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Douglas K. Moll

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Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes

Douglas K. Moll†

INTRODUCTION

The doctrine of shareholder oppression attempts to safeguard the close corporation minority investor from the improper exercise of majority control.[1] By identifying and protecting the "reasonable expectations" of close corporation shareholders, the oppression doctrine combats majority shareholder efforts to exclude a minority investor from the company's financial and participatory benefits.[2]

The New York decision of *In re Kemp & Beatley, Inc.* has been particularly influential in shaping the "reasonable expectations" framework.[3] In *Kemp*, the Court of Appeals stated that "oppressive actions . . . refer to conduct that

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† Associate Professor of Law, University of Houston Law Center. B.S. 1991, University of Virginia; J.D. 1994, Harvard Law School. The author wishes to thank Adam Goldberg, Stefanie Moll, Zelda Moll, Michael Muskat, and Robert Ragazzo for their insightful comments. Copyright 2002 by Douglas K. Moll.

1. *See, e.g.*, Bonavita v. Corbo, 692 A.2d 119, 124 (N.J. Super. Ct. Ch. Div. 1996) (noting that the "thrust" of the oppression-triggered dissolution statute "is protection from the abusive exercise of power"); *id.* at 128 ("[I]t is the 'wielding of . . . power' in a manner which 'destroy[s] a stockholder's vital interest and expectations' that constitutes oppression.").

This Article uses the terms "majority shareholder" and "minority shareholder" (or "majority" and "minority") "to distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not." J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 5 n.7 (1977). Such power "is most often determined by the size of shareholdings." *Id.*

2. *See* discussion *infra* Part I (describing the shareholder oppression doctrine).

3. 473 N.E.2d 1173 (N.Y. 1984); *see also infra* text accompanying note 8.

substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise."[4] As the court continued,

> A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment. . . .
>
> . . . A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.
>
> Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.[5]

By speaking of expectations that are "held by minority shareholders in committing their capital to the particular enterprise" and are "central to [a shareholder's] decision to join the venture," the *Kemp* formulation of the reasonable expectations inquiry focuses on the shareholder's expectations at the time it decided to invest in (and therefore join) the business.[6] For the disputes that characterize most of the published oppression decisions, this "time of investment" focus is suitable, as the aggrieved shareholder usually complains about expectations established around the time of the shareholder's actual commitment of capital to the business.[7] Perhaps for this reason, other jurisdictions have followed *Kemp* and have articulated a "time of investment" standard for their reasonable expectations inquiries.[8]

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4. *Kemp*, 473 N.E.2d at 1179.

5. *Id.*

6. *Id.*; *see also id.* (noting that the aggrieved shareholder's expectations "in entering the particular enterprise" are relevant); 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.28, at 9-173 (3d ed. 1996) [hereinafter CLOSE CORPORATIONS] (noting that the *Kemp* court's "focus [is] on the petitioner's expectations at the time he decided to join the enterprise").

7. *See infra* text accompanying notes 88-89.

8. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987) (explaining that courts have analyzed oppressive conduct by looking in part to "the 'reasonable expectations' held by the minority shareholders in committing

In certain significant contexts, however, a time of investment focus is problematic. One such area involves changing shareholder expectations. For example, assume that a 60% majority shareholder and two 20% minority shareholders form a close corporation engaged in the sale of a particular product. At the time the shareholders commit their capital to the business, they all agree that the company needs only two active managers. As a result, the majority and one of the minority shareholders assume active management roles in the business, while the other minority shareholder chooses to remain as the passive investor. Six months later, the three individuals realize for the first time that the growing business will require a third manager. With the support of the other two shareholders, the formerly passive minority assumes the third management position. For the next twenty years, all three shareholders participate actively in the management of the business. At the end of that time period, the majority unjustifiably removes both minority shareholders from their positions.

In this scenario, only the first minority shareholder has a reasonable expectation of management as of the time the investments in the company were made. After all, it was six months *after* the time of investment in the business when the shareholders first saw the need for a third manager. As a consequence, the second minority arguably did not reasonably expect a management position until well after the time of investment had passed. Thus, despite the near-equivalence of the minority shareholders' situations—both investors have participated in the management of the company, with the support of the majority, for approximately twenty years—an oppression doctrine premised on "time of investment"

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their capital and labor to the particular enterprise"); Davis v. Sheerin, 754 S.W.2d 375, 381 (Tex. App. 1988) ("[O]ppression should be deemed to arise only when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture."); *see also* Lardner v. Port Huron Golf Club, LC, No. 89-695-NZ, slip op. at 6-7 (Mich. Ct. App. Aug. 4, 1994) (citing and applying the *Kemp* framework). *But see* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) (noting that "'reasonable expectations' are to be ascertained by examining the entire history of the participants' relationship," including "the 'reasonable expectations' created at the inception of the participants' relationship; those 'reasonable expectations' as altered over time; and the 'reasonable expectations' which develop as the participants engage in a course of dealing in conducting the affairs of the corporation").

expectations may protect the first minority shareholder but, oddly, not the second.

A strict time of investment standard, therefore, seems to ignore the possibility that post-investment expectations may arise. One can imagine situations where a shareholder's expectations have changed since the time of the initial investment due to developments in the company, a changing business climate, or the mere passage of years. Focusing on one point in time—the time of investment—to measure the shareholder's expectations fails to capture potentially valid and reasonable expectations that may develop well after a shareholder commits capital to the venture.[9]

Furthermore, a strict time of investment framework fails to account for close corporation shareholders who have made no investment in the company. This group of "non-investing shareholders" includes, among others, stockholders who receive their shares as gifts or inheritances.[10] For example, assume that a founding shareholder of a close corporation passes away and bequeaths his stock in the company to his daughter. The daughter, with the approval of the majority shareholder, commences employment with the company in her father's former position. For years, the daughter continues to work in that position until the majority shareholder terminates her without justification. Although the father, as a founding shareholder, may have had a reasonable expectation of employment, it is unclear whether the daughter has a similar expectation, even assuming that she is equally as competent as her father. Indeed, because the daughter has committed no capital herself, there is, literally-speaking, no "time of investment" peculiar to her. For this group of non-investing shareholders, therefore, an assessment of reasonable expectations at the time of investment may lead to a conclusion that no specific reasonable expectations exist at all.[11]

If these categories of cases remained as outliers, there

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9. *See, e.g.*, 2 CLOSE CORPORATIONS, *supra* note 6, § 9.28, at 9-173 (criticizing a "focus on the [shareholder's] expectations at the time [of investment as] too narrow").

10. *See, e.g.*, Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 326 (1990) ("Shareholders obtaining stock by operation of law, by purchase from a minority shareholder, or by gift or inheritance, create a more difficult problem for courts engaging in an expectations analysis.").

11. *See infra* Part IV.A (discussing general and specific reasonable expectations).

would be little need to think more critically about the time of investment standard for measuring reasonable expectations. Particularly with respect to disputes involving non-investing shareholders, however, cases within these categories have already begun to arise,[12] and they will likely become increasingly prevalent as the oppression doctrine continues to develop. Indeed, because the business world inevitably changes for any type of corporation, shareholder expectations will also evolve and change. Moreover, given that "[f]amily-owned businesses alone represent ninety-five percent of all United States businesses and are responsible for nearly fifty percent of the jobs in the United States,"[13] it is only natural for issues relating to gifted and inherited stock to appear in the close corporation context. Thus, while a time of investment focus for the reasonable expectations inquiry may have sufficed for most of the published oppression decisions to date, it is vitally important to question the framework's suitability for these other categories of cases.

This Article analyzes whether and how the reasonable expectations inquiry could be applied to these changing expectations and non-investing shareholder cases.[14] By conceiving of oppression as a doctrine that protects the fair value of the shareholder's investment, this Article provides a context for thinking about the purpose of the shareholder oppression doctrine and its accompanying reasonable expectations inquiry. Using this "investment model" of oppression as a guide,[15] the Article argues that the law should view a reasonable expectation as a bargain struck between

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12. *See* Maul v. Van Keppel, 714 N.E.2d 707, 711-12 (Ind. Ct. App. 1999) (gift/inheritance); Bonavita v. Corbo, 692 A.2d 119, 120-22 (N.J. Super. Ct. Ch. Div. 1996) (inheritance); *In re* Schlachter, 546 N.Y.S.2d 891, 892 (App. Div. 1989) (gift); *In re* Smith, 546 N.Y.S.2d 382, 383-84 (App. Div. 1989) (inheritance); *In re* Gunzberg v. Art-Lloyd Metal Prods. Corp., 492 N.Y.S.2d 83, 86 (App. Div. 1985) (gift); Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. Spec. Term 1984) (gift/inheritance); Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1050 (Pa. 1983) (inheritance); *see also Meiselman*, 307 S.E.2d at 563 (addressing changing expectations).

13. Bahls, *supra* note 10, at 287.

14. In discussing the "particularly difficult situation" of "a spouse [who] inherits the stock of a former active shareholder and [who] is relegated to . . . passive investor" status, one commentator noted that the spouse's position "warrants further scholarly attention." Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relevant Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 86 n.265 (1982).

15. *See infra* Part III (describing the investment model of oppression).

majority and minority shareholders over a specific entitlement the minority is to receive in return for its investment in the company. Because majority and minority shareholders may strike these "investment bargains" throughout their participation in a close corporation, the Article contends that the oppression doctrine should look for evidence of such bargains during the entirety of the shareholders' relationship, rather than merely at the narrower time of investment. The reasonable expectations inquiry, therefore, should reflect this broader perspective. Moreover, although non-investing stockholders do not, by definition, commit any of their own capital to the company, they too may reach mutual understandings with the majority that, if proven, should be protected as investment bargains.

Part I of this Article discusses the nature of the close corporation and explains the development of the doctrine of shareholder oppression. Part II describes the investment model of oppression and the special nature of the close corporation shareholder's investment. While a time of investment focus for measuring reasonable expectations is not well-suited to disputes involving changing expectations or non-investing shareholders, this Part explains that a time of investment inquiry is nevertheless consistent with the theory of the investment model. Building on this analysis, Part III discusses the problems presented by shareholder expectations that change over time. Because corporate law seeks to prevent freeze-out conduct, this Part argues that the law should protect post-investment expectations. Moreover, by drawing from relational contract theory, this Part provides an additional basis for validating and enforcing post-investment expectations, even when the minority has provided no additional consideration. Part IV explores the puzzle of the non-investing shareholder and the various positions that the oppression doctrine could take towards these parties. After discussing whether non-investing shareholders should have (1) no specific reasonable expectations at all, (2) only the specific reasonable expectations of their investing transferors, or (3) any specific reasonable expectations that can be proven, this Part concludes that the third alternative promotes fairness and provides consistency with the investment model of oppression. Finally, Part V considers the role of the transferor's intent in single-founder cases. Rather than serving to bind successor shareholders, this Part suggests that the founder's intent

should serve merely as an evidentiary factor in the reasonable expectations analysis.

I. THE DOCTRINE OF SHAREHOLDER OPPRESSION

A. THE NATURE OF THE CLOSE CORPORATION

A close corporation is a business organization typified by a small number of stockholders, the absence of a market for the corporation's stock, and substantial shareholder participation in the management of the corporation.[16] In the traditional public corporation, the shareholder is normally a detached investor who neither contributes labor to the corporation nor takes part in management responsibilities.[17] In contrast, within a close corporation, "a more intimate and intense relationship exists between capital and labor."[18] Close corporation shareholders "usually expect employment and a meaningful role in management, as well as a return on the money paid for [their] shares."[19] Moreover, family or other

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16. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511 (Mass. 1975); Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 WM. MITCHELL L. REV. 1143, 1148 (1990) ("Close corporations have a limited number of shareholders, and most, if not all, of the shareholders are active in the corporation's day-to-day business.").

The definition of a close corporation varies. *See* 1 CLOSE CORPORATIONS, *supra* note 6, § 1.02, at 4-6 (noting that the possible definitions of a "close corporation" include: a corporation with "relatively few shareholders"; "a corporation whose shares are not generally traded in the securities market"; a corporation "in which the participants consider themselves partners interesse"; a corporation in which "'management and ownership are substantially identical'"; and "any corporation which elects to place itself in" a close corporation grouping); MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 338 (8th ed. 2000) (unabridged) ("Exactly what constitutes a close corporation is a matter of theoretical dispute. Some authorities emphasize the number of shareholders, some emphasize the presence of owner-management, some emphasize the lack of a market for the corporation's stock, and some emphasize the existence of formal restrictions on the transferability of the corporation's shares."). Nevertheless, the typical close corporation possesses most, if not all, of the attributes described in these various definitions.

17. *See* 1 CLOSE CORPORATIONS, *supra* note 6, § 1.08, at 31-32.

18. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993).

19. *Id.*; *see, e.g.*, Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."); 1 CLOSE CORPORATIONS, *supra* note 6, § 7.02, at 4 ("Ownership and management frequently coalesce in closely held corporations, where not uncommonly all the

personal relationships typically link close corporation investors such that a familiarity often exists between the participants.[20]

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for the close corporation minority shareholder.[21] Traditionally, most corporate power is centralized in the hands of a board of directors.[22] In a close corporation, the board is ordinarily controlled "by the shareholder or shareholders holding a majority of the voting power."[23] Through this control of the board, the majority shareholder has the ability to take actions that can harm the minority shareholder's interests.[24] Such

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principal shareholders devote full time to corporate affairs. Even where one or two shareholders may be inactive, the business is normally conducted by the others without aid from nonshareholder managers.").

20. *See, e.g.*, Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 196 (1988); *see also* Bostock v. High Tech Elevator Indus., 616 A.2d 1314, 1320-21 (N.J. Super. Ct. App. Div. 1992) ("[A] close[] corporation frequently originates in the context of personal relationships. Often such business entities are formed by family members or friends." (citations omitted)).

21. *See* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1:02, at 3-4 (2d ed. 1985) [hereinafter OPPRESSION] (characterizing majority rule and centralized management as the "traditional pattern of corporation management," and noting the dangers that this management pattern presents to close corporation minority shareholders); Thompson, *supra* note 18, at 702-03 ("In a closed setting, the corporate norms of centralized control and majority rule easily can become instruments of oppression.").

22. *See* REVISED MODEL BUSINESS CORP. ACT § 8.01(b) (1994) [hereinafter RMBCA] ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . . ."); Kleinberger, *supra* note 16, at 1152 ("In traditional theory, ultimate authority resides with the board of directors . . . .").

23. Kleinberger, *supra* note 16, at 1152; *see, e.g.*, 1 OPPRESSION, *supra* note 21, § 1:02, at 3 ("Indeed, in most closely held corporations, majority shareholders elect themselves and their relatives to all or most of the positions on the board.").

24. *See Bostock*, 616 A.2d at 1320 ("[B]ased upon its voting power, 'the majority is able to dictate to the minority the manner in which the [close] corporation is run.'"); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) ("[W]hen the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions."); Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 267 (S.C. 2001) ("This unequal balance of power often leads to a 'squeeze out' or 'freeze out' of the minority by the majority shareholders." (footnote omitted)); *see also* Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) ("In the instant case [a group of four shareholders], acting in concert, control a majority of the outstanding stock,

actions are often referred to as "freeze-out" or "squeeze-out" techniques[25] that "oppress"[26] the close corporation minority shareholder. Common freeze-out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning-off of corporate earnings through high compensation to the majority shareholder.[27] Quite often, the majority shareholder uses these tactics in combination. For example, the close corporation investor typically looks to salary rather than dividends for a share of the business returns because the "[e]arnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits."[28] When

though no single shareholder owns 51%. Because this control carries the power to destroy or impair the interests of minority owners, the law imposes equitable limitations on the rights of dominant shareholders to act in their own self-interest.").

25. *See* 1 OPPRESSION, *supra* note 21, § 1:01, at 3 n.2 ("The term 'freeze-out' is often used as a synonym for 'squeeze-out.'"). It has been noted that "the term 'squeeze-out' . . . mean[s] the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants." *Id.* at 1. Similarly, a "partial squeeze-out" is defined as "action which reduces the participation or powers of a group of participants in the enterprise, diminishes their claims on earnings or assets, or otherwise deprives them of business income or advantages to which they are entitled." *Id.* at 1-2. *See generally* 1 OPPRESSION, *supra* note 21, §§ 3:01-3:20, 4:01-4:06, 5:01-5:36 (discussing various squeeze-out techniques); 2 *id.* §§ 6:01-6:10 (discussing various squeeze-out techniques).

26. *See infra* notes 43-45 and accompanying text (describing judicial definitions of "oppression").

27. *See* 1 OPPRESSION, *supra* note 21, §§ 3:04 at 18-25 (discussing dividend withholdings), 3:06 at 44-66 (discussing the termination of minority shareholders' employment), 3:07 at 66-71 (discussing the siphoning off of earnings through high compensation to majority shareholders); *see also* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) (noting some of the possible freeze-out techniques).

28. 1 CLOSE CORPORATIONS, *supra* note 6, § 1.08, at 32; *see* Kleinberger, *supra* note 16, at 1148 ("Payout is frequently in the form of salary rather than dividends.").

When calculating its taxable income, a close corporation can deduct reasonable salaries paid to its employees to "reduce the amount of income tax that the company pays." Thompson, *supra* note 20, at 197 n.12 (citing I.R.C. § 162 (1986)). A close corporation cannot, however, deduct any dividends paid to its shareholders. As a consequence, dividends are subject to double taxation—once as business income at the corporate level, and once as personal income at the shareholder level. *Id.* at 197. Because of "[t]he tax system's discouragement of dividends" in favor of salaries, "most close corporations

actual dividends cease, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on its investment as well as any input into the management of the business.[29] Once the minority shareholder is faced with this "indefinite future with no return on the capital he or she contributed to the enterprise,"[30] the majority often proposes to purchase the shares of the minority shareholder at an unfairly low price.[31]

In the public corporation, the minority shareholder can escape these abuses of power by simply selling its shares on the market. By definition, however, there is no ready market for the stock of a close corporation.[32] Thus, when unfair treatment

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provide a return to participants in the form of salary or other employee-related benefits." Thompson, *supra* note 18, at 714 n.90; *see also* 1 OPPRESSION, *supra* note 21, § 1:03, at 4-5 ("[A] close corporation, in order to avoid so-called 'double taxation,' usually pays out most of its earnings in the form of salaries rather than as dividends.").

29. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return on his investment and remaining involved in the operations of the business was dashed when Sylvester removed Balvik as a director and officer of the corporation."); 1 CLOSE CORPORATIONS, *supra* note 6, § 1.15, at 89 ("An investor taking a minority investment position in a close corporation, expecting to receive a return on the investment in the form of a regular salary, would face the risk that, after a falling out among the participants, the directors would terminate the minority shareholder's employment and deprive that investor of any return on the investment in the corporation.").

30. Thompson, *supra* note 18, at 703; *see* 1 CLOSE CORPORATIONS, *supra* note 6, § 1.16, at 96 ("If, for example, the minority shareholder is fired from the employment that was providing the return on the investment in the close corporation, the minority may face an indefinite period with no return on the investment."); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 447 (1990) ("[T]he primary vulnerability of a minority shareholder is the spectre of being 'locked-in,' that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.").

31. *See Donahue*, 328 N.E.2d at 515 ("Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." (citations omitted)); 1 CLOSE CORPORATIONS, *supra* note 6, § 9.02, at 7 (noting that "[a] squeeze out usually does not offer fair payment to the 'squeezees' for the interests, rights, or powers which they lose"); Thompson, *supra* note 18, at 703-04 (noting that in a classic freeze-out, "the majority first denies the minority shareholder any return and then proposes to buy the shares at a very low price").

32. *See Donahue*, 328 N.E.2d at 514 ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not

occurs through termination or otherwise, a close corporation shareholder "cannot escape the unfairness simply by selling out at a fair price."[33]

B. THE CAUSE OF ACTION FOR OPPRESSION

Over the years, state legislatures and courts have developed two significant avenues of relief for the "oppressed" close corporation shareholder. First, many state legislatures have amended their corporate dissolution statutes to include "oppression" by the controlling shareholder as a ground for involuntary dissolution of the corporation.[34] Moreover, when oppressive conduct has occurred, actual dissolution is not the only remedy at the court's disposal. Both state statutes and judicial precedents have authorized alternative remedies that are less drastic than dissolution.[35] As the alternative forms of

available for shares in the close corporation."); Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993) ("[U]nlike shareholders in larger corporations, minority shareholders in a close corporation cannot readily sell their shares when they become dissatisfied with the management of the corporation."); Bostock v. High Tech Elevator Indus., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992) ("[A] minority interest in a close[] corporation is difficult to value because the shares are not publicly traded and a fair market is often not available."); 1 CLOSE CORPORATIONS, *supra* note 6, § 9.02, at 4-5 ("[A] shareholder in a close corporation does not have the exit option available to a shareholder in a publicly held corporation, who can sell shares in a securities market if dissatisfied with the way the corporation is being operated."); Thompson, *supra* note 18, at 702 ("[T]he economic reality of no public market deprives investors in close corporations of the same liquidity and ability to adapt available to investors in public corporations."); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 230-31 (1991) (noting that "the lack of an active market in shares" prohibits close corporation shareholders from creating "homemade dividends" by selling stock).

