz & Sons, Inc.*, No. A-4281-10T1, 2013 WL 4792847, at *5 (N.J. Super. Ct. App. Div. Sept. 10, 2013), quoting *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 154–55 (Law Div.1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (App.Div.1980).

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.⁸¹ 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.

⁸¹ *Jacobellis v. Ohio* 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (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).