

Are Discounts Appropriate?: Valuing Shares in Close Corporations for the Purpose of Remedying Breach of Fiduciary Duty under Massachusetts Law

“[S]tockholders 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.”¹

I. INTRODUCTION

In 1975, the Supreme Judicial Court of Massachusetts held, in *Donahue v. Rodd Electrottype*,² that a heightened fiduciary duty exists among shareholders of a close corporation.³ In so holding, the court recognized that the structure of a close corporation presents challenges to minority shareholders, and identified a common-law cause of action to remedy the harms caused by a majority acting contrary to the interests of all shareholders.⁴ Since *Donahue*, other states have recognized similar causes of action for aggrieved minority shareholders in close corporations.⁵ Moreover, many states have provided additional, statutory causes of action for dissolution in the event of shareholder “oppression.”⁶ Because Massachusetts has not added oppression to the enumerated grounds for corporate dissolution, aggrieved minority shareholders must continue to rely on the common-law action for breach of fiduciary duty.⁷

As a remedy for both statutory oppression and common-law breach of fiduciary duty, courts often order the corporation or majority shareholder to

1. *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 515 (Mass. 1975) (internal citations omitted) (describing fiduciary duty among shareholders in close corporations).

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

3. *Id.* at 515 (holding fiduciary duties similar to those of partners).

4. *Id.* at 513 (describing need for heightened duties).

5. See Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 305 (2004) (noting decisions outside Massachusetts following *Donahue*).

6. See *infra* note 52 and accompanying text (surveying states including oppression in statute).

7. See MASS. GEN. LAWS ch. 165D, § 14.30 (2005) (failing to include “oppression” as grounds for judicial dissolution).

buyout the minority's shares.⁸ Determining the value of shares in a close corporation, however, is no simple task.⁹ Because shares in close corporations are not publicly traded, a party valuing a close corporation cannot discern their value simply by examining an active trading price on an accessible market.¹⁰ Courts must therefore apply other methods of valuation.¹¹

One important question that arises in the valuation of a minority interest in a close corporation is whether the value of the shares should be discounted to compensate for certain characteristics unattractive to investors.¹² For example, unlike shares in a publicly traded stock, there is no ready market for shares in a close corporation.¹³ Therefore, sellers might have a more difficult time finding willing buyers in the event that they want to liquidate their shares.¹⁴ Additionally, minority shareholders, by definition, lack a controlling stake in the corporation, which investors prefer.¹⁵ The two major types of discounts applicable to close corporations are marketability discounts, accounting for the illiquid nature of the stock, and minority discounts, accounting for the shares' lack of controlling status.¹⁶

Some commentators have suggested that a bright-line rule against applying

8. See, e.g., *Hollis v. Hill*, 232 F.3d 460, 470-71 (5th Cir. 2000) (ordering buyout for breach of fiduciary duty); *O'Connor v. U.S. Art. Co.*, No. 03-1728 BLS, 2005 WL 1812512, at *6-7 (Mass. Super. Ct. June 27, 2005) (ordering payment for percentage of company owned prior to squeeze-out); *Keating v. Keating*, Nos. 00749, 00748, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (ordering majority buyout of minority shares); see also *Moll*, *supra* note 5, at 308-09 (recognizing buyout as most common remedy in shareholder oppression cases).

9. See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.08 (3d ed. 2003) [hereinafter O'NEAL & THOMPSON, CLOSE CORPORATIONS] (noting difficulty of valuing shares in a close corporation); see also *infra* Part V (discussing valuation).

10. Henry J. Haynsworth IV, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 459-60 (1982) (noting value calculated by multiplying mean share value by number of outstanding shares). The valuation of a publicly traded business is "relatively simple" when compared with valuing a close corporation. *Id.* at 459.

11. See *id.* at 459-60 (discussing methods for valuing close corporations). In order to value shares in a close corporation, courts usually look to the financial statements of the corporation to determine the business's overall value. The first step requires an evaluation of the accounting methods used by the corporation in preparing its financial statement and adjusting them, where necessary, to conform with Generally Accepted Accounting Principles (GAAP). *Id.* The second step is to evaluate the adjusted financial statements to reach an overall value for the corporation. *Id.* The valuator must then divide the overall value by the number of shares in order to reach a pro rata value for the shares. *Id.*

12. See *id.* at 460 (recognizing discounting as final step in valuation process); see also *infra* notes 77, 81 and accompanying text (noting significant effect of discounts on overall corporate value).

13. F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 7.2 (rev. 2d ed. 2004) [hereinafter O'NEAL & THOMPSON, OPPRESSION] (observing corporate norm of free transferability of shares non-existent in close corporations). The small number of shareholders in a close corporation and the generally small size of the business generally causes difficulties in the marketability of shares. *Id.*

14. See Haynsworth, *supra* note 10, at 489 (observing need to avoid marketability discount).

15. Haynsworth, *supra* note 10, at 492-93 (recognizing investor preference for majority shares).

16. See Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 402-04 (2003) (explaining two major discounts applicable to close corporations).

discounts is appropriate in cases where a majority shareholder has either oppressed the minority shareholder (as defined by the statutory oppression statute), or where the majority has breached a fiduciary duty owed to the minority.¹⁷ Moreover, some suggest that the *Donahue* decision itself indicates that fair value should be paid, which would imply that discounts would be inappropriate.¹⁸ Still, Massachusetts courts have failed to adopt a bright-line rule against discounting shares in a close corporation when remedying a breach of fiduciary duty.¹⁹

This Note will examine the appropriateness of discounting the value of shares in a close corporation in the context of a court-ordered buyout resulting from a common-law breach of fiduciary duty claim.²⁰ This Note will first look at the unique nature of the close corporation and the problems posed when valuing shares, including the use of discounts generally.²¹ Next, this Note will assess the applicability of other judicial buyout situations to the valuing of shares as a remedy for common-law breach of fiduciary duty, including the closely analogous statutory oppression action.²² Finally, this Note will conclude with an analysis of whether discounts are appropriate in court-ordered buyouts arising from breach of fiduciary duty claims.²³

II. THE NATURE OF THE CLOSE CORPORATION

Close corporations, as opposed to publicly traded corporations, represent the vast majority of corporate entities in the United States.²⁴ A close corporation is characterized by: “(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction[,] and operations of the corporation.”²⁵ Close

17. See Moll, *supra* note 5, at 305 (arguing statutory oppression and common-law actions not distinct for discount purposes); see also Haynsworth, *supra* note 10, at 489 (indicating discounts inappropriate in squeeze-out situation).

18. See Michael F. Connolly & Joseph D. Lipchitz, *Valuing Business Interests in Breach of Fiduciary Duty “Freeze-Out” Cases*, 48 BOSTON B.J. 18, 18-19 (2004) (suggesting *Donahue* indicates fair value is the appropriate measure). Connolly and Lipchitz cite the following language to support their contention: “When the minority shareholder agrees to sellout at less than fair value, the majority has won.” *Id.* at 19 (quoting *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975)).

19. Compare *O’Connor v. U.S. Art. Co.*, No. 03-1728 BLS, 2005 WL 1812512, at *6 (Mass. Super. Ct. June 27, 2005) (refusing to discount), with *Keating v. Keating*, Nos. 00749, 00748, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (upholding discount).

20. See *infra* Part VIII (analyzing competing rationales regarding application of discounts).

21. See *infra* Parts II-V (describing attributes of close corporations and problems valuing their shares).

22. See *infra* Part VIII (analyzing appropriateness of dissenters’ rights and shareholder oppression analogy).

23. See *infra* Part IX (stating conclusions).

24. Venky Nagar et al., *Ownership and Performance in the Close Corporation* 1 (July 2002) (working paper), available at <http://pages.stern.nyu.edu/~dwoolfenz/ownership.pdf> (recognizing prevalence of close corporations in American business).

25. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511 (Mass. 1975) (defining close corporation); see also O’NEAL & THOMPSON, *CLOSE CORPORATIONS*, *supra* note 9, § 1.02 (analyzing different definitions of

corporations are often family businesses, with members of a single family or a few families controlling all of the stock.²⁶ Despite the limited number of shareholders characteristic, a corporation's size is not a factor in determining whether it is closely held.²⁷ Instead, the number of shareholders and the relationship between them are the keys to identifying a close corporation.²⁸

Traditional norms of corporation statutes permit a majority shareholder in a close corporation to exert control over the corporation at the expense of minority shareholder interests.²⁹ For example, most corporate decisions require majority support from the board of directors.³⁰ Because corporation statutes permit the majority shareholder to elect a majority of the directors who in turn control the corporation, the majority shareholder is able to control the affairs of the corporation.³¹ As such, even when the minority shareholders disagree on a proposed course of action, it is possible for the majority to pursue their goals to

close corporation). Another common definition for close corporations is any business where shares are not publicly traded on a securities market. O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 9, § 1.02.