33. Kleinberger, *supra* note 16, at 1149; *cf.* Walensky v. Jonathan Royce Int'l, Inc., 624 A.2d 613, 615 (N.J. Super. Ct. App. Div. 1993) ("The interest owned by a minority shareholder in a closely held corporation is often a precarious one. In fact, it has been characterized by this court as being one of 'acute vulnerability.'").

34. Thompson, *supra* note 18, at 708. *See generally* Murdock, *supra* note 30, at 452-61 (describing the development of oppression as a ground for dissolution).

35. *See* MINN. STAT. ANN. § 302A.751(1) (West Supp. 2000) (authorizing any equitable relief and specifically authorizing a buyout of the shareholder's interest); N.J. STAT. ANN. § 14A:12-7 (West Supp. 1999) (providing a nonexclusive list of possible relief that includes the order of a buyout and the appointment of a provisional director or custodian); *Brenner*, 634 A.2d at 1033 ("Importantly, courts are not limited to the statutory remedies [for oppression], but have a wide array of equitable remedies available to them."); Balvik v. Sylvester, 411 N.W.2d 383, 388-89 (N.D. 1987) (listing alternative

relief have broadened over the years, orders of actual dissolution have become less frequent.[36] Thus, "oppression" has evolved from a statutory ground for involuntary dissolution to a statutory ground for a wide variety of relief.[37]

Second, particularly in states without an oppression-triggered dissolution statute, some courts have imposed an enhanced fiduciary duty between close corporation shareholders and have allowed an oppressed shareholder to bring a direct cause of action for breach of this duty.[38] In the seminal decision of *Donahue v. Rodd Electrotype Co.*, the Massachusetts Supreme Judicial Court adopted such a standard:

> [W]e hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the

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forms of relief for oppressive conduct such as appointing a receiver, granting a buyout, and ordering the declaration of a dividend); Masinter v. Webco Co., 262 S.E.2d 433, 441 & n.12 (W. Va. 1980) (listing ten possible forms of relief for oppressive conduct such as ordering the reduction of excessive salaries and issuing an injunction against further oppressive acts). *But see* Giannotti v. Hamway, 387 S.E.2d 725, 733 (Va. 1990) (stating that the dissolution remedy for oppression is "exclusive" and concluding that the trial court is not permitted "to fashion other . . . equitable remedies").

36. Thompson, *supra* note 18, at 708; *cf.* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1987) (finding that courts ordered remedies other than dissolution in the majority of thirty-seven involuntary dissolution cases studied). *See generally* Murdock, *supra* note 30, at 461-64 (discussing the development of alternative remedies).

37. *See* 2 CLOSE CORPORATIONS, *supra* note 6, § 9.27, at 159 ("The inclusion of 'oppression' and similar grounds as a basis for involuntary dissolution or alternative remedies has opened up a much broader avenue of relief for minority shareholders caught in a close corporation wracked with dissension."); Thompson, *supra* note 18, at 708-09 ("[I]t makes more sense to view oppression not as a ground for dissolution, but as a remedy for shareholder dissension.").

38. Thompson, *supra* note 18, at 726; *see also id.* at 739 ("It should not be surprising that the direct cause of action is developed particularly in states without an oppression statute, and [it] provides a vehicle for relief for minority shareholders in a close corporation where the statutory norms reflect no consideration for the special needs of such enterprises."). *See generally* Murdock, *supra* note 30, at 433-40 (discussing the development of the shareholder fiduciary duty).

corporation.[39]

Following the lead of the *Donahue* court, several courts outside of Massachusetts have also imposed an enhanced fiduciary duty between the shareholders in a close corporation.[40]

The development of the statutory cause of action and the enhanced fiduciary duty reflect "the same underlying concerns for the position of minority shareholders, particularly in close corporations after harmony no longer reigns."[41] Because of the similarities between the two remedial schemes, "it makes sense to think of them as two manifestations of a minority shareholder's cause of action for oppression."[42] In the close corporation context, therefore, one can view the parallel development of the statutory cause of action and the enhanced fiduciary duty action as two sides of the same coin—i.e., the shareholder's cause of action for oppression.

C. MEASURING OPPRESSION THROUGH "REASONABLE EXPECTATIONS"

The development of a shareholder's cause of action for oppression requires courts to determine when "oppressive" conduct has occurred. In wrestling with this issue, the courts have developed three principal approaches to defining oppression. First, some courts define oppression as

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39. Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (footnotes omitted) (citations omitted). The *Donahue* court, however, later scaled back its duty of utmost good faith and loyalty. Due to concerns that the "untempered application of the strict good faith standard enunciated in *Donahue* . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned," the Massachusetts Supreme Judicial Court suggested a balancing test in *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976). If "the controlling group can demonstrate a 'legitimate business purpose' for its action[s]," no breach of fiduciary duty will be found unless the minority shareholder can demonstrate "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.*

40. *See* Guy v. Duff & Phelps, Inc., 672 F. Supp. 1086, 1090 (N.D. Ill. 1987); Orchard v. Covelli, 590 F. Supp. 1548, 1559 (W.D. Pa. 1984); W & W Equip. Co. v. Mink, 568 N.E.2d 564, 574 (Ind. Ct. App. 1991); Evans v. Blesi, 345 N.W.2d 775, 779 (Minn. Ct. App. 1984); Fought v. Morris, 543 So. 2d 167, 170-71 (Miss. 1989); Crosby v. Beam, 548 N.E.2d 217, 220 (Ohio 1989); Estate of Schroer v. Stamco Supply Inc., 482 N.E.2d 975, 981 (Ohio Ct. App. 1984).

41. Thompson, *supra* note 18, at 739.

42. *Id.* at 700; *see id.* at 738-45 (describing the "combined cause of action for oppression").

"burdensome, harsh and wrongful conduct... 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."[43] Second, some courts link oppression to breach of an enhanced fiduciary duty owed from one close corporation shareholder to another.[44] Third, a number of courts tie oppression to the "frustration of the reasonable expectations of the shareholders."[45] Of these three approaches, the "reasonable expectations" standard garners the most approval, and courts have increasingly used it to determine whether oppressive conduct has taken place.[46] The highest courts in several states have adopted the reasonable expectations approach,[47] and commentators have generally

43. Thompson, *supra* note 18, at 711-12 (alteration in original) (quoting Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976)); *see, e.g.*, Skierka v. Skierka Bros., Inc., 629 P.2d 214, 221 (Mont. 1981); *see also* Haynsworth, *supra* note 36, at 36-39 (describing judicial definitions of oppression).

44. *See, e.g.*, *supra* notes 38-40 and accompanying text.

45. 2 CLOSE CORPORATIONS, *supra* note 6, § 9.27, at 161; *see In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (equating oppression with conduct that "substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise").

46. *See, e.g.*, 2 CLOSE CORPORATIONS, *supra* note 6, § 9.28, at 168 ("One of the most significant trends in the law of close corporations in recent years is the increasing willingness of courts to look to the reasonable expectations of shareholders to determine whether 'oppression' or similar grounds exist as a justification for involuntary dissolution or another remedy.").

47. *See* Stefano v. Coppock, 705 P.2d 443, 446 n.3 (Alaska 1985); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 933-34 (Mont. 1982); Brenner v. Berkowitz, 634 A.2d 1019, 1029 (N.J. 1993); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984); Meiselman v. Meiselman, 307 S.E.2d 551, 563-64 (N.C. 1983); Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987); Masinter v. Webco Co., 262 S.E.2d 433, 442 (W. Va. 1980). *But see* Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 265-66 (S.C. 2001) ("We find [that] adoption of the 'reasonable expectations' standard is inconsistent with [the South Carolina oppression-triggered dissolution statute], which places an emphasis not upon the minority's expectations but, rather, on the actions of the majority."). A number of intermediate appellate courts in other states have adopted the reasonable expectations standard as well. *See* Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 380 (Iowa Ct. App. 1988); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 237 (N.M. Ct. App. 1986); Davis v. Sheerin, 754 S.W.2d 375, 382 (Tex. Ct. App. 1988). In states without an oppression-triggered dissolution statute, the reasonable expectations standard has also been used to determine whether a breach of the enhanced fiduciary duty has occurred. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662-63 (Mass. 1976); Merola v. Exergen Corp., 648 N.E.2d 1301, 1305 (Mass. App. Ct. 1995). Finally, Minnesota and North Dakota have

approved of the reasonable expectations standard.[48]

As mentioned, the New York Court of Appeals in *Kemp* has been influential in its discussion of the reasonable expectations approach.[49] Unfortunately, by tying the expectations inquiry to the time of investment, the *Kemp* court's framework causes difficulty when changing expectations or non-investing shareholders are at issue. Before exploring either of these problems associated with the time of investment standard, however, a context in which to think about the shareholder oppression doctrine (and its accompanying reasonable expectations inquiry) is needed. After all, without a sense of what the shareholder oppression doctrine is attempting to accomplish, it is difficult to think principly about how these categories of cases should be handled.

II. THE INVESTMENT MODEL OF OPPRESSION

This Article contends that the shareholder oppression doctrine aims to protect the fair value of the close corporation shareholder's investment, including the specific components of the shareholder's return on investment. This conception, referred to in prior scholarship as the "investment model" of oppression,[50] generally finds oppression liability whenever unjustifiable[51] majority conduct harms any aspect of a

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explicitly incorporated the reasonable expectations standard into their dissolution statutes. MINN. STAT. ANN. § 302A.751(3)(a) (West Supp. 1999); N.D. CENT. CODE § 10-19.1-115 (1985).

48. *See* Haynsworth, *supra* note 36, at 37 ("The third definition of oppression, initially derived from English case law, and long advocated by Dean F. Hodge O'Neal as well as other leading close corporation experts, is conduct which frustrates the reasonable expectations of the investors."); Thompson, *supra* note 20, at 211 ("Recognition of the intimate, illiquid relationship within a close corporation therefore provides the necessary foundation for judging whether relief should be granted and, if so, what relief is appropriate; the shareholders' reasonable expectations has become the standard which best facilitates that approach.").

49. *See supra* notes 3-6 and accompanying text.

50. *See generally* Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 537-47 (developing the investment model of oppression and arguing that shareholder oppression should be viewed as a doctrine that protects the value of the close corporation shareholder's investment).

51. If the minority's misconduct or incompetence justifies the majority's allegedly oppressive action, a finding of shareholder oppression is likely unwarranted. *See* Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 800-01, 813 (2000).

shareholder's expected investment return. This result is typically derived from a determination that the shareholders struck a bargain for the protection of these investment return components when the minority committed its capital to the venture, as well as from an accompanying conclusion that the majority's subsequent actions have breached that bargain.[52] A brief discussion of the absence of a market, the purpose of involuntary dissolution statutes, and the rise of the buyout remedy will help support the conception of oppression as an investment-centered doctrine.

A. DERIVING THE INVESTMENT MODEL

1. The Absence of a Market

Understanding the shareholder oppression doctrine requires an examination of the "special nature of close corporations."[53] That "special nature" stems primarily from the lack of a market for close corporation shares.[54] Indeed, if the principle of majority rule harms the position of a public corporation shareholder, the shareholder can exit the situation by selling its holdings on the market. Because a "market exit" generally protects the fair value of a public company investment,[55] a public corporation shareholder is adequately safeguarded from oppressive majority conduct.[56]

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52. *See infra* notes 81-85 and accompanying text.

53. *In re* Topper, 433 N.Y.S.2d 359, 364 (Sup. Ct. 1980) (noting that "to a great extent, a definition of 'oppressive' depends on the special nature of close corporations"); 2 CLOSE CORPORATIONS, *supra* note 6, § 9.28, at 169; *see also* Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) ("The statutory concept of oppressive conduct, and the broad and imprecise definitions of the term given by the courts, is best understood by examining the nature and characteristics of close corporations.").

54. *See, e.g.*, Kleinberger, *supra* note 16, at 1149 (discussing the lack of a market for close corporation stock and observing that "[m]ore than any other characteristic, this 'no exit' phenomenon has pushed the law into developing special rules for shareholders in close corporations").

55. *See* 1 OPPRESSION, *supra* note 21, § 2:15, at 38 (observing that "in a public-issue corporation the sensitivity of management to the market price for the stock and the fact that stock prices are highly responsive to corporate earnings tend to assure the dissatisfied shareholder of a reasonable price when he liquidates his investment through the market" (internal quotation omitted)); *id.* (noting that "[i]n a large public-issue corporation, a shareholder who is dissatisfied with the way the business is being operated can sell his stock at no great financial loss").

56. *See* RMBCA, *supra* note 22, § 14.34 cmt. 1 ("Shareholders of publicly-traded firms are protected by their right to sell out if they are dissatisfied with

In the close corporation context, however, there is no market exit.[57] Thus, the close corporation shareholder "faces a potential danger that the shareholder of a public corporation generally avoids—the possibility of harm to the fair value of the shareholder's investment."[58] At its extreme, this harm manifests itself as the classic freeze-out where the minority shareholder faces a trapped investment[59] and an indefinite exclusion from participation in the business returns.[60] The position of the close corporation shareholder, therefore, is uniquely precarious. As one commentator noted, "[i]n no other type of business arrangement do owners face the possibility of completely losing their investments by being excluded from employment and denied profits."[61]

If the "special nature" of close corporations informs the meaning of oppression, the absence of a market should be

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current management or they may seek traditional remedies for breach of fiduciary duty."); Thompson, *supra* note 20, at 225 ("Once a corporation's shares are publicly traded, minority shareholders, even if they are also employees, are not subjected to the risks that are common to the close corporation and which inspired the modern legislative and judicial remedies."); *id.* at 237 (noting that the market offers public corporation shareholders "protection" and an "exit option").

57. *See supra* note 32 and accompanying text.

58. Moll, *supra* note 50, at 543.

59. *See* Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993) ("The inability to reflect dissatisfaction by withdrawing one's investment places the majority shareholder in an enhanced power position to use the minority's investment without paying for it." (internal quotation omitted)); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) ("The limited market for stock in a close corporation and the natural reluctance of potential investors to purchase a noncontrolling interest in a close corporation that has been marked by dissension can result in a minority shareholder's interest being held 'hostage' by the controlling interest, and can lead to situations where the majority 'freeze out' minority shareholders by the use of oppressive tactics."); Sandra L. Schlafge, Comment, *Pedro v. Pedro: Consequences for Closely Held Corporations and the At-Will Doctrine in Minnesota*, 76 MINN. L. REV. 1071, 1076 (1992) ("The terminated minority shareholders' capital is, in effect, held hostage by those in control of the corporation because there is no marketplace in which minority shareholders may sell their shares.").

60. *See supra* note 30 and accompanying text.

61. Schlafge, *supra* note 59, at 1074 n.19; *see also* Hetherington & Dooley, *supra* note 1, at 6 ("The position of the minority in the close corporation is as unique as it is precarious: no other form of business organization subjects an owner to the dual hazards of a complete loss of liquidity and an indefinite exclusion from sharing in the profitability of the firm."); *cf.* 1 CLOSE CORPORATIONS, *supra* note 6, § 7.20, at 90 ("[T]he lack of a market for the shares of a close corporation . . . leaves a minority shareholder vulnerable in a way that is distinct from the position of a shareholder in a publicly held corporation.").

viewed as the motivating force behind the development of the oppression doctrine in the close corporation setting.[62] Protecting the value of the close corporation shareholder's investment, therefore, should be understood as the focus of the shareholder oppression doctrine. The doctrine, in other words, should approximate the role of the market in the public corporation. Just as the market protects the value of the public corporation shareholder's investment, the oppression doctrine should protect the value of the close corporation shareholder's investment.

2. The Purpose of Involuntary Dissolution Statutes

Examining "the Legislature's general purpose in creating . . . involuntary-dissolution statute[s]" also helps to give meaning to the oppression doctrine.[63] As mentioned, the dissolution statutes of many states include "oppression" as a ground for involuntary dissolution of a corporation.[64] In the *Kemp* decision, the court discussed the purpose behind the legislature's inclusion of "oppressive actions" as an involuntary dissolution ground:

> As the stock of closely held corporations generally *is not readily salable*, a minority shareholder at odds with management policies may be without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment. *This predicament may fairly be considered the legislative concern underlying the provision at issue in this case*; inclusion of the criteria that the corporation's stock not be traded on securities markets and that the complaining shareholder be subject to oppressive actions supports this conclusion.[65]

The language of the *Kemp* court strongly suggests that the vulnerability of the close corporation investment provided the primary motivation behind the inclusion of the "oppressive actions" language in the involuntary dissolution statute. The

62. *See supra* note 54.

63. *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984); *see* 2 CLOSE CORPORATIONS, *supra* note 6, § 9.28, at 169 (noting that "most courts have come to recognize that [oppression and similar terms] can best be construed against the background of the special nature of close corporations and the legislative purpose in enacting involuntary dissolution statutes").

64. *See supra* note 34 and accompanying text.

65. *Kemp*, 473 N.E.2d at 1179 (emphasis added); *see also id.* at 1180 ("The purpose of this involuntary dissolution statute is to provide protection to the minority shareholder whose reasonable expectations in undertaking the venture have been frustrated and who has no adequate means of recovering his or her investment.").

purpose of the statute and the "oppressive actions" ground, therefore, was to provide the shareholder's investment with some protection in this vulnerable situation.[66] To the extent that the purpose of the statute gives meaning to the oppression action, protecting the close corporation shareholder's investment is central to the operation of the doctrine.

3. The Prevalence of the Buyout Remedy

Both legislatures and courts have authorized alternative remedies for oppressive conduct that avoid actual dissolution of the corporation.[67] The most common alternative remedy is the buyout of the oppressed investor's holdings.[68] The prevalence of

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66. Indeed, dissolution aids the oppressed close corporation shareholder to the extent that it provides a mechanism for recovering the value of the shareholder's investment. The conventional dissolution proceeding determines the value of a business and awards each stockholder its proportionate share of that value. *See* Murdock, *supra* note 30, at 447-51 (discussing different valuation approaches to dissolution and their effect upon the value of the minority shareholder's interest). A *Kemp*-like dissolution statute, therefore, is designed to protect the value of a close corporation shareholder's investment. *See* N.Y. BUS. CORP. LAW § 1104-a(b) (McKinney 2002) (stating that a court, "in determining whether to proceed with involuntary dissolution . . . shall take into account. . . . [w]hether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect *to obtain a fair return on their investment* . . . ." (emphasis added)); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979) ("[I]n most instances the market place provides a remedy for those shareholders who feel that they are being oppressed by a large corporation, *i.e.,* they can sell their stock. That remedy is not readily available to minority shareholders in close corporations. *The [oppression-based dissolution] statute was designed therefore to solve a problem peculiar to them.*" (emphasis added)).

67. *See supra* notes 35-37 and accompanying text.

68. *See* 1 CLOSE CORPORATIONS, *supra* note 6, § 1.16, at 97 (noting that "buyouts are the most common remedy for dissension within a close corporation"); Murdock, *supra* note 30, at 470 ("The most common form of alternative remedy is the buy-out of the minority shareholder."); *see also* Thompson, *supra* note 20, at 231 ("The increased use of buyouts as a remedy . . . is the most dramatic recent change in legislative and judicial thinking on close corporations problems.").

