IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

RUSSELL W. CALKINS, III, Plaintiff, vs. DONALD R. BRANDT, CTI HOLDINGS, INC., CLAIM TECHNOLOGIES INCORPORATED, and CTI ADMINISTRATORS, INC., Defendants.	CASE NO. EQCE081752 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

A trial was held in this matter from October 15 through 18, 2018. The court after hearing the evidence and considering the positions of the parties through their proposed findings of fact and conclusions of law finds and orders.

SUMMARY OF CLAIMS AND DEFENSES

Russell Calkins ("Calkins") filed the present matter asserting two theories of recovery. In count I Calkins seeks damages under Iowa Code section 490.1430(1)(b)(2) arguing his treatment by Donald Brandt ("Brandt") and the corporate defendants, CTI Holdings, Inc. ("CTIH"), Claim Technologies Incorporated ("CTI"), and CTI Administrators, Inc.("CTIH"), was illegal, oppressive or fraudulent. Their conduct was oppressive when (1) they violated his reasonable expectation they would negotiate a fair price for his interest in the company[1] and (2) they thwarted his reasonable expectation of continuing employment.[2] Finally he asserted defendants by their actions caused corporate assets to be misapplied or wasted in violation of section

[1] Petition ¶ 66
[2] *Id.* ¶ 67

490.1430(1)(b)(4).[3] He seeks damages for the value of his interest in CTIH, lost wages and benefits and corporate waste.[4] In count II Calkins asserted Brandt as majority shareholder breached his fiduciary duties of care and loyalty to Calkins and CTIH 1) by providing unreasonable compensation to his family members;[5] 2) freezing him out as an officer of CTIH;[6] 3) terminating him as an employee and using the termination to force his sale of his interest;[7] and 4) failed to negotiate fairly to purchase his interest in CTIH.[8] Calkins asserts that he and CTIH Inc. suffered damages as a result of Brandt's actions and requests judgment that fully and fairly compensate them which includes damages for lost wages and benefits.[9]

Defendants denied the allegations and asserted several affirmative defenses. Defendants asserted Calkins' claims were barred by the equitable doctrines of laches, estoppel and unclean hands.[10] Defendants asserted the defense failure to mitigate damages.[11] They asserted Calkins' claims were barred by the statute of limitations and the business judgment rule. Finally, and specifically as to the claim for oppression defendants asserted the parties agreed to a method for determining the fair market value of Calkins' shares which was a three-appraisal process.

FINDINGS OF FACT

Calkins and Brandt have known each other in the insurance-related administration and audit business for over 40 years. They worked together for the first time in 1977. After taking separate paths for a few years, Brandt started Claim Administrative Coalition, Inc. ("CAC") in

[3] *Id.* ¶ 68
[4] *Id.* Prayer for Relief at 16
[5] *Id.* ¶ 73(a-d)
[6] *Id.* ¶ 73(h)
[7] *Id.* ¶ 73(i-j)
[8] *Id.* ¶ 73(j)
[9] *Id*. Prayer for Relief at 17-18
[10] Answer, Additional and Affirmative Defenses ¶ 1
[11] *Id.* ¶ 3

the early 1990s.[12] Brandt started that company with another business acquaintance in the insurance industry, Pat Gagne ("Gagne"). The corporation provided third-party claims administration services to organizations with self-funded health care plans. Brandt owned 100% of the company at its inception, but agreed to gift Gagne 2% per year for 5 years until she owned 10%.

In the early 1990s, Calkins joined Brandt and Gagne in the ownership of the company. Calkins purchased a 39% ownership of the company for the price of $175,000.00. At that time, Brandt agreed to accelerate Gagne's ownership to 10% instead of waiting for the entire 5 years at 2% per year to run. After Calkins joined, Brandt owned 51% of the companies, Calkins owned 39%, and Gagne owned 10%. There was no appraisal or third-party valuation conducted at the time Calkins purchased his shares. There was no discussion whether the price paid by Calkins included a minority discount.

By 1993, another corporation existed. It was known as Claim Technologies Incorporated ("CTI"). CTI focused on auditing health insurance claims administration for public and private entities. At that time, CAC acted as a consultant for the national Boys & Girls Club Worker Association ("BGCWA") employee benefit plans, which was the largest client for the company. CAC also served as a consultant and administrator for other plans and funds.

Calkins and Brandt executed written employment agreements with CAC and CTI, respectively.[13] The employment agreements provided they would receive equal salaries and

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[12] The corporate history of the companies is somewhat confusing. The defendants introduced as an amendment to the articles of incorporation of Claim Administration Coalition, Inc. ("CAC") in which CAC was merged with CTI Administrators, Inc. (CTIA") in 1996. *See* Exhibit 203 at 3 of 10. 1n 1993 the corporate entity CTI was created. It is not clear when CTI Administrators, Inc. was created. The court points this out only because the initial SRRAs and employment agreements were between Calkins, Brandt and the corporate entities, CTI and CAC.

[13] *See* Exhibits 201-202

benefits.[14] Calkins and Brandt also entered into Shareholder Redemption and Restriction Agreements ("SRRA") for CTI and CAC.[15] The SRRAs contained the following procedure for determining the purchase price for any stock sale between Brandt and Calkins:

> 4. Purchase Price. The Purchase Price for purposes of Paragraphs 2 and 3 shall be the higher of (a) the Fair Market Value of the shares of stock owned by the terminated employee at the time of purchase or (b) the price paid for his shares of stock by the terminated employee plus interest at an annualized rate two percent (2%) in excess of the Prime Rate, provided such period shall not exceed five (5) years from the date the shares were Purchased. For purposes of this Agreement, the "Prime Rate" shall equal the rate per annum equal to the prime rate of interest on corporate loans at large United States money centers and commercial banks as reported by The Wall Street Journal. For purposes of this Agreement, the "Fair Market Value" of the shares shall be the fair market value to which Brandt and Calkins may agree to, or lacking such agreement, the fair market value to which three (3) professional investment bankers or appraisers (one (1) selected by Calkins, one (1) selected by Brandt and one (1) selected by CTI) may agree upon, or lacking such agreement, the average of the bona fide fair market values determined by each such investment banker or appraiser. The costs of all such investment bankers or appraisers shall be borne by CTI. The determination of the Fair Market Value when made shall be binding upon Calkins, Brandt and CTI.[16]

From the early 1990's to the end of Calkins' employment Calkins devoted the bulk of his efforts to the claims auditing business, and more specifically to the development of auditing clients. Brandt primarily worked on claims administration work, as well as development of claims audit services and software. Gagne divided her work between both companies and their functions. Both Brandt and Gagne assisted Calkins in the sale of audit services. While Brandt, Gagne, and the employees of these corporations worked in Des Moines, in 1999 Calkins' office was in Chicago.[17] Being in a major metropolitan area gave the Chicago office more credibility. It

[14] It is unclear to the court if Brandt also had an employment agreement with CAC or whether Calkins had an employment agreement with CTI since there were no exhibits entered into the record.
[15] *See* Exhibits 1 and 2
[16] Exhibit 1 at 2; Exhibit 2 at 2
[17] The office was in Calkins' home.

also provided easy airline access to the company a convenience for businesses wishing to do business with the auditing company. Calkins traveled to Des Moines for meetings and other corporate activities from time to time. His travel to Des Moines became less frequent as the relationship between Brandt and himself became strained. The companies' business grew and from 2000 forward, the corporations maintained employees numbering in the low-twenties (at its peak) but, more generally, numbering in the teens.

In 2009, the owners decided to create a new holding corporation that would own the stock of CTI and CTIA known as CTI Holdings, Inc. ("CTIH"). The holding company structure created tax advantages and the ability to allocate profits and losses for the combined entities instead of separately. The consolidated financial statement also made the audit company's finances look better for public bids that required financial disclosures.[18] The creation of the holding company also more accurately reflected the combined nature of the operations, with expenses and employees shared between CTI and CTIA. After the reorganization Brandt owned 51%, Calkins owned 39%, and Gagne owned 10% of the CTIH stock.[19] None of the owners paid new money for their CTIH stock, but instead agreed to transfer their respective CTI and CTIA shares to CTIH. The three owners signed a Reorganization Agreement[20] and Stock Powers[21] to that effect. After the reorganization, Brandt, Calkins, and Gagne owned only CTIH stock. CTIH owned the stock of CTI and CTIA after the reorganization.

New SRRAs and employment agreements were drafted for the shareholders to execute. However, only Gagne signed the new agreements. Brandt and Calkins did not. The new SRAAs

[18] Throughout the course of the trial the parties referred to the audit business as CTI and the claims administration business also CTIA.
[19] Exhibit 3
[20] Exhibit 3
[21] Exhibit 4

and employment agreements were similar but not identical to the earlier agreements and for that reason, Calkins did not sign the new agreements. Brandt testified he had his attorney redraft the agreements so they were identical to the initial SRRAs and employment agreements. Calkins did not sign those agreements and neither did Brandt. The failure by Brandt and Calkins to execute the SRRAs and employment agreements had no impact on the companies' day-to-day business operations. Brandt testified he believed the original SRRAs and employment agreements controlled the parties' conduct today.

At the time of trial CTIH was a closely held corporation in which two shareholders—Calkins held a 43.3 percent interest, and Brandt held a 56.7 percent interest. The percentages changed in 2015 when Gagne sold her interest in CTIH to the corporation pursuant to her SRAA.

The amicable working relationship between Brandt, Calkins and Gagne started to cool when Brandt hired his son, Randy Brandt ("R. Brandt") to work at the companies in 2001. Initially Calkins and Gagne did not believe this hiring was good for the companies due to a previous experience when Brandt hired his son, Larry to work in the company. This employment went awry when Gagne discovered Larry Brandt embezzled from the company, which resulted in his termination. When the company could not find a replacement for L. Brandt and the company workload became too much for the existing employees Brandt brought L. Brandt back into the company for a short period. While Gagne was emphatic that L. Brandt embezzled from the company Brandt testified at trial, he believed his son had lied to Gagne.

When Brandt decided to bring Randy Brandt into the company Calkins and Gagne did not believe this was good for the companies based upon the experience with Larry Brandt. They also questioned this decision because of R. Brandt's lack of experience in the insurance industry. R. Brandt had about 2 years of experience in property insurance but not healthcare at that time.

R. Brandt's compensation in the company rose quite rapidly from his beginning salary of $36,000. He received a 61% increase in salary within approximately six months of joining the company.[22] The evidence established he continued to receive raises to the point he was earning more than Gagne, which she discovered in 2009 or 2010. She testified when she confronted Brandt about this issue Brandt became upset and after that event, she believed the relationship between her and Brandt cooled. Calkins also was involved in discussions regarding this issue. He also testified that Brandt was angry about the challenge. Brandt, in his mind, solved the issue by raising Gagne's salary higher than R. Brandt's.

From the beginning, Brandt supervised and determined R. Brandt's compensation. It was undisputed R. Brandt reported directly to his father. Brandt provided R. Brandt with commissions as part of his compensation package, which no other employee received. Brandt made these decisions without input from Calkins or Gagne. Both Gagne and Calkins testified they received and reviewed R. Brandt's performance reviews and salary increases received by R. Brandt but did not have further discussions on this issue after Gagne raised it in 2009 or 2010, until 2014 when BGCWA terminated its relationship with them.

BGCWA was CTIA's largest client and had been with the company since its inception. R. Brandt primarily was responsible for this client. His compensation was largely covered by the revenues from BGCWA. In 2014 BGCWA terminated its relationship with CTIA.

