STATE OF MICHIGAN
IN THE SUPREME COURT

RAMA MADUGULA,
Plaintiff-Appellee

v

BENJAMIN A. TAUB,
Defendant-Appellant

Supreme Court No. 146289

Court of Appeals No. 298425

Circuit Court Case No. 2008-000537-CK

---

# AMICUS CURIAE BRIEF OF THE BUSINESS LAW SECTION OF THE STATE BAR OF MICHIGAN

---


Gerard V. Mantese (P34424)
Mark C. Rossman (P63034)
Brian M. Saxe (P77046)
Mantese Honigman Rossman
and Williamson, P.C.
Attorneys for Plaintiff-Appellee
1361 E. Big Beaver Road
Troy, MI 48083 / (248) 457-9200

Ian James Reach (P25316)
Reach Law Firm
Attorneys for Defendant-Appellant Taub
106 N. Fourth Ave., Suite 100
Ann Arbor, MI 48105 / (734) 994-1400





Peter S. Tangalos (P52969)
Tangalos & Asssociates, P.C.
Attorneys for Plaintiff-Appellee
255 S. Old Woodward Ave., Suite 300
Birmingham, MI 48009 / (248) 641-5161

John F. Ward, Jr. (*Pro hac vice*)
Jenner & Block LLP
Attorneys for Defendant-Appellant Taub
353 North Clark St.
Chicago, IL 606054 / (312) 923-2650

Corene C. Ford (P66118)
Blum & Associates
Attorneys for Plaintiff-Appellee
15815 W. 12 Mile Road
Southfield, MI 48076 / (248) 552-8500

Jessica Ring Amunson (*Pro hac vice*)
Jenner & Block LLP
Attorneys for Defendant-Appellant Taub
1099 New York Ave., N.W., Suite 900
Washington, D.C. 20001 / (202) 639-6000

Justin G Klimko (P31619)
Douglas L. Toering (P34329)
Cyril Moscow (P18009)
James L. Carey (P67908)
Attorneys for Amicus Curiae
Business Law Section, State Bar of Michigan

James L. Carey (P67908)
Thomas M. Cooley Law School
2630 Featherstone Road
Auburn Hills, MI 48326 / (248) 751-7800

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Statutes and Other Authorities**

## STATEMENT OF BASIS OF JURISDICTION

Amicus curiae accepts the Statement of Appellate Jurisdiction set forth at page 1 of defendant-appellant Taub's Brief on Appeal.

## STATEMENT OF QUESTIONS PRESENTED

**QUESTION 1** — Are claims brought under MCL 450.1489 equitable claims to be decided by a court of equity?

| | |
|---|---|
| Defendant-Appellant Taub's Answer: | Yes. |
| Plaintiff-Appellee Madugula's Answer: | No. |
| Trial Court's Answer: | No. |
| Court of Appeals' Answer: | No. |
| Amicus Curiae's Answer: | Yes. |

**QUESTION 2** — Can the provisions of a stockholders' agreement create shareholder interests protected by MCL 450.1489?

| | |
|---|---|
| Defendant-Appellant Taub's Answer: | No. |
| Plaintiff-Appellee Madugula's Answer: | Yes. |
| Trial Court's Answer: | Yes. |
| Court of Appeals' Answer: | Yes. |
| Amicus Curiae's Answer: | Yes, provided such interests are interests typically associated with being a shareholder and the interference substantially interferes with the total mix of the shareholder's rights. |

**QUESTION 3** — Were the plaintiff's interests as a shareholder interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship?

| | |
|---|---|
| Defendant-Appellant Taub's Answer: | No. |
| Plaintiff-Appellee Madugula's Answer: | Yes. |
| Trial Court's Answer: | Yes. |
| Court of Appeals' Answer: | Yes. |
| Amicus Curiae's Answer: | Retention of one's status as a shareholder and director does not preclude a Section 489 action. |

## STANDARD OF REVIEW

Amicus curiae accepts the standards of review set forth at each of page 18, 28 and 35 of defendant-appellant Taub's Brief on Appeal, namely that this Court reviews *de novo* each of: (1) the constitutional question of whether a party is entitled to a jury trial; (2) a trial court's denial of a motion for judgment notwithstanding the verdict; and (3) questions of statutory interpretation.

## INTEREST OF AMICUS CURIAE

The Business Law Section of the State Bar of Michigan files this brief amicus curiae pursuant to the June 5, 2013 invitation of the Supreme Court of Michigan.

## REQUIRED STATEMENT AND REPORT OF AMICUS CURIAE REGARDING POSITION TAKEN

The Business Law Section is a Section of the State Bar of Michigan whose members join voluntarily based on common professional interest. It does not speak for the State Bar of Michigan. The positions expressed in this brief are those of the Business Law Section only, and are not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The Business Law Section currently has over 3,200 members and the affairs of the Section are administered by an elected Council. The preparation of this brief on behalf of the Section was initially approved by the Council after discussions at a meeting held in conformance with the Section's bylaws on June 8, 2013. The positions taken in this brief were formally adopted by a vote of the Council after discussion at a meeting held in conformance with the Section's bylaws on December 2, 2013. The Council currently consists of 15 members. Of the 13 Council members who attended the December 2, 2013 meeting, 12 voted in favor of the positions that are presented in this amicus brief, 1 abstained, and 0 voted against.

The subject matter of the positions taken in this Brief is within the jurisdiction of the Business Law Section, and the positions taken in this Brief were adopted in accordance with the Section's bylaws. The requirements of State Bar of Michigan Bylaw Article VIII have been satisfied.

The required report from the Business Section of the State Bar of Michigan is provided on the next page.