Support for the buyout remedy exists in half the states, although the relevant statutes and judicial decisions differ in their operation. *See* Thompson, *supra* note 18, at 718. Some states permit the corporation or the shareholders to purchase the stock of a minority shareholder seeking involuntary dissolution. *See* ALASKA STAT. § 10.06.630 (Michie 2000); CAL. CORP. CODE § 2000 (West 1990); MICH. COMP. LAWS ANN. § 450.1489 (West 2001); MINN. STAT. ANN. § 302A.751(2) (West Supp. 2002); N.J. STAT. ANN. § 14A:12-7(8) (West 1992); N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney Supp. 2001-2002); N.D. CENT. CODE § 10-19.1-115 (2001); RMBCA, *supra* note 22, § 14.34(a) (1994). In other states, statutes authorize a court to order a

the buyout remedy in litigated cases supports the investment model's conception of shareholder oppression as a protector of the close corporation investment. By ordering a buyout of the minority's interest at "fair value,"[69] the courts effectively

buyout as one of several possible remedies in dissolution proceedings or in other litigation between shareholders. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1816 (West 1996); ME. REV. STAT. ANN. tit. 13-A, § 1123 (West 1992); S.C. CODE ANN. § 33-14-310(d)(4) (Law. Co-op. 1994); MODEL STAT. CLOSE CORP. SUPP. §§ 41, 42 (1997). Courts have also ordered buyouts as part of their general equitable authority. *See* Orchard v. Covelli, 590 F. Supp. 1548, 1560 (W.D. Pa. 1984); Davis v. Sheerin, 754 S.W.2d 375, 380, 383 (Tex. Ct. App. 1988); Thompson, *supra* note 18, at 720-21 ("Courts increasingly have ordered buyouts of a shareholder's interest by the corporation or the other shareholders even in the absence of specific statutory authorization."). The buyout remedy is not limited to dissolution proceedings; indeed, in the absence of a statute, courts have ordered buyouts after finding a breach of fiduciary duty. *See id.* at 723. Even when the court has ordered a dissolution, the parties will often agree on a buyout of one shareholder by another. *See* Thompson, *supra* note 20, at 232. A study by Professors Hetherington & Dooley indicated that in almost all cases of judicially ordered dissolution, the parties came to a contractual solution rather than actually liquidating the company. *See* Hetherington & Dooley, *supra* note 1, at 46. The contractual solution usually involved the buyout of a shareholder. *See id.*

69. The buyout statutes in several of the large commercial states use the term "fair value." *See* Thompson, *supra* note 18, at 718 (noting that "[s]everal of the largest commercial states permit a corporation or its majority shareholders to avoid involuntary dissolution by purchasing the shares of the petitioning shareholders at their 'fair value'"); *see also* RMBCA, *supra* note 22, § 14.34(a) ("In a proceeding under section 14.30(2) to dissolve a corporation . . . the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder *at the fair value* of the shares." (emphasis added)). State statutes vary in their definitions of fair value. New York has no definition at all. *See* N.Y. BUS. CORP. LAW § 1118 (McKinney Supp. 2002); Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 347 (App. Div. 1985) ("The statute [section 1118] does not define the term 'fair value,' and it fails to provide any criteria for determining 'fair value.'"). The California statute mentions liquidation value as of the valuation date, but the same statute notes that the possibility of sale as a going concern should be taken into account. *See* CAL. CORP. CODE § 2000 (West 1990). Wisconsin defines fair value with reference to going concern value. *See* WIS. STAT. § 180.1833 (1992); *see also* MODEL STAT. CLOSE CORP. SUPP. § 42(b)(1) (1993) (stating that a court, if it orders a share purchase, should "determine the fair value of the shares, considering among other relevant evidence the going concern value of the corporation"). In several states, the buyout statute refers to the state's appraisal statute as a guide in determining fair value. *See, e.g.*, MINN. STAT. ANN. § 302A.751 (West Supp. 2002); N.J. STAT. ANN. § 14A:12-7(8)(c) (West Supp. 1998); *cf.* RMBCA, *supra* note 22, § 14.34 cmt. 4 ("Section 14.34 does not specify the components of 'fair value,' and the court may find it useful to consider valuation methods that would be relevant to a judicial appraisal of shares . . . . The two proceedings are not wholly analogous, however, and the court should consider all relevant facts and circumstances of the particular case in determining fair value."). One

replicate a market for close corporation minority interests and allow oppressed shareholders to "cash out" of the business. Because the buyout remedy seeks to provide the close corporation shareholder with the "fair value" of his investment, one can logically assume that the doctrine triggering the remedy aims to protect the fair value of that investment.

In summary, the absence of a developed market, the purpose of involuntary dissolution statutes, and the prevalence of the buyout remedy all support a conception of oppression as an investment-centered doctrine. Under this conception, majority conduct that unjustifiably harms any aspect of the minority's investment return results in liability for oppression.

B. THE COMPONENTS OF A CLOSE CORPORATION INVESTMENT

Although the investment model suggests that shareholder oppression protects the value of the close corporation investment, the question of how to define that investment still remains. It is critical to understand that the components of a close corporation investment generally differ from the components of a public corporation investment. In a public corporation, the shareholder commits its capital with the expectation that its investment entitles the shareholder to a proportionate share of the company's earnings.[70] Accordingly, the public corporation shareholder understands that its investment return will consist solely of financial sums reflecting this proportionate share (e.g., dividend payments).[71]

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commentator noted that the reference to appraisal statutes "brings in a body of case law on valuation, but the precedent is often so open-ended that it provides little guidance." Thompson, *supra* note 20, at 233.

Despite these various articulations, the "fair value" of a close corporation is most commonly derived by calculating investment value—a calculation based typically upon the earnings of the corporation. *See id.* ("The most common method for determining fair value is to calculate investment value, usually based on the company's earnings."); *id.* ("[T]he most commonly utilized formula [for calculating investment value] treats company earnings as determinant of investment value."); *id.* ("[N]et asset value and market value are of little use in determining the fair value of an interest in an ongoing close corporation; net asset value is generally used when an enterprise is liquidating, and market value is not available because a close corporation [by definition] lacks a market for its shares."); *see, e.g.,* Taines v. Gene Barry One Hour Photo Process, Inc., 474 N.Y.S.2d 362, 366-67 (Sup. Ct. 1983) (rejecting net asset value and market value as methods for close corporation valuation proceedings).

70. A four percent shareholder, for example, expects that her investment entitles her to four percent of the corporation's profits.

71. *See, e.g.,* Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560

Put differently, "[t]he shareholder of a publicly traded corporation invests money . . . with a view to receiving money, as opposed to steady employment or associational benefits, in return."[72] In a close corporation, however, the shareholder typically commits its capital with the expectation that its investment entitles the shareholder to employment and to a management role, as well as to a proportionate share of the company's earnings.[73] Thus, a close corporation shareholder usually understands that the investment return will consist of employment benefits, management participation, and financial sums reflecting a share of the company's earnings.[74] The

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(N.J. Super. Ct. Law Div. 1979) ("Large corporations are usually formed as a means of attracting capital through the sale of stock to investors, with no expectation of participation in corporate management or employment. Profit is expected through the payment of dividends or sale of stock at an appreciated value."); Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 663 (1992) ("The shareholder of a publicly traded corporation may realize a return on her investment in either of two ways: directly, by a distribution of dividends, or indirectly, by an increase in the market value of her shares.").

72. O'Neill, *supra* note 71, at 663; *see also* Schlafge, *supra* note 59, at 1073 n.14 (noting that the interest of the public corporation shareholder is "limited to the amount of their dollar investment in their shares, which can be sold at any time on the public market, and is not tied to their salary and other employment benefits").

73. *See Exadaktilos*, 400 A.2d at 561 ("Unlike their counterparts in large corporations, [close corporation minority shareholders] may expect to participate in management or to influence operations, directly or indirectly, formally or informally. Furthermore, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation." (citation omitted)); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) ("[I]t is generally understood that, in addition to supplying capital and labor to a contemplated enterprise and expecting a fair return, parties comprising the ownership of a close corporation expect to be actively involved in its management and operation."); Schlafge, *supra* note 59, at 1077 n.29 ("Both [public corporation and close corporation] investors expect appreciation in the value of their investment. Investors in publicly held corporations receive dividends as a form of return on this investment, while investors in closely held corporations may expect to receive a salary and a management position as a *condition* of their investment." (emphasis added)); *see also* Michaud v. Morris, 603 So. 2d 886, 888 (Ala. 1992) ("Certain basic expectations of investors are enforceable in the courts, and among those is a right to share proportionally in corporate gains."); Bahls, *supra* note 10, at 330 ("Shareholders in close corporations expect proportional distribution of the earnings of the corporation while it is operating."); *supra* note 19 and accompanying text; *infra* note 74 and accompanying text.

74. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("The minority stockholder typically depends on his salary as the

components of a close corporation investment, therefore, should be viewed as much broader than those of a public corporation investment. As a consequence, the shareholder oppression doctrine must concern itself with protecting much more than the investor's proportionate share in the success of the company.[75]

principal return on his investment . . . ."); Bonavita v. Corbo, 692 A.2d 119, 124-25 (N.J. Super. Ct. Ch. Div. 1996) ("[E]mployment is, of course, a frequent and perfectly proper benefit of stockholders in a close[] corporation."); *id.* at 126 (noting that "the primary benefit that [the defendant close corporation shareholder] receives from the corporation is continued employment for himself and his family"); Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting) ("A person who . . . buys a minority interest in a close corporation does so not only in the hope of enjoying an increase in value of his stake in the business but for the assurance of employment in the business in a managerial position."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); 1 CLOSE CORPORATIONS, *supra* note 6, § 1.08, at 32 ("Even if shareholders in a close corporation anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive an immediate return in the form of salaries as officers or employees of the corporation rather than in the form of dividends on their stock."); Murdock, *supra* note 30, at 468 ("The courts have recognized the reality that compensation paid to those in control has a two fold function: to recompense services and to provide a return on investment."); Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1110 (1999) (noting that a close corporation shareholder "often invests for the purpose of having a job, and the salary and other benefits he receives are conceived to be part of the return on his investment"); *id.* at 1109 ("In a closely held corporation, a shareholder-employee has interests in his job and stock that are often economically intertwined."); *id.* at 1110 ("[T]he discharge of an employee in a closely held corporation usually involves appropriation of a portion of his investment by the remaining shareholders."); Schlafge, *supra* note 59, at 1094 ("Section 302A.751 [the Minnesota statute protecting minority shareholders] recognizes that shareholders in a closely held corporation legitimately expect a return of their investment, often in the form of a management position and a salary."); *supra* note 73 and accompanying text.

75. *Cf.* Meiselman v. Meiselman, 307 S.E.2d 551, 565 (N.C. 1983) (rejecting an argument that a close corporation shareholder is entitled to relief only when "traditional shareholder rights" have been infringed); *id.* ("While it may be true that a shareholder in . . . a publicly held corporation may have 'rights or interests' defined as defendants argue, a shareholder's rights in a closely held corporation may not necessarily be so narrowly defined. . . . Put another way, [a close corporation shareholder's] 'reasonable expectations' are not as limited as defendants contend.").

C. THE ROLE OF REASONABLE EXPECTATIONS WITHIN THE INVESTMENT MODEL

As noted, the reasonable expectations standard for measuring shareholder oppression has garnered the most approval from courts and commentators.[76] In general, if the majority's conduct frustrates the reasonable expectations of a minority investor, the courts characterize the conduct as "oppressive" and grant the minority shareholder relief.[77]

Under the investment model, the reasonable expectations inquiry is used in a more tailored fashion. It attempts to ascertain the benefits that the shareholder reasonably expected to receive as a result of its investment in the business. Those expected benefits represent the shareholder's expected return on investment, and the oppression doctrine seeks to protect this return as part of its effort to protect the fair value of the shareholder's overall investment.[78] The reasonable expectations inquiry, in other words, attempts to link the commitment of capital to certain expected benefits (e.g., employment, management) such that the benefits can be characterized as part of the protected investment return. For example, an inquiry into whether a shareholder reasonably expected continued employment should be understood as an inquiry into whether the shareholder reasonably expected that its investment in the venture entitled it to continued employment with the close corporation.[79] If the shareholder did have such a reasonable expectation, then a sufficient link exists between the job and the investment such that the benefits of continued employment can fairly be characterized as part of the shareholder's expected investment return.[80]

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76. *See supra* notes 46-48 and accompanying text.

77. *See, e.g., In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (defining "oppressive actions" as "conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise").

78. *See supra* Part II.A (describing the investment model of oppression); *supra* notes 74-75 and accompanying text.

79. *See, e.g., Kemp*, 473 N.E.2d at 1179 ("A shareholder who reasonably expected that ownership in the corporation would *entitle* him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment." (emphasis added)).

80. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 664 (Mass. 1976) (noting that the action of the majority disregarded a longstanding stockholder policy that "employment with the corporation would

It is critical to observe, however, that a reasonable expectation derives from shared understandings between the investors in a close corporation.[81] Thus, a court should not credit an asserted reasonable expectation unless the evidence reveals that the majority and minority investors mutually understood that a commitment of capital to the venture entitled one to a particular benefit.[82] Stated differently, a

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go hand in hand with stock ownership"); Merola v. Exergen Corp., 648 N.E.2d 1301, 1304 (Mass. App. Ct. 1995) (indicating that a fiduciary duty between shareholders is not at issue unless there is a "nexus between the plaintiff's investment of capital and his employment in the corporation"), *rev'd*, 668 N.E.2d 351 (Mass. 1996); *id.* at 1305 ("All that is required is the express, or reasonably understood, coupling of continuing employment with the employee's investment in the equity securities of the corporation . . . .").

81. *See* Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. Spec. Term 1984) ("[T]he 'reasonable expectations' test is indeed an examination into the spoken and unspoken understanding upon which the founders relied when entering into the venture."); Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) ("Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court."); Robblee v. Robblee, 841 P.2d 1289, 1293 (Wash. Ct. App. 1992) ("'Reasonable expectations' are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture."); *see also Kemp*, 473 N.E.2d at 1179 ("A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise."); *id.* (noting that unfulfilled "*subjective* hopes and desires in joining the venture" are insufficient to establish an oppression claim (emphasis added)); *Meiselman*, 307 S.E.2d at 563 ("Privately held expectations which are not made known to the other participants are not 'reasonable.'"); Bahls, *supra* note 10, at 322-23 n.229 ("[C]ourts have been careful to protect only those expectations of the minority known by and acquiesced to by the majority."); Hillman, *supra* note 14, at 78 ("[O]nly expectations embodied in understandings, express or implied, among the participants should be recognized."); Robert W. Hillman, *Indissoluble Partnerships*, 37 FLA. L. REV. 691, 728 (1985) (noting that relief may be warranted "[t]o the extent that a minority shareholder had reasonable expectations at the inception of a venture, those expectations were understood by other participants in the enterprise, and the prospect that the expectations will be realized is remote"); Thompson, *supra* note 20, at 224 (observing that a reasonable expectations standard is based "on the parties' understandings").

82. *See, e.g.*, Moll, *supra* note 51, at 810 ("[T]he aggrieved shareholder must offer evidence indicating that the stockholders shared a basic understanding at the venture's inception of an entitlement to certain specific benefits (e.g., employment, management participation) due to their commitments of capital to the business."). It should be noted that, in many cases, this evidentiary requirement will not be difficult to satisfy. Indeed, the Author has previously stated the following:

> In practice . . . any evidentiary "requirement" is loosely applied. Although explicit evidence of mutual understandings between the shareholders will occasionally be present—particularly where written

reasonable expectation should only arise when the evidence indicates that the shareholders have struck a bargain between themselves—i.e., the minority has agreed to contribute capital to the venture in return for the majority's promise to provide a particular benefit.[83] Under the investment model, therefore, a reasonable expectation is simply a shorthand reference for a bargain struck between the majority and minority shareholders over an entitlement the minority is to receive in return for its

> documents exist that spell out those understandings—such explicit evidence is usually absent. Indeed, close corporations typically operate on a more informal basis. As a consequence, generic information reflecting the parties' actions and course of conduct is often the only specific evidence of a reasonable expectation before the court. When that evidence matches a pattern of behavior that occurs in the typical close corporation, courts appear to be satisfied that a reasonable expectation has been established.... For example, proof (via testimony or otherwise) that the minority shareholder was a company founder who served as an employee and a manager after his or her initial investment satisfies many courts that the shareholder's situation fits within the general pattern. Correspondingly, this proof satisfies many courts that reasonable expectations of employment and management have been established. This "specific evidence," of course, is minimal, as it often reflects the undisputed facts of the case.

Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1006, 1009-10 (2001) [hereinafter Moll, *Reasonable Expectations*]. Nevertheless, in some oppression disputes, the shareholder cannot proffer sufficient evidence. *See, e.g.*, Merola v. Exergen Corp., 668 N.E.2d 351, 354-55 (Mass. 1996) (refusing to find that a termination of a shareholder-employee was a breach of fiduciary duty in part because "there was no general policy regarding stock ownership and employment, and there was no evidence that any other stockholders had expectations of continuing employment because they purchased stock").

83. *See, e.g., In re* Topper, 433 N.Y.S.2d 359, 365 (Sup. Ct. 1980) ("These reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised."); Sandra K. Miller, *A Note on the Definition of Oppressive Conduct by Majoirty Shareholders: How Can the Reasonable Expectation Standard be Reasonably Applied in Pennsylvania?*, 12 J.L. & COM. 51, 54 (1992) (describing the reasonable expectations approach as a "departure from the bargain struck by the majority and minority shareholders"); *cf.* Bahls, *supra* note 10, at 321 ("Remedies fashioned to protect expectations help insure that innocent shareholders will realize their bargained-for benefit."); *id.* at 325 ("Because participation and rights in a closely held corporation are normally negotiated, expectations are reasonable when they provide a basis for the bargain."); Murdock, *supra* note 30, at 465 (noting that when applying the reasonable expectations standard, "the crux is not identifying a traditional wrong but rather identifying the basis of the bargain—what were the explicit or implicit conditions pursuant to which the parties associated themselves together in the corporate form"); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 504 (1985) ("If a shareholder's reasonable expectations have been frustrated, the shareholder has lost the benefit of the original bargain.").

commitment of capital.[84] To say that majority conduct frustrated a minority's reasonable expectation of employment, therefore, is to say that the majority has broken the promise of continued employment that was made to the minority in exchange for its investment in the business.[85]

D. THE INVESTMENT MODEL AND THE "TIME OF INVESTMENT" FOCUS

As the prior discussion has indicated, the shareholder oppression doctrine can be viewed under the investment model as a doctrine that seeks to enforce the "investment bargains" struck between the majority and minority shareholders. The function of the reasonable expectations inquiry, therefore, is to identify these "investment bargains."

Under this rationale, a "time of investment" focus for measuring reasonable expectations is consistent with the theory of the investment model. After all, if the inquiry aims to identify majority promises made *in return for* the minority's investment, it is likely that most of the relevant promises will be found at or before the time when the minority actually contributes its capital to the business.[86] The time of the actual investment, therefore, provides a useful reference point. In

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84. *See supra* note 83.

85. An analogy to contract law is rather easily made. The exchange of the majority's promise of employment or other entitlements for the minority's contribution of capital reflects an offer and acceptance framework. The minority's invested capital should suffice as consideration for the majority's promises, see *infra* note 111 and accompanying text, and the contract is presumably formed as soon as the minority's investment is made. Thus, when the majority's actions "breach" this "contract" between the parties, oppression liability would arise.

Despite this contract law analogy, the law of oppression and the law of contracts "are more dissimilar in operation than they might appear." Moll, *Reasonable Expectations, supra* note 82, at 995. Contract law "has the tools to protect the close corporation shareholder," but "well-entrenched doctrinal hurdles (e.g., indefiniteness, expectation damages) will likely prevent it from doing so." *Id. See generally id.* at 1023-66 (explaining that contract law will likely be unable to protect the reasonable expectations of close corporation shareholders due to remedy limitations as well as problems associated with indefiniteness, employment at will, and the statute of frauds).

86. Indeed, in most cases, the minority presumably contributes its capital only *after* the majority makes satisfactory promises. If the majority fails to make the desired promises, the minority will likely forego investing in the company. *See* Moll, *Reasonable Expectations, supra* note 82, at 1075 ("Simply put, because the bargaining leverage at the outset favors the prospective shareholder-employee, nothing compels the shareholder-employee to invest on unfavorable terms.").

theory, a court may only need to look backwards in time to identify any relevant investment bargains between the parties.[87]

A time of investment focus for assessing reasonable expectations also works well in practice given the fact patterns that typify the published oppression decisions. Many (if not most) close corporation disputes involve participants who invest in the company as founders and who expect an employment position and a management role as a result of their commitments of capital to the venture.[88] In the typical case, subsequent majority conduct unjustifiably interferes with these employment and management expectations.[89] Thus,

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87. *Cf.* 2 OPPRESSION, *supra* note 21, § 7:15, at 91 (explaining that "primary emphasis" should be "on the participants' original business bargain" because "in a close corporation the most significant bargaining occurs at the initial stage of the enterprise"); Thompson, *supra* note 20, at 218 (same). Of course, if the need arises to look forward in time (i.e., post-investment) for relevant investment bargains, a strict time of investment standard is unhelpful. The investment model of oppression, however, is able to look post-investment, as its search for investment bargains is not temporally limited. *See infra* text accompanying notes 145-47. *See generally* Part IV *infra* (discussing the investment model's ability to handle disputes involving changing expectations).

88. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 658-61 (Mass. 1976); *In re* Topper, 433 N.Y.S.2d 359, 361-62 (Sup. Ct. 1980); Balvik v. Sylvester, 411 N.W.2d 383, 384-85, 388 (N.D. 1987); *supra* note 19 and accompanying text; *see also* Moll, *Reasonable Expectations*, *supra* note 82, at 1007 ("A noticeable pattern of behavior is observed in many (if not most) close corporations—i.e., shareholders invest in the company (generally as founders at the inception of the venture); they quit their prior jobs and immediately begin working for the company and serving in a management role; and they remain in employment and management positions unless dissension arises between the majority and minority investors. Such a pattern implies that typical close corporation shareholders invest with the expectation that their investments entitle them to employment and management participation with the company.").

89. *See, e.g.*, *Wilkes*, 353 N.E.2d at 664 ("At a minimum, the duty of utmost good faith and loyalty would demand that the majority consider that their action was in disregard of a long-standing policy of the stockholders that each would be a director of the corporation and that employment with the corporation would go hand in hand with stock ownership . . . ."); *Topper*, 433 N.Y.S.2d at 362 ("Nor do the majority stockholders deny that . . . they discharged [the minority shareholder] as an employee, terminated his salary, . . . removed him as an officer . . . and changed the locks on the corporate offices to exclude him."); *Balvik*, 411 N.W.2d at 388 ("Balvik [the minority shareholder] was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return on his investment and remaining involved in the operations of the business was dashed when Sylvester [the majority shareholder] removed Balvik as a director and officer of the corporation."); *see*

when aggrieved minority shareholders (who are often co-founders of the business) assert that the majority has frustrated their reasonable expectations of employment and management participation, they are complaining about their original expectations that motivated their decision to invest in the venture. In other words, only "time of investment" expectations are asserted in most of the published oppression decisions. It is much less common for courts to be confronted with expectations that allegedly arose after the time of investment, expectations that allegedly changed since the time of investment, or even participants who made no investment at all in the company.

Thus, a time of investment standard for measuring reasonable expectations—a standard that is consistent with the investment model of oppression—adequately addresses the typical oppression dispute that characterizes many of the published opinions.[90] As the oppression doctrine develops further, however, disputes centering around post-investment expectations or non-investing shareholders are inevitable. As mentioned, particularly with respect to non-investing shareholders, such cases have already begun to arise.[91] It is important, therefore, to explore these atypical case categories and to consider how they may be principally resolved. As will be seen, insights gleaned from the investment model of oppression will be quite helpful for these tasks.

III. THE PROBLEM OF CHANGING EXPECTATIONS

While it may be true that close corporation shareholders strike protective investment bargains between themselves, there is no reason to assume that the bargaining ceases for the

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also Kiriakides v. Atlas Food Sys. & Servs., Inc., 527 S.E.2d 371, 387 (S.C. Ct. App. 2000) (noting the "ubiquitous pattern of other cases in which a minority shareholder's employment is terminated from a company, salary and benefits cease, and the shareholder is deprived of participation in management"); Joshua M. Henderson, *Buyout Remedy for Oppressed Minority Shareholders*, 47 S.C. L. REV. 195, 201 (1995) ("Cases in which courts have found oppressive conduct on the part of majority shareholders frequently involve similar factual circumstances. Typically, the complaining shareholder will claim that she has been 'frozen out' or 'squeezed out' by the majority, which often means that the shareholder's employment with the company has been terminated, compensation (in the form of salary or dividends) has been cut off, and the shareholder generally has been excluded from participating in the management of the company.").

90. *See supra* notes 86-89 and accompanying text.

91. *See supra* note 12 and accompanying text.

remainder of the business venture once the time of investment has passed. Simply as a matter of common sense, the shareholders' expectations may change over time due to business developments or personal circumstances.[92] Stated in the language of the investment model, it seems quite plausible for changed circumstances to alter the nature of the shareholder's investment such that "time of investment" bargains become useless while new protective investment bargains become necessary.

A. PREVENTING FREEZE-OUTS: A CORPORATE LAW BASIS FOR ENFORCING POST-INVESTMENT EXPECTATIONS

If the law does not enforce expectations that develop after a shareholder's investment in a close corporation, majority action could harm or eliminate vital components of a shareholder's investment return. This potential for minority shareholder abuse—shareholders being "frozen-out" from the returns of the venture while their investments are "locked-in" to the company[93]—is what motivated corporate law to respond

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92. *See* Hillman, *supra* note 14, at 85-86 (noting that "[b]oth participants and expectations change"); Sandra K. Miller, *Should the Definition of Oppressive Conduct by Majority Shareholders Exclude a Consideration of Ethical Conduct and Business Purpose?*, 97 DICK. L. REV. 227, 254 (1993) (providing an example of a close corporation where the business priorities of the shareholders change over a fifteen-year period); Miller, *supra* note 83, at 74 (same); Thompson, *supra* note 20, at 219 ("[E]xpectations of participants in close corporations continue to evolve over the course of the life of the enterprise, and courts should give protection to these expectations as they have developed."); *see also* Bahls, *supra* note 10, at 325 ("Courts should . . . examine the relationship between the parties since the inception of the business to ascertain whether the understandings of the parties have changed over time. If so, then it is likely that the reasonable expectations of the parties have also changed." (footnote omitted)).

93. *See, e.g.*, Murdock, *supra* note 30, at 430-31 ("If the employment of a shareholder were terminated, a classic case of being 'frozen-out,' yet 'locked-in,' would exist. The shareholder would be frozen-out of any participation in the earnings of the corporation since no dividends would be paid and no compensation would be earned. The shareholder would be locked-in since his capital investment would be held by the corporation with the shareholder having neither a right to withdraw nor a ready market for sale of his shares." (footnotes omitted)); *cf.* Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993) (describing a close corporation minority shareholder as "powerless within [the] corporation, as well as powerless to leave [it]"); Bostock v. High Tech Elevator Indus., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992) ("As a consequence, a shareholder challenging the majority in a close[] corporation finds himself on the horns of a dilemma; he can neither profitably leave nor safely stay with the corporation.").

with the shareholder oppression doctrine in the first place.[94] To the extent that corporate law seeks to prevent this type of freeze-out conduct from occurring, it would presumably seek to protect the parties' mutual understandings—i.e., the parties' reasonable expectations[95]—no matter when they developed.

For example, assume that two investors form a close corporation. The majority investor contributes $20,000 to the business while the minority investor contributes $10,000. Both shareholders agree to serve on the company's board of directors but, at the time of the founding of the business, only the majority investor quits her prior employment position to work full-time in the new venture. The minority investor keeps his job and chooses not to work in the new company. One year later, however, the minority investor leaves his job and, with the majority shareholder's approval, commences full-time employment with the close corporation. Assume that the minority works competently for the close corporation for the next ten years until dissension arises between the majority and minority investors. Ultimately, the majority unjustifiably terminates the minority's employment.

If the law measures reasonable expectations at the time of investment, the minority arguably has no reasonable expectation of employment. After all, it seems likely that his capital was not given in return for a promise of continued employment because, at the time of investment, he had no need for employment with the company. Put differently, it is quite possible that the minority did not bargain for employment

94. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513-14 (Mass. 1975) ("The minority is vulnerable to a variety of oppressive devices, termed 'freeze-outs,' which the majority may employ. . . . [W]hen these types of 'freeze-outs' are attempted by the majority stockholders, the minority stockholders, cut off from all corporation-related revenues, must either suffer their losses or seek a buyer for their shares. . . . At this point, the true plight of the minority stockholder in a close corporation becomes manifest. He cannot easily reclaim his capital."); *id.* at 515 ("Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and *the inherent danger to minority interests in the close corporation*, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." (emphasis added) (footnotes omitted)); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1180 (N.Y. 1984) ("The purpose of this involuntary dissolution statute is to provide protection to the minority shareholder whose reasonable expectations in undertaking the venture have been frustrated and who has no adequate means of recovering his or her investment.").

95. *See supra* notes 81-82 and accompanying text.

protection at the time he committed his capital to the venture because he neither desired nor foresaw close corporation employment at that point.[96]

After working for the company for ten years, however, it is not a stretch to argue that the minority's employment has become part of his expected return on investment. For ten years, the minority has received the definitive benefits of a close corporation salary[97] as well as the intangible benefits of working for oneself.[98] Assuming that the company has paid no

96. It is possible, of course, that the minority did have a reasonable expectation of employment at the time of investment simply because the majority received employment with the company as a result of her investment in the venture. Put differently, the majority and minority shareholders may have reached a mutual understanding that investment in the company did entitle one to employment, although that employment did not have to commence until the shareholder desired it.

97. *See* 1 OPPRESSION, *supra* note 21, § 3:07, at 70 n.6 (noting that "the special prerogatives enjoyed by a majority in a close corporation not infrequently block the sale of a close corporation because the majority has difficulty obtaining such lucrative employment elsewhere" (citing J.C. Hetherington, *Special Characteristics, Problems, and Needs of the Close Corporation*, 1969 ILL. L.F. 1, 20 n.72)); SHANNON P. PRATT ET AL., VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 121 (3d ed. 1996) ("It is not uncommon to find an owner/manager of a successful closely held company earning a greater amount in annual compensation than the amount an equivalent nonowner employee would earn as compensation."); Ragazzo, *supra* note 74, at 1109 ("The shareholder may invest for the purpose of having a job that produces higher compensation than could be garnered through employment by third parties."); *see also* Bonavita v. Corbo, 692 A.2d 119, 124 (N.J. Super. Ct. Ch. Div. 1996) ("[W]hile there is no claim that the [close corporation] salaries are excessive, neither was there a showing that if the 'inside' employment were terminated those family members could earn as much elsewhere."); Nelson v. Martin, 958 S.W.2d 643, 644 (Tenn. 1997) (noting that the annual compensation of a shareholder-employee of a commercial printing business "was in excess of $250,000").

98. *See, e.g.*, Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting) (noting "the challenge, the independence, the prestige, the feeling of achievement, and the other intangible benefits of being part of the management of a successfully run small company"); Bahls, *supra* note 10, at 290-91 (noting that close corporation ownership includes "the social status and challenge of operating one's own company and the satisfaction of providing employment to one's children"); *id.* at 319 n.212 (mentioning the "loss of satisfaction and other qualitative perks associated with operating a business"); O'Neill, *supra* note 71, at 668 (describing the "psychological payoffs" that an "owner-manager" anticipates as a result of investing in a venture, including "the pleasure of being one's own boss, the feeling of satisfaction in creating a viable enterprise and even the excitement of taking a substantial risk"); Ragazzo, *supra* note 74, at 1110 ("Additionally, the employee may simply derive satisfaction from working in a business that he himself takes a substantial part in managing."); *cf. Bonavita*, 692 A.2d at 124 ("[A] job in the family business probably provides considerably more

dividends,[99] those employment benefits are apt to be the only return on investment that the minority has received.[100] More importantly, given that the majority's return on investment has also been limited to these employment benefits, the majority likely shares the minority's understanding that employment is critical and that the employment benefits have become a primary component of the minority's investment return.[101] To allow the majority to violate this understanding—an understanding that the majority presumably would not violate for herself[102]—simply because the minority's need for company employment developed after the time of investment seems rather arbitrary, particularly where additional evidence exists that links a company investment to company employment (e.g., all of the other shareholders work full-time for the company,

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security than one might find in other employment.").

99. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661, 663 n.13 (Mass. 1976) (involving a minority shareholder who was terminated from employment and removed from management in a company that did not pay dividends); *In re* Burack, 524 N.Y.S.2d 457, 459-60 (App. Div. 1988) (same); *In re* Topper, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980) (same); *see also* Silling v. Erwin, 881 F. Supp. 236, 238 (S.D. W. Va. 1995) (observing that a close corporation "never declared a dividend in its forty-five year history"); *Bonavita*, 692 A.2d at 125 ("Absent employment . . . the normal corporate benefit which one . . . might expect would be the payment of dividends. This corporation, however, pays no dividends."); *In re* Schlachter, 546 N.Y.S.2d 891, 892 (App. Div. 1989) ("[T]he record reveals that the corporations have never paid any dividends."); *In re* Smith, 546 N.Y.S.2d 382, 384 (App. Div. 1989) ("[A]s is common[] with closely held corporations, no policy of declaring dividends appeared to exist."); F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 887 (1978) (noting that it is "usually the case" that a close corporation pays no dividends).

100. *See, e.g.*, *supra* notes 28-29 and accompanying text; *infra* note 104 and accompanying text.

101. *See, e.g.*, Moll, *supra* note 51, at 817 ("[A]t the outset of the venture, attaching primary importance to the 'individual' investment components (e.g., employment, management participation) rather than to the 'enterprise' investment component (e.g., corporate profitability) is normally consistent with the majority's interests as well. After all, the typical majority shareholder has often left prior employment herself to join the speculative start-up business."); *cf. Bonavita*, 692 A.2d at 124 ("It is also clear that Alan Corbo [the controlling shareholder] recognized that such continued employment was indeed a substantial benefit. When Gerald Bonavita [the non-controlling shareholder] presented what he claimed was a chance to sell the entire business for a handsome price, Alan Corbo responded by insisting that an essential condition of any such sale must be the ability of his three sons and himself to continue their employment with the new corporate owner.").

102. *Cf.* Moll, *supra* note 51, at 817-18 ("Of course, it is hard to imagine the majority shareholder firing herself to benefit the corporation.").

the company distributes profits in the form of salaries and bonuses, or a general policy exists regarding stock ownership and employment).[103]

Moreover, allowing the majority to violate this post-investment understanding effectively results in a freeze-out, just as if the minority had reasonably expected employment from the outset. Indeed, even if the minority retains his position on the board, the loss of a job in combination with the absence of dividends typically means that the minority is cut off from the financial returns of the business[104] and, often correspondingly, from the minority's primary source of livelihood.[105] Even though the expectation of employment was not held at the time of investment, the freeze-out harm is the same. As a consequence, it seems overly formalistic to argue

103. *See, e.g.*, Merola v. Exergen Corp., 668 N.E.2d 351, 354 (Mass. 1996) (suggesting that a company investment was not tied to company employment because "there was no general policy regarding stock ownership and employment, . . . there was no evidence that any other stockholders had expectations of continuing employment because they purchased stock . . . [and] there was no evidence that the corporation distributed all profits to shareholders in the form of salaries").

104. Close corporations often distribute their corporate earnings through salary and other job-related benefits rather than through the declaration of dividends. *See supra* note 28 and accompanying text. When a stockholder is terminated from employment, therefore, the stockholder may be cut off from her proportionate share of the corporate earnings. *See* Nagy v. Riblet Prods. Corp., 79 F.3d 572, 577 (7th Cir. 1996) ("Many closely held firms endeavor to show no profits (to minimize their taxes) and to distribute the real economic returns of the business to the investors as salary. When firms are organized in this way, *firing an employee is little different from canceling his shares.*" (emphasis added)); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) ("In a close corporation, since dividends are often provided by means of salaries to shareholders, loss of salary may be the functional equivalent of the denial of participation in dividends."); *supra* note 29 and accompanying text.

105. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975) ("Typically, the minority stockholder in a close corporation has a substantial percentage of his personal assets invested in the corporation. The stockholder may have anticipated that his salary from his position with the corporation would be his livelihood." (citation omitted)); Muellenberg v. Bikon Corp., 669 A.2d 1382, 1385 (N.J. 1996) (noting that participation in the business is the "principal source of employment and income" for many close corporation shareholders); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) (noting that a shareholder's "participation in [a close] corporation is often his principal or sole source of income"); 1 OPPRESSION, *supra* note 21, § 1:03, at 4 ("[A close corporation shareholder] may put practically everything he owns into the business and expect to support himself from the salary he receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation . . . he may be in effect deprived of his principal means of livelihood.").

that the oppression doctrine would protect a minority shareholder who began working for the company at the time of his actual commitment of capital, but would not protect that same shareholder if he began working for the company one year after his investment was made.[106] As long as the minority can prove that he reached an explicit or implicit understanding of employment with the majority, that understanding should be enforced.[107]

Stated in investment model language, one can argue that the bargain struck between the shareholders in the above-mentioned fact pattern has been modified. While the minority's investment was not initially linked to company employment because he did not contribute capital in return for the majority's promise of employment, the majority and minority have both come to understand that the minority's employment is now an integral part of his investment. Because corporate law seeks to regulate freeze-out conduct in the close corporation context—whenever that conduct may occur[108]—that mutual understanding should be enforced as a modified bargain (i.e., a reasonable expectation) of its own.

B. RELATIONAL CONTRACTS: A CONTRACT LAW BASIS FOR ENFORCING POST-INVESTMENT EXPECTATIONS

Aside from corporate law's desire to combat freeze-outs, contract law also provides a ground for enforcing post-investment expectations. This Article has already suggested that a post-investment expectation could be enforced as a modification to the shareholders' original "time of investment" bargain.[109] Technically, however, a modification under contract

106. It is worth repeating that this hypothetical involves a shareholder who later became an employee of the company and asserted a reasonable expectation of employment. It is different from a scenario where an employee subsequently becomes a shareholder and asserts a reasonable expectation of employment. *See, e.g.*, 1 OPPRESSION, *supra* note 21, § 3:06, at 50 (noting that the shareholder oppression doctrine is unlikely to be applied "when the employment relationship dominates the shareholder relationship, for example where the individual was an employee before becoming a shareholder").

107. *See, e.g.*, Hillman, *supra* note 14, at 86 ("There may be situations . . . in which the parties reevaluate their expectations and reach new understandings which provide the basis for continued participation in the venture, and under such circumstances application of the [reasonable expectations] approach would be appropriate."); *supra* notes 81-82 and accompanying text.

108. *See supra* notes 93-95 and accompanying text.

109. *See supra* text accompanying note 108.

law requires additional consideration to be enforceable.[110] While the minority's original commitment of capital surely counts as consideration for the majority's initial promises,[111] it is unclear whether, in the typical close corporation dispute, any subsequent consideration will be present to support an alleged post-investment modification. After all, merely continuing to remain involved with the company as an employee or manager will not usually suffice as new consideration,[112] and additional commitments of capital by the minority will not often be present.[113] From the standpoint of contract law, therefore, it may be difficult to enforce post-investment expectations as modifications.[114] As a consequence, one could argue that

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110. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 5-14, at 262 (3d ed. 1987) ("[A]ccording to the majority of cases, under the pre-existing duty rule an enforceable agreement to modify a contract requires consideration on both sides."); E. ALLAN FARNSWORTH, CONTRACTS § 4.21, at 276 (3d ed. 1999) (noting that a modification was unenforceable because "there was no consideration for the new promise"). *But see* U.C.C. § 2-209(1) (2000) ("An agreement modifying a contract [for the sale of goods] within this Article needs no consideration to be binding."); *infra* note 149 and accompanying text.

111. *See, e.g.*, Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1321 (N.Y. 1989) (Hancock, J., dissenting) (observing that, for typical close corporation minority shareholders, "there is consideration which would support an implied understanding that, at least, the majority owner will not discharge him arbitrarily or in bad faith and without some legitimate business reason"); Gigax v. Repka, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992) (Grady, J., concurring) ("I would hold that the $70,000 in equity contributions made to the corporation by Gigax constitute consideration for his employment in addition to the services he provided, taking the relationship outside the 'at-will' definition . . . .").

112. *Cf.* 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 1.27, at 77 (2d ed. 1999) ("If an employee provides consideration beyond performing duties under the employment contract, then the presumption of employment at will may be rebutted. Merely continuing to work in the same employment relationship is not sufficient." (footnote omitted)); *id.* § 1.27, at 78 ("It has been held that an employer may unilaterally modify an employee handbook only if it contains a reservation of the right to do so. Without such a reservation of right, additional consideration is required, and the employee's continuing to work for the employer will not suffice as the consideration."); *id.* § 1.27, at 77 ("As a general rule, services and obligations associated with beginning new employment will not be considered sufficient additional consideration to override the presumption of at-will employment. Thus, moving to another city, resigning from a former position or job, or foregoing other employment or ceasing to search for other employment are not sufficient consideration to alter at-will status." (footnotes omitted)).

113. *But see* Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 558, 562 n.2 (N.J. Super. Ct. Law Div. 1979) (involving a minority shareholder who co-signed a note and apparently made additional capital contributions).

114. Under the Uniform Commercial Code, however, consideration is not

minority shareholder protections are limited to expectations established at the time of the minority's investment—i.e., at the time of "contract" formation when the minority arguably "accepted" the majority's "offer" of benefits by providing consideration.[115]

It is important to note, however, that the above discussion is premised on a traditional conception of contracts as "discrete transactions"—transactions "of short duration, involving limited personal interactions, and with precise party measurements of easily measured objects of exchange."[116] Paradigmatic examples of discrete contracts are one-time exchanges where the "parties need never deal with each other again,"[117] such as a sale of gasoline from a stranger while on a roadtrip,[118] or the purchase of a bottle of wine from a store while visiting a foreign country.[119] In such discrete transactions, "the complete future of the deal, to the extent that it has any at all, is 'presentiated'[120]—that is, the parties bring the future wholly into the present and treat it as present through complete planning of the transaction, planning which

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required to render a modification of an agreement enforceable. *See infra* note 149 and accompanying text.