26. See, e.g., *Galler v. Galler*, 203 N.E.2d 577, 579 (Ill. 1964) (identifying familial relationship between majority shareholders); *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 443 (Ind. 2003) (describing relationship between shareholders in close corporation); *Keating v. Keating*, Nos. 00749, 00748, 2003 WL 23213143, at *1 (Mass. Super. Ct. Oct. 3, 2003) (noting family relationship among parties); see also *Moll*, *supra* note 5, at 303-05 (discussing nature of the close corporation); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993) [hereinafter Thompson, *Shareholder's Cause of Action*] (noting business expectations in close corporations often "complicated by family or other personal relationships").

27. See O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 9, § 1.03 (citing Ford Motor Company, prior to going public in 1956, as large closely held corporation). Ford Motor Company, despite its size, was a close corporation because it was private and contained a rather small number of shareholders. *Id.*

28. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511 (Mass. 1975) (identifying characteristics of close corporations).

29. See Thompson, *Shareholder's Cause of Action*, *supra* note 26, at 702-03 (noting most statutes require majority vote of directors for corporate actions); see also *Moll*, *supra* note 5, at 300-01 (identifying corporate norms as cause of problems for minority shareholders in close corporations). This is less of a problem in large, publicly traded corporations because the shares can be sold on the public market in the event that a shareholder does not support the direction of the company. Haynsworth, *supra* note 10, at 489-90.

30. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 123-25 (2004) (noting statutory default of majority voting). Despite the general majority vote requirement, certain major corporate changes, such as mergers or dissolution, require a supermajority vote. *Id.* at 107.

31. *Id.* at 108 (discussing straight and cumulative voting). Under a "straight voting" scheme, the majority shareholder is able to elect all of the directors. *Id.* Cumulative voting—an alternative voting system—allows minority shareholders to have some representation on the board of directors, but the representation will still only constitute a minority block. See *id.* at 108-09. At one time, courts prohibited minority shareholders from utilizing contract devices, such as agreements to collectively elect directors, because they believed those devices unfairly burdened the free function of the corporation. O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7:2; see also *McQuade v. Stoneham*, 189 N.E. 234, 237 (N.Y. 1934) (invalidating shareholder agreement requiring use of best efforts to maintain individual's officer position); Thompson, *Shareholder's Cause of Action*, *supra* note 26, at 703 (discussing historical inability to use contract devices to protect against board action). Recently, however, courts have been more willing to accept shareholder agreements within a close corporation because they recognize the unique needs of the close corporation, such as the desire of minority owners to ensure that decisions are made together, rather than yielding to strict majority rule. See *Galler v. Galler*, 203 N.E.2d 577, 587 (Ill. 1964) (upholding shareholder agreement running counter to the corporate statutory norm); O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 9, § 5.03 (recognizing trend towards upholding shareholder agreements in close corporations).

the exclusion of the minority.³²

While the majority control dynamic is present in most corporation statutes, it raises particular difficulties in close corporations where a minority shareholder's ability to combat majority action is limited by the nature of the business model.³³ Shareholders in close corporations often rely on an employment salary as a return on his or her investment.³⁴ Therefore, minority shareholders can be prevented from gaining a return if they are fired, which a majority-controlled board can freely do.³⁵ Moreover, the lack of a ready market for shares in a close corporation prevents a minority shareholder from selling shares as a means of escape.³⁶ Finally, transfer restrictions, which are often used in close corporations to control ownership, can further trap a minority shareholder in a corporation where he or she is being exploited.³⁷

There are also a number of ways that majority shareholders can usurp the interest of the minority.³⁸ For instance, the terms "freeze-out" and "squeeze-out" are often used, synonymously, to describe a situation where the majority uses its controlling position to exclude a minority shareholder from participation in the business.³⁹ One common form of the squeeze-out occurs

32. See Moll, *supra* note 5, at 300-01 (discussing potential for exploitation of minority interest in close corporations).

33. See Thompson, *Shareholder's Cause of Action*, *supra* note 26, at 702 (recognizing market factors hinder transfer of shares in close corporation). A market exists for publicly traded shares in a corporation. *Id.* at 701. Therefore, in the event that a majority acts against the interests of the minority, a minority shareholder has the ability to easily sell her shares. *Id.*; see also Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 (Mass. 1975) (noting substantial personal investment by shareholders in close corporations). Minority shareholders often have a substantial amount of their personal assets invested in the corporation. *Donahue*, 328 N.E.2d at 512. If they are victims of a freeze-out, thus not gaining income because of the majority's schemes, they may have no choice but to liquidate their shares and find a more productive investment. *Id.* at 514.

34. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7.2 (discussing alternative investment returns in close corporations).

35. O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7.2 (recognizing board's authority to fire employees).

36. O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7.2 (identifying illiquidity as one factor limiting ability to obtain relief).

37. Adam Chernichaw, Note, *Oppressed Shareholders in Close Corporations: A Market-Oriented Statutory Remedy*, 16 CARDOZO L. REV. 501, 511 (1994) (noting problems associated with transfer restrictions despite potential benefits). Transfer restrictions come in different forms, but all limit the alienability of shares in a close corporation. *Id.* One common form is the right of first refusal, which provides that a shareholder must first offer his shares to the corporation, or shareholders within the corporation, before offering to an outside buyer. *Id.* Transfer restrictions generally work to protect the rights of existing shareholders, but they can work to trap an oppressed minority shareholder. *Id.*; see also PINTO & BRANSON, *supra* note 30, at 287 (noting shareholder desire, especially in close corporations, to restrict ownership to those originally involved).

38. See O'NEAL AND THOMPSON, OPPRESSION, *supra* note 13, § 3.2 (identifying common squeeze techniques). Common squeeze techniques include dividend withholding, whereby the majority refuses to issue dividends to shareholders; exclusion of minority shareholders from the directorate or employment; and preventing the minority from recognizing earnings by highly compensating management. *Id.*

39. See O'NEAL AND THOMPSON, OPPRESSION, *supra* note 13, § 1.1 (defining squeeze-outs). O'Neal and Thompson define "squeeze-out" as: "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 owners or participants." *Id.*

when a majority shareholder prevents a minority from receiving a return on her investment, and then attempts to buy the minority's shares when the value of the stock is compromised.⁴⁰ A minority shareholder, in the absence of legal remedy, might be inclined to accept the inadequate offer, as it would be the only way to assure any return on his investment.⁴¹

III. RECOGNITION OF HEIGHTENED FIDUCIARY DUTIES IN A CLOSE CORPORATION

In *Donahue*, the Supreme Judicial Court of Massachusetts recognized the unique character of the close corporation and the problems that the business form presented.⁴² In July 1970, the board of directors of the Rodd Electrotpe Company approved a purchase of forty-five company shares from Henry Rodd, a member of the group controlling the corporation.⁴³ When Euphemia Donahue, a minority shareholder, learned of the corporation's purchase of the shares, she demanded an offer at the same share price given to Rodd.⁴⁴ The corporation refused, and Donahue brought suit alleging the directors breached their fiduciary duty by not providing her with an equal opportunity to sell her shares.⁴⁵

The court equated the close corporation to a partnership, noting, "[T]he relationship among the stockholders must be one of trust, confidence[,] and absolute loyalty if the enterprise is to succeed."⁴⁶ The court recognized that the corporate form, while affording advantages such as limited liability, also makes

40. See O'NEAL AND THOMPSON, *OPPRESSION*, *supra* note 13, § 3.2 (identifying common squeeze pattern). Majority shareholders perpetrating a squeeze-out may use various techniques in combination to squeeze a minority, such as excluding the minority shareholder from employment and siphoning off profits by providing overly generous salaries to management. *Id.*

41. See Moll, *supra* note 5, at 302 (observing squeeze-out techniques causing sale of minority interest at less than market price).

42. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 514 (Mass. 1975) (noting limited options for victims of freeze-outs). The court identified "the true plight of the minority stockholder in a close corporation" as the lack of options in a squeeze-out. *Id.* The court recognized a problem in the difficulty in obtaining any return on investment once a squeeze-out has begun. *Id.*

43. *Id.* at 510 (reporting the facts preceding litigation). The price offered to Rodd purportedly reflected the book and liquidation value of the shares. *Id.* At the time of the July meetings, the board of directors of Rodd Electrotpe consisted of Harry Rodd, his son Charles Rodd, and Harold Magnuson, who served as defense attorney in the suit. *Id.*

44. *Id.* at 511 (noting Donahue's subsequent request that corporation purchase her shares). The clerk of the company, Harold Magnuson, responded to Donahue's request indicating that the corporation would not do so at the price given to Rodd. *Id.*

45. *Id.* at 511 (noting plaintiff's argument). *Donahue* does not stand for the proposition that all shareholders must have the opportunity to sell shares when a majority shareholder intends to sell. Compare *Donahue*, 328 N.E.2d at 518 (specifying equal opportunity necessary when corporation purchasing majority shareholder's shares), with *Zetlin v. Hanson Holdings, Inc.*, 397 N.E.2d 387, 389 (N.Y. 1979) (refusing rule mandating third-party purchase offers be open to all shareholders).