SBM | BUSINESS LAW SECTION

## Report on Public Policy Position

**Name of section:** Business Law Section

**Contact person:** Jeffrey J. Van Winkle, Section Chair

**E-mail:** jvanwinkle@clarkhill.com

**Amicus Curiae:** Amicus brief in *Madugula v Taub*

**Date position was adopted:** December 2, 2013

**Process used to take the ideological position:** Position adopted after discussion and vote at a special meeting.

**Number of members in the decision-making body:** 15

**Number who voted in favor and opposed to the position:**
12 Voted for position
0 Voted against position
3 Did not vote

**Position:**
The Michigan Supreme Court requested that the Business Law Section submit an amicus brief to address the issues raised by the case of *Madugula v Taub*. Three issues are raised in the appeal, of which the Section is addressing all three. The positions of the Section in the amicus brief are that: (1) claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity; (2) the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489 provided such interests are interests typically associated with being a shareholder and the interference substantially interferes with the total mix of the shareholder's rights; and (3) retention of one's status as a shareholder and director does not preclude a Section 489 action.

**Explanation of the position, including any recommended amendments:**
In the case of *Madugula v Taub*, the trial court should have made the determination of whether there was oppression under all of the circumstances, and if oppression were found, devise an appropriate remedy. These errors were upheld by the court of appeals. As the lower courts failed to properly apply the law in question, the Supreme Court should render a decision consistent with the above positions.

## LAW AND ANALYSIS

### Summary

Amicus curiae the Business Law Section of the State Bar of Michigan submits this brief at the invitation of the Court in its order of June 5, 2013 granting leave to appeal. In its order, the Court asked that the following issues be briefed: (1) whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity; (2) whether the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489; and (3) whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship. *Madugula v Taub*, 494 Mich 862, 831 NW2d 235 (2013).

In response to the first issue, amicus maintains that all of Section 489[1] is equitable. Where, as here, the statute does not plainly state whether a jury trial is available, Michigan courts have stressed legislative intent. *Anzaldua v Band*, 457 Mich 530, 578 NW2d 306 (1998). The oppression remedy was originally contained in Section 825[2] of the of the Michigan Business Corporation Act[3] (the "**BCA**"), within the chapter governing dissolution. That section provided that in a shareholder action to *dissolve* a corporation because of oppressive conduct, a court could make an order granting relief other than dissolution, and listed the remedies currently contained in Section 489(1)(b)-(e). This formulation, particularly with its premise of an action for dissolution, indicated that a proceeding under Section 825 was purely equitable.

As part of the 1989 BCA amendments, the oppression provision was moved to Chapter 4 of the BCA, which governs shareholder matters. This shifted the emphasis away from dissolution as a primary remedy. At the same time, and for the same purpose – to emphasize the

---

[1] MCL 450.1489.
[2] Former MCL 450.1825, prior to the 1989 amendments to the BCA.
[3] MCL 450.1101, *et seq.*

availability of remedies short of the drastic remedy of dissolution – Subsection (f) was added, permitting an award of damages. The list of remedies in Section 489(1)(a)-(f) is nonexclusive. Adding a reference to damages did not expand the relief available to shareholders; rather, it simply acknowledged a power that courts of equity have long had to grant full relief to the parties. There is a single action for oppression under Section 489. Whether oppression has occurred is to be determined by a court in equity. If the court finds oppression, it can then fashion a remedy in its discretion, which may (but is not required to) include the remedies listed in Subsections (1)(a)-(f).

Regarding the second issue, breach of an agreement among shareholders does not, of itself, give rise to an action under Section 489. A contract, however, can create a shareholder interest that might be considered as part of the aggregate rights of the shareholder when a court evaluates a claim for substantial interference with shareholder interests. Although a contractual breach can be evidence of a pattern of willfully unfair and oppressive conduct, in most situations the court should leave the parties to their contractual remedies.

Finally, the fact that a person remains a shareholder or a director does not bar him or her a Section 489 claim. The section begins by saying that "a *shareholder* may bring an action ...".[4] This limits actions to those who remain shareholders and dispels any suggestion that remaining a shareholder negates an oppression action. Additionally, the statute makes no reference to status as a director and instead focuses on a person's interests "as a shareholder".[5]

**Background**

The interpretation and application of MCL 450.1489 can best be understood in light of the evolution of the section. The development of this provision shows a continuous legislative

[4] MCL 450.1489(1) (emphasis supplied).
[5] MCL 450.1489(3).

attempt to make a flexible remedy available to oppressed minority shareholders while preventing overuse of the remedy. Prior to the adoption of the Michigan Business Corporation Act effective January 1, 1973, Michigan corporation statutes did not provide a statutory remedy for a shareholder seeking dissolution because of oppression. Courts of equity, however, provided a remedy in exceptional circumstances.

The prior Michigan law was summarized in *Stott Realty Co. v Orloff*, 262 Mich 375, 381, 247 NW 698, 699 (1933):

> The applicable law of this State may be summed up in a quotation from the opinion of Mr. Justice Clark in *Edison v. Fleckenstein Pump Co*, 249 Mich 234, 228 N.W. 705, 706 [(1930)] , in which the authorities are cited:
>
> "There is no doubt that in certain exceptional cases, such as relieving from fraud, or breach of trust, a court of equity may in its inherent power wind up the affairs of a corporation as an incident to adequate relief.***
>
> "But in the absence of all such exceptional circumstances the equity court, in its inherent power, may not dissolve a corporation, wind up its affairs, and, for that purpose alone, sequester corporate property."
>
> Dissolution is not a remedy to be lightly decreed. The court has ample power in other ways to give relief for substantially all corporate ills. *See Turner v Calumet & Hecia Mining Co.*, 187 Mich. 238, 153 N.W. 718 [(1915)]. It may require an accounting for misappropriation of funds, secret profits, and the like. It may restrain or compel the corporation and its officers to lawful conduct, and, ordinarily, protect the stockholders in all their rights without dissolution. Dissolution is a last-resort remedy, to be applied when no other will give relief.
>
> The ultimate test of dissolution is that, with any other remedy, the corporation cannot be made to function for the purpose of its creation. The test of failure of corporate purpose is whether ruin will inevitably follow continuance of the management. 43 A.L.R. 305, note.