115. *See supra* note 85.

116. Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 764 (1998) (quoting IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 12 (2d ed. 1978)).

117. Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 392 (1986); *see also* Ian Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 594 (1974) (describing a discrete transaction by stating that "[t]he two strangers expect to have nothing to do with each other between now and sundown, they expect never to see each other again thereafter, and each has as much feeling for the other as has a Viking trading with a Saxon.").

118. *See* Linzer, *supra* note 117, at 391 ("[Professor Ian] Macneil has argued that the traditional contract model is of a 'discrete transaction,' his paradigm being a cash sale of gasoline between strangers on the Jersey Turnpike.").

119. *See* Gudel, *supra* note 116, at 764; *see also* Macneil, *supra* note 117, at 594 (providing an example of two strangers involved in the purchase and sale of a horse).

120. The term "presentiation," as it relates to contract law, is generally attributed to Professor Ian Macneil. As one commentator noted,

> "Presentiation" is a rare, largely theological term meaning to treat future circumstance as happening in the present.... Macneil uses it in a slightly different sense, emphasizing that traditional contract theory requires most if not all aspects of relationships (franchises, employment, even supplier-customer dealings) that develop and evolve over many years to be focused in the moment of contracting.

Linzer, *supra* note 117, at 392-93 n.338.

then binds the parties."[121] As this comment suggests, the moment of contract formation is critical to the discrete contracts model given that the terms established at the time of the contract's formation will serve, from that point forward, as the governing "rules" for the parties' interactions.[122] The observations of one commentator underscore this point:

> [I]n the "classical" (i.e., Williston) and "neo-classical" (i.e., Corbin) models of contract, the parties must address all [their] needs, consciously and consensually, at the moment the contract is made. All future contingencies must be drawn back to the present—they must be "presentiated." The parties must deal with changes after the moment of contracting by later mutual agreement, or else the courts must use the cumbersome devices of excuse, such as for mistake or impracticability. Otherwise the terms presentiated at the time of contracting, perhaps years in the past, must govern.[123]

In contrast to the view of contracts as discrete exchanges, many transactions "involve long-term dealings between parties who continue to have contact with each other over the years" and whose needs "will change with external circumstances."[124] Such "relational contracts"[125] are typified "by long duration,

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121. Gudel, *supra* note 116, at 764.

122. *See infra* note 123 and accompanying text.

123. Linzer, *supra* note 117, at 392-93 (footnotes omitted); *see* A CONTRACTS ANTHOLOGY 92 (Peter Linzer ed., 2d ed. 1995) ("'[C]lassical' contract law requires that all the terms be expressed (and consented to) at the moment of contracting."); Gudel, *supra* note 116, at 767 (observing that classical contract law is criticized for "its attempt to locate the entire content of the parties' agreement, and thus the entire source of their obligation to one another, in an initial moment of agreement which contracts treatises describe as the 'meeting of the minds'"); Linzer, *supra* note 117, at 393 n.338 ("[T]raditional contract theory requires most if not all aspects of relationships (franchises, employment, even supplier-customer dealings) that develop and evolve over many years to be focused in the moment of contracting."); Danton B. Rice & Michael A. Schlueter, Note, *Deregulation and Natural Gas Purchase Contracts: Examination Through Neoclassical and Relational Contract Theories*, 25 WASHBURN L.J. 43, 62 (1985) ("Neoclassical contract law has only partially freed economic exchanges from the classical goals of discreteness and presentiation. These goals demand adherence to an overall structure founded on full consent at the time the contract is made."); *cf.* Gudel, *supra* note 116, at 766 ("[T]he doctrines of what are called classical and neo-classical contract law are largely based on the assumption that all contracts are discrete."); Rice & Schlueter, *supra*, at 59 ("In American neoclassical contract law, the basic proposition remains that planning governs contractual relations despite changed circumstances which make the transaction undesirable to one of the parties.").

124. Linzer, *supra* note 117, at 392.

125. Professor Ian Macneil has been described as "the contracts scholar most responsible for the concept of relational contract." Gudel, *supra* note 116, at 763-64; *see also* A CONTRACTS ANTHOLOGY, *supra* note 123, at 91

personal involvement by the parties and the exchange, at least in part, of things difficult to monetize or otherwise measure."[126] Common examples of relational contract arrangements include marriage, employment, franchises, and professional partnerships.[127] With relational contracts, "the participants never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior to grow and vary with events in a largely unforeseeable future."[128] Rather than bind the parties

("Macneil is best known for his 'relational' theory of contract."); Linzer, *supra* note 117, at 391 (observing that Professor Macneil "has applied a relational interests approach to contracts"). For samples of Macneil's work, see Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) [hereinafter Macneil, *Long-Term Economic Relations*]; Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974) [hereinafter Macneil, *Many Futures*]; and Macneil, *supra* note 117, at 589.

126. Gudel, *supra* note 116, at 765; *see also* A CONTRACTS ANTHOLOGY, *supra* note 123, at 92 (describing "relational" or "intertwined" dealings as "long-term, and involving people who get to know one another and whose futures are bound together by their dealings"); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 33, at 67 (3d ed. 1990) ("A relational contract is one of relatively long duration."); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981) ("A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance."); Macneil, *Long-Term Economic Relations*, *supra* note 125, at 900 (describing relational contracts as "more complex and of greater duration"); Rice & Schlueter, *supra* note 123, at 52 n.90 (noting "a tendency to equate the term 'relational contract' with long-term contractual involvements"); *cf.* MURRAY, *supra*, § 33, at 68 (describing discrete transactions as those of "short duration, limited interpersonal relationships, and easily measured objectifications of exchange").

127. *See, e.g.*, Gudel, *supra* note 116, at 765 ("[T]oward the relational end of the exchange spectrum we find such things as franchise arrangements, long-term employment, professional partnerships, labor/management relations and, quintessentially, marriage."); Macneil, *Many Futures*, *supra* note 125, at 725 (citing marriage and employment as examples of relational arrangements).

128. IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 13 (2d ed. 1978); *see* MURRAY, *supra* note 126, § 33, at 67 ("Many changes in that relationship may occur over a period of time, and these changes cannot be presentiated and brought into the present at the time the contract is formed."); *id.* § 33, at 68 ("At the opposite end of the spectrum we find long-term relationships such as the employment contract involving the engineer and the large corporation. This agreement presents difficult problems in measuring performance and numerous entangling possibilities that cannot be projected with definiteness and accuracy at the time of contract

to the terms established at the time of the formation of the contract, a relational contract approach "permit[s] the rights and duties of the parties to be openly adjusted *during* the relationship."[129]

Significantly, the investment bargains entered into by close corporation shareholders reflect the characteristics of relational contracts.[130] The typical employment and management bargains that majority and minority shareholders strike, for example, can be described as long-term arrangements, as they usually have no definitive termination points.[131] In addition, the very nature of employment and management bargains requires the ongoing personal involvement of the parties.[132]

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formation."); *see also* A CONTRACTS ANTHOLOGY, *supra* note 123, at 92 ("In long-term relational dealings the parties cannot possibly anticipate every problem; they expect to have to work things out as the months or years go by."); Gudel, *supra* note 116, at 786 ("Relational Contract Theory teaches that when committing to a relation, we cannot specify all the obligations and responsibilities that relation will entail.").

129. Linzer, *supra* note 117, at 393; *see also* Gudel, *supra* note 116, at 765 ("[P]lanning for relational contracts is often tentative rather than entirely binding . . . .").

130. *Cf.* O'Neill, *supra* note 71, at 659 ("The contract among shareholders and managers of a corporation is a long-term, relational contract, rather than a discrete transaction.").

131. Indeed, close corporation investors generally expect continuous employment and management participation. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("A guaranty of employment with the corporation may have been one of the basic reason(s) why a minority owner has invested capital in the firm." (internal quotation omitted)); Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) ("As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation." (internal quotation omitted)); *In re* Wiedy's Furniture Clearance Ctr. Co., 487 N.Y.S.2d 901, 903 (App. Div. 1985) ("Although the exact amount of the capital contribution is disputed, petitioner utilized his own funds in getting this new venture underway, not simply as an investment, but to provide employment and a future for himself."); Thompson, *supra* note 18, at 702 (noting that close corporation shareholders "usually expect employment and a meaningful role in management" (footnotes omitted)); Alyse J. Ferraro, Note, Ingle v. Glamore Motor Sales, Inc.: *The Battle Between Ownership and Employment in the Close Corporation*, 8 HOFSTRA LAB. L.J. 193, 215 (1990) ("As the majority emphasizes, Ingle was compensated for the sale of his shares, but to believe that the dollar amount received met his expectations would be to dismiss his purpose in acquiring those shares. Ingle had reasonably expected his employment to continue until he chose to retire or to acquire his own Ford dealership . . . .").

132. *See, e.g.*, Meiselman v. Meiselman, 307 S.E.2d 551, 557 (N.C. 1983) (stating that "[a]n organizational structure of this nature [i.e., a close

Promises of continued employment and management participation, moreover, are quite difficult to monetize due to the intangible benefits associated with close corporation employment and management positions.[133] Finally, as participants in a developing enterprise, close corporation investors cannot foresee all of the contingencies that may arise in the business and in their interactions with each other.[134] In

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corporation]—*in which the investment interests are interwoven with continuous, often daily, interaction among the principals*—necessarily requires substantial trust among the individuals" (emphasis added) (internal quotation omitted)); *cf.* 1 CLOSE CORPORATIONS, *supra* note 6, § 7.02, at 4 ("Ownership and management frequently coalesce in closely held corporations, where not uncommonly all the principal shareholders devote full time to corporate affairs. Even where one or two shareholders may be inactive, the business is normally conducted by the others without aid from nonshareholder managers."); Kleinberger, *supra* note 16, at 1148 (noting that, in close corporations, "most, if not all, of the shareholders are active in the corporation's day-to-day business"); Thompson, *supra* note 18, at 702 (observing that "a more intimate and intense relationship exists between capital and labor" in a close corporation).

133. *See* 1 OPPRESSION, *supra* note 21, § 3:07, at 67 (referring to the "prestige, privileges, and patronage that come from controlling a corporation and occupying its principal offices"); *id.* § 3:06, at 47 ("[L]osing the prestige of a directorship may be of considerable consequence to the shareholder."); *supra* note 98 and accompanying text (noting the intangible benefits of working for oneself in a close corporation); *cf.* Foley v. Interactive Data Corp., 765 P.2d 373, 407 (Cal. 1988) (Broussard, J., dissenting) ("A man or a woman . . . does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self-worth and worth in the community."); *id.* at 415 (Kaufman, J., dissenting) ("One's work obviously involves more than just earning a living. It defines for many people their identity, their sense of self-worth, their sense of belonging.").

134. *See* William Carney, *The Theory of the Firm: Investor Coordination Costs, Control Premiums and Capital Structure*, 65 WASH. U. L.Q. 1, 59-60 (1987) ("Investors in closely held enterprises are likely to be subject to conditions of bounded rationality, under which they either fail to perceive the complete set of problems that may occur later, or underestimate the probability of their occurrence."); Krishnan S. Chittur, *Resolving Close Corporation Conflicts: A Fresh Approach*, 10 HARV. J.L. & PUB. POL'Y 129, 139 (1987) (stating that "inadequately planned close corporations will always remain part of the picture," and noting that "[t]he most careful plan may fail to visualize some conflicts, even if it does not generate novel ones of its own"); Thompson, *supra* note 18, at 705 ("Investors often fail to anticipate the failure of their enterprise, or demonstrate an overly optimistic trust in those with whom they are undertaking the venture."); *cf.* O'Neill, *supra* note 71, at 659 ("[T]he contract [among shareholders and managers of a corporation] is necessarily incomplete; the parties cannot engage in explicit bargaining over many aspects of their interaction because they cannot foresee every possible contingency that might befall their venture."); Thompson, *supra* note 20, at 224 ("Parties entering into a business relationship are not always willing to fully explore the ramifications of possible disputes if things were to go

fact, there is no guarantee that the business will even survive, let alone succeed.[135] In short, all of the relational contract traits are present in the investment bargains struck between typical close corporation shareholders.[136]

When thinking about close corporations and changing reasonable expectations, therefore, the relational notion of an "open adjustment" of the parties' obligations is significant.[137] Indeed, the notion provides a theoretical basis for the propositions that the parties' understandings and bargains can change over time, and that such changes can be enforced without the need to satisfy all of the formalities of contract law

wrong.").

135. As one commentator observed,

> Businesses start and fail in the United States at an increasingly staggering rate. Every year, over a million people in this country start a business of some sort. Statistics tell us that by the end of the first year at least 40 percent of them will be out of business. Within five years, more than 80 percent of them . . . will have failed. . . . [M]ore than 80 percent of the small businesses that survive the first five years fail in the second five.

MICHAEL E. GERBER, THE E-MYTH REVISITED: WHY MOST SMALL BUSINESSES DON'T WORK AND WHAT TO DO ABOUT IT 2 (1995) (footnote omitted); *see also id.* (noting that "hundreds of thousands of people every year . . . pour their energy and capital—and life—into starting a small business and fail," and stating that "many others . . . struggle along for years simply trying to survive"); 1 OPPRESSION, *supra* note 21, § 1:04, at 8 (describing close corporations as "small business enterprises"); U.S. SMALL BUS. ADMIN., THE ANN. REP. ON SMALL BUS. AND COMPETITION 29 (1997) ("Fewer than half of all new firms are in operation after five years."); O'Neill, *supra* note 71, at 668 n.84 ("The risk of failure of the small business enterprise is notoriously high."); Ragazzo, *supra* note 74, at 1109 ("Small businesses are exceedingly risky enterprises with high failure rates.").

136. Both courts and commentators have looked to partnership principles in close corporation disputes due to the similarities between the two business structures. *See* Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. Spec. Term 1984) ("It is frequently said that the relationship between the founders of a close corporation approximates that between partners."); *Meiselman*, 307 S.E.2d at 557 ("[T]he commentators all appear to agree that [c]lose corporations are often little more than incorporated partnerships." (internal quotation omitted)); text accompanying note 39; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 297 (1986) ("That closely held corporations are really 'incorporated partnerships' is a common refrain."); Hetherington & Dooley, *supra* note 1, at 2 (observing that a close corporation is the "functional equivalent" of a partnership). To the extent that the partnership and the close corporation are seen as analogous, it is worth noting that the professional partnership is often cited as an example of a relational contract arrangement. *See supra* note 127 and accompanying text.

137. *See supra* text accompanying note 129.

(e.g., additional consideration for modifications).[138] Similarly, relational contract theory embraces the notion that the terms established at the time of the making of the contract—i.e., at the time of the minority shareholder's investment—are not forever set in stone.[139] In a relational arrangement, party conduct can be evidence of changing terms in a contract.[140] Oppression courts have focused on the conduct of the participants to determine that initial reasonable expectations

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138. *See, e.g.*, HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.7 (3d ed. 1992), *available at* WL JW-EMPDIS § 4.7 ("Under the relational theory, the parties expect that the terms of their relationship will evolve. There is no need for formalities to validate new practices in order to make those practices part of the contract."). As Professor Macneil observed,

> The most important processes used for maintaining flexibility are those of exchange itself, whether the sharply focused bargaining characteristic of labor contract renewals or the subtle interplays of day-to-day activities, or a host of other forms taken by exchange. These patterns of exchange take place against the power and normative positions in which the parties find themselves. This means that exchange patterns occur, *inter alia*, against the background of the discrete and presentiated aspects of the relations, whether those aspects were created by explicit prior planning, other existential circumstances, or combinations thereof. *This requires harmonization of changes with such a status quo but does not require doctrines such as the doctrine of consideration....*

Macneil, *Long-Term Economic Relations*, *supra* note 125, at 889-90 (emphasis added); *cf.* PERRITT, *supra*, § 4.7, *available at* WL JW-EMPDIS § 4.7 ("Consideration obviously is a reflection of the reciprocity norm identified in the relational contract literature. But the reciprocity norm in relational contracts is more flexible than the traditional consideration concept. The parties deal with each other in the context of a relationship. That is enough to give validity to the commitments they make to each other.").

139. *See, e.g.*, PERRITT, *supra* note 138, § 4.7, *available at* WL JW-EMPDIS § 4.7 ("Under the relational theory, obligations are not frozen in an initial bargain. They evolve over time as circumstances change, guided by norms of the particular community within which the relation exists."); Gudel, *supra* note 116, at 769 (noting that relational contract theory suggests that "there is no simple 'intent of the parties'" and that "the parties themselves are continually engaged in 'rewriting the contract'"); *id.* (observing that "Relational Contract Theory suggests that obligations evolve in the course of long-term relations," and noting that "contractual obligations cannot always be derived from an originary act of initial agreement"); *cf. id.* ("[A] legal approach which looks back to intent at the moment of initial agreement in effect does rewrite the contract by ignoring the reality of the parties' developed relation.").

140. *See, e.g.*, PERRITT, *supra* note 138, § 4.7, *available at* WL JW-EMPDIS § 4.7 ("Treating party conduct as reflecting terms of a[n] evolving contract is a highly relational approach."); *see also id.* (noting that under relational theory, "[s]imply doing something becomes part of the contractual relationship (if it is unobjectionable), more strongly so the longer it continues").

exist,[141] and courts could use a similar approach in analyzing whether post-investment expectations have been established. For example, recall the shareholder who began working for the close corporation one year after investing and who was terminated after ten years of employment.[142] Assume further that the company distributed its profits in the form of salaries and bonuses during the shareholder's ten years of working for the business, and that all of the close corporation shareholders worked full-time for the company during this period. It seems fair to assert that, in combination, the duration of employment, the use of employment as the vehicle for distributing the corporate returns, and the prevalence of shareholder-employee participants signify that the relation between the majority and the minority has evolved to the point where employment has become part of their investment bargain.[143] As one commentator noted,

> Under the relational theory, the parties expect that the terms of their relationship will evolve. There is no need for formalities to validate new practices in order to make those practices part of the contract. Simply doing something becomes part of the contractual relationship (if it is unobjectionable), more strongly so the longer it continues.... The parties deal with each other in the context of a relationship. That is enough to give validity to the commitments they

141. *See* Muellenberg v. Bikon Corp., 669 A.2d 1382, 1388 (N.J. 1996) ("In this case, it is reasonable to conclude that Burg's fair expectations were that should he give up his prior employment with a competitor company and enter this small corporation, he would enjoy an important position in the management affairs of the corporation."); *In re* Gunzberg v. Art-Lloyd Metal Prods. Corp., 492 N.Y.S.2d 83, 85 (App. Div. 1985) ("As a result of their long history of taking an active part in the running of the corporation, petitioners demonstrated that they had a reasonable expectation that they would continue to be employed by the company, and have input into its management."); Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik quit his former job to join Sylvester in the new business enterprise, making a relatively substantial investment in the process. It is apparent from the record that Balvik's involvement with [the business] constituted his primary, if not sole, source of livelihood and that he quite reasonably expected to be actively involved in the operations of the business."); *see also In re* Topper, 433 N.Y.S.2d 359, 365 (Sup. Ct. 1980) ("The parties' full understanding may not even be in writing but may have to be construed from their actions."); Moll, *Reasonable Expectations*, *supra* note 82, at 1008 ("[M]any courts use this course of conduct—investment, followed by company employment and management—to aid their conclusion that reasonable expectations of employment and management existed."); Thompson, *supra* note 20, at 217 ("Expectations... must be gleaned from the parties' actions as well as their written documents.").

142. *See supra* text accompanying notes 95-96.

143. *See supra* notes 103, 141 and accompanying text.

make to each other.[144]

Rather than conceptualizing the investment bargains struck between close corporation shareholders as "discrete transactions," therefore, conceiving of the investment bargains as relational in nature provides a contract law basis for enforcing post-investment expectations that develop between the parties.

It is important to recognize that the investment model of oppression is consistent with a relational conception of close corporation investment bargains. The investment model does primarily look to the time of the minority's investment as the focal point of the shareholders' bargaining. In contrast to the *Kemp* "time of investment" standard, however, nothing constrains the model from looking beyond that point as the relationship between the majority and the minority develops.[145] As mentioned, the model seeks to enforce the promises that the majority made to the minority in return for the minority's commitment of capital to the venture.[146] Those promises, however, can be made both before and after the time of the minority's actual investment. For example, assume that a majority shareholder promises an active management role to a prospective minority shareholder before the minority actually invests. The minority then contributes its capital to the company. Some time later, the majority also promises continued employment to the minority. The promise of an active management role was made in return for the minority's investment to the extent that the promise induced the minority's commitment of capital to the venture. One could argue, however, that the post-investment promise of employment was also given "in return for" the minority's investment—not because the promise induced the investment (it was a promise made *after* the minority's contribution of capital), but because the majority and minority have reached a mutual understanding that shareholder status in the company entitles one to employment.[147]

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144. PERRITT, *supra* note 138, at § 4.7, *available at* WL JW-EMPDIS § 4.7.