46. *Donahue*, 328 N.E.2d at 512 (analogizing requirements of relationship between partners in partnerships and shareholders in close corporations).

minority shareholders vulnerable to oppression by majority shareholders.⁴⁷ To alleviate the problem, the court held that shareholders in a close corporation owe a heightened fiduciary duty to one another, akin to that which exists among partners in a business partnership.⁴⁸ In describing the standard of care, the court quoted Judge Cardozo stating, “Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”⁴⁹ Thus, the court provided a means of redress when the majority shareholder breaches her fiduciary duty.⁵⁰

In the wake of the Massachusetts ruling, courts in many other states adopted the fiduciary duty rationale of *Donahue*, thereby recognizing heightened fiduciary duties among shareholders in close corporations and creating a common-law cause of action.⁵¹ Other states opted for legislative remedies, including statutory oppression as a ground for corporate dissolution.⁵² The statutory cause of action for oppression and the common-law cause of action for breach of fiduciary duty, while distinct, are closely related.⁵³

47. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 513 (Mass. 1975) (noting advantages of corporate form). One benefit of incorporation status is a liability shield not available in a partnership. *Id.* The liability shield protects shareholders from personal liability for wrongs inflicted by the business entity. *Id.*

48. *Id.* at 515 (analogizing duties among shareholders in close corporation to partners in partnership). The close corporation resembles a partnership because the intention is usually for ownership to remain in the original participants in the business venture, or in mutually agreed upon transferees. *Id.* at 512.

49. *Id.* at 516 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)) (describing requirements of relationship among partners). The court noted that it applies a stricter good faith standard to close corporations rather than the more lenient standard in corporations generally. *Id.* at 515-16.

50. *See id.* at 520-21 (finding in favor of aggrieved minority shareholder). The court held that the corporation breached a fiduciary duty by purchasing Harry Rodd’s shares in the corporation and that *Donahue* was entitled to relief. *Id.* at 521.

51. *See Moll, supra* note 5, at 305 (observing adoption of *Donahue* reasoning by other state courts).

52. *See, e.g.*, MICH. COMP. LAWS § 450.2825 (2005) (providing for corporate dissolution in event of “oppressive” conduct); R.I. GEN. LAWS § 7-1.2-1314 (2006) (including “oppressive” conduct as grounds for dissolution); MOD. BUS. CORP. ACT § 14.30(2)(ii) (2005) (including oppression in statute dealing with corporate dissolution); *see also Moll, supra* note 5, at 303 (observing one manner in which state legislatures and courts have responded to oppression). The Model Business Corporation Act provides a mechanism by which shareholders may petition for dissolution in the event that “the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.” MODEL BUS. CORP. ACT § 14.30(2)(ii) (2005); *see also Art, supra* note 16, at 376-402 (examining meaning of “oppressive” in Model Business Corporation Act). Corporation statutes do not adequately explain what constitutes oppressive conduct, causing confusion and lack of uniformity in the statute’s application. *Art, supra* note 16, at 374-75. One way courts determine if “oppressive” conduct has occurred is to determine whether there has been a breach of fiduciary duty. *Id.* at 372. An alternative approach is the “reasonable expectations approach,” which forces courts to determine what the reasonable expectations of the oppressed party would have been. *Id.* at 388-90.

53. *Moll, supra* note 5, at 305 (considering relationship between causes of action). *Moll* notes “states legislatures and courts have developed two significant avenues of relief for the oppressed close corporation shareholder,” the first being shareholder oppression statutes and the second being breach of fiduciary duty. *Id.* at 303-04. Therefore, “[i]n the close corporation context . . . it is sensible to view the parallel development of the statutory action and the fiduciary duty action as two sides of the same coin—i.e., the shareholder’s cause of action for oppression.” *Id.* at 305; *see also Thompson, Shareholder’s Cause of Action, supra* note 26, at 738-745 (noting distinctions between common-law and statutory causes of action).

IV. REMEDYING BREACH OF FIDUCIARY DUTY

Once a court determines that majority shareholders have breached their fiduciary duty, the court is forced to find an appropriate remedy.⁵⁴ Remedies for breach of fiduciary duty are equitable in nature.⁵⁵ Therefore, courts wield a great deal of discretion in fashioning a fair and equitable remedy.⁵⁶ Common remedies for breach of fiduciary duty in a close corporation include dissolution, reversal of an offending decision, or buyout of the minority shareholder's shares by the corporation.⁵⁷

The most common remedy employed by courts today, and the focus of this Note, is buyout.⁵⁸ Even in the statutory oppression setting, where the statute only provides for dissolution, courts often order buyout rather than dissolution.⁵⁹ Courts view buyout as a less harsh remedy than dissolution because it compensates the aggrieved shareholder, while allowing the corporate entity to survive.⁶⁰ It is also often the most practical remedy.⁶¹ A court order to rehire or return the shares sold, for example, may not be a viable option, because shareholders have obtained new employment or the shares have been resold to disinterested third parties.⁶²

54. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7.18 (discussing available remedies such as dissolution and buyout).

55. *Keating v. Keating*, Nos. 00749, 00748, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (identifying equitable nature of breach of fiduciary duty); see also *Demoulas v. Demoulas*, 703 N.E.2d 1149, 1169 (Mass. 1998) (recognizing equitable nature of remedying breach of fiduciary duty).

56. See *Demoulas*, 703 N.E.2d at 1169 (discussing equitable relief available to remedy breach of fiduciary duty); see also *Keating*, 2003 WL 23213143, at *18 (noting "broad range of equity powers" available to courts remedying breach of fiduciary duty). The Massachusetts Supreme Judicial Court, in *Demoulas*, raised the issue of remedies in a situation where one shareholder obtained control of a corporation through deceit and fraud. *Demoulas*, 703 N.E.2d at 1154-55. The court held the defendant breached his fiduciary duty to the plaintiff shareholders. *Id.* The court noted that "rescission may be ordered to avoid unjust enrichment of the fiduciary at the expense of a beneficiary." *Id.* at 1169. The court also observed the problem posed by bona fide subsequent purchasers of shares, who would have a defense against an aggrieved shareholder, thereby effectively prohibiting return of the shares. *Id.*

57. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, §§ 7:18-7:20 (reviewing different remedies available in statutory oppression or breach of fiduciary duty actions).

58. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7:20 (describing buyout as most common option); Moll, *supra* note 5, at 308-09 (noting buyout is most common form of relief, despite wide range available).

59. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7:20 (noting modern trend towards buyouts); see also *Brenner v. Berkowitz*, 634 A.2d 1019, 1031 (N.J. 1993) (holding statute does not supersede inherent equity powers of the court).

60. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7:20 (noting effect of buyout as being less harsh remedy than dissolution); see also Moll, *supra* note 5, at 296 (defining fair market value). Fair market value represents the amount that a willing hypothetical purchaser would pay for the shares. Moll, *supra* note 5, at 296. The fair market value of a close corporation would contain discounts. *Id.*

61. See *Keating v. Keating*, Nos. 00749, 00748, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (noting re-hire not available remedy when minority shareholder obtained new employment); Moll, *supra* note 5, at 309 (noting buyout allows majority to continue operating company while allowing minority to remove his investment).

62. See *Keating*, 2003 WL 23213143, at *18 (ordering buyout where rehiring unavailable).

V. DAMAGES, VALUATION, AND DISCOUNTS

In a buyout, the court orders either the corporation or a group of shareholders to purchase the shares of the minority shareholder, requiring the court to determine the value of those shares.⁶³ Unlike a publicly traded corporation, there is no objective measure of the value of shares in a close corporation.⁶⁴ This raises difficult questions of valuation.⁶⁵ The task of determining value is even more difficult because it often falls on courts unfamiliar with the accounting and financial methods necessary to provide an objectively supportable value.⁶⁶

Valuing a share in a close corporation usually begins with an analysis of the value of the corporation as a whole.⁶⁷ To do this, courts often look to three major approaches: market value, net asset value, and earnings value.⁶⁸ These factors are weighed differently, according to the specific factual circumstances, to reach a value of the business interest as a whole.⁶⁹ To determine the value of a share, the net value of the entire corporation is divided by the total number of shares.⁷⁰

63. See O'NEAL & THOMPSON, OPPRESSION, *supra* note 13, § 7:21 (noting effect of buyout). Even in statutory oppression cases, the value to be paid is often not defined in the statute. *Id.*

64. See O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 9, § 1:20 (observing characteristics of close corporation causing difficult valuation).

65. See O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 9, § 7:26 (acknowledging valuation difficulties caused by lack of public market); see also Stephen J. Leacock, *The Anatomy of Valuing Stock in Closely Held Corporations: Pursuing the Phantom of Objectivity into the New Millennium*, 2001 COLUM. BUS. L. REV. 161, 162 (2001) (noting the major difficulty courts have in valuing close corporations). Leacock argues that valuing stock in closely-held corporation is "one of the most perplexing problems facing the courts." Leacock, *supra*, at 162.