See also *Miner v. Belle Isle Ice Co.*, 93 Mich 97, 53 NW 218 (1892) where dissolution was ordered and the defendant controlling shareholder forced to account for funds improperly obtained.

These cases demonstrate that, to the extent that an action analogous to oppression existed at common law when Michigan's constitution was adopted in 1963, it was an action at equity for extraordinary relief.

As included in the BCA in 1973, former Section 825 provided:

> (1) The circuit court of the county in which the registered office of the corporation is located may adjudge the dissolution of, and liquidate the assets and business of, a corporation, in an action filed by a shareholder when it is established that the acts of the directors or those in control of the corporation are illegal, fraudulent or willfully unfair and oppressive to the corporation or to such shareholder.
>
> (2) In an action filed by a shareholder to dissolve the corporation on a ground enumerated in subsection (1), the circuit court upon establishment of such ground may make such order or grant such relief, other than dissolution, as it deems appropriate, including, without limitation, an order providing for any of the following:
>
> (a) Cancellation or alteration of a provision contained in the articles of incorporation, or an amendment thereof, or in the bylaws of the corporation.
>
> (b) Cancellation, alteration or injunction against a resolution or other act of the corporation.
>
> (c) Direction or prohibition of an act of the corporation or of shareholders, directors, officers or other persons party to the action.
>
> (d) Purchase at their fair value of shares of a shareholder, either by the corporation or by the officers, directors or other shareholders responsible for the wrongful acts.

The report of the Law Revision Commission that recommended the BCA be adopted in 1972 discussed Section 825:

> The purpose of the provision is to provide a remedy for oppressive acts of majority shareholders or directors. Dissolution as an available remedy, as provided in subsection (a), is widely provided in United States: e.g., [Model Business Corporation Act (1969 Revision)] § 97(a)(2) and (a)(4), allowing dissolution where "the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent" and also when "the corporate assets are being misapplied or wasted". The problem with this approach is that it is unduly limited: dissolution may be too drastic a remedy. The alternative approaches of (b) are derived from section 210 of English Companies Act and section 186 of the Uniform Australian Companies Act. Some favorable experience has developed in

> England and the Commonwealth countries with these provisions. See Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 Va. L. Rev. 1043 (1969). The South Carolina statute, which is an improvement, has had no litigation to date.
>
> Note that the alternative remedies of (b) are not mandatory. They simply afford the court greater flexibility in the oppression situation. It is unlikely, of course, that any such remedy would be imposed on a corporation whose shares are readily marketed, since the market itself would provide relief from oppression in almost any situation.

Michigan Law Revision Commission 5th Annual Report (Supplement) 1970 at 255.[6]

In practice, the intended broadening of available equitable remedies for oppression was limited by the location of the provision in the dissolution section and resulting court references to prior dissolution precedents. For example, in discussing the elements of an oppression action in the context of determining the likelihood of success on the merits for purposes of a preliminary injunction motion, the federal district court in *Meyer Jewelry Co. v Meyer Holdings, Inc.*, 906 FSupp 428 (ED Mich, 1995), quoted *Barnett v Int'l Tennis Corp.*, 80 Mich App 396, 417, 263 NW2d 908, 918 (1978), on the standard the defendant would have to meet to obtain dissolution as a remedy on its counterclaim: "The ultimate test is whether corporate ruin will inevitably follow continuance of present management."

To encourage alternative remedies to dissolution, the BCA was revised in 1989. As part of those changes, the substance of Section 825 was moved to a new Section 489. The commentary to the revisions prepared by the Business Law Section's Corporate Laws Committee for these amendments stated:

> The section is drawn in large part from now repealed section 825, but there are significant changes in both the placement and language of the provision. It has been moved from chapter 8 (the dissolution chapter) and its language modified to avoid undue emphasis upon dissolution as a remedy for oppression. As a result, it becomes clear that a court need not focus on dissolution as the sole or even

[6] Subsequent to this Annual Report, the proposed amendments were changed from lettering the subsections of Section 825 with (a) and (b) to numbering these subsections with (1) and (2).

> primary remedy for oppression; rather, a wide variety of remedies should be considered. The standard of oppression, however, has not been changed. New language has been adopted making the provision inapplicable to actions by those holding shares listed on a national securities exchange or regularly quoted in the over-the-counter market. Thus, the reach of section 489 is limited to smaller or closely held corporations; the limitation assures that the section will operate in conformity with its original purpose, the protection of minority holders of untraded stock.[7]

To facilitate the use of whatever remedies the court found appropriate, the new Section 489 expressly included damages in a new Subsection (f). This addition did not expand the options available to a judge in considering remedies for an oppression claim because the listing had always been nonexclusive. It simply expressly included in the statute an option that had always been available at common law.

The separation of the oppression remedy from dissolution precedents led to the unforeseen consequence of numerous allegations of oppression in ordinary employment and other business disputes. Consequently, the Corporate Laws Committee drafted a proposed definition of oppression that focused on shareholder interests. As adopted in the 2001 Amendments to the BCA, the definition stated:

> As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The drafters' comments to the section 489 amendment stated:

> The proposed amendment makes clear that section 489 does not protect employment interests unless an action or a course of conduct affecting employment also affects the shareholder's interests as a shareholder. In this

---

[7] Excerpts from the *Proposed Revised Michigan Business Corporation Act Reporters' Draft #2* (January, 1989) attached as **Exhibit A**. See also *Baks v Moroun*, 227 Mich App 472, 477, 576 NW2d 413, 416 (1998), quoting Shulman et. al., MICHIGAN CORPORATION LAW AND PRACTICE, (1993 Supp), p. S–71.

