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THE OUSTER OF KENDALL AND THE ROLE OF THE SHAREHOLDER OPPRESSION DOCTRINE

*Douglas K. Moll**

INTRODUCTION

In *Succession*'s first season, the “Austerlitz” episode involved the Roys attending a family therapy session at Connor’s ranch in New Mexico.¹ Early in the episode, we learn that Kendall is suing Logan because Kendall has been ousted from the company after spearheading a failed “vote of no confidence” against his father.² While the show does not provide any information about the causes of action involved in the lawsuit, one might speculate that a claim for shareholder oppression was involved—a claim that is typically asserted in the closely held setting.³ Waystar Royco, of course, is a publicly traded company, but there are some hints in the show (and internet chatter) that the Roy family held its shares in Waystar via a closely held family holding corporation. Assuming that such a closely held corporation existed, and further assuming that Kendall held a minority ownership interest in such a company, this Essay seeks to explain the basics of the shareholder oppression cause of action that Kendall may very well have asserted. More broadly, this Essay extends the observations made by Spencer Burke⁴ and Benjamin Means⁵ in their contributions to this Symposium about the importance of planning for succession in family businesses. When such planning does not occur, there is a greater chance of dissension among the family members. Litigation, including shareholder oppression claims, is often the result.

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1. See *Succession: Austerlitz* (HBO television broadcast July 15, 2018) (Season One, Episode Seven).

2. See *id.*

3. See *infra* Part I.A.

4. See Spencer B. Burke, *HBO's Succession: What Can Lawyers Learn from This Family Business Story?*, 73 DEPAUL L. REV. 771 (2024).

5. See Benjamin Means, *Logan Roy as King Lear: How Not to Succeed*, 73 DEPAUL L. REV. 921 (2024).

I. UNDERSTANDING THE SHAREHOLDER OPPRESSION CAUSE OF ACTION

A. *The Plight of the Minority Shareholder in the Closely Held Corporation*

A closely held 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 business.⁶ In a publicly held corporation, a shareholder is typically a passive investor who neither contributes labor to the corporation nor takes part in management responsibilities. A shareholder in a publicly held corporation simply invests money and hopes to receive a return on that money through dividend payments and/or sale of the company's stock at an appreciated value.⁷ By contrast, in a closely held corporation, a shareholder typically expects an active participatory role in the company, usually through employment and a meaningful role in management.⁸ A shareholder in a closely held corporation also invests money in the venture and, like all shareholders, he hopes to receive a return on that money. By definition, however, a closely held corporation lacks an active market for its stock.⁹ Thus, any investment return is normally provided by employment compensation and dividends, rather than by sales of stock at an appreciated value.¹⁰

6. See, e.g., *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 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.").

7. See, e.g., *Exadaktilos v. Cinnaminson Realty Co.*, 400 A.2d 554, 560 (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.").

8. See, e.g., *Parker v. Parker*, No. UNN-C-108-13, 2016 N.J. Super. Unpub. LEXIS 2720, at *25 (Dec. 22, 2016) (stating that shareholder expectations in a closely held corporation "include the security of long-term employment and financial return, a voice in the operation and management of the business and in the formulation of plans for future development"); *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.").

9. See, e.g., *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 available for shares in the close corporation."); cf. *Koshy v. Sachdev*, 81 N.E.3d 722, 731 (Mass. 2017) (noting that "in closely held corporations, the lack of a ready market for a shareholder's stock, and the greater likelihood that a shareholder is reliant on the corporation for a salary, tends to increase the potential for deadlock and accompanying oppressive tactics").

10. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662 (Mass. 1976) ("The minority stockholder typically depends on his salary as the principal return on his investment . . ."); *Baker v. Com. 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.").