66. Leacock, *supra* note 65, at 163 (questioning courts' ability to make factually supportable valuation). Most judges are not trained accountants and may not be familiar with standard accounting principles. *Id.* For example, in valuing close corporations for tax purposes, courts have engaged in the practice of "splitting the difference," whereby the court strikes a compromise between overly high IRS estimates and very low taxpayer estimates. *Id.* at 168. The practice "has no conceptual, theoretical, or intellectually convincing basis and tends to be grounded, quite simply, in expediency." *Id.*

67. See Haynsworth, *supra* note 10, at 460 (observing different steps in valuing shares of close corporation).

68. See Haynsworth, *supra* note 10, at 460 (presenting different values that combine to form overall business value). Among the criteria that impact valuation are:

The nature and history of the business; its economic potential; the business outlook for the particular industry and the company's competitive position within that industry; the strength of its management; its overall financial condition; the book value of its assets; the net asset value of the business; past and projected future earnings; dividend paying capacity; the value of its goodwill and other intangible assets; to the extent the information is available, the price of comparable companies whose stocks are actively traded; and the size of the ownership interest in questions; and any restrictions on the disposition of the interest.

Id. at 459-60.

69. *Columbia Mgmt. Co. v. Wyss*, 765 P.2d 207, 210 (Or. Ct. App. 1988) (applying standard valuation formulas to determine value of business).

70. *Id.* at 211-213 (noting last step in valuing shares in a business interest).

The final step that arises in the valuation of a close corporation is the application of discount to the shares.⁷¹ The two major discounts applied to shares in a close corporation are the marketability and minority discounts.⁷² Courts apply these discounts differently depending on the context for which the business is being valued.⁷³ Their effect, however, can be substantial.⁷⁴

The marketability discount compensates for the absence of a market for shares of a close corporation.⁷⁵ Investors will pay less for these shares, compared to more liquid shares, because they prefer shares that are easily sold and/or transferred.⁷⁶ Marketability discounts can be substantial, averaging from approximately thirty-five to fifty percent of the value of the stock.⁷⁷

The minority discount compensates for the fact that the shares constitute a minority interest in the corporation that is not controlling, so long as there is no shareholder agreement to the contrary.⁷⁸ Investors prefer stock that has the accompanying voting power to influence the operations of the corporation.⁷⁹ Therefore, investors will pay less for those shares than shares in the majority interest.⁸⁰ Like marketability discounts, minority discounts can have a

71. See PINTO & BRANSON, *supra* note 30, at 331 (identifying question of whether discounts as important in buyouts); see also O'NEAL & THOMPSON, *OPPRESSION*, *supra* note 13, § 7:21 (identifying discounts applicable to close corporations); Haynsworth, *supra* note 10, at 488-89 (discussing discount purposes and application).

72. See Moll, *supra* note 5, at 315-318 (discussing commonly applied discounts in close corporations); Christopher Vaeth, Annotation, *Propriety of Applying Minority Discount to Value of Shares Purchased by Corporation or its Shareholders from Minority Shareholders*, 13 A.L.R.5TH 840, § 2(a) (2004) (explaining minority discount as accounting for minority status of shares); Stephen A. Hess, Annotation, *Use of Marketability Discount in Valuing Closely-Held Corporation or its Stock*, 2003 A.L.R.5TH 11, § 2(a) (2003) (explaining marketability discount as discount accounting for illiquidity of shares).

73. See generally Hess, *supra* note 72 (surveying application of marketability discount); Vaeth, *supra* note 72 (surveying application of minority discount). Haynsworth indicates that applying discounts in squeeze-out or dissenters' rights cases would "undercut the purpose of the dissenters' rights statutes," which, he argues, is to give fair value of shares to the minority shareholders. Haynsworth, *supra* note 10, at 489.

74. See *infra* notes 77, 81 (discussing size of marketability and minority discounts, respectively); see also Moll, *supra* note 5, at 257-58 (observing size of discounts render them imprecise in responding to punitive goals). Discounts are sometimes not applied in buyout situations when a court seeks to punish the party ordered to purchase the shares. Moll, *supra* note 5, at 357-58. This is a poor analytical decision, however, because "a marketability discount is poorly calibrated to the conduct of an oppressive investor." *Id.* at 358. Discounts are empirically derived and intended to account for certain characteristics that make them less desirable to investors. *Id.* They are not calculated with punitive goals in mind. *Id.*

75. Hess, *supra* note 72, § 2(a) (explaining marketability discount). The lack of market is caused by the inability to trade shares in a close corporation on a public exchange. *Id.*

76. Haynsworth, *supra* note 10, at 489 (discussing impact of close corporate status on an "astute investor"). The shares are worth less to investors because they cannot be transferred freely. *Id.*

77. See Moll, *supra* note 5, at 317 (discussing percentage value of marketability discount); see also Haynsworth, *supra* note 10, at 490 (noting some commentators believe marketability discount of fifty to seventy-five percent would be appropriate).

78. See Vaeth, *supra* note 72, § 2(a) (explaining purposes of applying minority discount).

79. See Moll, *supra* note 5, at 315-16 (explaining investor's viewpoint and preferences regarding stock purchases).

80. See Haynsworth, *supra* note 10, at 492-94 (noting effect of minority status on investor's willingness to buy). Majority control, in most states, allows the shareholder to choose electors, and thus control the

substantial impact on the value of the shares, reducing the price as much as thirty-three percent.⁸¹

VI. DISCOUNTS IN OTHER CONTEXTS

A. Dissenters' Rights

The issue of whether to discount shares for purposes of buyout arises frequently in the context of dissenters' rights actions.⁸² So-called "dissenters' rights" statutes generally provide for buyout of a minority shareholder's shares in the event that he or she dissents from a specifically-delineated major corporation action, such as a merger.⁸³ Although dissenters' rights statutes vary slightly from state to state, most provide that a "fair value" shall be paid for the shares in the event of shareholder dissent.⁸⁴

There is a trend against discounting shares in the dissenters' rights context.⁸⁵ In rejecting the application of discounts, courts cite a number of different rationales.⁸⁶ One common reason is the legislative intent indicated by the use of the words "fair value," rather than "fair market value," in the statute.⁸⁷ In *First Western Bank Wall v. Olsen*,⁸⁸ the Supreme Court of North Dakota noted

management of the corporation. *Id.* at 493.

81. Moll, *supra* note 5, at 316 (identifying affect of average minority discount on stock value).

82. James H. Eggart, Note, *Replacing the Sword with a Scalpel: The Case for a Bright-Line Rule Disallowing the Application of Lack of Marketability Discounts in Shareholder Oppression Cases*, 44 ARIZ. L. REV. 213, 221 (2002) (examining application of discounts in dissenters' rights cases).

83. See Eggart, *supra* note 82, at 221 n.71 (noting role of dissenters' rights statutes in preventing major corporate actions without shareholder consent); see also MASS. GEN. LAWS ch. 156D, § 13.02 (2001) (requiring compensation for dissenting shareholder in multiple major corporate changes); MO. REV. STAT. § 351.455 (2005) (allowing shareholder who dissents from merger to demand value for shares); WIS. STAT. § 180.1302 (2005) (providing dissenting shareholder with remedy in situations involving mergers or substantial sale of assets).

84. See Hess, *supra* note 72, § 2(a) (noting standard value common in statutes); see also MASS. GEN. LAWS ch. 156D, § 13.02 (2001) (indicating "fair value" paid for dissenting shareholder's shares); MO. REV. STAT. § 351.455 (2005) (providing "value" paid for dissenting shareholder's shares); WIS. STAT. § 180.1302 (2005) (providing for "fair value").

85. See *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 495-96 (8th Cir. 2001) (observing refusal of most courts to apply minority discount in dissenters' rights context); see also, e.g., *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1145 (Del. 1989) (rejecting minority discount under Delaware dissenters' rights law); *Security State Bank v. Ziegeldorf*, 554 N.W.2d 884, 890 (Iowa 1996) (refusing to apply minority discount under Iowa law); *First Western Bank Wall v. Olsen*, 621 N.W.2d 611, 614 (S.D. 2001) (noting inappropriateness of minority discount in dissenters' rights cases under South Dakota law).

86. See *infra* notes 87-100 and accompanying text (detailing different rejection rationales).

87. *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 361 (Colo. 2003) (distinguishing "fair value" from "fair market value"); *First Western Bank Wall v. Olsen*, 621 N.W.2d 611, 617 (S.D. 2001) (defining "fair value" as undiscounted price). The court in *Pueblo Bancorporation* held "[w]e are convinced that 'fair value' does not mean 'fair market value.'" *Pueblo Bancorporation*, 63 P.3d at 361. Fair market value accounts for the price shares would be traded in an open market. *Id.* at 362. The court held that a marketability discount was inconsistent with "fair value." *Id.* at 364.