145. *See supra* note 87 and accompanying text.

146. *See supra* text accompanying notes 85-86.

147. Assume, for example, that the shareholders' original deal provided benefit "A" and benefit "B" to the minority if the minority invested. After the minority's actual contribution of capital, however, the shareholders also agree that benefit "C" will be provided because of the investment. The investment model would enforce the agreements for all three benefits.

In summary, both corporate law's desire to prevent freeze-outs and contract law's acceptance of relational arrangements support the proposition that post-investment expectations are valid and deserving of protection. A reasonable expectations framework that focuses solely on the time of investment, therefore, is overly restrictive. Instead, as the investment model conveys, the framework should explicitly adopt a broader perspective that looks for investment bargains between the shareholders throughout the entirety of their relationship.[148]

In addition, this discussion has suggested that post-investment expectations can be enforced without the provision of additional consideration. As relational contract theory teaches, such an assertion is far from radical. Even under the Uniform Commercial Code—a more "traditional" source of contract law—a modification needs no consideration to be binding.[149] Because the majority can easily abuse the

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148. *See* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) (noting that reasonable expectations "are to be ascertained by examining the entire history of the participants' relationship," including "the 'reasonable expectations' created at the inception of the participants' relationship; those 'reasonable expectations' as altered over time; and the 'reasonable expectations' which develop as the participants engage in a course of dealing in conducting the affairs of the corporation"); 2 CLOSE CORPORATIONS, *supra* note 6, § 9.28, at 173 (articulating a broader standard that looks to the shareholders' reasonable expectations "as they existed at the inception of the enterprise, and as they developed thereafter through a course of dealing"); Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1064 (1969) ("In evaluating what could reasonably be expected by the minority, the court must examine the history of the relationship between the parties."); O'Neal, *supra* note 99, at 886 ("The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, and as they develop thereafter through a course of dealing concurred in by all of them, is perhaps the most reliable guide to a just solution of a dispute among shareholders, at least a dispute among shareholders in the typical close corporation.").

Although some courts have already adopted a broader reasonable expectations standard, *see, e.g.*, *Meiselman*, 307 S.E.2d at 563, such courts typically lack a coherent framework for explaining how and why the broader standard should apply in the contexts discussed in this Article. The investment model of oppression, however, provides such a coherent framework that can handle changing expectations and non-investing shareholder disputes. As a consequence, the rationales and justifications discussed in this Article are useful even to these more "progressive" courts.

149. *See* U.C.C. § 2-209(1) (2000) ("An agreement modifying a contract [for the sale of goods] within this Article needs no consideration to be binding."); *see also* U.C.C. § 2-313(1)(a) (2000) (noting that express warranties must be "part of the basis of the bargain," but observing that post-contract assurances can also become warranties even in the absence of additional consideration); *id.* at cmt. 7 ("If language is used after the closing of the deal (as when the

relationship between shareholders in a close corporation,[150] and because the minority relies, often for its livelihood, on the implicit and explicit understandings that it reaches with the majority,[151] it is the existence of a mutual understanding itself that merits the protection of the oppression doctrine.[152] Majority shareholders should recognize, therefore, that their promises, informal policies, or course of dealing with the stockholders can suggest that an understanding or bargain has been reached with a minority investor. If the majority's actions violate such an understanding or bargain, the oppression doctrine can be triggered on that basis alone.

IV. THE PUZZLE OF THE "NON-INVESTING" SHAREHOLDER

As mentioned, the *Kemp* standard of measuring reasonable expectations at the time of investment does not explicitly account for close corporation shareholders who have made no contribution of capital to the company. On the surface, of course, the investment model of oppression also has difficulty handling these shareholders. After all, the model relies upon a conception of a prospective minority shareholder bargaining with a majority shareholder over entitlements the minority is

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buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order.").

150. *See supra* notes 23-31, 104-05 and accompanying text.

151. *See supra* notes 81-82, 105 and accompanying text.

152. This framework is similar to a claim of promissory estoppel. The promissory estoppel doctrine can enforce a promise even without the provision of consideration if the promisee relied on the promise, the promisor had reason to expect the reliance, and the avoidance of injustice can occur only by enforcing the promise. *See* Litle v. Waters, No. CIV.A.12155, 1992 WL 25758, at *6 (Del. Ch. Feb. 11, 1992) (observing that "promissory estoppel . . . operates as a substitution for consideration."); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); FARNSWORTH, *supra* note 110, § 2.19, at 95 ("First, there must have been a promise. Second, the promisor must have had reason to expect reliance on the promise. Third, the promise must have induced such reliance. Fourth, the circumstances must have been such that injustice can be avoided only by enforcement of the promise."). As mentioned, the close corporation minority shareholder relies on the understandings that it reaches with the majority; the majority has reason to expect such reliance given that it too is dependent on, for example, employment benefits; and the failure to enforce such understandings often results in the injustice of a freeze-out. *See supra* text accompanying note 151; *supra* notes 101, 104-07 and accompanying text.

to receive in return for its investment.[153] When assessing the rights of a minority shareholder who did not actually contribute capital, however, that shareholder has made no investment over which to bargain.[154]

In theory, the law could take a number of positions in dealing with non-investing shareholders. The oppression doctrine could find (1) that non-investing shareholders are not entitled to any specific reasonable expectations at all; (2) that non-investing shareholders are entitled to specific reasonable expectations, but only to the specific reasonable expectations of their investing transferors; or (3) that non-investing shareholders are entitled to any specific reasonable expectations that can be proven. Each of these positions will be explored in turn. As a preliminary matter, however, it is necessary to understand the differences between "general" reasonable expectations and "specific" reasonable expectations.

A. "GENERAL" AND "SPECIFIC" REASONABLE EXPECTATIONS

At bottom, the shareholder oppression doctrine protects close corporation shareholders with a set of special judicial rules that go beyond the protections provided generally by public corporations law.[155] An important corollary to this

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153. *See supra* notes 83-85 and accompanying text.

154. A person receiving stock via gift, inheritance, or operation of law can loosely be described as an "involuntary" shareholder of a close corporation. The investment model contemplates the typical investor who voluntarily chooses whether or not to become a shareholder in the venture. If the minority can strike a satisfactory bargain for benefits with the majority, the minority invests and becomes a shareholder. If a satisfactory bargain is not struck, the minority withholds its capital and forgoes becoming a shareholder. *See supra* note 86 and accompanying text (observing that a minority shareholder is not compelled to invest on unfavorable terms). In contrast, non-investing shareholders are not given the opportunity to make this threshold choice, as they become shareholders in the close corporation "involuntarily" through the investment decision of others. *See, e.g.*, Meiselman v. Meiselman, 307 S.E.2d 551, 558-59 (N.C. 1983) ("[W]hen a minority shareholder receives his shares in a close corporation from another in the form of a gift or inheritance . . . the minority shareholder never had the opportunity to negotiate for any sort of protection with respect to the 'reasonable expectations' he had or hoped to enjoy in the close corporation."); Bahls, *supra* note 10, at 326 (observing that non-investing shareholders "usually do not bargain for the terms of their participation in the business"). As mentioned, however, that "involuntary" description is used loosely, particularly because an intended recipient can decline even a gift or an inheritance of stock. *See, e.g.*, FARNSWORTH, *supra* note 110, § 10.3, at 683 (noting that "a donee of a gift can refuse the gift").

155. Under public corporation rules, courts rarely interfere with

proposition, however, is that close corporation shareholders do not lose any of the protections provided by general corporate law—i.e., at a minimum, they receive the baseline public corporation protections. In a public corporation, of course, the

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employment, management, and dividend decisions, as the business judgment rule is often invoked to protect the majority's discretion. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("[C]ourts fairly consistently have been disinclined to interfere in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors and employees, which essentially involve management decisions subject to the principle of majority control."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) ("[T]he plaintiff will find difficulty in challenging dividend or employment policies. Such policies are considered to be within the judgment of the directors." (footnote omitted)); Peeples, *supra* note 83, at 469 ("The declaration of dividends is always at the discretion of the board of directors. The business judgment rule protects such a decision." (footnote omitted)); *id.* at 477 ("The hiring, firing, and compensation of employees are ultimately board decisions and have always qualified as management decisions protected by the business judgment rule."); Ragazzo, *supra* note 74, at 1125 n.126 ("The business judgment rule is seldom overcome on dividend questions."). When these matters are challenged in the close corporation context, however, courts subject the majority's decisions to greater scrutiny than a business judgment rule approach. *See* Smith v. Atl. Props., Inc., 422 N.E.2d 798, 804 (Mass. App. Ct. 1981) (stating, in a close corporation dispute, that "[t]he judgment . . . necessarily disregards the general judicial reluctance to interfere with a corporation's dividend policy ordinarily based upon the business judgment of its directors"); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 935 (Mont. 1982) ("When it is also considered that in close corporations dividend withholding may be used by controlling shareholders to force out minority shareholders, the traditional judicial restraint in interfering with corporate dividend policy cannot be justified." (citation omitted)); Grato v. Grato, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994) (noting that "judicial consideration of a claim of majority oppression or freeze-out in a closely held corporation is guided by considerations broader than those espoused in defendants' version of the 'business judgment rule'"); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) ("[T]he statutory language embodies a legislative determination that freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny."); O'Neill, *supra* note 71, at 692 ("The burden-shifting scheme devised in *Wilkes* [a close corporation decision] effectively deprives majority shareholders of the protection of the business judgment rule by requiring close judicial scrutiny of the majority's action whenever the minority is harmed."); *id.* at 690 ("Courts in some jurisdictions have refused to apply the business judgment rule to close corporations in an effort to correct the squeeze out problem."). *But see* Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) (noting, in a close corporation dispute, that "the court is hesitant to overturn the corporation's valued exercise of its business judgment," and observing that "[t]he Chancery Division properly concluded that it could not second-guess the corporation's exercise of its business-judgment").

mere status of "shareholder" entitles one to a proportionate stake in the company's earnings[156] as well as to various other rights.[157] Significantly, these entitlements and rights are provided *regardless* of whether the shareholder actually committed its own capital to the business.[158] One can assert, therefore, that every shareholder—whether in a public corporation or a close corporation—reasonably expects that its position as a stockholder entitles it to a proportionate share of the company's profits.[159] Whenever this "general" reasonable expectation is frustrated in a close corporation—i.e., "whenever controlling shareholders squeeze-out a minority shareholder from the business returns but continue to share in the corporate earnings themselves"[160]—oppression liability should arise.

As mentioned, however, a proportionate share of the company's earnings is only one component of the typical close corporation shareholder's investment. Indeed, unlike in a public corporation, the investment return in a close corporation

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156. *See* Michaud v. Morris, 603 So. 2d 886, 888 (Ala. 1992) ("Certain basic expectations of investors are enforceable in the courts, and among those is a right to share proportionally in corporate gains."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); Hillman, *supra* note 14, at 79 n.248 ("Obviously, an individual commits capital to a venture with the expectation that a return will be forthcoming, either through an appreciation in the value of his holdings or, more typically for a close corporation, through a distribution of corporate earnings."); *supra* note 70.

157. *See* DEL. CODE ANN. tit. 8, § 220(b) (1998) (detailing the inspection rights available to "[a]ny stockholder"); *id.* § 251(c) (describing the right of "stockholders" to vote on mergers or consolidations); Meiselman v. Meiselman, 307 S.E.2d 551, 565 (N.C. 1983) (listing the following as examples of "traditional rights and remedies to which shareholders have been entitled": right to receive notice of shareholder's meetings, right to cumulative voting, right to examine books and records, and right to compel payment of dividends); *see also* Moll, *Reasonable Expectations*, *supra* note 82, at 1026 ("Just as in a public corporation, of course, the status of 'shareholder' entitles an investor to such benefits as a proportionate share of the corporate earnings (e.g., a proportionate share of the dividends, if declared), a right to any stock appreciation, a right to inspect company books and records (with a proper purpose), a right to vote on shareholder issues, and a right to be recognized as a shareholder.").

158. A person who received a 25% stake in a company as a gift, for example, is entitled to 25% of the corporation's profits, even if the giftee did not contribute any of its own capital to the business. *See infra* text accompanying note 192.

159. *See supra* notes 70-74, 156-58 and accompanying text.

160. Moll, *supra* note 50, at 553.

often includes employment and management benefits as well.[161] "Specific" reasonable expectations refer to these "extra" components of the close corporation shareholder's investment return—"extra" to the extent that they are in addition to the stockholder's entitlement to a proportionate share of the company's earnings. In investment model language, a specific reasonable expectation refers to an individually tailored investment bargain between a majority shareholder and a particular minority shareholder for employment, management, or some other benefit—a benefit beyond a proportionate stake in the company's earnings—that the minority shareholder will receive in return for its commitment of capital.[162] Thus, unlike a status-triggered general reasonable expectation, a specific reasonable expectation is not held by every close corporation participant who can be characterized as a "shareholder." To the contrary, a specific reasonable expectation is personal in nature,[163] as it requires proof that a close corporation majority shareholder and a particular minority shareholder reached a mutual understanding about a certain entitlement the minority is to receive in return for its investment in the business. By safeguarding specific reasonable expectations of employment, management, or other entitlement, the oppression doctrine is offering special protection to close corporation shareholders—"special" to the extent that public corporation shareholders do not receive similar protection.[164]

B. POSITION ONE: NO SPECIFIC REASONABLE EXPECTATIONS

It may be too strong to assert that the *Kemp* standard does not account for non-investing close corporation shareholders, or that the investment model of oppression has difficulty handling this group. Both frameworks may very well cover non-investing shareholders, and both may reach the rather simple conclusion that such shareholders are not entitled to any

161. *See supra* notes 73-74 and accompanying text.

162. *See supra* notes 83-85 and accompanying text.

163. *See infra* note 176 and accompanying text.

164. *See supra* note 155 and accompanying text. To some extent, of course, the public corporation shareholder does not need any "special" protection. After all, public corporation shareholders invest only with the general reasonable expectation that their investment entitles them to a proportionate share of the company's earnings. *See supra* notes 70-72 and accompanying text. For this limited interest, a market exit provides adequate protection. *See supra* notes 55-56 and accompanying text.

specific reasonable expectations at all.[165] Simply put, when a shareholder does not make a capital contribution, there is no "time of investment" peculiar to that shareholder for measuring reasonable expectations. Similarly, there is no investment in return for which majority promises of benefits might have been made. Stated differently, by not committing any capital, one can argue that the non-investing minority shareholder has failed to strike an investment bargain with the majority that can be protected as a specific reasonable expectation.

Even if such a position is credited, it is important to understand that the oppression doctrine will still protect non-investing stockholders' general expectations of proportionately sharing in the company's earnings. In some instances of oppressive conduct, this protection will suffice. For example, assume that three equal investors operate a close corporation. All three shareholders own the same class of stock with identical rights and privileges. Assume further that two of the three shareholders ("the controlling block") invested their own capital in the business at the time they joined the venture. The other shareholder, however, received her stock as a gift and has contributed no financial capital of her own to the enterprise. All of the investors work for the company and serve in management positions. For purposes of the hypothetical, assume that the reasonable value of the labor services performed by each shareholder for the corporation is $40,000.

Rather than pay dividends, the shareholders agree that the company will distribute all profits on the basis of share ownership as salary and other employment-related benefits.[166] Over the years, assume that company profits average approximately $150,000 annually. Such a profit figure results in a $50,000 annual "salary" or "bonus" payment to each shareholder. Assume that this arrangement works well for several years until dissension arises between the controlling block and the "giftee" minority. As a result of the dissension, the controlling block unjustifiably terminates the giftee's employment. Upon termination, the giftee no longer receives the salary and other employment-related benefits that the

165. Such a conclusion conveys, of course, that these shareholders will not receive the special "specific expectations" protections of the oppression doctrine. *See supra* Part IV.A (discussing general and specific reasonable expectations).

166. From a tax standpoint, such an agreement is advantageous. *See supra* note 28 (discussing the double taxation of dividend payments).

remaining shareholders continue to earn. Nevertheless, the company adheres to its policy of not paying dividends.

In this scenario, it is important to understand that the actions of the controlling block have frustrated the giftee minority's general expectation of sharing proportionately in the corporate earnings. The facts indicate that only a portion of the salaries and bonuses paid to the shareholders ($40,000) represents compensation for the actual labor services that they perform for the venture. The remaining amounts received by the shareholders ($10,000) are "de facto" dividends—distributions of company profit disguised as salary and other employment-related compensation.[167] When all three stockholders shared proportionately in these de facto dividends, their general expectations were being met. By terminating the giftee minority and continuing to pay de facto dividends to itself, however, the controlling block has effectively excluded the giftee from her proportionate share of the business returns.[168] Indeed, it is functionally equivalent to the

167. To the extent that a shareholder's salary and job-related benefits exceed the value of the actual labor services provided by the shareholder to the corporation, the excess compensation is often referred to as a "de facto dividend." The term refers to the fact that the excess compensation actually represents a distribution of corporate profit that is disguised, for tax reasons, as compensation for labor services. *See, e.g.*, Murdock, *supra* note 30, at 468 (observing that employed shareholders can receive "de facto dividends" through salary); *id.* ("The courts have recognized the reality that compensation paid to those in control has a two fold function: to recompense services and to provide a return on investment."); *supra* note 28. In this hypothetical, for example, the facts indicate that the reasonable value of the labor services performed by the shareholders is $40,000. When the company earns $150,000 in profits, however, each shareholder receives employment compensation totaling $50,000. In actuality, therefore, that $50,000 figure includes (1) $40,000 as compensation for the actual labor services provided to the company, and (2) $10,000 as a distribution of profit that is disguised as employment-related compensation. *See also* Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1049 (Pa. 1983) ("When the trial court has determined an amount that would have been reasonable compensation for Harry, Isadore, and Joseph's services to the corporations, if amounts in excess of that amount, either in salaries or other benefits were paid, those excess amounts shall be treated as profits which were distributed to the three brothers and shall be used, along with other excess payments (i.e., auto, boat and entertainment payments which have already been determined to be non-business related), to calculate the amount which is to be distributed to Ms. Ferber as her share of profits.").

168. *See, e.g.*, Nagy v. Riblet Prods. Corp., 79 F.3d 572, 577 (7th Cir. 1996) ("Many closely held firms endeavor to show no profits (to minimize their taxes) and to distribute the real economic returns of the business to the investors as salary. When firms are organized in this way, *firing an employee is little*

controlling block choosing to declare a dividend only for itself. Where all of the shareholders own the same class of stock with identical rights and privileges (as is the case here), such a non-uniform declaration is impermissible, as dividends should be paid proportionately to *all* stockholders in the class on the basis of their share ownership.[169] Simply put, unless the terminated giftee is included in the profit-distribution scheme of the company, her general expectation of sharing proportionately in the company earnings will be frustrated.[170] As a consequence, oppression liability will arise.

As this hypothetical illustrates, the oppression doctrine's enforcement of general reasonable expectations would protect the terminated giftee to the extent that she is complaining about her exclusion from company profits that the other shareholders are continuing to receive.[171] Thus, she can

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different from canceling his shares." (emphasis added)); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) ("In a close corporation, since dividends are often provided by means of salaries to shareholders, loss of salary may be the functional equivalent of the denial of participation in dividends."); *see also* Bonavita v. Corbo, 692 A.2d 119, 128 (N.J. Super. Ct. Ch. Div. 1996) ("When defendants terminated the salary payments that had been made to Gerald Bonavita, they had an obligation to provide, or at least try to provide, some alternative benefit to the holder of the Bonavita stock. They were not free simply to ignore those interests and operate the corporation for the sole benefit of [the controlling shareholder]."); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1180 (N.Y. 1984) (involving a close corporation that, after two shareholders ceased working for the company, oppressively changed its policy of distributing earnings from one based on share ownership to one based on services rendered to the corporation: "It was not unreasonable for the fact finder to have determined that this change in policy amounted to nothing less than an attempt to exclude petitioners from gaining any return on their investment through the mere recharacterization of distributions of corporate income.").

169. *See* Moll, *supra* note 50, at 539 n.92 ("If the majority shareholder pays a dividend to himself but not to the minority shareholder, the payment is generally illegal unless there is an explicit provision in the articles of incorporation or the bylaws that permits such an unequal distribution.").