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for a minority investor in a closely held corporation. Traditionally, most corporate power is centralized in the hands of a board of directors.¹¹ The directors set policy, elect officers, and supervise the normal operation of the corporation. Because directors are elected by shareholder vote, the board of a closely held corporation is typically controlled by the shareholder (or shareholders) holding a majority of the voting power. Through this control of the board, a majority shareholder (or majority group)¹² has the ability to take unjustified actions that are harmful to a minority shareholder's interests.¹³ Such actions are usually designed to restrict (or deny altogether) the minority's financial and participatory rights, and they are often referred to as "freezeout" or "squeezeout" actions that "oppress" a minority shareholder.¹⁴ Common oppressive tactics include the termination of a minority shareholder's employment, the removal of a minority shareholder from the board of directors, the denial of access

11. See, e.g., 8 DEL. CODE § 141(a) (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .").

12. The terms "majority shareholder" and "minority shareholder" are often used "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). The term "controlling shareholder" is also used to refer to the shareholder (or group of shareholders) who possesses the actual power to control the operations of the firm.

13. See, e.g., *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."); *McLaughlin v. Schenk*, 220 P.3d 146, 156 (Utah 2009) (observing that a minority shareholder in a closely held corporation is left "with no remedy for the abuses and oppression that may result due to the small number of shareholders, the frequency of familial and other personal relationships, and the likelihood that majority shareholders control the board in close corporations"). Along with majority or controlling shareholders, directors and officers may also have the ability to take unjustified actions that are harmful to a minority shareholder's interests. As a result, most oppression statutes allow shareholders to bring actions against "directors or those in control." See *infra* note 35 and accompanying text; cf. *Bontempo v. Lare*, 119 A.3d 791, 804 (Md. 2015) ("The statute does not define 'oppressive' acts, although it is a term commonly used to describe adverse treatment of minority shareholders in a closely-held corporation by those who wield power within the company.").

14. The term "freezeout" is often used synonymously with the term "squeezeout." Both terms refer to conduct that is designed to deny a shareholder his participatory rights in the business, his financial rights in the business, or, most often, both sets of rights. Cf. *McCann v. McCann*, 275 P.3d 824, 830 (Idaho 2012) ("Squeeze-outs, sometimes called freeze-outs, are actions taken by the controlling shareholders to deprive a minority shareholder of his interest in the business or a fair return on his investment."); *Haag Trucking Co. v. Haag*, 896 N.E.2d 1207, 1217 (Ind. Ct. App. 2008) ("A freeze-out is the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the corporation or reduce the minority shareholders' voting power or claims on corporate assets to relative insignificance.").

to information, the refusal to declare dividends, and the siphoning off of corporate earnings to the majority shareholder.¹⁵

Quite often, these tactics are used in combination. For example, rather than declaring dividends, closely held corporations often distribute their earnings to shareholders in the form of salary and other employment-related compensation. (Reasonable employment compensation is tax deductible to a corporation as a business expense, while dividend payments are not.)¹⁶ When dividends are not paid in a closely held corporation, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business.¹⁷ Such conduct often culminates with a majority proposal to purchase the shares of the minority owner at an unfairly low price.¹⁸ In short, this denial of financial and participatory rights is at the core of many lawsuits alleging that the majority used his control in an abusive or “oppressive” fashion against a minority shareholder.

15. *See, e.g.*, *Orchard v. Covelli*, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) (“Tactics employed against a minority shareholder to effect a squeeze out can take on many forms including generally oppressive conduct, the withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to the operation of the corporation, appropriation of corporate assets, denying dissenting shareholders appraisal rights, failure to hold meetings and excluding the minority from a meaningful role in the corporate decision-making.”).

16. When calculating its taxable income, a closely held corporation can deduct reasonable salaries paid to its employees to decrease the amount of income tax that the company pays. *See* 26 U.S.C. § 162(a)(1) (stating that “a reasonable allowance for salaries or other compensation for personal services actually rendered” is deductible). A closely held corporation cannot, however, deduct any dividends paid to its shareholders. As a consequence, corporate income paid as dividends is subject to double taxation—once as business income at the corporate level, and once as personal income at the shareholder level. As a result of the tax-disadvantaged nature of dividends, many closely held corporations forego “true” dividends and instead provide a return to shareholders via salary and other employment-related benefits. *See, e.g.*, *Hirschhorn v. Severson*, 319 N.W.2d 475, 477 (N.D. 1982) (The corporation “paid no dividends Rather, the corporate directors distributed the profits via salary increases, bonuses, and benefits”); *see* cases cited *supra* note 10 and accompanying text (noting that investment return is often provided by employment compensation).