The concern raised by the loss of the BGCWA account was how the company was going to maintain R. Brandt's high level of compensation when this account was gone. Discussions on this issue occurred between Brandt, Calkins and Gagne where the latter two questioned R.

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[22] Exhibit 225 (Brandt testified R. Brandt received this raise because he assumed the sales and marketing for CTIA, which involved the BGCWA account. He assumed the duties of an employee who held that position and had left the company at that time.)

Brandt's high level of compensation and Brandt's decision to move R. Brandt into a marketing role in the audit business. Calkins particularly did not believe the CTI audit business could absorb R. Brandt's salary and R. Brandt had no experience in the audit side of the company.[23] Brandt became angry with Calkins and Gagne when they challenged him on this decision.[24]

Also in 2014, Brandt and Calkins began discussions concerning a potential buyout of Calkins' ownership interest and Calkins' retirement. It was at this time that Brandt suggested utilizing Marsh Berry & Co. ("Marsh Berry"). This firm had specialized knowledge and experience in insurance industry valuations and transactions. Brandt previously worked with Marsh Berry on a transaction unrelated to CTIH, and from that experience came to learn and appreciate Marsh Berry's industry knowledge and expertise. Brandt and Calkins mutually agreed to have the corporation engage Marsh Berry for the appraisal of Calkins' shares, including separate valuations of CTIA and CTI. An initial meeting occurred with Marsh Berry however shortly after the meeting the company received notice of BGCWA's decision to terminate its relationship with the company and the valuation was put on hold.[25]

In 2015, these discussions resurrected.[26] Although both Calkins and Brandt had each discussed eventual retirement, neither one had set any retirement date. Calkins' retirement was to occur when he and Brandt reached an agreement on the contemporaneous purchase of his stock. Calkins never set a specific retirement date, and no one at the corporation, including Brandt, knew when Calkins was going to retire. The agreement between Brandt and Calkins was that Marsh Berry's valuation would establish the value of the company for the purchase of Calkins' interest thereafter Calkins would retire. On cross-examination, Brandt agreed with the

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[23] *See* Exhibits 9, 12-15
[24] *See* Exhibit 10 ("tired of your bullshit") and disconnected phone call with Calkins)
[25] Exhibit 37
[26] *See* Exhibits 15 and 16

hypothetical question that if Marsh Berry calculated the stock was worth $18 a share Brandt would prepare an offer for Calkins accordingly.

During this same time, there were discussions that Paul von Ebers might be interested in purchasing a 25% minority share in the companies. The tentative agreement was for von Ebers to pay the same price per share that the companies paid for Calkins' shares.[27] Calkins believed the initial valuation from Marsh Berry was to be shared only between Marsh Berry, Brandt and himself. Brandt agreed to this but when he told Calkins he agreed to this arrangement, he had already forwarded the initial valuation to von Ebers.[28] Calkins argued this act by Brandt was another example of Brandt attempting to influence the valuation contrary to Calkins' interest.

In December 2015, Marsh Berry provided their initial fair market valuation.[29] They determined that CTIH as a combined entity had a value of $2,299,400. CTI had a value of $2,856,400 and CTIA had a value of $471,400. These figures included Marsh Berry's 10% reduction in value to account for a lack of marketability discount. After discussions with Brandt and Calkins Marsh Berry revised their valuation and provided this valuation in January 2016. Their valuation concluded CTIH's combined valuation was $2,559,800.[30] CTI valued separately was $3,110,200[31] and CTIA valued separately was $471,400.[32] These valuations also included the lack of marketability discount of 10%. The 2016 valuations were higher than the initial

[27] Exhibit 45 at 2
[28] *See* Exhibits 45-46
[29] Exhibit 189. Calkins believed this was a draft, as did Marsh Berry. Brandt believed it was the first valuation Marsh Berry prepared.
[30] Exhibit 19 at 13 of 23
[31] Exhibit 19 at 14 of 23
[32] *Id.*

valuations by approximately $300,000.00.[33] The primary cause of this increase was the use of a 5% growth rate for the companies.[34]

Based upon these valuations Brandt's first offer to purchase Calkins' stock in March 2016 was $642,257.[35] Brandt used the December 2015 Marsh Berry combined valuation of $2.299 million and reduced it for various factors to reach an adjusted valuation of $1.852 million for the company.[36] His offer included a minority shareholder discount of 20%.[37] He also proposed payment terms giving the companies until January 2019 for complete payment.[38] In response to this offer, Calkins utilized the aggregate total value of the January 2016 Marsh Berry valuations of CTI and CTIA and counteroffered at $1.34 million.[39] After conferring with counsel and Marsh Berry, Brandt raised his offer to $725,000 on June 9, 2016.[40] The second offer also included a minority shareholder discount.[41]

On July 18, 2016, Calkins responded with a proposal for the sale of his stock for $1.25 million. On July 20, 2016, Brandt's attorney sent a two-sentence email to Calkins' attorney:

> I have confirmed with Don that we are so far apart and in view of the absence of stock redemption, we consider the matter of a buy-out of Russ's shares at an impasse. We do not intend to take any further action with respect to a buy-out at this time.[42]

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[33] Exhibit 18 at 13-14
[34] *See* Exhibit 20 (discussion of value Paul von Ebers thought his company could bring to CTIH); Exhibit 19 at 7 of 23 (company expects growth from the addition of PVE Consulting and increased CTI's fee income to increase 5%); Exhibit 22 at 2 of 3
[35] Exhibit 49
[36] Exhibit 49 at 2; Exhibit 64
[37] *Id.*
[38] *Id.*
[39] Exhibit 50
[40] Exhibit 53
[41] Exhibit 53 at 1 ("A minority shareholder discount will be reflected in any fair market valuation of the stock."); Exhibit 220
[42] *Id.*

The next day, Brandt called a special meeting of the corporation's officers that included all the officers—except Calkins. The meeting was brief. R. Brandt, Rob Rater, Dan Montgomery, and Michelle Suckow attended. R. Brandt, Rater, and Montgomery testified that it was Brandt's idea to call the meeting and Brandt suggested Calkins be terminated. Brandt denied in his testimony that it was his idea to terminate Calkins. Despite claiming that going into the meeting he did not intend to terminate Calkins, Brandt under cross-examination had no answer why he excluded Calkins from the meeting.

On July 22, Brandt provided notice of termination to Calkins in a letter sent via certified mail to Calkins' home.[43] He did not call Calkins to deliver the message he was terminated nor the reasons why. Brandt's termination letter stated in relevant part:

> As you know, our financial reports through the first six months are not good. . . . In light of your desire to retire, we agreed that the best remedy is to terminate your employment rather than terminate other employees that are essential to our future growth. Accordingly, I have decided that your employment with CTI Holdings, CTI Administrators, and Claim Technologies Incorporated will be terminated effective August 31, 2016. Please work with Randy on the transition of the Private sector business and Dan on the Public sector.[44]

The loss of the BGCWA account caused the financial hardship facing the company, referenced by Brandt in his letter to Calkins. As noted previously the company in 2014 knew they lost the BGCWA account.[45] The company negotiated a settlement with BGCWA in which the company received a settlement of $460,000, which provided they would handle the claims runout until August 2016. The company knew by January 2015 the settlement runout would end in August 2016. No one suggested prior to the July 2016 that Calkins retire to save the company money. In addition, while everyone anticipated Calkins would retire he indicated it was contingent on reaching an agreement on the purchase of his interest in the company.

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[43] Exhibit 56
[44] *Id.*
[45] Exhibits 214 and 215

The termination of the BGCWA account created not only a significant loss of income but it was the major source of R. Brandt's work duties. Since this work was gone questions arose as to what R. Brandt would do and how would this lack of work justify the exceptionally high salary he had. Calkins' and Gagne's discussion of reducing R. Brandt's salary with Brandt went nowhere.[46] Brandt acknowledged in his testimony he saw no reason to lower R. Brandt's salary as a cost saving measure.

However, during the same time in an effort to help the company financially, Brandt decreased his and Calkins' salary by over 38 percent in two reductions in November 2015 and January 2016. These reductions also occurred during the period Marsh Berry was working on its valuation. During the same period on September 17, 2015, rather than lower R. Brandt's salary, Brandt gave him two significant raises—a 10 percent increase retroactive to January 1, 2015, and another 10 percent increase on March 17, 2016.[47] R. Brandt's W-2 compensation in 2016 totaled $177,979.[48] Other employees likewise received significant raises during this period.[49] Also during this same period, Brandt authorized the expenditure of nearly $200,000 on website development and related work by Flying Hippo.[50] The expenditure with Flying Hippo occurred during the same time that Calkins was working on a redesign of the website.

Prior to July 20, 2016, there was no hint Calkins might be terminated to address financial challenges of the corporation, or for any other reason. Brandt conceded there were no performance issues that supported Calkins' termination. Expense reduction was the only reason ever provided for Calkins' termination. Yet Brandt testified that cutting expenses could not solve

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[46] *See* Exhibit 10
[47] Exhibit 225 at 1 of 6; Exhibit 62
[48] Exhibit 106 at 132 of 148
[49] Exhibit 62
[50] Exhibit 31

the corporation's problems but, to the contrary, the corporation needed to spend more to generate business to increase revenues.

After terminating Calkins, Brandt misrepresented both to CTI's employees and to CTI's clients the reason for Calkins' departure. Rather than informing employees and clients that Calkins was terminated, Brandt communicated that Calkins retired.

In Brandt's termination letter to Calkins, Brandt stated Randy would transition into Calkins' role on private sector business, with Dan Montgomery handling CTI's public sector business. Montgomery joined the corporation in 2007, and was a licensed attorney with decades of experience in the insurance industry and with the claims auditing work CTI performed. Montgomery worked primarily with Calkins in developing, managing, and maintaining CTI's audit clients his entire time with CTI. Montgomery testified that R. Brandt, to whom Brandt had just assigned CTI's substantial private client book of business, could not have gone to any CTI client and been able to explain, "This is how we audit."[51] R. Brandt stated that at the time of the transition, he had no experience or relationships with CTI's clients or other similar potential clients, and had no experience in marketing insurance auditing products or services.

Following Calkins' firing, Brandt through counsel offered to have CTIH valued in a manner similar to the method provided under the 1993 SRRA. The parties discussed this proposal for some period but never reached a consensus. Later Brandt made another offer for Calkins' shares substantially decreased from the July 2016 offer. In late November 2016, Brandt offered to buy Calkins' shares based on a net book value calculation in the amount of $247,317, plus decreasing percentages of the corporation's cash flows over the ensuing three years. Brandt's offer included this statement to Calkins:

[51] Court Exhibit 1, Deposition of Dan Montgomery at 95:1-9

> Without the revenues previously generated by CTI Administrators (CTIA), CTI Holdings (CTIH) is not expected to make a profit in the near future. Understanding the CTIH financial situation, no reasonable investor would pay anything for the opportunity to lose money. Regrettably, this is the CTIH that exists today.[52]

Brandt followed this offer with another valuation he alone commissioned. Brandt engaged HDH Advisors to conduct this valuation. Calkins had no input in the HDH Advisors' valuation. HDH Advisors' appraisal showed a value for Calkins' 43.3 percent interest of $96,000.[53] That amount came before proposed minority discounts of 15 percent for lack of control and 25 percent for lack of marketability, further decreasing Calkins' appraised interest to $61,000.[54]

While receiving substantial distributions from the company annually during his employment since his termination Calkins received distributions totaling only a few hundred dollars.

CONCLUSIONS OF LAW

A. <u>Count I - Oppression</u>

As to count I the following law is applicable.