> connection, 'interests' as a shareholder means financial return related to status as a shareholder.[8]

Conduct or actions permitted by agreement were excluded from oppression to avoid undermining close corporation shareholder agreements under MCL 450.1488. Shulman, *et. al.*, MICHIGAN CORPORATION LAW AND PRACTICE, Section 4.22, Note 173a.

The 2001 amendments also attempted to deal with the court of appeals decision in *Baks v Moroun*, 227 Mich App 472, 576 NW2d 413 (1998). There, the court held that Section 489 did not create a separate cause of action and that the limitation periods in MCL 450.1541a apply to Section 489 actions. The 2001 Amendments responded to the *Baks* decision by revising the alternative damage remedy provision in Section 489(1)(f), to read:

> An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.[9]

In the working draft of the amendment containing the statute of limitations dated October 19, 2000, the BCA Subcommittee of the Corporate Laws Committee included the following comment:

> The *Baks* decision created the anomalous result that directors who engage in unfair and oppressive conduct are subject to the limitations period in section 541a(4), but non-director controlling persons committing similar acts are subject to another limitations period. The origin of section 489 as an alternative to dissolution suggests that a single limitations period should apply. Section 489 requires a showing of more egregious conduct ("unfair and oppressive") than a simple breach of duty that could create a claim on behalf of the corporation that is subject to section 541a(4). To resolve the discrepancy brought about by Baks, the proposed language uses the formulation of section 541a(4) but with the general

---

[8] Excerpts from the *Proposed Amendments Michigan Business Corporation Act Working Copy* dated October 19, 2000 attached as **Exhibit B**, exhibit page 3, document page 22.

[9] The Corporate Laws Committee recommended the usual default six year statute of limitations to overcome the *Baks* case holding. Senate Bill 206 with that limitations period was changed in the Senate committee to the three year formulation used in Section 541(a). There is no evidence of intention to impose a jury requirement for the Subsection (f) damage award alternative.

> six year statute of limitations for claims for monetary relief. Other remedies, such as an injunction or a court ordered buyout of minority shareholders at fair value, are not affected by the limitations period and would remain governed by general equitable principles. Since the action is derived from the traditional equity powers of the court over corporations, a jury trial should not be available.[10]

In 2002, the *Baks* decision was overturned by a court of appeals conflict panel in *Estes v Idea Eng'g & Fabrications, Inc.*, 250 Mich App 270, 649 NW2d 84 (2002).

Although the new partial definition of oppression ("interests of a shareholder as a shareholder") was intended to refine the standard and limit the growth of oppression actions, it was applied in an overly restrictive manner in *Franchino v Franchino*, 263 Mich App 172, 687 NW2d 620 (2004). There, the court used the "as a shareholder" phrase to deny a remedy, even though a termination of employment was allegedly involved with appropriation of corporate profits and retaliation for failure to sign a shareholder agreement. To recognize the possible connection between employment actions and shareholder financial interests, the 2006 Amendments to the BCA added the following sentence to Section 489:

> Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.

*See* Shulman, *et. al.*, MICHIGAN CORPORATION LAW AND PRACTICE, Section 4.22, Note 175(f).

Section 489 has evolved out of attempts to balance equitable remedies for oppression against an overuse of those remedies. Applying the general standard of willfully unfair and oppressive conduct to concrete circumstances necessarily involves judicial discretion applying equitable principles.

---

[10] Excerpts from the *Proposed Amendments Michigan Business Corporation Act Working Copy* dated October 19, 2000 attached as **Exhibit B**, exhibit pages 3-4, document pages 22-23.

## I. CLAIMS BROUGHT UNDER MCL 450.1489 ARE EQUITABLE CLAIMS TO BE DECIDED BY A COURT OF EQUITY.

The statutory background demonstrates that Section 489 evolved out of the equitable powers of courts. Section 489 has consistently been considered to involve an equitable action. See *Forsberg v Forsberg Flowers, Inc.*, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued December 5, 2006 (Docket No. 253762); *Salvadore v Connor*, 87 Mich App 664, 276 NW2d 458 (1978); *Matter of Dissolution of Esquire Products Int'l, Inc.* (On Remand), 145 Mich App 106, 377 NW2d 356 (1985); *Kotsonis v Kotsonis*, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued August 15, 2000 (Docket No. 216274); Moscow and Ankers, *Oppression of Minority Shareholders*, Mich Bar Journal, No. 11, p. 1088 (1998); Shulman, *et.al.*, MICHIGAN CORPORATION LAW AND PRACTICE, Section 4.22.

When a party demands jury trial of a claim, the court must determine whether the claim is one that must be decided by a court of equity. Here, the trial court allowed a jury trial on all aspects of plaintiff-appellee Madugula's oppression claims, including the determination of oppression and the awarding purchase of Madugula's shares and damages as remedies. The court of appeals affirmed with multiple opinions, but only one included a direct discussion of the availability of a jury trial.