170. *See* Michaud v. Morris, 603 So. 2d 886, 888 (Ala. 1992) ("Shareholders in close corporations have a right to share in corporation earnings, and a majority cannot deprive such shareholders of that right by failing to declare dividends or otherwise manipulating corporate earnings to squeeze out minority interests."); Sawyer v. Curt & Co., Nos. C7-90-2040, C9-90-2041, 1991 WL 65320, at *2-3 (Minn. Ct. App. Feb. 12, 1991) ("We believe [that] when those in control of a closely held corporation terminate the employment of a moving shareholder, a good faith effort must be made to buy-out the shareholder at a fair price or [to] adjust the income distribution mechanism to insure the shareholder an equitable investment return.").

171. The oppression doctrine would presumably require the controlling block to include the terminated shareholder in the earnings-distribution

challenge the loss of her job as oppressive on general expectation grounds.[172] To the extent that the terminated giftee is complaining about the loss of the benefits of the close corporation job itself (e.g., loss of a higher-paying position, loss of prestige, lost ability to work for oneself),[173] however, she is complaining about benefits beyond her entitlement to a proportionate stake in the company's earnings. As mentioned, the oppression doctrine protects such "extra" benefits only if a specific reasonable expectation for that benefit exists.[174] Of course, if one takes the position that non-investing shareholders are not entitled to any specific reasonable expectations, the terminated giftee's protection will not extend this far. Thus, she cannot challenge the loss of her job as oppressive on specific expectation grounds.

Even if non-investing shareholders are not entitled to any specific reasonable expectations, therefore, they will still receive some protection under the oppression doctrine via their general reasonable expectations. Although non-investing

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scheme of the corporation or, alternatively, to buy out the terminated shareholder's holdings. *See, e.g.*, Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1021 (Sup. Ct. Spec. Term 1984) ("While his [a terminated shareholder who embezzled from the company] past misdeeds provided sufficient justification for the majority's acts to date, there is a limit to what he can be forced to bear, and that limit has been reached. The other shareholders need not allow him to return to employment with the corporation, *but they must by some means allow him to share in the profits.*" (emphasis added)).

172. Assume, however, that after the controlling block terminated the giftee minority's employment (and therefore cut the minority off from de facto dividends), the controlling block started paying the minority a "true" dividend in the amount of her proportionate share of the company's earnings. What the giftee used to receive as a de facto dividend, in other words, she now receives as a "true" dividend. In such circumstances, it is important to recognize that the giftee's general reasonable expectation is satisfied. *See supra* notes 170-71 and accompanying text. Although the vehicle for distributing the corporate earnings has changed (from salary to true dividend payments), the giftee is still receiving her proportionate share of the company's profits. Under these facts, she cannot challenge the loss of her job as oppressive on general expectation grounds. *Cf.* Bahls, *supra* note 10, at 326 ("Assume, for example, that after one minority shareholder dies, the majority shareholders stop dividend payments to all shareholders and instead pay above market salaries to the family. In this situation, the court could order payment of dividends to the minority shareholders.").

173. It is not uncommon for close corporation positions to pay a higher salary and to carry more prestige than comparable jobs available outside of the close corporation. *See supra* notes 97, 133 and accompanying text. Moreover, close corporation positions often provide intangible "be your own boss" value. *See supra* note 98 and accompanying text.

174. *See supra* text accompanying notes 161-63; *infra* note 187.

shareholders could not challenge terminations of employment or removal from management positions as oppressive in and of themselves, they could challenge such actions as oppressive to the extent that they deny the shareholders their proportionate share of the company's earnings.

C. POSITION TWO: ONLY THE SPECIFIC REASONABLE EXPECTATIONS OF THE INVESTING TRANSFEROR

In dealing with non-investing shareholders, the oppression doctrine could take the alternative position that such shareholders are entitled to specific reasonable expectations, but only to the specific reasonable expectations of their investing transferors. A company founder who reasonably expected employment and management participation, for example, could pass on those expectations to any third party who received the founder's stock through purchase, gift, or inheritance. Under this position, specific reasonable expectations would run with the shares, rather than with the shareholders.[175]

For various reasons, this position is untenable. Most importantly, specific reasonable expectations are personal in nature.[176] As mentioned, under the investment model, a specific reasonable expectation represents an individually tailored investment bargain that a majority shareholder

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175. *Cf.* Meiselman v. Meiselman, 307 S.E.2d 551, 573 (N.C. 1983) (Martin, J., concurring) ("Another circumstance to be considered is the fact that most, if not all, of plaintiff's stock was given to him by his father. He did not contribute his own hard-earned cash to the enterprise. This could indicate that he did not assume the risk of having his investment held hostage by the majority, *or it could be that one has to accept what one gets by gift—in this case, a locked-in minority interest in a family corporation.*" (emphasis added)).

176. *See* Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. Spec. Term 1984) ("The original participants in a close corporation enter into their agreement on the basis of the assessments of each other's talents, assets, intentions and characters and their agreement must, therefore, be regarded as personal in nature. Unless there is an unmistakable expression of their intent to the contrary, the agreement will not 'run with the shares.'"); Bahls, *supra* note 10, at 326 ("The intent of original shareholders to operate the business is usually personal in nature. An expectation that one will participate in management of the business does not necessarily mean that one's son, daughter, ex-spouse, or other transferee will have the same opportunity."); Hillman, *supra* note 14, at 86 n.265 ("Ordinarily, expectations are personal and therefore would not be transferable . . . . Thus, an individual who acquires stock by gift or inheritance would not also take the expectations of the original owner.").

entered into with a particular minority shareholder.[177] In theory, therefore, it makes no sense to allow a third party to assert rights under a bargain that was struck between two different parties and that was tailored to the needs and wishes of those two different parties.[178]

In practice, the problematic nature of the position is even more stark. A majority shareholder may have been willing to promise employment or management to a prospective investor because of the skills and talents that the investor offered. A prospective investor with experience in the relevant industry of a close corporation, for example, is likely a more valuable employee to the business than a prospective investor without such experience. Because of such personal considerations, it is unreasonable to allow these promises of employment, management, or some other benefit to pass (through gift, inheritance, or otherwise) to transferees who lack the skills, talents, or experience of the transferor.[179] Indeed, it seems rather unfair to bind the majority to employ an unskilled transferee of stock simply because the *transferor's* abilities garnered a promise of employment.[180] As a New York court bluntly stated, "Even if an original participant had . . . a reasonable expectation of personal employment, after his death the surviving shareholders would not be bound to employ any dolt who happened to inherit his stock."[181] Because of what different investors can bring to the table, it is simply unworkable to contend that a majority promise of employment or management made to one party should necessarily transfer to another party.

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177. *See supra* text accompanying note 162; *supra* notes 83-85 and accompanying text.

178. This proposition assumes the absence of a third-party beneficiary situation. In that context, a third party would be entitled to assert rights under a bargain struck between other parties. *See infra* Part IV.D.2 (discussing a third-party beneficiary analysis).

179. *See supra* note 176.

180. *Cf.* UNIF. PARTNERSHIP ACT § 18(g) (1914) ("No person can become a member of a partnership without the consent of all the partners."); WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 69 (7th ed. 1995) (unabridged) ("Under UPA § 18(g), however, no person can become a partner without the consent of all the partners. It follows that unless the partnership agreement otherwise provides, a partner cannot make a transfer of his partnership interest that would substitute the transferee as a partner in the transferor's place.").

181. Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 n.6 (Sup. Ct. Spec. Term 1984).

Finally, these problems are compounded in situations where the transferor distributes its stock to multiple transferees. When a founder dies, for example, its shareholdings may very well pass via inheritance to a number of friends or relatives. Similarly, a shareholder may distribute portions of its holdings as gifts over the years to numerous recipients. Does the transferor's specific reasonable expectation of employment or management pass to all of these transferees? Would a majority shareholder be obliged to employ *multiple* unskilled and inexperienced transferees to fend off the possibility of oppression liability?[182] Surely the answer to both of these questions is *no*. When considering multiple transferees, it is even more evident that a "pass with the shares" position is one that the oppression doctrine should avoid.[183]

D. POSITION THREE: ANY SPECIFIC REASONABLE EXPECTATIONS THAT CAN BE PROVEN

As previously discussed, one could take the position that non-investing shareholders are not entitled to any specific reasonable expectations because of their failure to contribute capital to the business. Such a blanket denial of specific reasonable expectations, however, seems overly restrictive. A slight modification of an earlier hypothetical helps to convey this point. Assume that a 60% majority shareholder and two 20% minority shareholders start a business as a close corporation. They all invest their own capital at the time they join the venture and they all quit their prior employment positions to begin serving full-time as employees and managers of the close corporation. Six months after the company's inception, assume that one of the minority shareholders passes away. His wife, who is employed outside of the close corporation, inherits his stock. Assume further that the wife quits her outside employment and, with the full support of the other shareholders, commences employment with the close

182. Multiple generations further complicate this problem. If a transferor can pass on its specific reasonable expectations to several transferees (e.g., its children), the transferees can presumably pass on the same expectations (e.g., to their children).

183. In addition, to the extent that one believes that reasonable expectations can change over time, see *supra* Part III, it is arguably inconsistent to contend that non-investing shareholders are stuck solely with the specific reasonable expectations of their investing transferors.

corporation.

Over the next fifteen years, this arrangement continues. During that time, the company issues additional stock to bring in three other investors, and they all take employment positions with the company. In addition, the company distributes all profits as salary and other employment-related benefits during this time period. At the end of fifteen years, assume that the majority unjustifiably terminates both the wife and the founding minority shareholder.

In this situation, it seems odd to suggest that the founding minority has a reasonable expectation of employment while the transferee wife does not. Both shareholders quit their prior employment to begin working for the close corporation, presumably because the close corporation job offered benefits that were not available in their prior positions.[184] Both shareholders worked for the company for approximately fifteen years.[185] Further, and as noted, the fact that all of the shareholders work for the company and that profits are distributed solely as employment-related benefits is evidence suggesting a mutual understanding that stockholders are entitled to continued employment.[186] The facts suggest, in other words, that both shareholders have specific reasonable expectations of employment that are frustrated when the benefits of these close corporation jobs are unjustifiably terminated by the majority.[187] Given the similarity of the

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184. *See supra* notes 97-98, 133 and accompanying text; *cf. In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) ("As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation." (internal quotation omitted)); Murdock, *supra* note 30, at 472 ("[W]hat is at stake in the 'oppression' cases is often a job—a very attractive job."); Ragazzo, *supra* note 74, at 1110 (noting that a close corporation shareholder "often invests for the purpose of having a job").

185. *See, e.g.*, Thompson, *supra* note 20, at 217 (observing that expectations can be derived from the parties' actions); *cf.* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) ("The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, *and as they develop thereafter through a course of dealing concurred in by all of them*, is perhaps the most reliable guide to a just solution of a dispute among shareholders, at least a dispute among shareholders in the typical close corporation." (emphasis added)).

186. *See supra* note 103 and accompanying text.

187. Even if the company altered its profit distribution scheme after the terminations to provide the discharged shareholders with "true" dividends in the amount of their proportionate share of the profits, oppression liability should still arise. While the shareholders' general reasonable expectations of

shareholders' situations, an attempt to justify a difference in treatment by the oppression doctrine seems unwarranted.[188]

From an equitable standpoint, therefore, a position that non-investing shareholders can have specific reasonable expectations is sensible. Significantly, this position only states that non-investing shareholders *can* have specific reasonable expectations. If the shareholder cannot adduce the requisite proof of a shared understanding, no specific reasonable expectation will be found.[189] While the fairness of this outcome may be relatively easy to understand, however, the process of fitting the result within the investment model is more difficult. As mentioned, under the investment model, a specific reasonable expectation is simply a shorthand reference for a bargain struck between the majority and minority shareholders over an entitlement the minority is to receive in return for its commitment of capital.[190] By definition, of course, the non-investing shareholder has made no commitment of capital. Thus, one must stretch the theory of the investment model to accommodate a result that allows non-investing shareholders to have specific reasonable expectations. There are several

a proportionate stake in the company's profits would be satisfied, the shareholders' specific reasonable expectations of continued benefits from their close corporation positions would be frustrated. *See* Moll, *supra* note 50, at 568 ("[E]ven if a shareholder-employee receives 'true' dividends after termination in the same amount as the de facto dividends received before termination, oppression liability should still arise if the discharge frustrated a specific reasonable expectation of employment.").

188. *See In re* Schlachter, 546 N.Y.S.2d 891, 892 (App. Div. 1989) ("This [reasonable expectations] standard is equally applicable to [a] situation such as the instant case, where the shareholder's stock interest was a gift."); *In re* Smith, 546 N.Y.S.2d 382, 384 (App. Div. 1989) ("[W]e are of the opinion, contrary to the appellants' contention, that the 'reasonable expectation' standard can be applied to a case in which a stock interest is inherited . . . ."); *In re* Gunzberg v. Art-Lloyd Metal Prods. Corp., 492 N.Y.S.2d 83, 86 (App. Div. 1985) ("[P]etitioners received their shares as gifts; therefore there was no 'investment' which is a prerequisite to a finding of whether there is any other means by which they can expect to obtain a 'fair return on their investment.' . . . In any event, it seems clear that the holders of over 41% of a successful corporation are entitled to have their interests protected, regardless of whether or not those shares were received as gifts." (citation omitted)); *cf.* Hillman, *supra* note 14, at 86 n.265 ("Ordinarily, expectations are personal and therefore would not be transferable . . . . Thus, an individual who acquires stock by gift or inheritance would not also take the expectations of the original owner. *However, an individual in such a position may develop mutual expectations with the other participants which should be recognized.*" (emphasis added)).

189. *See infra* notes 193-96 and accompanying text.

190. *See supra* notes 83-84 and accompanying text.

different ways in which this could be done.

1. Pass the Investment to the Transferee

The investment model could assume that the investment of the transferor has passed to the transferee. Under this assumption, the doctrine would treat the non-investing shareholder as if it actually made the investment itself. If the transferee can then demonstrate that it reached a shared understanding with the majority for the provision of a specific benefit, the arrangement will be characterized as a bargained-for benefit that was promised in return for the transferee's "investment." In this manner, the result of allowing non-investing shareholders to have specific reasonable expectations can fit within the framework of the investment model.

Treating the investment of the transferor as the investment of the transferee is actually quite appropriate. The transferor's commitment of financial capital is represented by the shares of stock. When the original investor transfers those shares (via gift, inheritance, or otherwise) to another party, it is like the capital contribution was transferred to the other party, at least to the extent that the transferee is now the party who possesses the right to recover the capital contribution, along with any appreciation or depreciation, upon the dissolution or sale of the company (or sale of the shares themselves).[191] Indeed, under general corporate law, it is the party with lawful ownership of the share certificates who has a rightful claim to the capital represented by those certificates—not the party who actually contributed the capital in the first place.[192] Thus, it

191. *See, e.g.*, RMBCA, *supra* note 22, § 14.05(a) (1993) (stating that a dissolved corporation may "distribut[e] its remaining property *among its shareholders* according to their interests" (emphasis added)); *supra* note 66 (observing that the conventional dissolution proceeding determines the value of a business and awards *each stockholder* its proportionate share of that value); *cf.* O'Neill, *supra* note 71, at 663 ("The shareholder of a publicly traded corporation may realize a return on her investment in either of two ways: directly, by a distribution of dividends, or indirectly, by an increase in the market value of her shares."); Schlafge, *supra* note 59, at 1077 n.29 ("Both [public corporation and close corporation] investors expect appreciation in the value of their investment.").

192. *See supra* notes 156-58 and accompanying text; *cf.* Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 557 (N.J. Super. Ct. Law Div. 1979) ("[I]t must be [a father-in-law] alone who advanced money from his adequate funds to purchase the stock. These findings, however, do not carry the day for defendants. Legal title to the stock resides in [the son-in-law] and his claim of 'oppression' must be considered . . . .").

makes sense for oppression law to treat giftees or beneficiaries of stock as if they had made a financial investment in the company themselves.

It is worth repeating that treating a non-investing shareholder as if it had committed the capital itself does not automatically provide the shareholder with a specific reasonable expectation. Specific reasonable expectations arise only if the evidence indicates that a majority shareholder and a particular minority shareholder reached a mutual understanding about an entitlement the minority is to receive in return for its investment in the business.[193] While treating a giftee or beneficiary of stock as if it had committed the capital itself provides such a party with the requisite investment, it does nothing to establish the mutual understanding or bargain that is also required for a specific reasonable expectation.[194] Stated differently, treating non-investing shareholders as if they had invested themselves gives these stockholders only the *opportunity* to prove the existence of a specific reasonable expectation. Unlike a position that automatically grants non-investing shareholders specific reasonable expectations—e.g., where non-investing shareholders assume, as a matter of law, their transferor's expectations[195]—this position merely allows the non-investing shareholder the chance to present evidence of an explicit or implicit understanding that it reached with the majority. Even with a transferred "investment," therefore, if a shareholder cannot produce sufficient evidence of a bargain or mutual understanding, no specific reasonable expectation has been established.[196] As a consequence, the shareholder oppression doctrine will have no specific reasonable expectation to enforce.

2. Apply a Third-Party Beneficiary Analysis

In some instances, majority and minority investors may reach an understanding that a benefit will be provided to

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193. *See supra* note 82 and accompanying text.

194. *See supra* notes 81-85 and accompanying text.

195. *See supra* Part IV.C (discussing the possibility of the transferee assuming the transferor's specific reasonable expectations).

196. *See, e.g., In re* Smith, 546 N.Y.S.2d 382, 384 (App. Div. 1989) ("While we are of the opinion, contrary to the appellants' contention, that the 'reasonable expectation' standard can be applied to a case in which a stock interest is inherited, the petitioner's conduct did not evidence a reasonable expectation of being an active participant in the management of the corporations."); *supra* notes 81-85 and accompanying text.

someone other than the minority in return for the minority's commitment of capital. For example, founding majority and minority shareholders may agree that the minority's investment in the company entitles it to continuous employment and, upon its death, entitles its daughter to continuous employment. In such a situation, it is fair to say that the minority has a specific reasonable expectation of employment due to its investment and the explicit or implicit promise of employment that it received in return for that investment.[197] It is also fair to say, however, that the daughter possesses a specific reasonable expectation of employment—not because she struck an investment bargain herself, but because she can be characterized as a third-party beneficiary of the investment bargain struck between her father and the majority shareholder.[198] Indeed, the founders intended the arrangement to benefit the daughter, as the majority (the promisor) made a promise to the minority (the promisee) to employ the minority's daughter (the beneficiary) in return for consideration (the minority's investment).[199] Under the investment model, in other words, even though the daughter did not commit any of her own capital to the venture, her desire for employment can be enforced as a specific reasonable expectation because it literally falls within the reasonable expectations conception.[200] The daughter's desire for employment is indeed the product of a bargain struck between the shareholders over an entitlement the minority is to receive in return for its investment. That

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197. *See supra* text accompanying notes 161-63.

198. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979) (discussing intended and incidental beneficiaries of a contract).

199. *See id.* § 302 ("Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."); FARNSWORTH, *supra* note 110, § 10.3, at 679 ("In order to be an intended beneficiary of a gift promise, one must show both that this is 'appropriate to effectuate the intention of the parties' and that 'the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised performance.'"); *supra* note 111 and accompanying text (discussing consideration); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (1979) ("This Section reflects the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person.").

200. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1979) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, *and the intended beneficiary may enforce the duty.*" (emphasis added)).

minority entitlement, of course, is the right to have its daughter employed by the company after the minority's death, but it is no different than any other bargained-for benefit that the minority might have received more directly (e.g., continuous employment or management participation for the minority itself). Indeed, it bears repeating that the majority assented to this arrangement in return for the minority's capital. Allowing the majority shareholder to deny the daughter employment, therefore, is as much a breach of the minority's investment bargain with the majority as the unjustified termination of the minority's own employment. Thus, a third-party beneficiary analysis fits within the theory of the investment model and provides another way of thinking about the specific reasonable expectations of non-investing shareholders.[201]

The downside of the third-party beneficiary analysis is that it is only applicable when (1) a minority investor has the foresight to make arrangements for third parties, and (2) when the majority shareholder agrees to such arrangements.[202] Given that close corporation ventures often lack future-oriented planning,[203] it is fair to say that these situations will not frequently arise. Unlike the "passed investment" approach,

201. *Cf.* Bahls, *supra* note 10, at 326 n.251 ("Sometimes... founding shareholders will have expectations as to how heirs, donees or involuntary transferees should be treated. Expectations might include continued employment or continued dividend payments. *These shareholders then are akin to third party beneficiaries of the original parties* and should be entitled to protection of those expectations." (emphasis added)).

202. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (1979) ("This Section reflects the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person. *The requirements for formation of a contract must of course be met*...." (emphasis added)); MURRAY, *supra* note 126, § 28, at 51 (noting that mutual assent and a definite agreement are "essential elements to the formation of the typical contract" (footnote omitted)).