88. 621 N.W.2d 611 (S.D. 2001).

that the two terms are not synonymous and that the legislature would have used “fair market value” if that was its intent.⁸⁹ The court defined fair market value as “the price a willing buyer would pay a willing seller, under no obligation to act[,]” and notes that the term “fair value” has an implied definition of “the value of those shares as proportionate interest in the business as an entity”⁹⁰

Some courts state that the context and purpose of the legislation suggest that no discount should apply.⁹¹ In *Swope v. Siegel Robert, Inc.*,⁹² for example, the Eighth Circuit Court of Appeals applied Missouri law to reject the application of both a marketability and minority discount.⁹³ The court recognized that the dissenters’ rights statute was part of a quid pro quo arrangement, whereby the standard of unanimity for major corporate change was relaxed to a majority requirement with the understanding that a dissenting shareholder would not be forced to remain a shareholder against his or her will.⁹⁴ Similarly, the Wisconsin Supreme Court has refused to extend minority discounts because the discount “unfairly penalizes dissenting shareholders for exercising their legal right to dissent.”⁹⁵

Another argument offered by courts to reject discounts in dissenters’ rights actions is that they occur in the context of a forced sale.⁹⁶ The minority shareholders are not willing sellers, but are selling because they disagree with a corporate decision.⁹⁷ One court looking at the issue has reasoned that the market of willing buyers and sellers, presupposed by the term “fair market value,” is simply not present in a forced sale.⁹⁸ In *Swope*, the court noted that the minority discount “injects a market factor into the determination of fair value” which should not be included.⁹⁹ Finally, the New Jersey Supreme Court

89. *Id.* at 617 (holding court bound by statutory language).

90. *Id.* at 617 (discussing the different meanings of fair value and fair market value).

91. *See Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 494, 497 (8th Cir. 2001) (refusing to extend minority or marketability discounts in dissenters’ rights action arising from merger).

92. 243 F.3d 486 (8th Cir. 2001).

93. *Id.* at 494, 497 (noting conclusions on issue of majority and minority discounts). *Swope* involved the merger of two corporations. *Id.* at 490. The corporation offered dissenting shareholders \$20 per share, and while a number of shareholders accepted the amount, other shareholders brought an action alleging the amount did not constitute “fair value.” *Id.*

94. *See id.* at 491-492 (discussing legislative intent). The legislation providing for buyout arose from a desire to not give any minority shareholder the power to block corporate action. *Id.*

95. *HMO-W, Inc. v. SSM Health Care Sys.*, 611 N.W.2d 250, 261 (Wis. 2000) (refusing to apply minority discount to shares). Two corporate shareholders demanded payment for their shares in *HMO-W, Inc.* after dissenting from a planned merger. *Id.* at 252. The suit arose from a disagreement as to the fair value of the shares. *Id.*

96. *See Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 492 (8th Cir. 2001) (recognizing dissenting shareholders not willing participants in the market).

97. *Id.* (noting lack of bargaining power in hands of dissenting shareholder).

98. *Id.* (recognizing sales pursuant to dissenters’ rights statutes do not involve willing buyers and sellers). The court held, “Dissenting shareholders, by nature, do not replicate the willing and ready buyers of the open market. Rather, they are unwilling sellers with no bargaining power.” *Id.*

99. *Id.* at 495-496 (distinguishing fair value from fair market value).

has refused to discount shares because corporations have notice, via the statute, that certain actions will trigger the dissenters' rights statute and, thus, accepted their obligations under the statute by proceeding with the action.¹⁰⁰

Some courts, however, have chosen to discount dissenters' shares, holding that the term "fair value," as used in the statute, connotes "fair market value."¹⁰¹ In *Columbia Mgmt Co. v. Wyss*,¹⁰² for example, the Oregon Court of Appeals noted that "there are no hard and fast rules for determining the fair value of dissenters' shares [However, m]arket value is certainly one approach to fair value, and a marketability discount would take that approach into consideration."¹⁰³ Moreover, the American Law Institute (ALI) takes the position that the term "fair value" is not necessarily dispositive in determining whether discounts should apply.¹⁰⁴ Instead, the ALI notes that there should be a presumption against discounting, and indicates that discounts should only apply in "extraordinary circumstances."¹⁰⁵

B. Statutory Oppression

The issue of whether to apply discounts also arises in court-ordered buyouts in statutory oppression actions.¹⁰⁶ While most statutes are similar—in part

100. See *Lawson Mardon Wheaton, Inc. v. Smith*, 734 A.2d 738, 750 (N.J. 1998) (holding discounts inapplicable in dissenters' rights actions); see also Bobbie J. Hollis II, *The Unfairness of Applying Lack of Marketability Discounts to Determine Fair Value in Dissenters' Rights Cases*, 25 IOWA J. CORP. L. 137, 149 (1999) (noting application of discounts would give majority shareholders unfair gain without cost).

101. See, e.g., *Perlman v. Permonite Mfg. Co.*, 568 F. Supp. 222, 231-32 (N.D. Ind. 1983) (holding discounts applicable if relevant to fair market value); *Weigel Broad. Co. v. Smith*, 682 N.E.2d 745, 749 (Ill. App. Ct. 1996) (noting fair value includes "anything that might impact on the stock's intrinsic value"); *Columbia Mgmt. Co. v. Wyss*, 765 P.2d 207, 213 (Or. Ct. App. 1988) (finding marketability discount component of fair value).

102. 765 P.2d 207 (Or. Ct. App. 1988).

103. *Id.* at 212-13 (finding market value may be component of fair value as used in the statute). *But see* *Cooke v. Fresh Express Food Corp. Inc.*, 7 P.3d 717, 725 (Or. Ct. App. 2000) (rejecting discounts in dissenters' rights context). The Oregon Court of Appeals determined that neither minority nor marketability discounts should ever be applied to shares in a corporation for dissenters' rights purposes. *Id.*

104. See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (Am. Law Inst. 1994) (arguing discounts inappropriate in most dissenters' rights cases).

105. See *id.* (delineating exception to general rule). The ALI takes the position that it is improper in dissenters' rights actions to discount the value of a share to account for minority status. *Id.* The value at issue is not a valuation of the securities, but of the business as a whole. *Id.* It does, however, indicate that a marketability discount is appropriate in limited situations. *Id.* The example that the ALI suggests is a corporation with "highly illiquid assets [that] is financially troubled." *Id.*

106. See, e.g., *Brown v. Allied Corrugated Box Co.*, 154 Cal. Rptr. 170, 175-76 (Cal. Ct. App. 1979) (determining appropriateness of minority discount in shareholder oppression action); *Cooke v. Fresh Express Food Corp.*, 7 P.3d 717, 725 (Or. Ct. App. 2000) (refusing both minority and marketability discount in shareholder oppression context); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 611-13 (R.I. 1991) (evaluating application of majority and minority discounts in shareholder oppression context). See generally Moll, *supra* note 5 (examining use of discounts in shareholder oppression cases). In his analysis of the application of discounts in the statutory oppression context, Moll groups buyout for breach of fiduciary duty with statutory oppression claims and argues against applying discounts in both settings. See Moll, *supra* note 5, at 305, 366. He urges that the statutory oppression action and the action for breach of fiduciary duty be

because many are based on the Model Business Corporations Act—there are some differences that impact the discount analysis.¹⁰⁷ Some statutes provide for buyout as a remedy for oppressive conduct, while others do not mention buyout and provide only for dissolution.¹⁰⁸ Despite the language of the statutes, courts in many jurisdictions are willing to order a buyout, relying on their inherent equitable powers.¹⁰⁹ When ordering a buyout, however, courts are divided on whether to discount the value of the shares, with a slight majority of jurisdictions refusing to discount shares.¹¹⁰

Courts employ a number of different rationales for rejecting discounts in the shareholder oppression context.¹¹¹ Some courts hold that a discount would result in substantially less compensation for the minority shareholder than if the more traditional remedy of dissolution were applied.¹¹² In the event of corporate dissolution, the debts of the corporation would be paid off first, and then the remaining assets would be distributed, pro rata, among the shareholders.¹¹³ This process would reflect a distribution of the total value of the company.¹¹⁴ If a court applied a discount, the shareholder would receive less than the pro rata share that she would have received in the event of dissolution.¹¹⁵

viewed as the “shareholder’s cause of action for oppression.” *See id.* at 305. *But see* Thompson, *Shareholder’s Cause of Action for Oppression*, *supra* note 26, at 739 (noting common law and statutory oppression remedies are distinct). Thompson writes that statutory and common-law remedies may be viewed “as part of a combined cause of action for oppression, but this combination leaves the framework a little rough at points.” *Id.* For example, there are procedural differences in bringing a derivative common law breach of fiduciary action versus a direct statutory oppression action. *See id.*

107. *See* MODEL BUS. CORP. ACT § 14.30(2)(ii) (providing dissolution remedy for oppression); *see also* N.J. STAT. ANN. § 14A:12-7 (West 2004) (providing buyout remedy).