17. *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 operation of the business was dashed when Sylvester removed Balvik as a director and officer of the corporation.”).

18. *See, e.g.*, *Donahue v. Rodd Electrotpe Co. of New England, Inc.*, 328 N.E.2d 505, 515 (Mass. 1975) (“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); Robert B. Thompson, *The Shareholder’s Cause of Action for Oppression*, 48 Bus. Law. 699, 703-04 (1993) (noting that in a classic freezeout, “the majority first denies the minority shareholder any return and then proposes to buy the shares at a very low price”).

In a publicly held corporation, a minority shareholder can largely escape these abuses of power by selling his shares into the market and by correspondingly recovering the value of his investment. This market exit provides some protection to investors in publicly held corporations from the conduct of those in control.¹⁹ By definition, however, there is no market exit in a closely held corporation,²⁰ and a minority investor in such a company is left in a vulnerable position.²¹

Even if a minority shareholder could locate prospective outside investors, a minority ownership position in a closely held corporation is unlikely to garner much interest. A minority ownership position lacks sufficient voting power to control the operations of the firm.²² As a result, a minority interest is far less appealing (as well as less valuable) to outside investors. When the company has a track record of oppressive majority conduct, a minority interest is even less attractive.²³ Moreover, because all closely held shares lack the liquidity that a ready securities market would provide, outside investors tend to be less interested in the stock of a closely held corporation, at least in comparison to the easily traded stock of a publicly held corporation.²⁴

If, for whatever reason, an outside investor was interested in purchasing the minority's ownership position, the presence of stock transfer restrictions would likely create further obstacles to consummating the sale. By default, a shareholder of a corporation may unilaterally transfer some or all of his shares, including any ownership rights associated

19. See, e.g., 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.”); *supra* note 9 and accompanying text (discussing the lack of a market).

20. See *supra* note 9 and accompanying text (discussing the lack of a market).

21. See, e.g., 1 F. HODGE O’NEAL, ROBERT B. THOMPSON & HARWELL WELLS, O’NEAL AND THOMPSON’S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE § 7:12 (rev. 3d ed. 2023) [hereinafter CLOSE CORPORATIONS] (stating that “the lack of a market for the shares of a close corporation . . . leaves the minority shareholder vulnerable in a way that is distinct from the position of a shareholder in a publicly held corporation”).

22. See, e.g., Hetherington & Dooley, *supra* note 12, at 5 n.7 (defining a “minority” shareholder as a shareholder “who [does not] possess the actual power to control the operations of the firm”).

23. See, e.g., Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) (“Dissension within the close corporation tends to make the minority interest even more unattractive to a prospective purchaser.”); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) (noting the “natural reluctance of potential investors to purchase a noncontrolling interest in a close corporation that has been marked by dissension”).

24. See, e.g., Wisniewski v. Walsh, A-2650-13T3, 2015 WL 9380616, at *4 (N.J. Super. Ct. App. Div. Dec. 24, 2015) (noting that “the pool of potential buyers for a relatively illiquid interest in a closely-held company would be limited”); see also SHANNON P. PRATT, ROBERT F. REILLY & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 334 (3d ed. 1995) [hereinafter VALUING A BUSINESS] (“[T]he universe of realistically potential buyers for most closely held minority ownership securities is an infinitesimally small fraction of the universe of potential buyers for publicly traded securities.”).

with those shares, to a third party.²⁵ In the typical closely held corporation, however, the shareholders desire control over the identity of their fellow owners. As a result, contractual restrictions on the transfer of stock usually exist.²⁶ Depending upon the nature of the restriction, a minority's attempt to sell may trigger an obligation to sell the shares to the company for less than fair value,²⁷ or may require the controlling group's permission.²⁸ The mere presence of such restrictions tends to discourage private sales.²⁹

For all of these reasons, an effort to escape abusive majority conduct by selling shares is unlikely to be successful for a minority investor in a closely held corporation. The lack of an active securities market for the stock, the relative undesirability of a minority position, and the existence of stock transfer restrictions effectively dooms most efforts to sell. In fact, often the only potential purchaser of a minority's shares is the oppressive majority himself (or the corporation controlled by the oppressive majority).³⁰ As mentioned, these parties will usually offer an amount that is significantly below the fair value of the minority's shares—if they choose to make an offer at all.³¹