203. *See, e.g.*, Chittur, *supra* note 134, at 131 (observing that "people generally avoid complex and expensive planning in small businesses"); *id.* at 139 (stating that "inadequately planned close corporations will always remain part of the picture," and noting that "[t]he most careful plan may fail to visualize some conflicts, even if it does not generate novel ones of its own"); *see also* O'Neal, *supra* note 99, at 883-84 ("A person taking a minority position in a close corporation often leaves himself vulnerable to squeeze-out or oppression by failing to insist upon a shareholders' agreement or appropriate charter or bylaw provisions...."); Thompson, *supra* note 20, at 237 ("The relationship among participants in a close corporation requires the ongoing exercise of mutual discretion for which advance[d] planning would be impossible or prohibitively expensive.").

therefore, the third-party beneficiary analysis provides a framework for non-investing shareholders to have specific reasonable expectations only in a narrow range of cases.

3. Depart From an Investment-Centered Reasonable Expectations Standard

A final approach to allowing non-investing shareholders to have specific reasonable expectations is to abandon the prerequisite notion of an investment altogether. The New York decision of *Gimpel v. Bolstein* essentially took this approach by deciding, in a dispute involving non-investing shareholders, to measure oppression by the alternative definition of "burdensome, harsh, and wrongful conduct . . . a visible departure from the standards of fair dealing, and a violation of fair play."[204] Under this approach, a non-investing shareholder's right to continued employment or other entitlement would stem not from that shareholder's reasonable expectation of receiving its bargained-for benefits, but would derive instead from the "unfairness" associated with terminating the shareholder's employment or denying the shareholder some other benefit.

The vagueness of such a "wrongful" or "unfair" standard, however, is problematic, as it provides little coherent guidance regarding what constitutes oppressive conduct.[205] Whereas an

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204. 477 N.Y.S.2d 1014, 1018, 1020 (Sup. Ct. Spec. Term 1984).

205. For example, under a "wrongful" or "unfair" standard, it is difficult to explain how a termination of employment could be oppressive in an employment at will jurisdiction. *See, e.g.*, Burk v. K-Mart Corp., 770 P.2d 24, 26 (Okla. 1989) ("The classic statement of the at-will rule was that an employer may discharge an employee for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."); 1 ROTHSTEIN ET AL., *supra* note 112, § 8.1, at 671 ("The employment at will doctrine . . . provided that an employee without a contract for a fixed term could be fired for any reason or no reason at all."). After all, terminating an employee for any reason or for no reason at all is often viewed as "unfair," but employment "unfairness" is, to some extent, permitted by the at-will doctrine. *See, e.g.*, Webster v. Schauble, 400 P.2d 292, 292, 294 (Wash. 1965) (stating that the plaintiff's termination of employment was "a result of probably unfair and certainly ruthless treatment," but concluding that plaintiff had no remedy due to the employment at will doctrine). An investment-centered reasonable expectations approach, however, makes it clear that a termination of employment can be oppressive, even in an employment at will jurisdiction, because close corporation shareholders often have an investment interest in their jobs rather than a mere employment interest. *See, e.g.*, Moll, *supra* note 50, at 538-39 ("Discharge-related harms suffered in an *employee* capacity . . . fall within the province of employment at will. . . . [I]t makes conceptual sense

investment-centered reasonable expectations standard defines oppression as majority conduct that breaches an investment bargain with a minority shareholder, the "wrongful" or "unfair" standard provides no such context. Similarly, under the investment model, the reasonable expectations standard conveys to both courts and shareholders that, before the oppression doctrine will provide specific protection, proof of majority promises made in return for the minority's investment is required. Under a "wrongful" or "unfair" standard, however, it is unclear what evidence will be required to warrant the protection of the doctrine. Simply put, by conceiving of oppression as a doctrine that protects bargained-for investment expectations, rather than a doctrine that polices a seemingly free-floating notion of unfairness, the doctrine is provided with standards that courts and shareholders can use in assessing whether oppressive conduct has occurred.

In summary, although non-investing shareholders will receive some protection under the oppression doctrine even without specific reasonable expectations (the protection of general reasonable expectations), it is both equitable and sensible to provide these shareholders with the opportunity to prove that a mutual understanding—i.e., a specific reasonable expectation—was reached with the majority shareholder. By treating the investment of the transferor as the investment of the transferee, the law can protect such a specific reasonable expectation as an "investment bargain" without the limitations of the third-party beneficiary analysis or the vagaries of an "unfairness" standard. As long as the requisite evidence is adduced, the oppression doctrine should treat the non-investing shareholder and the investing shareholder in an equivalent manner.[206]

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to invoke the doctrine of shareholder oppression only where the loss of a shareholder-employee's job damages the value of that shareholder-employee's investment. In such circumstances, the loss of the job represents harm suffered in a *shareholder* capacity and, as a consequence, the termination falls outside of the proper scope of the at-will doctrine." (first emphasis added)).

206. The death of the majority shareholder adds another wrinkle to the analysis. Assume, for example, that a minority shareholder establishes that the majority promised continued employment in return for the minority's investment in the business. Because of this bargain, the minority has an enforceable specific reasonable expectation of employment. Assume further, however, that the majority dies and that her son inherits her controlling interest in the company. Is the employment bargain struck between the minority and the former majority binding upon the new majority shareholder, or can the new majority terminate the minority without fear of oppression

V. THE ROLE OF THE TRANSFEROR'S INTENT

In situations where majority and minority shareholders have agreed to provide a benefit to a third party, the transferor's intent is significant. In these third-party beneficiary arrangements, there is no reason to deny a transferor's intent to, for example, provide its daughter with employment in the close corporation. After all, the

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liability?

On the one hand, the son was not a party to the bargain between the minority and the former majority and, similarly, he did not explicitly assent to the arrangement. On the other hand, allowing the new majority to disclaim prior bargains and understandings results in the minority becoming a party to a different investment bargain that it may not agree with (e.g., an arrangement without an assurance of continued employment). Either way, one party is subject to the terms of a bargain that it may not have assented to.

In most instances, the minority will have greater difficulty handling this "nonconsensual" burden. Simply put, the minority has no options. Given that the minority has no ability to extract an investment that has already been made, an oppression framework that allows a new majority to ignore prior investment bargains effectively licenses the majority to commence a freeze-out. Although the minority negotiated for continued employment before committing its capital to the venture, such a framework allows the new majority to ignore the promise of employment while retaining the minority's investment.

In contrast, the majority shareholder does have options if it disagrees with the investment bargains entered into by its predecessor. First, the majority can always circumvent the predecessor's bargains if it is willing to buy out the minority's holdings at "fair value." After all, "fair value" is what the minority is likely to receive if it prevails in an oppression action. *See supra* note 69 and accompanying text (explaining that a buyout remedy provides the shareholder with the "fair value" of its investment). In a sense, therefore, the prior investment bargains limit the majority only to the extent that it (or the corporation) is unwilling to bear the expense of a "fair value" buyout. *See supra* note 68. *But see* Hillman, *supra* note 14, at 70-75 (stating that "[t]he assumption that those who desire to avoid a dissolution of the corporate enterprise may easily do so by purchasing the interest of a dissatisfied minority shareholder ignores a number of problems which may be encountered by those who wish to continue the venture," and discussing those problems (citation omitted)). Second, in many jurisdictions, the majority shareholder can unilaterally dissolve the company. *See, e.g.*, CAL. CORP. CODE § 1900(a) (West 1990) ("Any corporation may elect voluntarily to wind up and dissolve by the vote of shareholders holding shares representing 50 percent or more of the voting power."); N.Y. BUS. CORP. LAW § 1001(a) (McKinney 2001) ("Such dissolution [of a corporation] shall be authorized at a meeting of shareholders by . . . a majority of the votes of all outstanding shares entitled to vote thereon . . . ."). Unlike the minority shareholder, therefore, the dissatisfied majority stockholder can extract its investment. *See supra* note 66. Finally, to the extent that the new majority has accepted the benefits of its stock inheritance (i.e., the power to control the company), it may be appropriate to require the majority to accept the burdens of the inheritance as well (i.e., the bargains struck by the predecessor).

arrangement is only enforced because it is consensual between the majority and minority shareholders. If the majority shareholder had not assented to the third-party benefit, there would be no mutual understanding or bargain to enforce.[207]

Where there is only one founding investor, however, it is worth asking whether that shareholder's intent should have any bearing on the reasonable expectations of successor shareholders who receive their stock through gift or inheritance. Assume, for example, that upon reaching retirement age, a sole founding shareholder of a close corporation decides to give 60% of his holdings to a daughter and 40% of his holdings to a son. Assume further that the founder explicitly conveys his intent that the son shall remain employed by the close corporation. If both children accept the gift, is the daughter (the majority shareholder) bound to continually employ the son (the minority shareholder)?

Under the investment model's view of reasonable expectations, a specific reasonable expectation only exists if a majority and minority shareholder both assent to a bargain that provides for a specific benefit such as employment.[208] It is hard to argue that the requisite assent is present in this hypothetical, as the situation is not one where the employment "terms" of the arrangement are bargained for between the majority and minority themselves. Instead, the terms are more or less injected into the shareholders' relationship without any form of bargaining at all. Similarly, given that an ever-changing business world requires the majority shareholder to possess sufficient flexibility to make decisions,[209] it is sensible for the law to avoid limiting this business discretion unless the majority has assented, either explicitly or implicitly, to such a limitation.[210] From this standpoint, one could argue that the

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207. *See supra* note 202 and accompanying text.

208. *See supra* text accompanying notes 162-63; *supra* notes 83-85 and accompanying text.

209. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976) ("[W]e acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees.").

210. *Cf.* Maul v. Van Keppel, 714 N.E.2d 707, 711 (Ind. Ct. App. 1999) ("[A] departure from general corporate law is warranted only when (1) the shareholders agreed to bind themselves to partner-like conduct or (2) each shareholder intended to treat the others as equal partners.").

majority daughter would not be bound to employ the minority son absent other evidence indicating that the shareholders have reached a mutual understanding between themselves regarding continued employment for the minority.[211]

There is room, however, for a contrary position. One could argue that the majority daughter has assented to continually employ the minority son because she cannot accept the benefits of the gift without the accompanying burdens. In other words, to the extent that the majority has accepted the benefits of the gift by assuming control of the business as the majority shareholder, she could arguably be deemed to have also assented to the employment restriction involving the minority son.[212] If such an argument is accepted, the investment model

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211. The language of one court reflects such an argument:

> Although Maul [a minority shareholder] states in her affidavit that her mother gave and bequeathed equal shares to each daughter, those statements are not probative of an agreement among the shareholders. The statements may demonstrate the mother's intent that the daughters forever maintain equal ownership of the farm corporation, but the mother's intent was not binding upon the daughters.... [T]here was no agreement between the shareholders/sisters to maintain equal ownership, to be treated as partners, or to offer each other rights of first refusal on available shares. Further, there is no evidence of a meeting of the minds or of mutual intent to maintain equal ownership. Absent such evidence, the court cannot impose a duty upon the shareholders/sisters to maintain equal ownership or to offer each other rights of first refusal.

Id. at 711-12. Of course, "other evidence" of an employment understanding between the shareholders may include the majority itself promising employment, the existence of an express employment agreement for the minority, a company policy of providing employment for all of its shareholders, the minority actually working for the company for some period of time, or the company's use of salary and other employment-related benefits to distribute the profits of the business. *See, e.g.*, MINN. STAT. ANN. § 302A.751(3a) (West 2002) ("[A]ny written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements."); Kelly v. Rudd, No. C7-91-1142, 1992 WL 3651, at *3 (Minn. Ct. App. Jan. 14, 1992) (noting that "agreements affect the reasonableness of appellant's expectations"); *supra* notes 103, 141 and accompanying text.

Even without a specific reasonable expectation of employment, it is important to note that the minority son's "shareholder" status will still entitle him to general reasonable expectation protection. *See supra* notes 156-60 and accompanying text.

212. *Cf.* Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1050 (Pa. 1983) ("It would be anomalous and inequitable to hold that while the Cohen brothers may utilize the bequests in their father's will to assume control of the family business, they may disregard other provisions of that will which limits their power to dispose of the earnings from the family business for their own

could enforce the expectation as if the majority and minority themselves struck a bargain regarding the minority's continued employment. Alternatively, to the extent that the bargain is conceived as having been struck between the founder and the majority (where the founder gives stock in return for the majority's promise to employ the minority), the minority could enforce the bargain under the investment model on a third-party beneficiary basis.[213]

Ultimately, in these "one founder" cases, the founder's intent may be better viewed simply as an evidentiary factor for a court to consider in the reasonable expectations analysis. As a mere factor, the founder's intent should neither bind the majority shareholder nor be per se irrelevant to the reasonable expectations inquiry.[214] Indeed, the founder's intent may be difficult to carry out as the corporation evolves over the years,[215] but that intent may nevertheless shed some light on the "reasonableness" of an asserted expectation.[216] Thus, when a

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benefit.").

213. *See supra* Part IV.D.2.

214. *See, e.g.*, 2 OPPRESSION, *supra* note 21, § 7:15, at 91-92 ("If shares have been received by inheritance or gift, the donor's wishes may have *some bearing* on whether the donee's expectations are reasonable." (emphasis added)).

215. Assume, for example, that a close corporation manufactures and distributes a clothing line and a cosmetics line. Both lines of business are profitable. Upon retirement, the sole founder of the company transfers his stock to family members with the explicit intent that the company always remain in both lines of business and that the founder's son shall manage the enterprise. As the years pass, however, assume that changing consumer tastes ultimately cause the clothing line to become highly unprofitable. Under such circumstances, it may be fair to say that the founder's intent is no longer practicable and that the controlling shareholder of the company should not be bound to continue a losing segment of the business. Similarly, surely the founder's intent that his son shall manage the business should not continue to bind the shareholders if the son ultimately proves to be incompetent. Simply put, there are times when the realities of business should outweigh the founder's wishes. *Cf.* Bahls, *supra* note 10, at 327 ("[T]he business may have changed so much that reasonable expectations can no longer be fulfilled. For example, due to changes in business conditions, a corporation once able to support two or more owners, ... may no longer be able to provide sufficient support."); *id.* ("A brother and sister, for example, might decide to incorporate the family farm to provide a livelihood for both of them, even though the farm is simply too small to provide the expected support.").

216. In *Nixon v. Blackwell*, for example, a sole shareholder founded a close corporation with two classes of common stock—class A voting stock and class B non-voting stock. 626 A.2d 1366, 1370 (Del. 1993). Upon the founder's death, his testamentary plan resulted in the transfer of the class A voting stock to the key employees of the company and most of the class B non-voting

minority shareholder claims a reasonable expectation of management participation, for example, a founder's intent that the minority remain as a passive investor should be viewed merely as evidence that the minority's expectation of management is unreasonable. As a mere evidentiary factor, however, the founder's intent can be outweighed by other evidence suggesting the reasonableness of the shareholder's expectation (e.g., a majority promise of a management role, or the company's history of placing shareholders in management positions).[217]

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stock to the founder's family. *See id.* In subsequent years, the corporation established an employee stock ownership plan (an "ESOP") for the benefit of the company employees and, for certain employees, the corporation purchased "key man" life insurance policies with death benefits payable to the corporation. *See id.* at 1371-72. The plaintiffs were a group of class B shareholders who claimed that the defendants "breach[ed] their fiduciary duties by pursuing a discriminatory liquidity policy that favors employee stockholders over non-employee stockholders through the ESOP and key man life insurance policies." *Id.* at 1370, 1373.

Although the court did not speak in the language of "reasonable expectations," it effectively concluded that the plaintiffs had no reasonable expectation of equal liquidity with the employee shareholders. *See id.* at 1376. Indeed, the court noted that "stockholders need not always be treated equally for all purposes," it pointed out that ESOPs and key man insurance programs are "normal corporate practice[s]," and it observed that because ESOPs are "normally established for employees . . . there is no inequity in limiting ESOP benefits to the employee stockholders." *Id.* at 1376-77, 1379. Significantly, however, the *Nixon* court also considered the founder's intent as a factor contributing to its decision:

> The directors have followed a consistent policy originally established by Mr. Barton, the founder of the Corporation, whose intent from the formation of the Corporation was to use the Class A stock as the vehicle for the Corporation's continuity through employee management and ownership. Mr. Barton established the corporation in 1928 by creating two classes of stock, not one, and by holding 100 percent of the Class A stock and 82 percent of the Class B stock. Mr. Barton himself established the practice of purchasing key man life insurance with funds of the Corporation to retain in the employ of the Corporation valuable employees . . . . The directors' actions following Mr. Barton's death are consistent with Mr. Barton's plan.

Id. at 1379.

217. Courts may give greater weight to a founder's intent when stock is transferred through a will rather than as a mere gift. The effect of testamentary intent under the law of wills, in other words, may lead a court to treat "inheritance" cases differently from mere "gift" cases. *See, e.g.*, Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1050 (Pa. 1983) ("The present case combines, to some degree, the law of corporations and the law of wills. . . . [C]onsideration must be given to the testamentary intent of Ms. Ferber's father . . . . Therefore, in making its equitable determination as to the reasonableness of compensation paid to the brothers, the trial court must consider not only what would be reasonable compensation in a strict business

CONCLUSION

In the business world, change is a virtual certainty. Moreover, in close corporations, the presence of family is almost as certain, as family-owned enterprises are, and will likely remain, a significant component of the overall business landscape.[218] Given these realities, disputes involving changed shareholder expectations and gifted or inherited stock—disputes that have already started to surface in oppression decisions—will only become more prevalent as the oppression doctrine develops further. As a consequence, there is a pressing need to address these issues. By calling attention to the issues of changing expectations and non-investing shareholders, this Article has revealed that a "time of investment" standard for measuring reasonable expectations—a standard that a number of jurisdictions have adopted—is too narrowly focused. As a result, it inadequately protects shareholders whose expectations have changed since the time of their investment as well as shareholders who have not contributed any of their own capital to the business.

In light of this significant shortcoming, a broader reasonable expectations perspective is needed. By conceiving of oppression as a doctrine that protects the fair value of the shareholder's investment, this Article has suggested that a reasonable expectation should be viewed as a bargain struck between majority and minority shareholders over a specific entitlement the minority is to receive in return for its investment in the company. As explained, however, close corporation shareholders may strike these "investment bargains" throughout their course of dealing with each other. Thus, with respect to the problem of changing expectations, this Article has argued for a reasonable expectations standard

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sense, but also what would be reasonable in light of that provision of Benjamin Cohen's will which clearly intends that a benefit should flow from the family business to *all* the named children."); *id.* at 1050-51 (Hutchison, J., concurring) ("Placing the burden of proof on the appellants would simplify the Chancellor's task of effectuating the testamentary intent of appellee's father that appellee share, in a meaningful way, in the corporate profits."). *But see* Maul v. Van Keppel, 714 N.E.2d 707, 711 (Ind. Ct. App. 1999) ("Although Maul [a minority shareholder] states in her affidavit that her mother gave and *bequeathed* equal shares to each daughter, those statements are not probative of an agreement among the shareholders. The statements may demonstrate the mother's intent that the daughters forever maintain equal ownership of the farm corporation, *but the mother's intent was not binding upon the daughters*." (emphasis added)).

218. *See supra* note 13 and accompanying text.

that protects shareholders' investment bargains whenever they may be struck, rather than merely at the time of investment. More importantly, by looking to corporate law's effort to prevent freeze-outs as well as contract law's recognition of relational arrangements, this Article has provided strong rationales for its contentions that post-investment expectations can and should be protected.

With respect to the puzzle of the non-investing shareholder, this Article has asserted that stockholders who receive their shares through gift or inheritance should be treated equivalently to stockholders who actually contribute their own capital to the venture. The non-investing shareholder, in other words, should have the same opportunity as the investing shareholder to prove that it reached a bargain or understanding with the majority shareholder (i.e., to prove that a specific reasonable expectation existed). The investment model of oppression assists in this conclusion as well. Indeed, by demonstrating that it is appropriate to treat the investment of the transferor as the investment of the transferee, this Article is able to characterize a mutual understanding between a majority shareholder and a non-investing minority shareholder as a protected "investment bargain"—a bargain that can be enforced as a specific reasonable expectation.

In short, the plight of the close corporation minority shareholder is real. Although the shareholder oppression doctrine has made great strides in strengthening the rights of minority shareholders, the doctrine's vitality depends on its ability to effectively respond to new problems and situations. While a "time of investment" expectations inquiry may have sufficed for most of the published oppression decisions to date, its blemishes can no longer be ignored. For disputes involving change, gifts, or inheritances, a broader perspective is needed.