> Iowa's Business Corporations Act (IBCA) provides that a district court may dissolve a corporation in several types of proceedings, including one initiated by a shareholder alleging "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent." Iowa Code § 490.1430(2)(*b*) (2011). The IBCA, however, offers no definition of "oppressive" or "oppression," and the Model Business Corporation Act, on which the IBCA is based, likewise fails to furnish definitions of these terms. We have not yet interpreted "oppression" in this context, but our court of appeals, after examining the decisions of other jurisdictions, has concluded oppression is "an expansive term used to cover a multitude of situations dealing with improper conduct which is neither illegal nor fraudulent." *Maschmeier v. Southside Press,*

[52] Exhibit 112
[53] Exhibit 59 at 4
[54] *Id.*

> *Ltd.,* 435 N.W.2d 377, 380 (Iowa Ct.App.1988) (citing *Balvik v. Sylvester,* 411 N.W.2d 383, 386 (N.D.1987)).[55]

In *Baur* the court after analyzing the approaches of other jurisdictions adopted a "reasonableness standard for the adjudication of minority shareholder claims of oppression in Iowa."[56] In adopting this standard, the court stated:

> This standard comports with principles announced in our earlier decisions protecting the interests of minority shareholders in closely held corporations. Management-controlling directors and majority shareholders of such corporations have long owed a fiduciary duty to the company and its shareholders. *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.,* 430 N.W.2d 447, 451 (Iowa 1988). This fiduciary duty encompasses a duty of care and a duty of loyalty to the corporation. *Id.* The fiduciary duty also mandates that controlling directors and majority shareholders conduct themselves in a manner that is not oppressive to minority shareholders.
>
> The determination of whether the conduct of controlling directors and majority shareholders is oppressive under section 490.1430(2)(b) and supports a minority shareholder's action for dissolution of a corporation must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances.[57]
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> * * *
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> We hold that majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value.[58]

Calkins contends that he was subjected to a "squeeze-out" or "freeze out" of the corporation by the acts of Brandt when he refused to negotiate a buy-out of his minority interest in the company and terminated his employment. In *Maschmeier,* the court held that majority

[55] *Baur v. Baur Farms, Inc.,* 832 N.W.2d 663, 670 (Iowa 2013)
[56] *Id.* at 673
[57] *Id.* at 673-74
[58] *Id.* at 674

shareholders acted oppressively when they attempted to squeeze out minority shareholders by terminating their employment and preventing their participation in the corporation.[59]

In *Maschmeier* the minority shareholders were sons of the majority owners their parents. The parents started the business. They leased a building they owned to the corporation. The parents each owned 1300 shares of stock in a family business. They were the only officers and directors of the company. The parents gifted each son 1200 shares of stock in the corporation. The corporation employed the sons until the summer of 1985 when family disagreements led to the sons' termination from the corporation. The parents also blocked their sons' attempts to borrow against their pension and profit sharing plans. The parents then discontinued their own employment with the corporation. After discontinuing their employment, the parents set up a competing business. They terminated the lease agreement with the family corporation for the building they owned. They then leased the building to the new corporation. They also entered into lease agreements with the new corporation in which that entity leased the family corporation's assets and gave the new company the option to purchase all of the assets of the family corporation for $20,000. The parents also gave themselves salaries as officers of the family corporation in an amount of $20,000. The court concluded that these actions constituted oppression and waste of the corporation's assets. The court found the action terminating the sons' employment and preventing them from borrowing against the company's pension and profit sharing plans a "freeze-out."[60]

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[59] *Maschmeier v. Southside Press, Ltd.*, 435 N.W.2d 377, 380-81 (Iowa Ct. App. 1988)

[60] *Id.* at 379-80 (citing *Balvik v. Sylvester*, 411 N.W.2d 383, 385, 388 (N.D. 1983)). The *Balvik* court held the firing of a minority shareholder as vice president by the majority shareholder and removing him as director and officer "was to freeze him out from the business in which he reasonably expected to participate, and this conduct, . . ., constituted oppression. . . ."

Other courts find "freeze outs" when the majority shareholder attempts to terminate a minority shareholder's employment or keep them from participating in the corporate affairs of the company.[61] One commentator states:

> The abrupt removal of a minority shareholder from positions of employment and management can be a devastatingly effective squeeze-out technique. A person acquiring a substantial interest in a closely held business often invests a large percentage of personal recourses to acquire that interest. Typically such an investor enters the enterprise expecting to participate actively in the entity's affairs as a key employee and perhaps as a manager, for example as a director and principal officer of a corporation. The investor may give up employment with accumulated seniority and security features to work full time for the new business. Often the participant may have no income other than the salary from the business. Close corporations usually do not pay dividends or pay only small infrequent dividends so that a shareholder excluded from employment is effectively denied anything more than a token return on the investment even though that investment may be substantial.[62]

In order to prevail on his claim under count I Calkins must prove that Brandt, as the majority shareholder, failed "to satisfy the reasonable expectations of a minority shareholder by

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[61] *Muellenberg v. Bikon Corp.,* 143 N.J. 168, 180-81, 669 A.2d 1382, 1388-89 (N.J. 1996) (ouster of minority shareholder was considered a freeze out); *In re the Application of Topper,* 107 Misc.2d 25, 433 N.Y.S.2d 359 (1980) (termination of minority shareholder as employee and officer of two corporations was deemed to be oppressive.); *Gidwitz v. Lanzit Corrugated Box Co.,* 20 Ill.2d 208, 220 , 170 N.E.2d 131, 138 (1960) (majority shareholder deprived other shareholders of participation in the management of corporation deemed oppressive conduct); *Stumpf v. C.E. Stumpf & Sons, Inc.,* 47 Cal.App.3d 230, 235, 120 Cal. Rptr. 671, 675 (1975) (dissolution proper where minority shareholder severed contact from family "he received no salary, dividends, or other revenue from his investment in the corporation."); *Wilkes v. Springside Nursing Home, Inc*., 370 Mass. 842, 847, 852, 353 N.E.2d 657, 661, 662, 664 (Mass. 1976) (elimination of weekly salary, failure to reelect shareholder as director or officer, and told his services nor his presence was wanted by the other shareholders – "it is an inescapable conclusion from all the evidence that the action of the majority stockholders here was designed 'freeze out' for which no legitimate business purpose has been suggested. Furthermore, we may infer that a design to pressure Wilkes into selling his shares to the corporation at a price below their value well may have been at the heart of the majority's plan.")

[62] F. Hodge O'Neal & Robert B. Thomson, 1 O'Neal & Thompson's Oppression of Minority Shareholders & LLC Members [hereinafter, O'Neal & Thompson] § 3:6. (cited in *Baur*, 832 N.W.2d at 670–71, 676).

paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value" and the corporation had the financial resources to do so.[63]

One court has opined that the reasonable expectations that a minority shareholder has is not determined solely at the time of the purchase of the shares but is a continuum examined from the time of the purchase until the end of the relationship. Specifically the *Mieselman* court stated:

> These "reasonable expectations" are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations" created at the inception of the participants' relationship; those "reasonable expectations" as altered over time; and the "reasonable expectations" which develop as the participants engage in a course of dealing in conducting the affairs of the corporation. The interests and views of the other participants must be considered in determining "reasonable expectations." The key is "*reasonable.*" In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not "reasonable." Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.[64]

In reviewing the history of the relationship between Calkins, Brandt and the corporations the reasonable expectations that Calkins had when he joined the company in 1991 can be demonstrated by a review of the agreements the parties executed at that time. First, there was an employment agreement. That agreement provided that Calkins would carry the title of executive vice president.[65] A review of Calkins' and Brandt's employment agreements demonstrated they were to have equal salaries and bonuses even though Brandt was the president. He received a leased vehicle comparable to any lease provided to Brandt.[66] Any other benefits provided to Brandt Calkins also received.[67] The employment agreement provided he was an at-will employee

[63] *Baur v. Baur Farms, Inc.*, 832 N.W.2d at 674
[64] *Meiselman v. Meiselman*, 309 N.C. 279, 298, 307 S.E.2d 551, 563 (1983)
[65] Exhibit 200
[66] Exhibit 200 at 2
[67] Exhibit 200 at 2

since he could be terminated without cause with thirty days notice as could Brandt.[68] The only difference between Calkins' and Brandt's employment agreements was the company would purchase a key person policy for Brandt in the amount of $500,000 while the same policy for Calkins was only $400,000.[69] These provisions demonstrated Calkins and Brandt were to be treated equally even though Calkins was a minority shareholder.[70]

During Calkins' employment with the company, the evidence established the working relationship between he and Brandt was professional and successful. Calkins enjoyed a significant amount of income and bonuses throughout his career the same amounts enjoyed by Brandt since the parties to the end always received the same salary and bonuses.

Calkins consulted with Brandt on a regular basis regarding the affairs of the company. The evidence established that the management had weekly meetings in the Des Moines office and Calkins participated in those meetings in person when in Des Moines and by telephone when he was in Chicago or traveling. There was no evidence prior to 2016 where Calkins did not participate in these meetings or was not involved in corporate decisions. The only decisions that Calkins and Gagne were not consulted involved decisions by Brandt when he employed his family members in the business. These facts demonstrate Calkins' reasonable expectation of equal treatment by the majority shareholder Brandt. The initial expectations of equal treatment and involvement in corporate governance continued.

The SRRAs provided a means by which Calkins could sell his interest in the company when he decided to leave.[71] Therefore, it is reasonable to conclude that when Calkins joined the company in 1991 as a 39% shareholder his expectation was he would receive compensation for

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[68] *Id.* at 3
[69] *Id.* at 3
[70] *Compare* Exhibit 200 *with* Exhibit 201
[71] Exhibits 1 and 2

his investment. His interest and incentive for working in the company was to build the auditing business to grow the overall value of the companies increasing the companies' value, which he would reap.[72] The SRRA also provided a process to calculate and pay for his interest.[73] Thus, he had a reasonable expectation his initial investment would grow and he would be compensated for that growth at the time he left the company.

As Calkins reached the end of his tenure with the company, he spoke with Brandt about a buyout of his interest. He indicated he intended to retire once they reached an agreement on a buyout of his interest. The retirement was contingent on reaching an agreement on his buyout. They agreed to use Marsh Berry to value the companies and to use that valuation for his buyout. Brandt suggested utilizing Marsh Berry and Calkins agreed. His reasonable expectation at that time was that he would receive a fair price for his interest and he would retire. Brandt knew this over the period of time that he and Calkins worked with Marsh Berry on the valuation, particularly since the plan was to bring in Paul von Ebers as a new shareholder to purchase Calkins' shares.

The court finds Brandt's actions in terminating Calkins and ceasing negotiations constituted oppressive conduct towards Calkins. This conclusion is based on several facts. Brandt's actions in unilaterally terminating the negotiations surrounding the buyout of Calkins' interest. The abruptness of Calkins' termination of his employment when he did not accept Brandt's second offer. The lack of any discussion about Calkins' termination with Calkins prior to the meeting. Brandt's failure to include Calkins in the meeting. The lack of any performance issue concerning Calkins. Brandt's refusal to look at R. Brandt's salary as a possible cost cutting measure. The substantially reduced offers to purchase Calkins' shares after termination. The

[72] *Id.*
[73] *Id.*

employment of a new appraiser who greatly reduced the value of Calkins' shares after Calkins' termination. The lack of distributions to Calkins after termination.

The defendants argued Brandt terminated Calkins to keep from terminating other productive employees. The court finds this veiled attempt to create a business reason for Calkins' termination was unsupported by the evidence. The financial crisis was known for almost 2 years prior to Calkins' termination, the shareholders discussed and implemented cost saving measures and yet Calkins' termination was never discussed as a response to the financial issues. There were no issues with his performance. Brandt refused to consider lowering R. Brandt's salary rather he raised it by 20% during this period. These facts demonstrate Brandt lacked a business reason for ceasing negotiations and terminating Calkins.