Despite the lack of a market and the difficulties associated with selling to outside purchasers, minority shareholders in closely held corporations would still have effective exit rights if they could force the corporation (or the controlling shareholder) to purchase their shares on demand. A default buyout right would ensure that a minority shareholder could recover the value of his investment and would thwart any controlling shareholder effort to confiscate the minority's capital. No state's corporation law, however, provides such a right. Without an explicit buyout provision in a stockholder's agreement or the

25. See DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS § 4.01[A][1], at 4-2 (LexisNexis 2023).

26. See *id.* at 4-2-4-3.

27. See *id.* at 4-2-4-6 (discussing first-option agreements).

28. See *id.* § 4.01[A][4], at 4-8-4-9 (discussing consent restrictions).

29. For example, assume that a first-option agreement requires a shareholder wishing to sell to offer the shares to the corporation for less than fair value. Such circumstances would discourage a shareholder from pursuing a sale. See *id.* § 4.01[C], at 10 (“Who will want to sell his shares if they must first be offered to the corporation, or other shareholders, for a fraction of their true worth?”). Similarly, if the controlling group can withhold consent and block a sale, an outsider may decide that it is not worth incurring the time and expense of researching the value of the minority's interest and the financial condition of the company. Moreover, even if the sale were consummated, the outsider may be deterred by the fact that his shares would be subject to the same restrictions.

30. See, e.g., *Orchard v. Covelli*, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) (“[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. In reality, the only prospective buyer turns out to be the majority shareholder.”).

31. See *supra* note 18 and accompanying text.

corporation's organizational documents, shareholders have no right to compel a redemption of their holdings.³²

Dissolution of a company can also provide liquidity to business owners by requiring the sale of the company and by allocating to each owner his proportionate share of the company's sale value (after the claims of creditors have been satisfied).³³ If a minority shareholder in a closely held corporation had the right to compel dissolution, a mechanism for recovering the value of the invested capital would exist. In the closely held corporation setting, however, a minority shareholder has no default right to unilaterally dissolve a corporation, as voluntary dissolution usually requires the assent of at least a majority of the outstanding voting stock of a corporation.³⁴ For an oppressed minority shareholder, therefore, voluntary dissolution rights are largely unhelpful.

In short, when a majority shareholder in a closely held corporation exercises his control in an oppressive fashion against a minority shareholder, the minority has little ability to exit the situation.

B. *The Birth of a Cause of Action*

Over the years, state legislatures and courts have developed two significant avenues of relief for an oppressed shareholder in a closely held corporation. First, many state legislatures have amended their corporate dissolution statutes to include "oppressive" action by "directors or those in control" as a ground for involuntary dissolution of the corporation.³⁵ In jurisdictions with such dissolution-for-oppression statutes, courts have developed various approaches to defining the statutory term. Some courts define oppression as:

burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its

32. *See, e.g.*, *Blaustein v. Lord Baltimore Cap. Corp.*, 84 A.3d 954, 958 (Del. 2014) ("Under common law, the directors of a closely held corporation have no general fiduciary duty to repurchase the stock of a minority stockholder. An investor must rely on contractual protections if liquidity is a matter of concern. *Blaustein* has no inherent right to sell her stock to the company at 'full value,' or any other price."); *Goode v. Ryan*, 489 N.E.2d 1001, 1004 (Mass. 1986) ("In the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or by-laws, neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation.")

33. *See, e.g.*, *Brenner v. Berkowitz*, 634 A.2d 1019, 1031 (N.J. 1993) ("In the case of dissolution, a distribution [of assets] results in the termination of the corporation's business, with its assets being proportionately distributed to the stockholders.")

34. *See, e.g.*, DEL. CODE tit. 8, § 275 (2022); MODEL BUS. CORP. ACT § 14.02 (AM. BAR ASS'N 2017).