The court of appeals majority in *Forsberg* correctly analyzed the availability of jury trial under Section 489:

> By its unambiguous language, we conclude MCL 450.1489 does not provide for a right to a jury trial. It does not direct before whom an action is to be tried. However, it expressly indicates that, when a party establishes grounds for relief, "the circuit court may make an order or grant relief as it considers appropriate." MCL 450.1489 (1). This is a directive as to what the court "should do." *Anzaldua, supra* at 536. It does not presume, in contrast to the WPA, that in doing so the court "is entering an order based on previously decided issues of fact." *Id.*
>
> Moreover, five of the six enumerated remedies in MCL 450.1489 are equitable in nature. See MCL 450.1489(1)(a)-(e); cf. *Anzaldua, supra* at 541 (discussing legal

> remedy of money damages). While the court is likewise authorized to award damages, MCL 450.1489(1)(f), "the mere fact that damages are sought is not determinative of the legal or equitable nature of the action, because damages may be recovered in purely equitable proceedings. " *Anzaldua v Band*, 216 Mich App 561, 576 n 4; 550 NW2d 544 (1996), *affd* 457 Mich 530 (1998) [hereinafter "*Anzaldua II*"]. Because MCL 450.1489 contemplates that the circuit court fashion an order or grant relief it deems appropriate, a jury trial right is not embodied in the statute.
>
> Although the inclusion of a potential award of damages under MCL 450.1489 could be deemed legal in nature, and thus within the province of a jury, see *Anzaldua, supra* at 541, such a conclusion is not consistent with the history of this statute. As originally enacted, MCL 450.1489 contained the remedies enumerated in its current form, including language expressly authorizing an award of damages. See 1989 PA 121, § 489. The predecessor to MCL 450.1489 was MCL 450.1825. See 1972 PA 284, § 825; see also *Estes v Idea Engineering & Fabricating, Inc.*, 250 Mich App 270, 284; 649 NW2d 84 (2002). MCL 450.1825 granted circuit courts the power to take the same actions currently stated under MCL 450.1489, except that the courts were not specifically authorized to award damages. Both statutes empowered circuit courts to "make orders" or "grant relief" as appropriate. However, the actions embodied in MCL 450.1825 were traditionally considered to be equitable in nature. See, e.g., *Barnett v International Tennis Corp*, 80 Mich App 396, 403-404, 416-417; 263 NW2d 908 (1978). The addition of authority to award damages did not change the character of these actions, given that the other provisions remained substantially the same. Further, nothing surrounding the enactment of MCL 450.1489 suggests that the Legislature intended this authorization to alter the equitable nature of the action.

The background of Section 489 demonstrates that claims brought under the section are equitable claims to be decided by a court of equity. Neither the determination that oppression has occurred, nor the award of remedies if oppression is found, should be given to a jury.[11]

The express addition of "award of damages" to the list of nonexclusive alternative remedies available to the court did not create a right to a jury trial. Rather, the drafters and the legislature intended to do nothing more than encourage flexibility in the application of the remedies historically available. Michigan courts of equity traditionally had the power to award

---

[11] The defendant in this case agreed that the damage claim could be submitted to a jury. Just as a party may waive its right to a jury trial (see *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 183, 405 NW2d 88 (1987)), it may also waive its right to have a matter decided by a court of equity. Absent such a waiver, however, Section 489 claims are equitable claims to be decided by a court.

damages as part of general equity powers. *Johnson v Douglas*, 281 Mich 247, 274 NW 780 (1937); *Frank v Coyle*, 310 Mich 14, 16 NW2d 649 (1944); *Reinink v Van Loozenoord*, 370 Mich 121, 121 NW2d 689 (1963); *Godwin v Lindbert*, 101 Mich App 754, 300 NW2d 514 (1980). There is no indication that the legislature, in adding Subsection (f) to Section 489, intended to create a new cause of action or add a right to jury trial to what had previously been a strictly equitable proceeding. Instead, the basic structure of Section 489 remained intact.

Moreover, the use of the term "award" in Subsection (f) supports the conclusion that no jury trial was intended for damages. *Cf Anzaldua v Band,* 457 Mich 530, 536, 578 NW2d 306, 309 (1998). Similarly, the addition of a limitations period in Subsection (f) in the 2001 Amendments was a reaction to the confusion in the *Baks* case and not intended to change the equitable nature of the Section 489 provision.

Section 489 contemplates a single action for oppression and makes remedies available only if "the shareholder establishes grounds for relief...".[12] If the threshold question of whether oppression has occurred were subject to determination by two separate triers of fact – a judge for purposes of granting relief under Subsections (1)(a)-(e) and a jury for relief under Subsection (1)(f) – there could be inconsistent findings of liability on the same set of facts. A judge might find no oppression while a jury finds oppression, or vice versa. Though Michigan courts have recognized the possibility of such inconsistent factual determinations where required to preserve constitutional rights (*see Smith v Univ. of Detroit*, 145 Mich App 468, 479; 378 NW2d 511, 516 (1985)), this is not a preferred outcome. While Section 489 contemplates the possibility that some relief might be granted while other relief is denied, there is no indication that the legislature intended that the same set of facts would lead to inconsistent findings of liability in

[12] MCL 450.1489(1).

the same action. In addition, if the damage remedy were given to the jury, the court would lose the discretion to fashion a remedy that includes damages as an element of granting complete relief.

Section 489 anticipates that the court may make an order or grant relief that it considers appropriate *after* finding that oppression has occurred. Expressly including damages as a remedy in Section 489 was not intended suddenly to create a legal cause of action where none had existed under its predecessor, Section 825. This is especially true because it "is well established that an equity court, once it has acquired jurisdiction over the subject matter of a controversy, has discretionary power to award complete relief including compensatory damages."[13] Adding damages to the nonexclusive list in Section 489 merely made more clear the breadth of the equitable remedies available for oppression.

Overall, both the background and the language indicate that Section 489 provides a flexible set of equitable remedies to be applied when a court finds that willfully unfair and oppressive conduct has been established.