The defendants also argued their actions could not be considered oppression because the company did not have the financial resources to pay Calkins in 2016. The court does not find the company's financial situation precluded it from paying the buyout amount offered by Calkins. At no time did Brandt or his attorney indicate that a buyout of Calkins' interest was not financially feasible. The SRRAs had a provision that precluded a buyout if it would cause a "financial default." While this court does not find that agreement binding presently, if Brandt felt the company could not afford a buyout he never raised that issue. He never claimed a buyout would financially strap the company. He simply disagreed with the valuation of the company and sought to reduce the amount he paid Calkins for his interest.[74] In his first offer, Brandt indicated payments completed by January 20, 2019 with the initial payment being over $200,000 in early

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[74] While Brandt's offers incorporated installment payments to Calkins that fact does not establish the company did not have the financial resources to pay for the buyout. It is an indication that Brandt wanted to pay for the buyout over time. To compensate for the installment payment Brandt included interest at 4.5%.

2016 and the second payment of $138,000 being on January 17, 2017.[75] The offer also provided payment of 4.5% interest on the remaining balance.[76] His second offer in June 2016 also provided payments over time with interest.[77] The court finds CTIH had financial resources to purchase Calkins' shares.

B. Count II - Breach of Fiduciary Duty of Care and Loyalty

In count II Calkins alleges Brandt breached his fiduciary duty of care and loyalty to Calkins. Under Iowa law to state a claim for breach of a fiduciary duty the plaintiff must prove

1. A fiduciary duty existed between the plaintiff and defendant.
2. The defendant breached the fiduciary duty.
3. The breach of fiduciary duty was a cause of damage to the plaintiff.
4. The amount of damage.[78]

In *Linge* the supreme court recognized that majority shareholders owed a fiduciary duty to minority shareholders.[79] The district court characterized this "as a duty to exercise the highest standard of good faith, honesty and openness in every significant aspect."[80] In *Linge* the court addressed whether a fiduciary duty existed when the majority was purchasing the shares of the minority shareholder. In addition, the minority brought an action for fraud regarding the purchase of their shares. However, the court did not address how a majority shareholder breached the fiduciary duty. There was no discussion whether the breach of fiduciary duty constituted a tort independent of fraud.[81] The court later affirmed that a majority shareholder owed fiduciary duties to minority shareholders but the court did not address the breach instead

75 *See* Exhibit 49 and Exhibit 52 (Calkins' response)
76 Exhibit 49 at 2
77 Exhibit 220
78 Iowa Uniform Jury Instruction No. 3200.1
79 *Linge v. Ralston Purina, Co.,* 293 N.W.2d 191, 194 (Iowa 1980)
80 *Id.*
81 *Id.* at 196-97

analyzing whether the majority shareholder who was also a director breached fiduciary duties as a director.[82]

As noted above, the *Baur* court held that a majority shareholder had a fiduciary duty of care and loyalty to the corporation and this duty requires the majority shareholder and controlling director to conduct themselves in a manner, which is not oppressive to the minority shareholder.[83] Thus, it appears a breach of fiduciary duty claim may be asserted by a minority shareholder against a majority shareholder.[84] However, the court in its analysis did not adopt as its standard for reviewing oppression claims "the derogation of the fiduciary duty 'of utmost good faith and loyalty' owed by shareholders to each other in close corporations."[85] The *Baur* court did not indicate how a breach of the duty of care and loyalty was to occur or whether it was a separate cause of action distinct from a claim for oppression under the Iowa statute.

The *Knobloch* court addressed the issue facing this court, whether a minority shareholder has both a claim for oppression and breach of fiduciary duty.[86] The court determined that "[b]ecause Knobloch's allegations of breach of fiduciary duties also served as Knobloch's exclusive bases for his oppression claims, Knobloch's claims for breach of fiduciary duties and

[82] *Cookies Food Prod., Inc. v. Lakes Warehouse Distrib., Inc.,* 430 N.W.2d 447, 451-53 (Iowa 1988)

[83] *Baur,* 832 N.W2d at 673-74

[84] *Id.* at 667 (minority shareholder brought action against majority shareholder who was also a director and officer in the corporation alleging, fraud, illegality and oppressive conduct and that he breached his fiduciary duty as a director and officer. Initially, district court granted summary judgment on acts of oppression this was reversed by court of appeals and case went back to district court.)

[85] *Id.* at 670 (citing *Balvik,* 411 N.W.2d at 387; *see also Maschmeier,* 435 N.W.2d at 380; *Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 328 N.E.2d 505, 515 (1975); *Baker,* 507 P.2d at 394)

[86] *Knobloch v. Home Warranty, Inc.,* No. C15-4239-MWB, 2016 WL 6662709, at *4 (N.D. Iowa Nov. 10, 2016) ("I must first ascertain whether these claims are distinct or merely two sides of the same coin, requiring the same analyses.")

minority oppression are indistinct for purposes of analyses. "Evidence of a breach of fiduciary duty will be considered as evidence of oppressive conduct."[87]

Here Calkins' claims for breach of fiduciary duties and his claim for minority oppression are indistinct for purposes of this court's analyses. Consequently, the court considers the evidence on the minority oppression claim on the breach of fiduciary duty claim.

Brandt had a fiduciary duty of good care and loyalty to Calkins. This fiduciary duty arises in each of his roles as a majority shareholder and as president.[88] He had control as majority shareholder and as president of the company. The court finds Brandt breached this duty by terminating Calkins through a contrived management meeting, by unilaterally ceasing the negotiations for his buyout and by his efforts to use Calkins' termination to force a sale of his shares in CTIH at a price less than fair value. The court finds this breach was a cause of damage to Calkins.

C. <u>Reasonable Expectation of Continued Employment and Damages</u>

Under both counts, Calkins requests that this court find he had a reasonable expectation of continued employment. He seeks an award of lost wages and benefits.

The court's analysis begins with a review of Iowa's at-will employment doctrine because at the time of his termination he was an at-will employee. The employment contract he executed in 1993 indicated he was at-will[89] as was Brandt.[90] There existed no written employment agreement between CTIH and Calkins at his termination.

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[87] *Id.* at *6
[88] There was no evidence how many directors the company had. There was evidence the actions Brandt took were done through board action.
[89] Exhibit 200 at 1 of 5
[90] Exhibit 201 at 1 of 5 (that contract was not in effect at the time of Calkins' termination)

Under Iowa law, at-will employment is terminable "at any time, for any reason, or no reason at all."[91] However, an employer's right to discharge an employee who is at-will is limited by public policy considerations.[92] In order to recover under the public-policy exception the employee must establish:

> (1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge.[93]

The first two elements are questions of law for the court.[94]

Our appellate courts have not addressed whether the oppressive conduct of a majority shareholder would meet the public-policy exception. To meet the public policy exception the court requires a "clearly defined and well-recognized public policy."[95] A review of the cases recognizing this exception all involve a violation by the employer of an established public policy designed to protect "the communal conscience and common sense of our state in matters of public health, safety, morals, and general welfare or involve matters "fundamental to citizens' social rights, duties, and responsibilities."[96] Calkins did not identify any public policy recognized in Iowa that would trigger the public-policy exception in this instance. The court does not find the statutory protection against oppressive conduct to meet the requirements of the

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[91] *Dorshkind v. Oak Park Place of Dubuque II, LLC,* 835 N.W.2d 293, 300 (Iowa 2013) (quoting *Fitzgerald v. Salsbury Chem., Inc.,* 613 N.W.2d 275, 280 (Iowa 2000))
[92] *Dorshkind,* 835 N.W.2d at 300
[93] *Id.*
[94] *Id.*
[95] *Ackerman v. State,* 913 N.W.2d 610, 614-15 (Iowa 2018) (review of public-policy exception)
[96] *Berry v. Liberty Holdings, Inc.,* 803 N.W.2d 106, 110 (Iowa 2011) (quoting *Jasper v. H. Nizam, Inc.,* 764 N.W2d 751, 761 (Iowa 2009))

public policy exception to the at-will employment doctrine. However, this is not the end of the inquiry.

Calkins argues he had a reasonable expectation of employment due to the nature of his business interest in CTIH. This reasonable expectation created an employment agreement, which extricated him from being an at-will employee. Some courts have found a minority shareholder has a claim for damages due to this reasonable expectation of employment.[97]

Calkins urges this court to recognize as part of his oppression claim a reasonable expectation of continuing employment. In asserting this claim, Calkins relied on decisions from Minnesota,[98] Massachusetts[99] and North Dakota[100] where courts found that the minority shareholder had a reasonable expectation of employment allowing them to recover lost wages and benefits. Calkins' request requires this court to determine for the first time whether Iowa

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[97] *See Gunderson v. Alliance of Computer Professionals, Inc.,* 628 N.W.2d 173, 189-90 (Minn. Ct. App. 2001) (court recognized claim alleging violation for under oppression statute when controlling shareholders acted in a manner unfairly prejudicial to minority shareholder); (*Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 664–65 (Mass. 1976) (holding termination of minority shareholder's employment was oppression and a breach of fiduciary duty and allowing minority shareholder to recover from the individual shareholders "the salary he would have received had he remained an officer and director of [the corporation"); *Pedro v. Pedro*, 489 N.W.2d 798, 800–01 (Minn. Ct. App. 1992) (affirming award of $256,740, plus prejudgment interest of $31,750.37, as compensation for lost wages associated with termination squeezing out minority shareholder with reasonable expectation of continued employment); *Evans v. Blesi*, 345 N.W.2d 775, 779–80 (Minn. Ct. App. 1984) (holding majority shareholder breached fiduciary duty in forcing minority shareholder to resign and allowing compensatory damages award of minority shareholder's salary to time of appeal that was joint and several against majority shareholder and corporation); *see also Crawford v. Mindel*, 469 A.2d 454, 462 (Md. Ct. Spec. App. 1984) (allowing minority shareholders to recover award for lost wages where majority shareholder breached fiduciary duty by committing fraud in attempt to seize control of corporation and terminating minority shareholders).

[98] *Gunderson v. Alliance of Computer Professionals, Inc.,* 628 N.W.2d 173 (Minn. Ct. App. 2001); *Pedro v. Pedro*, 489 N.W.2d 798, 800–01 (Minn. Ct. App. 1992)

[99] *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976)

[100] *Kortum v. Johnson,* 755 N.W.2d 432, 446 (N.D. 2008)

courts would recognize a reasonable expectation of continuing employment as a new exception to the at-will employment doctrine.

Courts examine a number of factors when determining whether a minority shareholder's expectation of continued employment is reasonable.

> Factors to be considered in determining whether a shareholder's expectation of continued employment are reasonable include whether (1) the shareholder made a capital investment in the company; (2) continued employment could be considered part of the shareholder's investment; (3) the shareholder's salary could be considered a de facto dividend; and (4) continued employment was a significant reason for making the investment.[101]

As the *Gunderson* court noted a reasonable expectation of employment by a minority shareholder in a closely held corporation is an exception to the general rule of at-will employment if the minority shareholder can prove the action of the majority frustrated his reasonable expectation. The threshold question the court must ask "is whether a minority shareholder's expectation of continuing employment is reasonable."[102]

An expectation of continuing employment is reasonable in the first instance if "continu[ing] employment can fairly be characterized as part of the shareholder's investment."[103] If the shareholder's salary and benefits constitute de facto dividends and procuring employment with the corporation was a significant reason for investing in the business are factors that support

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[101] *Haley v. Forcelle*, 669 N.W.2d 48, 59 (Minn. Ct. App. 2003); *Kortum v. Johnson*, 755 N.W.2d 432, 446 (N.D. 2008); *Balvik*, 411 N.W.2d at 388.