35. *See* MOLL & RAGAZZO, *supra* note 25, § 7.01[D][1][b], at 7-64 n.192 (noting that "[f]orty states have statutes providing for dissolution or other relief on the grounds of 'oppressive actions' (or similar term) by 'directors or those in control'").

members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.³⁶

Other courts define oppression by linking it to action that constitutes a breach of fiduciary duty.³⁷ Many courts, however, tie oppression to conduct that frustrates a minority shareholder's "reasonable expectations."³⁸ As one court observed,

[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.³⁹

Of these approaches, the reasonable expectations standard garners the most approval. The highest courts in several states have adopted the reasonable expectations approach,⁴⁰ and commentators have generally been in favor of the reasonable expectations standard.⁴¹

Second, particularly in states without a dissolution-for-oppression statute, some courts have imposed a fiduciary duty between shareholders of a closely held corporation and have allowed an oppressed

36. *Fix v. Fix Material Co.*, 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) (footnote omitted) (internal quotations omitted); *see, e.g.*, *Skierka v. Skierka Bros., Inc.*, 629 P.2d 214, 221 (Mont. 1981); *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1018–19 (Sup. Ct. 1984); *Landstrom v. Shaver*, 561 N.W.2d 1, 7 (S.D. 1997).

37. *See, e.g.*, *Masinter v. Webco Co.*, 262 S.E.2d 433, 440 (W. Va. 1980) (“[W]e conclude that our cases involving the fiduciary duty owed by majority shareholders, officers and directors of a corporation embrace the same standard which other courts have evolved under the term ‘oppressive conduct.’”); *see also* *McCann v. McCann*, 275 P.3d 824, 830 (Idaho 2012) (noting that “courts have analogized alleged ‘oppressive’ conduct by those in control in terms of ‘fiduciary duties’ owed by the majority shareholders to the minority”).

38. *See, e.g.*, *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984) (equating oppression with conduct that “defeats the ‘reasonable expectations’ held by minority shareholders in committing their capital to the particular enterprise”).

39. *Id.*

40. *See, e.g.*, *Stefano v. Coppock*, 705 P.2d 443, 446 n.3 (Alaska 1985); *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013); *Bontempo v. Lare*, 119 A.3d 791, 794 (Md. 2015); *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*, 473 N.E.2d at 1179; *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*, 262 S.E.2d at 442.

41. *See, e.g.*, Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 31 (1987) (stating that defining oppression as “conduct which frustrates the reasonable expectations of the investors” was “initially derived from English case law, and [has been] long advocated by Dean F. Hodge O’Neal as well as other leading close corporation experts”); Robert B. Thompson, *Corporate Dissolution and Shareholders’ Reasonable Expectations*, 66 WASH. U. L.Q. 193, 211 (1988). *But see* *Ritchie v. Rupe*, 443 S.W.3d 856, 889–90 n.60 (Tex. 2014) (stating that “[e]ven the most developed common-law standards for ‘oppression’—the ‘reasonable expectations’ and ‘fair dealing’ tests—have been heavily criticized for their lack of clarity and predictability,” and citing commentators’ criticism).

shareholder to bring a direct cause of action for breach of this duty.⁴² In the seminal decision of *Donahue v. Rodd Electrottype Co. of New England, Inc.*,⁴³ the Massachusetts Supreme Judicial Court adopted such a standard:

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. 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 corporation.⁴⁴

Following the lead of the *Donahue* court, several courts outside of Massachusetts have also imposed a fiduciary duty running directly from shareholder to shareholder in a closely held corporation.⁴⁵

The development of the statutory action and the fiduciary duty approach reflect “the same underlying concerns for the position of minority shareholders, particularly in close corporations after harmony

42. See 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, 433–40 (1990) (discussing the development of the shareholder-to-shareholder fiduciary duty); Thompson, *supra* note 18, at 739 (“It should not be surprising that the direct cause of action is developed particularly in states without an oppression statute and 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.”).

43. 328 N.E.2d 505 (Mass. 1975).

44. *Id.* at 515 (citations and footnotes omitted); see *Koshy v. Sachdev*, 81 N.E.3d 722, 735 (Mass. 2017) (“Shareholders in a close corporation owe fiduciary duties to both their fellow shareholders and the corporation itself. Like partners, they owe to one another a duty of ‘utmost good faith and loyalty.’”) (citation omitted).