108. *Compare* MODEL BUS. CORP. ACT § 14.30(2) (ii) (providing dissolution remedy for oppression), *with* N.J. STAT. ANN. § 14A:12-7 (providing buyout remedy for oppression). *See also* Chernichaw, *supra* note 37, at 517-18 (discussing effect of dissolution). Dissolution requires the sale of all corporate assets, using the profits to settle all outstanding debts, and then distributing any remaining capital pro rata among shareholders. Chernichaw, *supra* note 37, at 517-18.

109. *See, e.g.,* Orchard v. Covelli, 590 F. Supp. 1548, 1559 (W.D. Pa. 1984) (prescribing buyout because protecting interests not “so drastic a remedy” as dissolution); Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274 (Alaska 1980) (acknowledging extra-statutory remedies); McCauley v. Tom McCauley & Son, Inc. 724 P.2d 232, 236 (N.M. 1986) (recognizing trial court’s extra-statutory equity powers); *see also* Moll, *supra* note 5, at 309-10 (explaining reasoning used by courts in choosing to apply discounts).

110. *See* Charland v. Country View Golf Club, Inc., 588 A.2d 609, 611 (R.I. 1991) (noting most courts reject applying minority discount).

111. *See infra* notes 112-122 and accompanying text (discussing rationale for rejecting discounts).

112. *See* Charland, 588 A.2d at 611-12 (recognizing traditional remedy of dissolution results in higher award than discounted buyout value). With regard to the minority discount, the court reasons that “an unscrupulous controlling shareholder” could unfairly avoid proportionate distribution by electing to buy out shares rather than dissolve the corporation. *See id.* at 612. The court applied similar reasoning in rejecting a marketability discount. *See id.* at 612-13; *see also* Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 176 (Cal. Ct. App. 1979) (noting controlling interests would not affect share value in dissolution).

113. *See* PINTO & BRANSON, *supra* note 30, at 79, 331-32 (explaining liquidation value of corporation).

114. *See* PINTO & BRANSON, *supra* note 30, at 331 (observing effect of liquidation on shareholders).

115. *See* Chiles v. Robertson, 767 P.2d 903, 926 (Or. Ct. App. 1989) (noting inappropriateness of compensating minority shareholders less in a buyout than dissolution).

In jurisdictions where buyout is specifically prescribed as a remedy for oppressive conduct, some statutes specifically call for “fair value” to be paid.¹¹⁶ In these jurisdictions, some courts have refused to apply discounts, stating that the language of the statute indicates that a discount should not be applied.¹¹⁷ This is analogous to the argument advanced in the dissenters’ rights context.¹¹⁸

Some courts have noted that the context of the statutory oppression action does not align with the goals of the two discounts.¹¹⁹ This argument centers on the fact that a buyout does not occur on an open market.¹²⁰ Therefore, courts argue that they should not apply discounts that account for irrelevant market conditions.¹²¹ As Professor Moll writes, “[t]he forced-sale nature of buyout proceeding and the identity of the purchasers involved weigh heavily against the application of discounts.”¹²²

When courts choose to discount shares for purposes of buyout in a shareholder oppression action, they often base their decision on equitable considerations.¹²³ For example, in *Balsamides v. Protameen Chemicals, Inc.*,¹²⁴ the New Jersey Supreme Court pointed to equities when ordering a marketability discount be applied to the value of shares for the purpose of a

116. See, e.g., 805 ILL. COMP. STAT. 5/12.55 (2005) (providing “fair value” as amount to be paid for shares); N.J. STAT. ANN. § 14A:12-7 (West 2005) (using term “fair value”); OR. REV. STAT. § 60.952 (2003) (designating “fair value” to be paid for shares).

117. See *Cooke v. Fresh Express Foods Corp.*, 7 P.3d 717, 725 (Or. Ct. App. 2000) (noting “fair value” not liquidation value called for by statute); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 612 (R.I. 1991) (noting different definitions of fair value); see also Moll, *supra* note 5, at 336-37 (advancing strength of statutory language rationale for rejecting discounts). But see *Balsamides v. Protameen Chemicals, Inc.*, 734 A.2d 721, 734 (N.J. 1999) (discounting value despite statutory language calling for “fair value”).

118. See *supra* notes 87-88 (discussing fair market value/fair value distinction in dissenters’ rights context).

119. See, e.g., *Brown v. Allied Corrugated Box Co.*, 154 Cal. Rptr. 170, 176 (Cal. Ct. App. 1979) (rejecting minority discount because when majority purchase minority shares, shares lose minority status); *Charland*, 588 A.2d at 611-12 (adopting reasoning of *Brown* regarding minority discount); *Diluglio v. Providence Auto Body, Inc.*, No. 89-9628, 1997 WL 839873, at *2 (R.I. Super. Ct. Jan. 13, 1997) (noting stock not sold on open market); see also Moll, *supra* note 5, at 319-36 (discussing contextual rationale for rejecting discounts).

120. Moll, *supra* note 5, at 320 (noting forced sale not contemplated by fair value analysis). Moll states “valuing the minority’s shares on the basis of a hypothetical sale makes little sense when the minority investor was not looking to sell in the first place.” *Id.*

121. See *Charland*, 588 A.2d at 612 (rejecting minority discount). The court pointed to the rationale of California courts, reasoning that while minority status would decrease the value of the shares in the open market, the shareholder sold the shares to the corporation, not on the open market. *Id.* (discussing *Brown v. Allied Corrugated Box Co.*, 154 Cal. Rptr. 170, 176 (Cal. Ct. App. 1979)). It is therefore irrelevant that the shares are non-controlling. *Id.*

122. See Moll, *supra* note 5, at 319 (arguing discounts should not be applied).

123. See, e.g., *Devivo v. Devivo*, No. CV980581020, 2001 WL 577072 at *11 (Conn. Super. Ct. May 8, 2001) (noting “exceptional circumstances” permit marketability discount); *Advanced Comm’n Design, Inc. v. Follet*, 615 N.W.2d 285, 292-93 (Minn. 2000) (discounting shares due to unfair burden of undiscounted value); *Balsamides v. Protameen Chemicals, Inc.*, 734 A.2d 721, 734-35 (N.J. 1999) (applying discount where oppressed individual purchased shares).

124. 734 A.2d 721 (N.J. 1999).

court-ordered buyout.¹²⁵ Rather than force the oppressor shareholder to purchase the oppressed shareholder's stock, the trial court chose a different remedy, holding that the oppressed shareholder was entitled to buyout the shares of the oppressor.¹²⁶ The court applied discounts despite the statutory language calling for "fair value" to be paid.¹²⁷

Another closely related rationale, often used to support the discounting of shares in the context of shareholder oppression, is "extraordinary circumstances."¹²⁸ While courts maintaining this view would not generally permit discounts, they would grant them if certain extraordinary facts are present, such as undue financial impact on the corporation.¹²⁹ The Minnesota Supreme Court, for example, applied a discount based on "exceptional circumstances" where the undiscounted value of the interest to be bought out was "more than five times the total net worth of the corporation."¹³⁰

Finally, some courts have argued that the use of the term "fair value" rather

125. *Id.* at 735 (holding courts must take into account fairness and equity). The court explains its rationale by holding, "When Balsamides eventually sells, he will suffer the full effect of any marketing difficulties." *Id.* at 736. The case differs from many statutory oppression buyout cases because Balsamides, whom the court ordered to buyout the shares, was the oppressed and not the oppressor. *Id.* at 736. The court points to equities as an indicator for whether courts should apply discounts. *Id.*; see also *Jahn v. Kinderman*, 814 N.E.2d 116, 125-26 (Ill. App. Ct. 2004) (noting discretion of trial courts in applying discounts).

126. *Balsamides*, 734 A.2d at 723-724 (noting trial court's holding). The New Jersey Supreme Court affirmed the trial court's decision to order the oppressor to sell shares to the oppressed. *Id.* at 738. The court, however, objected to the appellate court's holding that a marketability discount applied by the trial court was inappropriate. *Id.* The court noted that the appropriateness of discounts depended on whether the oppressed or oppressor was ordered to buyout the other party's shares. *Id.* The court held:

Requiring [the oppressed shareholder] to pay an undiscounted price for [the oppressor shareholder's] stock penalizes [the oppressed shareholder] and rewards [the oppressor shareholder]. The statute does not allow the oppressor to harm his partner and the company and be rewarded with the right to buy out that partner at a discount. We do not want to afford a shareholder any incentive to oppress other shareholders. What to do when it is the oppressing shareholder who is given the buy-out option is a harder question that we need not decide. The guiding principle that we apply in this case . . . is that a marketability discount cannot be used unfairly by the controlling or oppressing shareholders to benefit themselves to the detriment of the minority or oppressed shareholders.