[102] *Gunderson v. Alliance of Computer Professionals, Inc.,* 628 N.W.2d 173, 190 (Minn. Ct. App. 2001)

[103] *Id.* (citing Douglas K. Moll, Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution, 1999 U. Ill. L.Rev. 517, 551–52 (1999) (proposing an "investment model of oppression" under which "oppression liability arises when the value of a shareholder's investment is harmed" and stating that the proper inquiry in loss-of-employment oppression cases is "whether the shareholder reasonably expected that her investment in the venture entitled her to continued employment with the close corporation")

a reasonable expectation of continued employment.[104] The other shareholders must know and accept this expectation.[105] Owners in close corporations can agree between themselves for greater employment protections and "[o]ften, shareholder expectations arise from understandings that are not expressly stated in the corporation's documents."[106] Oppression only arises when the majority's conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to join the venture"[107] or in this case when Calkins and Brandt began discussing the purchase of his shares and Calkins' eventual retirement.[108] This expectation must be balanced against the majority shareholder's need to operate the company.[109]

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[104] *See Gunderson*, 628 N.W.2d at 191 (citing Moll at 547-51 noting that "in the close corporation setting, a job can be part of an investment in a de facto dividend sense and in a procurement of employment sense")

[105] *Id.* at 191

[106] *Id.* at 186; *Grady*, 2012 WL 171006, at *7; *Application of Topper*, 107 Misc.2d 25, 33 (N.Y. Sup. Ct. 1980) ("[I]n a close corporation the bargain of the participants is often not reflected in the corporation's charter, by-laws nor even in separate signed agreements. The parties' full understanding may not even be in writing but may have to be construed from their actions.").

[107] *Gunderson*, 628 N.W.2d at 191

[108] *See Meiselman*, 309 N.C. at 298, 307 S.E.2d at 563 ("These 'reasonable expectations' are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations' created at the inception of the participants' relationship; those 'reasonable expectations' as altered over time; and the 'reasonable expectations' which develop as the participants engage in a course of dealing in conducting the affairs of the corporation.'"); *Gunderson,* 628 N.W.2d at 186 ("Often, shareholder expectations arise from understandings that are not expressly stated in the corporation's documents.")

[109] *Gunderson*, 628 N.W.2d at 191 (citing *Wilkes v. Springside Nursing Home, Inc.,* 370 Mass. 842, 353 N.E.2d 657, 663 (1976) (expressing concern that the "untempered application of the strict good-faith standard * * * will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned," and concluding that no breach of fiduciary duty occurs if "the controlling group can demonstrate a legitimate business purpose for its action"); *Brenner*, 634 A.2d at 1033 (concluding that "[a] shareholder's expectation of employment must *192 be balanced against the corporation's ability to run its business efficiently");

Expectation is not reasonable when the minority shareholder's conduct causes the termination.[110] Shareholders who sign buyout agreements permitting termination of employment for any reason and obligating shareholder to sell their shares to the corporation upon termination would probably not have a reasonable expectation of continued employment.[111] Similarly, an employee who has no capital investment in the corporation but either buys a small percentage of stock through periodic company offerings or receives a small percentage of stock as part of a compensation package most likely lacks a reasonable expectation of continuing employment.[112]

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110 *Gunderson*, 628 N.W.2d at 192 (citing Exadaktilos v. Cinnaminson Realty Co., 167 N.J.Super. 141, 400 A.2d 554, 562 (Law Div.1979) (no oppression liability found when minority shareholder failed to satisfy the condition precedent to employment in the company, namely, "that he learn the business"); Kemp, 484 N.Y.S.2d at 806, 473 N.E.2d 1173 (observing that "the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection"); Gimpel v. Bolstein, 125 Misc.2d 45, 477 N.Y.S.2d 1014, 1017, 1019–20 (N.Y.Sup.Ct.1984) (observing that "[i]t was clearly not wrongful for the corporate victim of a theft to exclude the thief from the councils of power" and noting that "the only expectation [a terminated shareholder-employee who stole from the company] could reasonably entertain were those of a discovered thief: ostracism and prosecution"); see Moll, Perspective, supra, at 776 (suggesting that a reasonable expectation is protected only when "the court is satisfied that all of the investors intended th[e] basic understanding [reached at the venture's inception] to persist in the post-inception circumstances that arise").

111 *See, e.g., In re Apple*, 224 A.D.2d 1016, 637 N.Y.S.2d 534, 535 (1996) (stating that a terminated employee who signed an agreement binding him to sell his stock to the company after discontinuing his employment with the corporation for any reason "cannot be heard to argue that he had a reasonable expectation that he would be employed * * * for life"); *Ingle*, 528 N.Y.S.2d at 604 (same). Similarly, an employee who has no capital investment in the corporation but either buys a small percentage of stock through periodic company offerings or receives a small percentage of stock as part of a compensation package most likely lacks a reasonable expectation of continuing employment.

112 *Cf., e.g., Merola v. Exergen Corp.,* 423 Mass. 461, 668 N.E.2d 351, 354 (1996) (holding the evidence was insufficient to support finding that majority shareholder breached his fiduciary duty by terminating employment of shareholder-employee who purchased stock through periodic company offerings because "there was no general policy regarding stock ownership and employment, and there was no evidence that any other stockholders had expectations of continuing employment because they purchased stock," that employment was a source of de facto dividends, or that the employee was required to buy stock as a condition of employment); *Harris*, 421 N.W.2d at 353 (holding, without mentioning reasonable expectations, that a close-corporation shareholder who acquired a small percentage of stock as part of compensation

The evidence established that Calkins paid $175,000 for his investment in the company. He spent months observing the operations of the company before he decided to invest his money and begin a career with the company. He worked for the company for over 25 years and developed it into a successful corporate entity that rose, as Brandt testified, from "an idea."[113] Calkins' salary was his primary source of income, benefits and distributions.[114] Calkins and Brandt agreed "their salaries would always be equal, which could be considered a de facto dividend on their investment in the company."[115]

When the company lost the BGCWA account Calkins, Brandt and Gagne discussed possible cost saving measures. None of those measures included termination of Calkins. Calkins did have his salary reduced as did Brandt but there was no mention that his job was in jeopardy or that his retirement would help the company. Brandt never mentioned to Calkins that he felt Calkins performance was suffering or put his job in jeopardy. Calkins informed Brandt he would retire but not until they reached an agreement on his buyout. In response Brandt did not suggest Calkins retire prior to any agreement on his buyout as a cost saving measure rather they kept moving forward with the valuation process with Marsh Berry. During this valuation, process both shareholders who were over the age of 70 and continued to work full-time for the company.

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package but did not invest capital in the venture did not stand in a fiduciary relation with the shareholder who founded and funded the venture).

[113] *See Wilkes,* 353 N.E.2d at 664 (finding breach of fiduciary duty in terminating minority shareholder who was founder of the company and had "invested his capital and time for more than fifteen years with the expectation that he would continue to participate in corporate decisions"); *Muellenberg,* 669 A.2d at 1388 ("He could not reasonably have expected that after ten years as general manager he would be frozen out of the business.").

[114] *Balvik,* 411 N.W.2d at 388 ("It is apparent from the record that [minority shareholder's] involvement with [company] constituted his primary, if not sole, source of livelihood and he quite reasonably expected to be actively involved in the operations of the business."); *Haley*, 669 N.W.2d at 59; *Grady v. Grady*, No PB 09-0367, 2012 WL 171006, *6 (R.I. Super. Ct. Jan. 17, 2012).

[115] *Haley*, 669 N.W.2d at 60.

Both recognized they would retire but there was no date set. Brandt by his actions knew Calkins would not retire until they reached an agreement on his shares. Brandt knew Calkins would work during the transition phase.[116]

Non-shareholder employees believed the owners were protected from termination. For instance, after the loss of the BGCWA account, Calkins and Gagne called Montgomery regarding their concerns involving R. Brandt's transition to CTI. Montgomery testified that, while he did not believe he could speak because he was not an owner and thus could be terminated.[117] Montgomery did not feel that same risk applied to either Calkins or Gagne.[118]

The evidence established that at the time Brandt and Calkins began their preparations for the purchase of his shares Calkins had a reasonable expectation of continued employment until an agreement was reached on the purchase of his shares. This was known and accepted by

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[116] Exhibit 15 at 2 of 3 (being employed for 1 to 1 ½ years post sale)

[117] Court Exhibit 1, Montgomery Depo. at 76:24–77:1) ("My response was, I'm not an owner. I'm not going to be up front on this issue. Don could fire me if he wanted to. And I need my job.").

[118] To the extent the Defendants argue Calkins's employment agreement shows he was an at-will employee, the law and facts show this is not the case. First, that agreement is no longer operative. When the owners created CTIH, they voided the shares and agreements with CTI and CTIA. Though new employment and stock-redemption agreements with CTIH were drafted, neither Calkins nor Brandt signed them. *See* Ex. 55 (Brandt's attorney stating it is Brandt's position there were no agreements in place). There is no written agreement controlling Calkins's employment status with CTIH. *Selmark Assoc., Inc. v. Ehrlich*, 5 N.E.3d 923, 934 (Mass. 2014) (holding expired employment agreement allowing at-will termination of minority shareholder could not block his breach of fiduciary duty claim related to his termination). Additionally, "written agreements are not dispositive of shareholder expectations in all circumstances" and the shareholders' expectations should be construed from their conduct. *Gunderson*, 628 N.W.2d at 186; *Topper*, 107 Misc.2d at 33. Brandt entered into an identical expired agreement as Calkins and testified he did not believe he was an at-will employee. Calkins shared the same expectation. *See Kortum*, 755 N.W.2d at 445–46 (holding fact minority shareholder signed at-will employment agreement did not relieve majority shareholder of fiduciary duties and could still have reasonable expectation of continued employment because she helped form and capitalize the corporation).

Brandt evidenced by Calkins' testimony, their agreement to seek a valuation and the negotiations for the purchase.

However, our appellate courts have not carved out an exception to at-will employment in the context presented to this court. In addition, the claim recognized in *Gunderson, Wilkes* and *Kortum* arise out of language in their oppression statutes, which is different from Iowa's. The court found these claims existed when the majority took action that unfairly prejudiced the minority shareholder. Iowa does not have this provision in its statute. Based upon our courts adherence and affirmance of its decisions involving the public-policy exception and the statutory language under Iowa's oppression statute, this court does not believe our appellate courts would allow a claim on this basis at this time.

D. <u>Claim for Corporate Waste or Misapplication of Assets</u>

Under both counts, Calkins seeks a finding that Brandt caused corporate waste or a misapplication of corporate assets. Calkins asserted that the compensation paid to R. Brandt, the hiring of other family members and the retention of Flying Hippo to redesign the company website were acts of corporate waste or misapplication of corporate assets. The court finds that Calkins failed to prove these actions constituted corporate waste.

The evidence does not establish that the hiring of the other family members to provide part-time duties for the company was a waste or misapplication of the corporate assets. The duties performed were necessary, they were provided at a reasonable cost to the company and did not amount to large expenditures. The payment of a director's fee to Brandt's brother, Dale, does not constitute waste of the corporation's assets since it is common to pay a director for these services. The evidence established that Dale Brandt provided consulting services to the company and the amount in involved was not significant.