45. See, e.g., *Johnson v. Gibbs Wire & Steel Co., Inc.*, No. X05CV095013295S, 2011 WL 2536480, at *8 (Conn. Super. Ct. May 31, 2011); *Orlinsky v. Patraaka*, 971 So. 2d 796, 801 (Fla. Dist. Ct. App. 2007); *Melrose v. Capitol City Motor Lodge, Inc.*, 705 N.E.2d 985, 991 (Ind. 1998); *Evans v. Blesi*, 345 N.W.2d 775, 779 (Minn. Ct. App. 1984); *Fought v. Morris*, 543 So. 2d 167, 170–71 (Miss. 1989); *Whitehorn v. Whitehorn Farms, Inc.*, 195 P.3d 836, 843 (Mont. 2008); *I.P. Homeowners, Inc. v. Radtke*, 558 N.W.2d 582, 589 (Neb. Ct. App. 1997); *Clark v. Lubritz*, 944 P.2d 861, 864–65 (Nev. 1997); *Parker v. Parker*, No. UNN-C-108-13, 2016 N.J. Super. Unpub. LEXIS 2720, at *35 (Dec. 22, 2016); *Walta v. Gallegos L. Firm, P.C.*, 40 P.3d 449, 456–57 (N.M. Ct. App. 2001); *Stavroulakis v. Pelakanos*, 106 N.Y.S.3d 725 (Table) (Sup. Ct. 2018); *Crosby v. Beam*, 548 N.E.2d 217, 220 (Ohio 1989); *A. Teixeira & Co. v. Teixeira*, 699 A.2d 1383, 1386–88 (R.I. 1997); *McLaughlin v. Schenck*, 220 P.3d 146, 150, 156 (Utah 2009); *Jorgensen v. Water Works, Inc.*, 582 N.W.2d 98, 104–06 (Wis. Ct. App. 1998); see also *Hollis v. Hill*, 232 F.3d 460, 468 (5th Cir. 2000) (noting that “[*Donahue*’s] recognition of special rules of fiduciary duty applicable to close corporations has gained widespread acceptance”).

no longer reigns.”⁴⁶ Because of the similarities between the two remedial schemes, it has been suggested that “it makes sense to think of them as two manifestations of a minority shareholder’s cause of action for oppression.”⁴⁷ In the closely held corporation setting, therefore, it is sensible to view the parallel development of the statutory action and the fiduciary duty approach as two sides of the same coin—i.e., the shareholder’s cause of action for oppression.

C. Common Acts of Oppression

As mentioned, lawsuits alleging shareholder oppression typically involve the controlling shareholder (or the controlling group) interfering with the minority’s financial rights (e.g., failing to pay salary or dividends to the minority)⁴⁸ and participatory rights (e.g., excluding the minority from the board of directors or restricting access to company information).⁴⁹ Conflict of interest transactions involving the controlling shareholder may also accompany such interference,⁵⁰ and the overall course of conduct often culminates in an attempt to force the minority to relinquish his stock at an unfairly low price.⁵¹ Not all of these elements need to be present, however, for a court to find that oppressive conduct has occurred. Any one of the elements may, by itself, be sufficiently compelling to a court.⁵² Moreover, any other unfair conduct by the controlling shareholder may lead to an oppression finding.⁵³

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

47. *Id.* at 700; *see id.* at 738–45 (describing the “combined cause of action for oppression”).

48. *See generally* MOLL & RAGAZZO, *supra* note 25, § 701[C][1], [4], at 7-25–7-30, 7-37–7-39 (discussing interference with employment and suppression of dividends).

49. *See generally id.* § 701[C][2]–[3], at 31–37 (discussing interference with management participation and information rights).

50. *See generally id.* § 701[C][5]–[6], at 40–48 (discussing de facto dividends and other conflict of interest transactions).

51. *See supra* note 18 and accompanying text. *See generally* MOLL & RAGAZZO, *supra* note 25, § 701[C][7], at 7-48–7-49 (discussing forced sales of the minority’s holdings).