Id. The court noted, despite this holding, the trial court's recognition that the shareholder was "oppressed" and contributed to the disagreements within the corporation. *Id.* at 724.

127. *Balsamides*, 734 A.2d at 737-38 (applying discount). *But see supra* notes 116-117 and accompanying text (discussing statutory language and courts' rationale for rejecting discount).

128. See *Advanced Commc'n Design, Inc. v. Follett*, 615 N.W.2d 285, 293 (Minn. 2000) (granting marketability discount in light of "extraordinary circumstances"); see also *Devivo*, 2001 WL 577072, at *11 (allowing marketability discount because financial demands of undiscounted price too great). In applying a discount in *Advanced Communication Design*, the Minnesota Supreme Court noted that "[a]ny other result would be inconsistent with the statutory requirement that a court-ordered buy-out be 'fair and equitable to all parties.'" *Advanced Commc'n Design*, 615 N.W.2d at 293 (quoting statute). The court believed that an undiscounted price would put "unrealistic financial demands on the corporation." *Id.*

129. See *Devivo*, 2001 WL 577072, at *11 (recognizing undiscounted value 1.6 times net worth of corporation constituted extraordinary circumstances).

130. *Advanced Comm'n Design*, 615 N.W.2d at 293 (finding demands imposed by undiscounted price exceptional).

than “fair market value” is not determinative on the issue of whether to apply discounts.¹³¹ New York courts have indicated that a marketability discount is one of many appropriate factors to consider in establishing fair value.¹³² Despite the different rationales for permitting discounts, the view that they are appropriate is the minority position.¹³³

VII. DISCOUNTS FOR BREACH OF FIDUCIARY DUTY IN MASSACHUSETTS

Although limited case law exists, Massachusetts courts have failed to adopt a bright-line rule against discounts.¹³⁴ Massachusetts superior courts vary in their approach to discounts, depending on the facts of the case.¹³⁵ In *Keating v. Keating*,¹³⁶ the minority shareholder in a family-owned close corporation brought suit against the majority shareholder, his father, for breach of fiduciary duty.¹³⁷ The court ordered a buyout and noted, “Where freezeout conduct is of an exacerbated nature without mitigating factors, . . . the remedy should include a punitive aspect.”¹³⁸ The court held that “[t]he discharge decision was a highly emotional one without an analysis of the repercussions” and, thus, found discounts appropriate.¹³⁹ Significantly, the court considered the conduct of the parties when determining whether to apply a discount.¹⁴⁰

131. See *infra* note 131 and accompanying text (surveying New York decisions analyzing discount issue).

132. See, e.g., *In re Joy Wholesale Sundries, Inc.*, 508 N.Y.S.2d 594, 595-96 (N.Y. App. Div. 1986) (upholding marketability discount); *Blake v. Blake Agency, Inc.*, 486 N.Y.S.2d 341, 349 (N.Y. App. Div. 1985) (discussing various components used to determine fair value); *In re Fleischer*, 486 N.Y.S.2d 272, 274-75 (N.Y. App. Div. 1985) (noting market value comprises one component of fair value). But see *supra* notes 116-117 and accompanying text (discussing statutory language and legislative intent).

133. See *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 611 (R.I. 1991) (observing trend against applying discounts when remedying statutory oppression actions).

134. Compare *O'Connor v. U.S. Art Co.*, No. 03-1728 BLS, 2005 WL 1812512, at *6 (Mass. Super. Ct. June 27, 2005) (refusing to apply discounts), with *Keating v. Keating*, Nos. 00748, 00749, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (discussing discount in breach of fiduciary duty buyout).

135. Compare *Keating*, 2003 WL 23213143, at *18 (applying discount because both parties contributed to breaching event), with *O'Connor*, 2005 WL 1812512, at *6 (refusing discount where only one party clearly at fault).

136. 2003 WL 23213143 (Mass. Super. Ct. Oct. 3, 2005).

137. *Id.* at *1, *10 (relating facts of case). The majority shareholder and minority shareholder, father and son respectively, had a long history of squabbling and disagreement. *Id.*

138. *Id.* at *18 (contemplating applicability of marketability and minority discounts). The court's holding was based on the parties' mens rea. *Id.*

139. *Id.* (noting inequity of not discounting share value).

140. See *Keating*, 2003 WL 23213143, at *18 (applying discount based on father's mens rea at time breach of fiduciary duty occurred). The court, in dicta, indicated that if there was ill will, punitive action should be taken, and therefore, no discount should be applied. *Id.* But see *O'Connor*, 2005 WL 1812512, at *11 (holding discount inappropriate where one shareholder breached duty owed towards minority shareholder); Moll, *supra* note 5, at 357-58 (arguing against discounts as punitive device because of poor calibration ability).

VIII. ANALYSIS

A. *Limited Utility of Analogy to Dissenters' Rights and Statutory Oppression Situations*

Some commentators have suggested that a bright-line rule against applying discounts is appropriate within the contexts of statutory oppression, breach of fiduciary duty actions, and dissenters' rights claims.¹⁴¹ Despite this assertion, the arguments for declining to apply discounts in dissenters' rights and statutory oppression actions are not directly analogous to actions for breach of fiduciary duty.¹⁴² Many rationales used by courts to reject discounts in actions for statutory oppression and dissenters' rights do not apply to common-law breach of fiduciary duty.¹⁴³

Unlike dissenters' rights and statutory oppression statutes, courts lack statutory language as a guide in a common-law fiduciary duty action.¹⁴⁴ As a result, courts remedying a breach of fiduciary duty cannot reason that statutory language calling for "fair value," as opposed to "market value," indicates the intent to reflect an undiscounted price.¹⁴⁵ In light of the lack of statutory language, determining whether or not discounts should be applied in the context of a breach of fiduciary action requires a separate analysis from those explored in either the statutory oppression or dissenters' rights discount contexts.¹⁴⁶

In addition to statutory language, dissenters' rights statutes typically include a legislative history suggesting that a discount should be applied, which is absent from the common law in the breach of fiduciary setting.¹⁴⁷ Dissenters' rights statutes permitted certain corporate events to proceed without unanimity, which would be unavailable under traditional corporation statutes.¹⁴⁸ In

141. See Moll, *supra* note 5, at 305 (arguing statutory oppression and common-law actions not distinct for discount purposes); see also Haynsworth, *supra* note 10, at 489 (noting discounts inappropriate in remedying squeeze-outs).

142. See *infra* notes 144-153 and accompanying text (discussing difference between statutory oppression, dissenters' rights, and breach of fiduciary duty contexts).

143. See *infra* notes 144-153 and accompanying text (noting lack of statutory intent or legislative history).

144. Compare *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 520 (Mass. 1975) (finding cause of action for common-law breach of fiduciary duty), with *First Western Bank Wall v. Olsen*, 621 N.W.2d 611, 617 (S.D. 2001) (recognizing statutory language as indication of legislative intent to not discount in dissenters' rights context).

145. See *First Western Bank Wall*, 621 N.W.2d at 617 (identifying statutory language as indicia of inappropriateness of discounts in dissenters' rights case); see also *Cooke v. Fresh Express Food Corp.*, 7 P.3d 717, 725 (Or. Ct. App. 2000) (observing use of "fair value" in oppression statutes as indicia of legislative intent).

146. See *supra* notes 87-90, 116-117 and accompanying text (examining statutory language rationale for rejecting discounts); *supra* note 45 (identifying breach of fiduciary duty as common law cause of action).

147. See *HMO-W, Inc. v. SSM Health Care Sys.*, 611 N.W.2d 250, 255 (Wis. 2000) (noting discounts inconsistent with legislative intent).

148. See *id.* at 253-54 (discussing quid pro quo of dissenters' rights statutes); see also *supra* note 100 and

exchange, the statutes gave dissenting shareholders a remedy in case they disagreed with the proposed action.¹⁴⁹ The quid pro quo nature of the development of dissenters' statutes has no counterpart in an action for breach of fiduciary duty.¹⁵⁰

The argument that the buyout remedy should not result in a lower damage amount than in statutory dissolution is also less relevant in the breach of fiduciary duty action.¹⁵¹ While oppression statutes specifically provide for dissolution in the event of oppression, dissolution is just one of the many equitable remedies employable by the courts to rectify a breach of fiduciary duty.¹⁵² The equitable nature of the common-law breach of fiduciary duty further suggests that an analysis of discounts in this context should be distinct from the analysis in dissenters' rights or statutory oppression situations.¹⁵³

In light of these differences, the case for adopting a bright-line rule against discounting shares in common-law breach of fiduciary duty actions is much weaker than for a bright-line ban on discounts in statutory oppression and dissenters' rights contexts.¹⁵⁴ Therefore, it is necessary to engage in a specific analysis of the context of a breach of fiduciary duty action to determine whether to apply discounts.¹⁵⁵ In this analysis, some of the arguments used by courts to reject and uphold discounts in other settings are equally applicable to the fiduciary duty setting.¹⁵⁶

B. Context of a Breach of Fiduciary Duty Action

Despite the differences between the statutory oppression, dissenters' rights, and common-law breach of fiduciary duty actions, context remains important in

accompanying text (recognizing statute give majority notice that action will trigger appraisal rights of minority).

149. See *HMO-W, Inc.*, 611 N.W.2d at 253-54 (noting goals of dissenters' rights statutes). The statutes attempt to fully compensate dissenting shareholders for value of shares. *Id.*

150. Compare *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975) (noting common law quality of Donahue's action), with *HMO-W, Inc.*, 611 N.W.2d at 261 (noting statutory nature of cause of action).

151. See *supra* note 115 (discussing argument that shareholders should not receive less in buyout than in dissolution proceeding).

152. See *supra* notes 54-58 and accompanying text (discussing equitable nature of breach of fiduciary duty cause of action).

153. See *Donahue*, 328 N.E.2d at 516 (noting common-law nature of breach of fiduciary duty action); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 611-12 (R.I. 1991) (noting oppression statutes provide for dissolution, not buyout).

154. See *supra* notes 144-153 and accompanying text (noting inapplicability of certain rationales for discounting shares in breach of fiduciary duty context).

155. See *supra* notes 144-153 (discussing inconsistencies in analysis of statutory versus common-law causes of action). *But see* Moll, *supra* note 5, at 305 (articulating view that statutory and common law oppression can be viewed as single action).

156. See *supra* notes 98-101 and accompanying text (observing "forced sale" nature of buyout makes discounting inappropriate in dissenters' rights cases); *supra* notes 119-122 and accompanying text (observing contextual arguments for rejecting use of discounts in shareholder oppression actions).

evaluating discounts in any of the actions.¹⁵⁷ Much like dissenters' rights and statutory oppression contexts, the sale arising from a breach of fiduciary duty claim is involuntary.¹⁵⁸ The shareholder is forced to sell their shares as a result of actions taken by the other party.¹⁵⁹ Therefore, the argument rejecting discounts due to unwilling sellers and buyers in statutory oppression actions and dissenters' rights actions also applies to common-law breach of fiduciary duty actions.¹⁶⁰ Market value, which contemplates willing buyers and sellers, should be rejected in favor of fair value, which does not rely on market factors.¹⁶¹ If market value is inappropriate, then discounts that account for market factors would also be inappropriate.¹⁶²

The typical freeze-out situation arises when a minority shareholder has no other choice but to sell their shares to the majority shareholder at less than their fair value.¹⁶³ From a policy standpoint, it would be illogical to discount the value of the shares because doing so would reward an oppressive majority shareholder and injure the party who is relatively blameless.¹⁶⁴ Moreover, while there is no similar quid pro quo as in dissenters' rights statutes, or an explicit dissolution remedy like in the statutory oppression context, buyout is a less harsh alternative than dissolution.¹⁶⁵

The willingness of Massachusetts courts to look at the conduct of the parties in assessing whether to discount shares is inappropriate.¹⁶⁶ Courts should not use discounts as a means of attributing punitive damages.¹⁶⁷ The impact of discounts, which may be a large percentage of the overall share value, may not correctly align with the appropriate level of punitive damages.¹⁶⁸ The failure of

157. See *supra* notes 98-101 and accompanying text (observing forced-sale nature of buyout); *supra* notes 119-122 and accompanying text (noting inconsistency between goals of discounts and nature of buyout in statutory oppression actions); see also Moll, *supra* note 5, at 319 (arguing that context is one of the stronger arguments to reject discounts in shareholder oppression actions).

158. See *Keating v. Keating*, Nos. 00748, 00749, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (ordering buyout as remedy to breach of fiduciary duty).

159. See *id.* (discussing common fact pattern of oppression).

160. See *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 492 (8th Cir. 2001) (discussing lack of willing buyers and seller in buyout pursuant to dissenters' rights statute); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 612 (R.I. 1991) (discussing forced sale aspect of buyout to remedy statutory oppression).

161. See *Swope*, 243 F.3d at 492 (observing the inappropriateness of considering market factors in context of forced sale).

162. See *id.* (noting the inappropriateness of discounts); *supra* note 119 (discussing forced sale rationale in statutory oppression context).

163. See *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975) (describing freeze-out).

164. See Moll, *supra* note 5, at 319 (arguing against discounts).

165. See *supra* note 94 and accompanying text (discussing history of dissenters' rights statutes); *supra* note 112 and accompanying text (noting buyout is less harsh than dissolution).

166. Compare *Keating v. Keating*, Nos. 00748, 00749, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (discussing, in dicta, that discounts not appropriate if punitive action is necessary), with Moll, *supra* note 5, at 357-360 (discussing inappropriateness of considering punitive goals in calculation of value).

167. See *Keating*, 2003 WL 23213143, at *18 (discussing, in dicta, that discounts not appropriate if punitive action is necessary).

168. See Moll, *supra* note 5, at 316-17 (observing discount size renders discounts inappropriately

a court to adhere to objective measures of value further complicates the valuation process.¹⁶⁹

In justifying the use of discounts, courts often point to the equitable nature of the remedy, urging that they should utilize their full discretion in fashioning an appropriate remedy.¹⁷⁰ In both dissenters' rights and statutory oppression jurisprudence, there is support for the idea that "extraordinary circumstances" may require discounting.¹⁷¹ For instance, because both the seller and the buyer are unwilling participants in the sale, it is equally unfair to give the seller a windfall as it is to punish him or her.¹⁷² One could argue that if neither party is completely responsible for a breach, but failing to discount would result in major financial troubles for the corporation and perhaps its discontinuance, a discount is appropriate.¹⁷³ Despite the possibility of both parties contributing to the oppressive conduct, the same arguments used to reject discounts as a punitive device undermine this argument as well.¹⁷⁴

An action for breach of fiduciary duty is an equitable action.¹⁷⁵ Remedies for breach of fiduciary duty are designed with the goal of reaching a just resolution, such as restoring the aggrieved party to his or her status and position prior to the breach.¹⁷⁶ This is difficult in the case of a breach of fiduciary duty in close corporation because, as *Donahue* indicates, shareholders in a close corporation must be willing to trust and work with each other to make the business function effectively.¹⁷⁷ Thus, once shareholders breach their duty of loyalty, it is usually impossible to restore the parties to their earlier position.¹⁷⁸ In light of this reality, when majority shareholders breach their fiduciary duties, they should be required to pay the full, undiscounted, fair value for the minority's shares.

calibrated measure for assessing punitive damages); *see also* Haynsworth, *supra* note 10, at 494 (observing discounts as high percentage of overall business value).

169. *See supra* notes 65-66 and accompanying text (noting complex nature of valuing interests in close corporations); *supra* note 68 (noting major approaches to valuation).

170. *See Demoulas v. Demoulas*, 703 N.E.2d 1149, 1169 (Mass. 1998) (pointing out wide range of possible remedies available in breach of fiduciary duty action).

171. *See Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 492 (8th Cir. 2001) (noting discounts applicable only in "extraordinary circumstances" in dissenters' rights action); *Advanced Commc'n Design, Inc. v. Follett*, 615 N.W.2d 295, 293 (Minn. 2000) (applying "extraordinary circumstances" analysis in statutory oppression action).

172. *See Keating v. Keating*, Nos. 00748, 00749, 2003 WL 23213143, at *18 (Mass. Super. Ct. Oct. 3, 2003) (noting majority shareholder/father was compelled to purchase minority shareholders shares).

173. *See id.* at *18 (noting both parties in *Keating* contributed to breach of duty); *cf. Swope*, 243 F.3d at 492 (finding discount appropriate due to extraordinary circumstances).

174. *See Moll, supra* note 5, at 318 (arguing against appropriateness of discounts as punitive device).

175. *See Demoulas v. Demoulas*, 703 N.E.2d 1149, 1169 (Mass. 1998) (observing discretion utilized by courts in remedying breach of fiduciary duty).

176. *See id.* (noting rescission as one possible remedy in a breach of fiduciary duty action).

177. *See Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 512 (Mass. 1975) (analogizing relationships in close corporation to those in partnerships); *Keating*, 2003 WL 23213143, at *18 (noting difficulties in merely restoring status quo in cases of breach of fiduciary duty).

178. *See Keating*, 2003 WL 23213143, at *18 (ordering buyout to remedy breach of fiduciary duty).

IX. CONCLUSION

Valuing shares in a close corporation is a difficult task. Determining whether to apply discounts adds another level of complexity and can significantly impact share price. Additionally, the discounts contemplate market factors that do not exist in a situation where an aggrieved minority shareholder is seeking court-ordered buyout of his or her shares. While the courts use their equitable powers to fashion an appropriate remedy, discounts are often large and poorly calibrated to attribute blame. Massachusetts courts should reconsider their willingness to discount shares in a close corporation when remedying breaches of fiduciary duty in the close corporation.

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