The amount of compensation paid to R. Brandt created a significant strain in the relationship between Calkins and Brandt and was a contributing factor for Brandt's decision to terminate Calkins and terminate negotiations over his buyout when Calkins suggested R. Brandt's salary be reduced. The evidence established that while R. Brandt earned a substantial salary these complaints became critical when the BGCWA account was lost, primarily because the income from that account paid all or substantially all of R. Brandt's salary and commissions. The loss of the account created uncertainty as to what R. Brandt's duties in the company would be since his duties were the management of this account and he had not been substantially involved with other portions of the companies' business due to the time commitment required on the BGCWA account. Naturally this created questions as to what can he do to justify his salary. Brandt's approach was to get R. Brandt involved in other areas of the business and maintain his salary at its present level during the training process. This is not an unreasonable use of the company's employee resources. Obviously, Brandt made a business decision where he believed R. Brandt would be handling duties that justified his compensation. The court's finding here does not distract from its finding that Brandt's negative reaction to Calkins' suggestion that R. Brandt's salary be reduced was a contributing factor in his oppressive conduct and his breach of his fiduciary duties of care and loyalty to Calkins. Nor does it distract from this court's finding that Marsh Berry's reduction of R. Brandt's salary was an appropriate adjustment to arrive at the company's fair value.

While the court finds later in its decision that it was appropriate for Marsh Berry to reduce R. Brandt's salary in its valuation the court also recognized Marsh Berry's initial valuation, which reduced all management compensation since they believed it was higher than what a willing investor would pay. The court is not finding that R. Brant's higher salary constituted corporate waste. The court is not finding that Brandt, Calkins and Gagne's salaries constituted corporate waste.[119] The court does not believe the reduction advocated by Marsh Berry is an indictment of the compensation paid management but it was an attempt to determine what a willing buyer would pay for the company.

Based upon the court's finding here the court need not address the defendants' affirmative defenses of estoppel, estoppel by acquiescence, laches, unclean hands or the statute of limitations.

DAMAGES

A. <u>Value of Interest in Company</u>

Calkins seeks judgment in an amount equal to the 2018 Marsh Berry valuation[120] for his share of the company. He does not request the court order the corporation dissolved under section 490.1434. While defendants dispute they owe anything to Calkins because he failed to prove the elements of his claim, they also requested the court not order dissolution of the corporation due to its ongoing viability, business and the impact it would have on its 20 employees.

Calkins requests the court order the defendants to purchase his interest in CTIH at fair value and use its equitable powers to set the terms of payment as contemplated under section 490.1434. Defendants request, if the court finds them liable for oppression, to utilize the process provided in the 1993 SRRA where the shareholders select three appraisers to determine the corporation's value.

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[119] *See Hanrahan v. Kridenier,* 473 N.W.2d 184, 188 (Iowa 1991) (court recognized that "when "high salaries are paid to corporate executives, an indicia of self-dealing appears to exist." Constituting corporate waste))

[120] Exhibit 33

In fashioning appropriate remedies, trial courts "should regard requests for general equitable relief with considerable liberality."[121] In shareholder oppression cases in particular, the Iowa Supreme Court states the district court "has considerable flexibility in resolving the dispute."[122]

Section 490.1434 gives the district court several options in fashioning relief, which includes allowing shareholders to elect purchasing shares at fair value, in lieu of dissolution.[123] The statute also allows district courts to stay proceedings and order purchase of shares at fair value upon application of any party.[124] District court orders requiring majority shareholders to purchase minority shares at fair market value despite a lower share value set by the corporate bylaws[125] and requiring majority shareholders buy out minority shareholders at fair price have been affirmed.[126] These cases demonstrate the statute allows the district court to fashion equitable relief.[127] The authoritative O'Neal & Thompson treatise on oppression, cited by the Iowa Supreme Court in *Baur*, notes that "[t]he traditional remedy of dissolution (often named in the statute providing relief) has given way, both in statutes and judicial opinions, to remedies based on a buyout."[128]

The court finds that it has the equitable power to order the defendants to purchase Calkins' interest in the company at fair value. The court finds Calkins proved the fair value of his

121 *Baur*, 832 N.W.2d at 678.
122 *Baur*, 832 N.W.2d at 677-78 (citing *Sauer v. Moffitt,* 363 N.W.2d 269, 275 (Iowa Ct. App.1984) (affirming order requiring majority shareholders buy out minority shareholders at fair price and observing statute granting power to liquidate corporation allows district court to fashion other equitable relief).
123 Iowa Code § 490.1430(1)
124 *Id.* § 490.1434(4)-(5)
125 *Maschmeier*, 435 N.W.2d at 382
126 *Sauer v. Moffitt*, 363 N.W.2d 269, 275 (Iowa Ct. App.1984)
127 *Id.*
128 O'Neal & Thompson, § 7:17.

interest in the company as of August 31, 2016 based primarily upon the 2018 Marsh Berry valuation.

The court finds the procedure in the 1993 SRRA not applicable since that agreement expired in 2009 during the reorganization of the company. In addition, Brandt by retaining Marsh Berry and agreeing with Calkins that their valuation would establish the value of the company demonstrates there was no agreement that the 1993 SRRA procedure was applicable. This was further confirmed when Brandt, through counsel, informed Calkins there was no redemption procedure.[129]

In section 490.1434 the legislature determined that any buyout of shares under section 490.1434 should be based upon fair value.[130] "Fair value" is not defined in the dissolution division of chapter 490. However, fair value is defined under the appraisal rights division of chapter 490. When determining fair value the legislature stated:

> *"Fair value"* means the value of the corporation's shares determined according to the following:
> a. Immediately before effectuation of the corporate action to which the shareholder objects.
> b. Using customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring appraisal.
> c. Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 490.1302, subsection 1, paragraph *"e"*.[131]

Fair value has also been defined as "a shareholder's pro rata share of the value of the corporation as a going concern."[132]

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[129] Exhibit 55 (" in the absence of stock redemption agreement")
[130] Iowa Code § 490.1434(1)
[131] Iowa Code § 490. 1301(4)
[132] *See, e.g., Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del.1989) (cited in *Nw. Inv. Corp. v. Wallace*, 741 N.W.2d 782, 787–88 (Iowa 2007)).

In determining fair value, the statute disapproves of share valuations incorporating a discount for a minority interest and the Supreme Court recognized this prohibition.[133] In *Baur* the court stated it disapproved of share valuations incorporating a discount for a minority interest.[134]

The 1999 amendment to the Model Business Corporation Act ("MBCA") states:

> valuation discounts for lack of marketability or minority status are inappropriate in most appraisal actions, both because most transactions that trigger appraisal rights affect the corporation as a whole and because such discounts give the majority the opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction.[135]

The official comment to the MBCA explains subsection (c) of the statute is "designed to adopt a more modern view that appraisal should generally award a shareholder his or her *proportional interest in the corporation after valuing the corporation as a whole,* rather than the value of the shareholder's shares when valued alone."[136] While sections 490.1430-1434 do not define "fair value" the court believes the legislature in enacting chapter 490 intended the definition of "fair value" set forth in section 490.1301 applied to the phrase "fair value" in section 490.1434. The court finds the fair value standard should be used in valuing the company.

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[133] *Baur*, 832 N.W.2d at 669 n.5 (citing *Nw. Inv. Corp. v. Wallace*, 741 N.W.2d 782, 787–88 (Iowa 2007); *Sec. State Bank v. Ziegeldorf*, 554 N.W.2d 884, 889 (Iowa 1996) ("Such a discount 'in effect would let the majority force the minority out without paying its fair share of the value of the corporation.'") (quoting *Woodward v. Quigley*, 133 N.W.2d 38, 43 (Iowa 1965))).

[134] *Baur*, 832 N.W.2d at 669 n.5 (citing *Nw. Inv. Corp. v. Wallace*, 741 N.W.2d 782, 787–88 (Iowa 2007) (("Our legislature made a policy decision when it adopted the current definition of 'fair value.' By not allowing a discount for lack of marketability or minority status, the legislature implicitly required shares to be valued on a marketable, control interest basis.").

[135] *Northwest Inv. Corp.v. Wallace,* 741 N.W.2d 782, 787 (Iowa 2007) (quoting Model Bus. Corp. Act § 13.01 cmt. 2, at 13–10)

[136] *Nw. Inv. Corp. v. Wallace*, 741 N.W.2d 782, 787 (Iowa 2007) (quoting Model Bus. Corp. Act § 13.01 cmt. 2, at 13–10 (emphasis added); *see Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del.1989) (stating the corporation must be valued as an entity before determining the shareholder's proportionate interest).

The court extensively reviewed the various valuations provided to it. These valuations include Marsh Berry's initial valuation dated December 2015,[137] its valuation dated January 2016[138] and their updated valuation dated September 2018.[139] The court reviewed Eric Engstrom's critiques of Marsh Berry's December 2015[140] and September 2018 valuations.[141] The review also included HDH's valuation[142], the 2011[143] and 2013[144] LBWJ valuations and Ted Lodden's report.[145] As the court finds, when confronted with various valuations there are differences within each that make it difficult for the court to reconcile. The assumptions and subjective decisions made by each valuator cause these differences. Consequently, it is rare the court can say absolutely state this is the correct and final valuation of the entity in dispute. However, the law does not require the plaintiff to prove an absolute the law requires proof based upon a preponderance of the evidence.

Before discussing the valuations and the awarding of damages, the court makes additional findings of fact. Calkins requested the court utilize his last day of work as the valuation date-August 31, 2016. Although Brandt did not care what date Calkins used, including the date at the time of trial, he agreed August 31, 2016 was acceptable.[146] Accordingly, the court uses the financial information applicable to the company as of August 31, 2016 for determining the company's value. The court finds this date appropriate in light of the flexibility given under the statute, Brandt's assent to the date and it was the last day Calkins worked for the company,

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[137] Exhibit 18
[138] Exhibit 19
[139] Exhibit 33
[140] Exhibit 21
[141] Exhibit 232
[142] Exhibit 59
[143] Exhibit 43
[144] Exhibit 102
[145] Ex. 32
[146] *See also* Exhibit 221 (Brandt's offer to use August 31, 2016 as valuation date)

which values the company during his tenure.[147] By accepting this date, the other valuations' usefulness are as references or guideposts since the valuation dates in those valuations valued the company at different points in time.

A second finding relates to the use of the value of the combined entity or the aggregate value of the two companies. Calkins argued the aggregate value of the two companies was the fair value to use since the companies could be sold separately. Defendants argued the valuation of the combined entity was the appropriate one to use since that was the purpose of the valuation. The court finds the combined value of CTIH should be the fair value used. The court makes this finding based upon what was to occur in 2016.

The 2015 and 2016 valuations by Marsh Berry were not performed to give management the ability to market the individual companies. The purpose of those Marsh Berry valuations was to find the value of the entire corporate entity so the combined entity could purchase Calkins' interest. There was never any suggestion that Calkins might take his interest in one of the individual companies and attempt to sell it to someone else or that he would only request the corporation buy a portion of his interest. Second, this is consistent with the way the parties operated the business. In 2009, they combined the entities and operated CTIH as a combined company. The evidence established that for the most part employees for the individual companies worked on projects for each company. After the 2009 reorganization the stock interest the shareholders held were percentages in the combined entity not the individual companies. Thus, the court will utilize the fair value for the combined entity, CTIH.