52. *See, e.g.*, Schimke v. Liquid Dustlayer, Inc., No. 282421, 2009 Mich. App. LEXIS 1954, at *6–7 (Sept. 24, 2009) (“Thus, ‘willfully unfair and oppressive conduct’ [under the Michigan oppression statute] may be established by proof of *either* (1) a continuing course of conduct, (2) a *significant action*, or (3) a series of actions. Accordingly, a single significant action that substantially interferes with a shareholder’s interests as a shareholder is sufficient to support a cause of action under § 489.”); Brenner v. Berkowitz, 634 A.2d 1019, 1033–34 (N.J. 1993) (finding oppression based solely on the removal of the minority from the board of directors); *cf.* Redmon v. Griffith, 202 S.W.3d 225, 234 n.3 (Tex. App. 2006) (“Because any one of a variety of activities or conduct can give rise to shareholder oppression, the fact that there may be a lack of evidence to support the existence of one such activity does not defeat the claim so long as there is evidence to support that another such instance of conduct occurred.”).

53. *See generally* MOLL & RAGAZZO, *supra* note 25, § 701[C][8], at 7-50–7-54 (discussing miscellaneous acts of oppression).

D. Remedies for Oppressive Conduct

When dissension has arisen between shareholders in closely held corporations, courts are generally authorized (either by statute or judicial decision) to offer a wide range of remedies.⁵⁴ As previously discussed, oppression is listed as a ground for involuntary dissolution in the statutes of numerous states.⁵⁵ Significantly, dissolution is viewed as a non-exclusive remedy in many of these jurisdictions and, correspondingly, the courts are empowered to fashion alternative forms of relief that are less drastic than dissolution.

In some jurisdictions, the authority to grant alternative remedies upon a showing of oppressive conduct stems from the statute itself. For example, Minnesota's involuntary dissolution statute provides that, upon a showing of "unfairly prejudicial" conduct, a court is authorized to "dissolve a corporation and liquidate its assets and business" or to "grant any equitable relief it deems just and reasonable in the circumstances."⁵⁶ Similarly, the New Jersey involuntary dissolution statute expressly empowers a court to appoint a custodian or provisional director, order a sale of shares, or dissolve the corporation.⁵⁷ The Illinois statute goes even further by listing eleven alternative remedies to dissolution:

- (1) The performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers of or any other party to the proceedings;
- (2) The cancellation or alteration of any provision in the corporation's articles of incorporation or by-laws;
- (3) The removal from office of any director or officer;
- (4) The appointment of any individual as a director or officer;
- (5) An accounting with respect to any matter in dispute;
- (6) The appointment of a custodian to manage the business and affairs of the corporation to serve for the term and under the conditions prescribed by the court;
- (7) The appointment of a provisional director to serve for the term and under the conditions prescribed by the court;
- (8) The submission of the dispute to mediation or other forms of non-binding

54. See generally Thompson, *supra* note 18, at 718–26 (discussing remedies for dissension); *infra* notes 55–63 and accompanying text (same).

55. See *supra* note 35 and accompanying text.

56. MINN. STAT. § 302A.751 subd. 1 (2023); accord N.D. CENT. CODE § 10-19.1-115 subd. 1 (2023).

57. N.J. STAT. § 14A:12-7(1) (2023). By specifying that a court "may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock . . . or enter a judgment dissolving the corporation," the wording of the New Jersey statute suggests that the listed remedies are exclusive. *Id.* Nevertheless, the Supreme Court of New Jersey has held that courts are not limited to the specified remedies. See, e.g., *Brenner*, 634 A.2d at 1033 ("We hold that the statutory remedies of N.J.S.A. 14A:12-7(1) are discretionary. Even when the statute is triggered, the trial court has the discretion to choose the appropriate remedies. Most acts of misconduct or oppression will warrant some type of remedy, but only the most egregious cases will warrant the drastic remedies permitted by the statute. Importantly, courts are not limited to the statutory remedies, but have a wide array of equitable remedies available to them.").

alternative dispute resolution; (9) The payment of dividends; (10) The award of damages to any aggrieved party; (11) The purchase by the corporation or one or more other shareholders of all, but not less than all, of the shares of the petitioning shareholder for their fair value and on the terms determined under subsection (e); or (12) The dissolution of the corporation if the court determines that no remedy specified in subdivisions (1) through (11) or other alternative remedy is sufficient to resolve the matters in dispute.⁵⁸

In other jurisdictions, the involuntary dissolution statute is silent on the power to grant remedies other than dissolution when oppressive conduct is found. Nevertheless, many (but not all) courts have concluded that such power is part of their equitable authority.⁵⁹ As these alternative forms of relief have broadened over the years, orders of actual dissolution have become less frequent.⁶⁰ Thus, “oppression” has evolved from a statutory ground for involuntary dissolution to a statutory ground for a wide variety of relief.