[13] *Punitive Damages Held Recoverable in Action for Equitable Relief*, 63 Colum. L. Rev. 175, 176 (1963). See also Longhofer, McKenna, Saltzman and Deming, 3 MICHIGAN COURT RULES PRACTICE § 2508.4 (6th ed.).

## II. THE PROVISIONS OF A STOCKHOLDERS' AGREEMENT CAN CREATE SHAREHOLDER INTERESTS PROTECTED BY MCL 450.1489 WHEN THEIR VIOLATION SUBSTANTIALLY INTERFERES WITH THE AGGREGATE OF SHAREHOLDER INTERESTS.

The standard of "willfully unfair and oppressive" conduct requires that a court apply the general terms to a concrete situation. It, therefore, is not appropriate to adopt a strict rule that a particular action automatically meets the standard. Even after the court in Section 489 case determines that the general standard is satisfied, the court must fashion an appropriate remedy, taking into account other remedies that might be available.

Here, the lower courts correctly determined that violations of a shareholder agreement under some circumstances could be evidence of willfully unfair and oppressive conduct. For example, a squeeze-out attempt might involve breaches of contractual provisions as part of a program to force a minority shareholder to sell shares.

On the other hand, a breach of an agreement to employ a shareholder, standing alone (even if in a shareholder agreement), could give rise to a contractual claim, but would not ordinarily constitute oppression. Instead, willfully unfair and oppressive conduct is "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of a shareholder as a shareholder". Not every breach of an agreement to which a shareholder is a party constitutes oppression.

In this case, defendant-appellant Taub allegedly violated the shareholder's agreement by failing to observe a supermajority vote requirement prior to changing the nature of the business and reducing the plaintiff-appellee Madugula's compensation. Although shareholder interests are not necessarily confined to basic rights like voting, neither the nature of the business nor employment directly relate to interests of a shareholder ***as a shareholder***, as required under Section 489. Also, the denial of special contractual voting rights alone would not constitute a continuing course of conduct or a significant action or series of actions that would substantially

interfere with shareholder interests. As indicated in the subcommittee comments to the 2006 Amendments to the BCA, a change in compensation could be evidence of oppression in some circumstances.

Amicus suggests the following framework for Section 489 analysis:

1. A court must consider all of the circumstances on a case by case basis to determine whether there is willfully unfair and oppressive conduct under Section 489.

2. Section 489 provides a cause of action only for substantial interference with a shareholder's interests "as a shareholder". Those interests, in turn, generally relate to traditional rights associated with shareholder status, such as ownership, voting, distributions and share transfer. It is important to note, however, that such interests might extend beyond those traditional rights in some circumstances in the close corporation context.

3. The statutory reference to "interests" in the plural indicates a focus on the total mix or aggregation of shareholder interests and not on a particular interest in isolation. The total mix of shareholder interests in a particular case must be considered.

4. A shareholder agreement can create a shareholder interest, which in an appropriate situation might be considered as part of the aggregate interests of a shareholder protected under Section 489.

5. Depending on the degree of interference and the importance of the shareholder interests involved, violation of a single significant shareholder interest could constitute oppression, while violation of multiple lesser shareholder interests might not. There is no quantitative test or tally to determine whether the threshold of substantial interference has been crossed; rather, in each case, the court should determine whether the conduct complained of

substantially interferes with the shareholder's aggregate interests as a shareholder, giving appropriate weight to the various interests.

Even if an interest created by an agreement qualifies under the definition, a violation of the right will not be oppression unless it is part of "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of a shareholder as a shareholder". Breach of a single provision is unlikely to satisfy the test, but it might be evidence of a continuing course of conduct that affects overall shareholder interests. If oppression is found, then the court has discretion to either deny relief or fashion an appropriate remedy from all of the equitable remedies available to Michigan courts.

In this case, the defendant was found to have breached a supermajority voting provision in an agreement. These votes related to employment and business direction changes, which individually would not typically be interests of a shareholder as a shareholder. Nevertheless, deciding whether the breach significantly interfered with the aggregate interests of the shareholder under the circumstances and, if so, what remedy is appropriate, is for the trial court.

The availability of contract remedies militates against the use of equitable remedies. Although breaches of contract in some circumstances could be evidence of possible oppression, in most cases a court of equity should leave the plaintiff to his or her contractual remedies. This would be consistent with the overall policy of the BCA. MCL 450.1488, which immediately precedes Section 489, permits shareholders of privately held corporations to arrange corporate affairs in ways that would not otherwise be permissible under the BCA. This demonstrates a policy to permit private ordering of the affairs of close corporations and to respect the principle of freedom of contract.

## III. WHETHER THE PLAINTIFF'S INTERESTS AS A SHAREHOLDER COULD BE INTERFERED WITH DISPROPORTIONATELY, WHERE PLAINTIFF KEPT HIS BOARD SEAT AND SHARES, DEPENDS ON ALL OF THE CIRCUMSTANCES.

The background summary demonstrates that the "disproportionately" language was an attempt to separate ordinary disputes, such as employment claims, from an abuse of minority shareholders. As in the case of breaches of a shareholder agreement, changes in the position of a minority shareholder in a corporation might under certain circumstances be evidence of oppression. By the same token, a court might find that a person's continuation as a shareholder or director is evidence that no oppression has occurred under the circumstance of a particular case. However, continuation of such status is not a threshold issue or a bar to maintaining an action under Section 489.

First, removing a shareholder as a director would not itself be willfully unfair and oppressive conduct because continuation as a director is not an interest "as a shareholder". There is neither a requirement nor an expectation at law that a shareholder will be a director.[14] For this reason, the fact that a shareholder continues as a director is not conclusive evidence of a lack of oppression.

Next, Section 489 assumes that a person bringing a claim *will* be a shareholder: "[a] *shareholder* may bring an action ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive ...".[15]

Therefore, the fact that a claimant under Section 489 continues to be a shareholder or director at most can only be evidence to consider under the totality of the circumstances as they relate to the interests of the shareholder as a shareholder, but it does not bar the action.

---

[14] MCL 450.1501 states that "[a] director need not be a shareholder of the corporation unless the articles or bylaws so require."
[15] MCL 450.1489(1) (emphasis supplied).

In this case, the continuation of director and shareholder status may be relevant to the claim made by the plaintiff-appellee Madugula if the trial court concludes that he has been denied access to information about the company. Under MCL 450.1487, a director has the right to full access to corporate information, while a shareholder has a more limited right to information for a proper purpose. The trial court in this case should have first taken into account the legal remedies available to the plaintiff in determining whether extraordinary relief was appropriate in connection with an alleged lack of access to corporate information. As discussed earlier, equitable remedies should not generally be applied where a legal remedy is available.

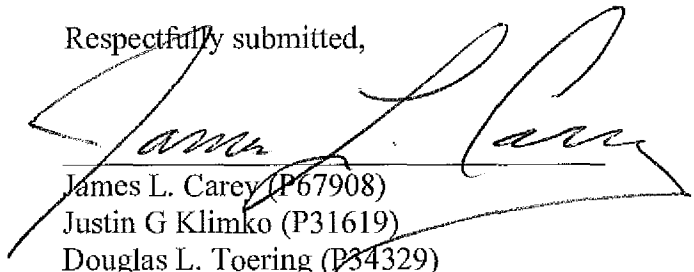
## CONCLUSION

Section 489 evolved in an attempt to provide relief to minority shareholders for oppression by controlling persons where legal remedies are unavailable. Its development evidences an intent to provide remedies short of dissolution of the corporation and without encouraging excessive litigation. Section 489 claims require an equitable analysis that evaluates whether there has been substantial interference with the totality of a shareholder's interests and invokes the discretion of the court in fashioning remedies. Violations of a shareholder agreement and the continuation of a claimant's status as a director and shareholder may be considered as evidence in determining the presence or absence of "willfully unfair and oppressive conduct", but are not determinative.

In this case, the trial court should have made the determination of whether there was oppression in light of all of the circumstances, and, if it found oppression, should have devised an appropriate remedy. The alleged breaches of high voting requirements in the shareholder agreement and lack of access to information do not appear to meet the statutory standard, especially since plaintiff-appellee Madugula has contractual and statutory remedies for the claimed abuse. Based upon the foregoing reasons and authorities, amicus requests that this Court render a decision consistent with the above analysis.

Dated: December 3, 2012

Respectfully submitted,



James L. Carey (P67908)
Justin G Klimko (P31619)
Douglas L. Toering (P34329)
Cyril Moscow (P18009)
Attorneys for Amicus Curiae
Business Law Section of the State Bar of Michigan

Justin G. Klimko, Chair
Corporate Laws Committee
Business Law Section of the
State Bar of Michigan

Douglas L. Toering, Chair
Commercial Litigation Committee
Business Law Section of the
State Bar of Michigan

# EXHIBITS

Exhibit A

# PROPOSED REVISED MICHIGAN BUSINESS CORPORATION ACT

REPORTERS' DRAFT #2

January, 1989

CORPORATE LAWS COMMITTEE

BUSINESS LAW SECTION

STATE BAR OF MICHIGAN

SEC. 489. A SHAREHOLDER MAY BRING AN ACTION IN THE CIRCUIT COURT OF THE COUNTY IN WHICH THE PRINCIPAL PLACE OF BUSINESS OR REGISTERED OFFICE OF THE CORPORATION IS LOCATED, TO ESTABLISH THAT THE ACTS OF THE DIRECTORS OR THOSE IN CONTROL OF THE CORPORATION ARE ILLEGAL, FRAUDULENT, OR WILLFULLY UNFAIR AND OPPRESSIVE TO THE CORPORATION, OR TO THE SHAREHOLDER. UPON ESTABLISHMENT OF SUCH GROUND, THE CIRCUIT COURT MAY MAKE AN ORDER OR GRANT RELIEF AS IT CONSIDERS APPROPRIATE, INCLUDING, WITHOUT LIMITATION, AN ORDER PROVIDING FOR ANY OF THE FOLLOWING:

(A) THE DISSOLUTION AND LIQUIDATION OF THE ASSETS AND BUSINESS OF THE CORPORATION.

(B) THE CANCELLATION OR ALTERATION OF A PROVISION CONTAINED IN THE ARTICLES OF INCORPORATION, OR AN AMENDMENT OF THE ARTICLES, OR IN THE BYLAWS OF THE CORPORATION.

(C) THE CANCELLATION, ALTERATION, OR INJUNCTION AGAINST A RESOLUTION OR OTHER ACT OF THE CORPORATION.

(D) THE DIRECTION OR PROHIBITION OF AN ACT OF THE CORPORATION OR OF SHAREHOLDERS, DIRECTORS, OFFICERS, OR OTHER PERSONS PARTY TO THE ACTION.

(E) THE PURCHASE AT FAIR VALUE OF THE SHARES OF A SHAREHOLDER, EITHER BY THE CORPORATION OR BY THE OFFICERS, DIRECTORS, OR OTHER SHAREHOLDERS RESPONSIBLE FOR THE WRONGFUL ACTS.

(F) AWARD OF DAMAGES TO THE CORPORATION OR A SHAREHOLDER.

(2) NO ACTION UNDER THIS SECTION MAY BE BROUGHT BY A SHAREHOLDER WHOSE SHARES ARE LISTED ON A NATIONAL SECURITIES EXCHANGE OR REGULARLY QUOTED IN AN OVER-THE-COUNTER MARKET BY 1 OR MORE MEMBERS OF A NATIONAL OR AFFILIATED SECURITIES ASSOCIATION.