The court considers Marsh Berry's 2018 valuation more credible than Engstrom's critique of it. The court finds Wayne Walkotten's explanation of Marsh Berry's analysis and

[147] Iowa Code § 490.1434(4)

methodology more credible than Engstrom's critique. The court finds the 2018 valuation and Walkotten's testimony more credible for several reasons. Brandt originally recommended Marsh Berry because he was impressed with their previous performance. It was an update of the 2015 and 2016 valuations. Thus, it followed a similar format to those valuations. The 2015 and 2016 valuations were for a business purpose not after litigation commenced.

In addition, Brandt and Calkins provided input on both valuations. Marsh Berry had unfettered access to the company's financial information. The 2018 valuation was a complete review since it supplemented the 2015 and 2016 valuations. A growth rate of 3% was applied which was consistent with past valuations of the company and removed the increased value anticipated from the input provided by von Ebers. It reduced excess management compensation and took a closer look at actual management compensation versus a percentage of revenues. It removed the marketability and minority shareholder discounts. The 2018 Marsh Berry valuation was simply more complete and thorough. The court also found Marsh Berry's experience more extensive in valuing insurance businesses, since they conduct over 100 valuations per year on insurance businesses. This is their business. Engstrom had limited experience valuing companies in the insurance industry.

Next, the court addresses Engstrom's main criticisms of Marsh Berry's 2018 valuation. The first major criticism was Marsh Berry's reduction of R. Brandt's salary to $75,000. Prior to the 2018 valuation Marsh Berry reduced management payroll to a level that equaled approximately 20% of net revenues. This reduction was made in an effort to obtain a more realistic management salary level that a willing buyer would pay if the company was purchased. The rationale for this reduction was the realization in closely held companies, management compensate themselves by means other than salary, such as car leases, country club memberships, distributions, clothing allowances or other perks which allow management to take profits out of the company. Marsh Berry wanted to obtain a more accurate picture of management compensation, which would give a more realistic analysis of the actual profitability of the company. This is what an interested investor would want to know. Ted Lodden also opined that it was common to reduce management compensation to remove the corporate perks.

Marsh Berry forecasted their concern about management compensation to Brandt and Calkins before it reached any conclusion on value and indicated they intended to reduce management compensation to eliminate the excessive compensation to show a realistic market value.[148] They recognized at that time R. Brandt's salary may not reflect current market rate.[149]

As noted initially, Marsh Berry used a 20% cap of net revenues rather than looking at individual salaries and applied this cap to all management salaries thus reducing all management salaries in its 2015 and 2016 valuations.[150] In its 2018-valuation Marsh Berry more closely analyzed the duties and responsibilities of R. Brandt and determined his role was similar to an office manager.[151] This was based on their experience with the salaries of similarly situated individuals in the insurance industry.

The evidence established that while R. Brandt assumed duties of other employees who managed certain aspects of the company he did not completely assume the duties of those roles. For instance, he did not assume all of the duties of the information technology manager when she left. While Brandt testified R. Brandt assumed those duties he did not write programs that she

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[148] Exhibit 17 at 3 of 10 ("Compensation is an area that needs to be reviewed to further quantify the projected ongoing market rate as the companies move forward. (see attached employee list).") Also reduced retirement and benefits to reflect current market rate. *See id.* at 4 of 10

[149] *Id.* at 4 of 10 ("Does Randall Brandt's current level of compensation reflect current market rate for the role and services he is providing?")

[150] *See* Exhibit 18 at 5 of 23; Exhibit 19 at 5 of 23

[151] *See* Exhibit 225 (from 2011 through 2015) (he also carried this as part of his title)

had done, instead he hired outside vendors to perform this function. He took over negotiating the leases on the company offices and the auto leases. Typical office manager duties previously handled by Brandt. He was in charge of copier leases, and office supplies. Again duties of an office manager. Even his role with the BGCWA litigation was to provide information to the company lawyers, which was an information-gathering role.

Also important was Pat Gagne's testimony that R. Brandt's duties after the BGCWA account was lost were similar to an office manager. Dan Montgomery testified that he believed R. Brandt functioned like an office manager when the BGCWA account terminated.

Finally, his salary increases in 2015 and 2016 of 10% on each occasion were given not for performance but to replace the commission income he lost when BGCWA terminated the contract. In addition, he had management compensation in the form of two country club memberships, he received commissions in the company and he had a clothing allowance. No other employee or shareholder received these corporate perks.[152]

Engstrom argued the 20% net revenue cap was not appropriate since he did not believe it was realistic to reduce salaries that the company may never reduce. However, in his valuation he accepted the 20% net revenue cap established by Marsh Berry in their 2015 and 2016 valuations.[153] He never addressed what R. Brandt's salary should be in light of his duties and responsibilities. The court finds Marsh Berry's reduction of R. Brandt's salary in an attempt to reconcile it to a realistic market rate based upon his duties and responsibilities was more realistic

[152] Other management personnel did have one country club membership.
[153] Exhibit 232 at 11 of 14 (However, his use of the cap at this point does not take into account the lost salaries from Calkins, Gagne and Montgomery)

and justified the adjustment Marsh Berry made as of August 31, 2016 however, the court finds the adjustment in its 2018 valuation lower than the evidence justified.[154]

Pat Gagne suggested R. Brandt's duties justified a salary of between $80,000 to 90,000. R. Brandt's salary was $119,344 on September 17, 2014[155] just prior to the notice the company received from BGCWA that they intended to terminate the company's services in 2015.[156] After losing this account and much of his duties he received on September 17, 2015 an increase in salary to $131,270, which was made effective January 1, 2015 and it also provided an additional 10% increase on March 17, 2016.[157] As Brandt testified these increases were to cover the lost commissions R. Brandt suffered when they lost the BGCWA account in late 2014. Thus, at the time Calkins was terminated R. Brandt's salary was approximately $144,397.[158]

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[154] The court notes defendants' exhibit 227. It is an analysis of R. Brandt's duties by title with an accompanying range of salaries based upon the time he spent in each role. No witness spoke to this exhibit but it was admitted into the record as an exhibit so the court can consider it to the extent it speaks for itself. Brandt carried the title of vice president marketing/office manager for the years 2011-2015. *See* Exhibit 225. During those years he handled the marketing for the BGCWA account. After Calkins was terminated, he moved into a marketing position for the audit business thus retaining his duties in sales as demonstrated in Exhibit 227. The exhibit also demonstrated his other roles in the company, which was verified by the testimony presented. His roles in information technology and marketing in the audit business were relatively new due to the departures of Calkins and the information technology person. His roles as an office manager and life health sales representative were duties he performed for the company not positions where he worked with the company's customers. Brandt testified that because R. Brandt's licensing he was able to secure reductions in health costs for the company. The exhibit concludes his salary range would be between $100,800 and $153,750. The court can only assume this document was created for the purpose of litigation so it demonstrated R. Brandt's salary range at the time of trial and not August 31, 2016, particularly since the rest of the exhibit is a 2018 Salary Guide prepared by The Palmer Group. A review of the salary guide demonstrates that the range of salaries was taken from the various titles associated with R. Brandt.

[155] Exhibit 225 at 2 of 6

[156] Exhibit 214 ("We are in receipt of your letter notice of termination dated October 6, 2014.")

[157] Exhibit 225 at 1 of 6

[158] The salary does not include the other corporate benefits R. Brandt received as demonstrated in his W-2 forms. In 2014 his W-2 demonstrated he had wages and compensation in the amount of $167,916. *See* Exhibit 106 at 72 of 148. In 2016 his W-2 demonstrated he had wages and compensation in the amount of $177,980. *See* Exhibit 106 at 132 of 148

The court in finding an appropriate salary for R. Brandt as of August 31, 2016 considered several facts. Pat Gagne's testimony establishing a salary between $80,000 and 90,000. His actual salary of $119,344 in 2014 when he was in charge of marketing the BGCWA account and his office manager duties and the additional duties he acquired when the information technology individual left. The court recognized Marsh Berry's reduction of R. Brandt's total compensation by almost $30,000 in its December 2015 and January 2016 valuations. The court considered the range of salaries in exhibit 227 and R. Brandt's time with the company. Based upon these factors the court finds an appropriate salary for R. Brandt at the end of August 31, 2016 would have been $120,000. The court reduces the fair value of the 2018 valuation by $45,000 to take into account the court's modification.

Engstrom's second main dispute with Marsh Berry's 2018 valuation was the use of the 14.25% weighted average of capital equity or discount rate. Lodden explained while the weighted average of capital equity is the valuator's attempt to show the present value of their future projections reaching this average is different than establishing the discount rate. Brandt never questioned or modified the weighted average of capital equity when he made his offers to purchase Calkins' shares even though he saw Engstrom's critique of the December 2015 valuation where Engstrom raised this issue for von Ebers.[159] In addition, Marsh Berry explained the reduction of their weighted average of capital equity from 15.01% in January 2016 to 14.25% for the valuation of August 31, 2016. They reduced the average due to lower interest rates on the company debt.

Engstrom argued the selection of a discount rate was inevitably subjective. He noted the previous LWBJ valuations in 2011 and 2013 used discount rates of 19 and 20%. He argued the

[159] Exhibit 21 at 3 of 4

proper discount rate should be between 18-20% but never explained how he reached that conclusion. Lodden in reviewing the LWBJ valuations in 2011 and 2013 indicated they used a method for calculating discount rates, which he referred to as a buildup method, which is different than calculating the weighted average of capital equity done by Marsh Berry. In reality because of the method LWBJ used, Lodden testified their discount rate was closer to 16 or 17%. The court understands all experts agreed a lower discount rate increases the company's value and a higher rate decreases the value. However, Marsh Berry's weighted average is consistent with its 15.01% earlier in the year and was modified to reflect the market interest rates at the time and the company's financial position. The LWBJ rates in 2011 and 2013 were under different market conditions and the company's value was substantially different. While Engstrom argued his rate was more consistent with the 2011 and 2013 valuations, he did not explain how he arrived at his conclusion or why his method was more realistic than Marsh Berry's weighted average. Lodden also testified that based upon Marsh Berry's experience with insurance companies they were probably better at determining the weighted average of equity capital. The court finds Marsh Berry's 14.25% weighted average of capital equity the appropriate method for determining present value.

The final main criticism of Marsh Berry's 2018 valuation was their inclusion of tangible equity value. Engstrom argued this was mixing valuation methods. Marsh Berry utilized an income approach to valuing the company, as did LWBJ in their 2011 and 2013 valuations. Every expert used this method, except HDH. Those using the income approach argued that was the proper method for valuing the company since the revenues of the company were generated primarily by the services the company provided for its customers. Engstrom argued that by valuing the company's tangible assets Marsh Berry was in effect double counting. Marsh Berry justified their inclusion of tangible equity value based upon the excess assets the company had that were not used in generating revenues. They were not double counting but reflecting the value of company's additional assets above the working capital needed to operate the company, which they felt, should be included in providing a realistic company value.

Engstrom testified that it was proper to include additional assets not necessarily used in the company's business in the company's value. He stated that a condominium in Hawaii that was not used for the company's business would be an example of this kind of asset. This asset has value above the working capital needed to operate the business. Based upon Marsh Berry's explanation they included the value of assets above the working capital needed to operate the company. The court finds Marsh Berry's inclusion of tangible equity value a proper measure of the company's value.

Based upon the court's review and its additional findings the court finds the fair value of CTIH on August 30, 2016 was $2,755,600. Calkins 43.4% share of the company is equal to $1,193,175.

B. <u>Personal Liability of Donald Brandt</u>

Calkins requests that judgment be entered against Brandt. Calkins relies on Iowa Code section 490.831(b)(3) for imposing personal liability on Brandt in his role as a director. Section 490.831provides:

> 1. A director shall not be liable to the corporation or its shareholders for any decision as director to take or not to take action, or any failure to take any action, unless the party asserting liability in a proceeding establishes both of the following:
>
> a. That any of the following apply:
>
> (1) No defense interposed by the director based on any of the following precludes liability:

(a) A provision in the articles of incorporation authorized by section 490.202, subsection 2, paragraph "d".