In jurisdictions that handle oppression disputes as breach of fiduciary duty actions, courts also have significant remedial discretion. Indeed, because breach of fiduciary duty is viewed as an equitable claim,⁶¹ courts tend to describe their remedial authority in very broad terms.⁶² Nevertheless, in most breach of fiduciary duty actions, courts award

58. 805 Ill. COMP. STAT. 5/12.56 (2023).

59. *See, e.g., Masinter v. Webco Co.*, 262 S.E.2d 433, 442 (W. Va. 1980) (“Most states have adopted the view that a dissolution statute does not provide the exclusive remedy for injured shareholders and that the courts have equitable powers to fashion appropriate remedies . . .”). Some courts base this conclusion on the rationale that the legislative grant of judicial power to dissolve a corporation necessarily includes the power to fashion less drastic forms of relief. *See, e.g., Brenner*, 634 A.2d at 1031 (“That the court would have the statutory power to order dissolution of a corporation, but not the lesser authority to compel the corporation to use its assets to acquire the stock of an oppressed shareholder, would make no sense.”); *see also Brodie v. Jordan*, 857 N.E.2d 1076, 1082 n.7 (Mass. 2006) (“In most of these States, statutes authorize the more drastic remedy of involuntary dissolution, and thus courts have understandably inferred the power to order the lesser remedy of a buyout.”) (citing cases). *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 was not permitted “to fashion other . . . equitable remedies”).

60. *See Thompson*, *supra* note 18, at 708; *cf. Haynsworth*, *supra* note 41, at 50 (finding that courts ordered remedies other than dissolution in the majority of 37 involuntary dissolution cases studied). *See generally Murdock*, *supra* note 42, at 461–64 (discussing the development of alternative remedies).

61. *See, e.g., Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012); *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 244 (Ind. 2001); *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 179 n.32 (Mass. 1997).

62. *See, e.g., G&N Aircraft, Inc.*, 743 N.E.2d at 244 (“[W]e agree with the trial court that traditional powers of equity courts are available to fashion a remedy for breach of a fiduciary duty in a close corporation. We also agree with the courts that have recognized the need for more flexible remedies in the case of close corporations.”); *Brodie*, 857 N.E.2d at 1081 (“Courts have broad equitable powers to fashion remedies for breaches of fiduciary duty in a close corporation, and their choice of a particular remedy is reviewed for abuse of discretion.”).

traditional remedies, such as damages (including punitive damages) and injunctions.⁶³

CONCLUSION

Succession never makes clear what Kendall's ouster from the company entailed. Nevertheless, if such an ouster involved denying Kendall his financial or participatory rights in the family holding company, it is a good bet that a shareholder oppression action would be part of his lawsuit. Indeed, a claim for shareholder oppression would make it clear that Kendall will not allow his ouster to turn him into one of the "ground pounders" that his father disdains.⁶⁴

63. See, e.g., *G&N Aircraft, Inc.*, 743 N.E.2d at 243, 245 (stating that "[d]amages are ordinarily the proper remedy for a shareholder aggrieved by breach of director duty," and upholding an award of punitive damages); *Brodie*, 857 N.E.2d at 1082 ("For breaches visited upon the plaintiff resulting in deprivations that can be quantified, money damages will be the appropriate remedy. Prospective injunctive relief may be granted to ensure that the plaintiff is allowed to participate in company governance, and to enjoy financial or other benefits from the business . . .") (footnote omitted).

64. See *Succession: The Summer Palace* (HBO television broadcast Aug. 11, 2019) (Season Two, Episode One) ("OK, Karl. I need to debrief the double agent. The ground pounders can f*** off.").