Comment: The section is drawn in large part from section 825 of the present act. There are, however, significant changes in both the placement and language of the provision. It has been moved from chapter 8 (the dissolution chapter) and its language modified to avoid undue emphasis upon dissolution as a remedy for oppression. As a result, it becomes clear that a court need not focus on dissolution as the sole or even primary remedy for oppression; rather, a wide variety of remedies should be considered. Further, new language has been adopted making the provision inapplicable to actions by those holding shares listed on a national securities exchange or regularly quoted in the over-the-counter market. Thus, the reach of section 489 is now limited to smaller or closely held corporations; the limitation assures that the section will operate in conformity with its original purpose, the protection of minority holders of untraded stock.

(3)

Exhibit B

**Working Draft**
**10/19/00**

**PROPOSED AMENDMENTS**
**Michigan Business Corporation Act**

The proposed amendments to the Michigan Business Corporation Act are:

**Section 106 Definitions; C to E**

(4) "ELECTRONIC TRANSMISSION" OR "ELECTRONICALLY TRANSMITTED" MEANS ANY FORM OF COMMUNICATION, NOT DIRECTLY INVOLVING THE PHYSICAL TRANSMISSION OF PAPER, THAT CREATES A RECORD THAT MAY BE RETAINED AND RETRIEVED BY THE RECIPIENT THEREOF, AND THAT MAY BE DIRECTLY REPRODUCED IN PAPER FORM BY THE RECIPIENT THROUGH AN AUTOMATED PROCESS.

COMMENT: The Act already includes provisions for electronic transmission, e.g., Section 421(3)(b) (granting a proxy). The proposed amendments include other authorizations for the use of electronic transmission. The proposed definition has been adopted in Delaware and is similar to the definition in the Model Act section 1.40(7A). As stated in the Model Act commentary, "electronic transmission" or "electronically transmitted" includes both communication systems which in the normal course produce paper, such as telegrams and facsimiles, as well as communication systems which transmit and permit the retention of data which is then subject to subsequent retrieval and reproduction in written form. Electronic transmission is intended to be broadly construed. The term includes the evolving methods of

I. A CONTINUING COURSE OF CONDUCT, OR

II. A SIGNIFICANT ACTION OR SERIES OF ACTIONS,

THAT SUBSTANTIALLY INTERFERES WITH THE INTERESTS OF THE SHAREHOLDER AS A SHAREHOLDER.

(B) DOES NOT INCLUDE CONDUCT OR ACTIONS THAT ARE PERMITTED BY CONTRACT, THE ARTICLES OF INCORPORATION, THE BYLAWS OR THE CONSISTENTLY APPLIED WRITTEN CORPORATE POLICIES OR PROCEDURES.

3

(4) AN ACTION UNDER THIS SECTION FOR MONETARY RELIEF SHALL BE COMMENCED WITHIN SIX YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED, OR WITHIN TWO YEARS AFTER THE TIME WHEN THE CAUSE OF ACTION IS DISCOVERED OR SHOULD REASONABLY HAVE BEEN DISCOVERED BY THE COMPLAINANT, WHICHEVER OCCURS FIRST.

(5) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities exchange.

COMMENT: The proposed language is an attempt to state a balance and to give courts guidance in a difficult area. *Baks v. Moroun*, 227 Mich. App. 472 (1998), highlighted problems

in the interpretation of section 489. *Baks* did not recognize a cause of action under 489 and imported a statute of limitations period from 541a(4). There also now is uncertainty as to the meaning of the statutory test for relief and the effect of shareholder agreements. In addition, the authorization for close corporation participants to make agreements in the Act could be undermined if expectations are not limited by contract. The proposed amendments to the section address these problems.

The revised section recognizes that a section 489 creates a cause of action that does not depend upon or preclude other proceedings on the same facts. It is possible that facts that would support a claim under section 489 also could provide a basis for a shareholder derivative action for breach of director duties.

The proposed amendment makes clear that section 489 does not protect employment interests unless an action or a course of conduct affecting employment also affects the shareholder's interests as a shareholder. In this connection, "interests" as a shareholder means financial return related to status as a shareholder.

The *Baks* decision created the anomalous result that directors who engage in unfair and oppressive conduct are subject to the limitations period in section 541a(4), but non-director controlling persons committing similar acts are subject to another limitations period. The origin of section 489 as an alternative to dissolution suggests that a single limitations period should apply. Section 489 requires a showing of more egregious conduct ("unfair and oppressive") than a simple breach of duty that could create a claim on behalf of the corporation that is subject to

COMMITTEE AMENDMENT TO 3 YEARS

section 541a(4). To resolve the discrepancy brought about by *Baks*, the proposed language uses the formulation of section 541a(4) ~~but with the general six year statute of limitations~~ for claims for monetary relief. Other remedies, such as an injunction or a court ordered buyout of minority shareholders at fair value, are not affected by the limitations period and would remain governed by general equitable principles. Since the action is derived from the traditional equity powers of the court over corporations, a jury trial should not be available.

**Section 521. Regular or special meetings of the board.**

(3) Unless otherwise restricted by the articles of incorporation or bylaws, a member of the board or of a committee designated by the board may participate in a meeting by means of conference telephone or ~~communications equipment~~ OTHER MEANS OF REMOTE COMMUNICATION through which all persons participating in the meeting can communicate with the other participants. Participation in a meeting pursuant to this subsection constitutes presence in person at the meeting.

[The remainder of the section is unchanged.]

COMMENT: The proposed amendment is intended to include any type of technology satisfactory to the directors, including forms of remote communication.