* * *

b. That the challenged conduct consisted or was the result of one of the following:

* * *

(3) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct, which also meets both of the following criteria:

(a) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation.

(b) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation. [or]

* * *

(5) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.[160]

Section 490.202(2)(d) provides:

2. The articles of incorporation may set forth any or all of the following:

* * *

d. (1) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for any of the following:

(a) The amount of a financial benefit received by a director to which the director is not entitled.
(b) An intentional infliction of harm on the corporation or the shareholders.
(c) A violation of section 490.833.
(d) An intentional violation of criminal law.[161]

The articles of incorporation for CTIH provide:

[160] Iowa Code § 490.831 (2016).
[161] *Id.* § 490.202(2)(d)

> ARTICLE VIII
>
> A director or an officer of the corporation shall not be personally liable to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director or an officer, except liability for any of the following: (1) the amount of a financial benefit received by a director or officer to which the director or the officer is not entitled; (2) an intentional infliction of harm on the corporation or the shareholders; (3) a violation of section 490.833 of the Iowa Business Corporation Act; or (4) an intentional violation of criminal law.[162]

The only provision under which Calkins could establish personal liability for Brandt would be that he intentionally caused harm to him as a minority shareholder. The protection from personal liability provided in CTIH's articles mirrored the language in the statute, which allows director liability for an intentional infliction of harm on the shareholder. By its very nature, an oppressive act contemplates an intentional act. The oppressive act here was Brandt's freeze out of Calkins by ceasing negotiations and terminating his employment, which caused harm to Calkins.

In addition, the court finds that Calkins established the elements necessary under section 490.833(1)(b)(1) or (2)(b)(3)(a & b). Brandt lacked objectivity in his decision to cease negotiations and terminate Calkins' employment. His control of the corporation, as majority shareholder and president, allowed him to take this action and the evidence established he took the action by calling the management meeting and obtaining an affirmative vote for termination. He was upset that Calkins refused to accept the offer he made. It was a "take it or leave it" attitude which previously manifested itself when challenges to his decisions arose from Calkins or Gagne. While Brandt argued he terminated Calkins because it was in the best interests of the corporation the court finds they were not. The court finds based upon these actions Brandt

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[162] Exhibit 204 at 2 of 3

intentionally intended to cause harm to Calkins. Accordingly, he is found to be personally liable to Calkins.

C. Reasonable Expectation of Continued Employment Damages

Defendants argued the claim for reasonable expectation of continued employment should be denied because the damages are duplicative. Defendants cite no law where a court has found an award for damages in this context duplicative. The only case cited to the court was *Pedro II*[163] in which the court allowed a minority shareholder to recover the fair value of his shares and his lost wages. In allowing both damage awards, the court stated, "respondent has two separate interests, as owner and employee. Thus, allowing recovery for each interest is appropriate and will not be considered a double recovery."[164]

The other cases cited by Calkins where lost wages were allowed on an oppression case, involved plaintiffs who did not seek an award for the fair value of their shares. The court does not deny Calkins' claim on the ground they are duplicative. The court finds that if this claim was allowed a proper measure of damages would be the wages and benefits the employee lost. These damages are different from the damages a minority shareholder is entitled for the value of his/her minority interest in the company.

If our appellate courts determine that a claim for reasonable expectation of continuing employment as a claim for oppression is an exception to the at-will doctrine, the defendants did

[163] *Pedro v. Pedro*, 489 N.W.2d 798, 803 (Minn. Ct. App. 1992) ("Finally, appellants dispute the trial court's award of damages for lost wages following the buyout. They claim once respondent's ownership interest is severed, he has no right to damages for lost wages. We believe the trial court's award of future damages for lost wages is wholly consistent with the court's broad equitable powers found in § 302A.751, subd. 3a and is warranted based upon its finding of a contract for lifetime employment.") In *Pedro v. Pedro,* 463 N.W.2d 285, 289 (Minn. Ct. App. 1991) (jury found plaintiff had reasonable expectation of employment with company until age 72)

[164] *Pedro II,* 489 N.W.2d at 803

not challenge the damages calculated by Lodden other than to argue they were duplicative. The court finds that the damages Lodden calculated for lost wages and benefits for $377,879 appropriate.

1. *Mitigation of Damages*

The court next addresses defendants' mitigation of damages defense as it pertains to this claim by Calkins. Defendants argued Calkins should be precluded from recovery on this claim because he testified that he did not seek other employment after he was terminated.

The party asserting the defense has the burden of proof.[165] The plaintiff must show that he/she attempted to mitigate damages.[166] Plaintiff must use reasonable diligence in finding suitable employment.[167] Defendants bear the burden of demonstrating there were suitable positions available and Calkins failed to use reasonable care in seeking them.[168]

> The burden to mitigate damages is not onerous and does not require success. *Id.; Brooks v. Woodline Motor Freight, Inc.,* 852 F.2d 1061, 1065 (8th 1988). "All that is required by law is an honest, good faith effort." *Brooks,* 852 F.2d at 1065. The plaintiff need not go into "another line of work, accept a demotion, or take a demeaning position." *Parrish v. Immanuel Med. Center,* 92 F.3d 727, 735 (8th Cir.1996). Whether a plaintiff has mitigated his damages requires a factual assessment of the reasonableness of his conduct. *Hill v. Pontotoc, Miss.,* 993 F.2d 422, 427 (5th Cir.1993).[169]

The evidence established that Calkins was 75 years of age at the time of trial so he was 73 years of age at the time of his termination depending upon his birthdate. Calkins admitted he did not look for employment after his termination. He presented no evidence that he made any

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[165] *Tow v. Truck Country of Iowa, Inc.,* 695 N.W.2d 36, 40 (Iowa 2005)
[166] *Ferrell v. IBP, Inc.,* No. C 98-4047, 2000 WL 34031485, at *3 (N.D. Iowa 2000) (citing *Newhouse v. McCormick,* 110 F.3d 635, 641 (8th Cir.1997); *Hunter v. Board of Trustees of Broadlawns Medical Center,* 481 N.W.2d 510, 517 (Iowa 1992)).
[167] *Ferrell,* 2000 WL 34031485, at *3 (citing *Denesha v. Farmers Ins. Exchange,* 161 F.3d 491, 502 (8^{th} Cir. 1998))
[168] *Ferrell*, 2000 WL 34031485, at *3
[169] *Id.*

effort to find employment. Defendants presented no evidence that there were suitable positions available for Calkins.

Several federal circuit courts examining the plaintiff's failure to seek any employment hold this failure relieves the employer of demonstrating there were suitable positions for the plaintiff, thus establishing their defense of failure to mitigate damages. The underlying rationale for this exception "is that an employer should not be saddled by a requirement that *it* show other suitable employment in fact existed—the threat being that if it does not, the employee will be found to have mitigated his damages—when the employee, who is capable of finding replacement work, failed to pursue employment at all."[170] These courts have barred compensation awards.[171] Other courts reject this exception and place the burden on the employer to prove there is suitable employment on the basis the employer should not benefit from their wrongful act of termination.[172]

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[170] *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998) (referred to as *Greenway* exception by other courts); *Weaver v. Casa Gallardo, Inc.,* 922 F.2d 1515, 1527 (11th Cir.1991) ("If ... an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment."); *Sellers v. Delgado College,* 902 F.2d 1189, 1193 (5th Cir.1990) ("if an employer proves that an employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially equivalent employment.").

[171] *Sellers v. Delgado College*, 902 F.2d at 1194-96 (upheld denial of back pay); *Greenway v. Buffalo Hilton Hotel,* 143 F.3d at 54 (awards of front pay, future health insurance premiums, and future medication costs vacated when employee failed to seek suitable employment after termination)

[172] *In re Appeal of Joel Davidson,* 186 Vt. 45, 49-50, 978 A.2d 1, 4-5 (2009) (reversed decision not to award back pay when trial court adopted *Greenway* exception to mitigation fo damages defense); *NLRB v. Westin Hotel,* 758 F.2d 1126, 1130 (6th Cir.1985 *Schiller v. Keuffel & Esser Co.,* 21 Wis.2d 545, 124 N.W.2d 646, 651 (1963) (70 year old salesperson award upheld when he did not seek employment); *Kenaston v. Sch. Admin. Dist. # 40*, 317 A.2d 7, 11 (Me.1974) (teacher's award upheld when she did not seek employment); *Selland v. Fargo Pub. Sch. Dist. No. 1*, 302 N.W.2d 391, 393 (N.D.1981) (sixty-five year old teacher's award upheld when she did not seek employment).

The Iowa appellate courts have not addressed this issue. Based upon this court's review of the Iowa mitigation of damages cases, this court believes our supreme court would not adopt the *Greenway* exception maintaining the burden of proving all of the elements of the defense on the defendant. Here defendants failed to prove there was suitable employment for Calkins. Consequently, the defendants failed to establish their mitigation of damages defense.

D. Payment Terms and Conditions

Calkins also requested the court establish the terms and conditions for the payment of his interest in the company as contemplated under section 490.1434(5). The court finds the defendants shall make an initial payment of $250,000 to Calkins by April 15, 2019. The second payment of $300,000 shall be paid by January 1, 2020. The third payment of $300,000 shall be paid by September 1, 2020. The fourth payment shall be paid April 15, 2021 and the remaining balance shall be paid by January 1, 2022. The defendants shall pay pre-judgment and post-judgment interest. The defendants shall pay interest at the statutory rate applicable on the date of the entry of this order,[173] however, interest is calculated from the date of the filing of the petition.[174] This rate will be applicable until the judgment is satisfied. While the court is providing for future installment payments these payments are not future damages. The statutory rate is 4.58%.[175]

IT IS THEREFORE ORDERED judgment is entered in favor of Russell Calkins for $1,193,175 against the corporate defendants and Donald Brandt, jointly and severally, for his fair value in CTIH.

[173] Iowa Code § 668.13(3)
[174] Iowa Code § 668.13(1)
[175] *See* www.federalreserve.gov/releases/h15/ (The one-year treasury constant maturity on January 24, 2019 was 2.58.) Pursuant to the statute, 2% is added to this value.

IT IS FURTHER ORDERED that pre-judgment interest shall be paid on the judgment from the date of the filing of the petition, July 17, 2017 until the date of entry of judgment. The interest rate applicable is 4.58%. Post-judgment interest will accrue at 4.58% until the judgment is satisfied.

IT IS FURTHER ORDERED the defendants, jointly and severally, shall make payments on the following days and in the amounts indicated:

April 15, 2019 - $250,000 plus pre and post judgment interest accrued to this date.

January 1, 2020 - $300,000 plus post-judgment interest accrued on the remaining balance.

September 1, 2020 - $300,000 plus post-judgment interest accrued on the remaining balance.

April 15, 2021 - $300,000 plus post-judgment interest accrued on the remaining balance.

February 1, 2022 – remaining balance owed plus interest accrued on the remaining balance.

IT IS FURTHER ORDERED Russell Calkins' claim for lost wages and benefits is **DISMISSED.**

IT IS FURTHER ORDERED Russell Calkins' claim for corporate waste or misapplication of corporate assets is **DISMISSED.**

IT IS FURTHER ORDERED costs of this action are taxed, jointly and severally, against the corporate defendants and Donald Brandt.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCE081752	RUSSELL W CALKINS III VS DONALD R BRANDT ET AL

So Ordered

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa