MICHIGAN
IN THE MICHIGAN SUPREME COURT

EDWARD CASTLE, JR., and
THE FILTER DEPOT, LLC,

Plaintiffs-Appellees/Cross-Appellants,

v.

MARCIA SHOHAM
JONATHAN SHOHAM, and
MIDWEST AIR FILTER INC.,

Defendants-Appellants/Cross-Appellees.

Case No. 158511
COA Case No. 337969

Macomb County Circuit Court
LC No. 14-3568-CB

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PLAINTIFFS-APPELLEES' ANSWER IN OPPOSITION
TO DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

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I. Whether the Court of Appeals' finding that the Defendants' violations of the operating agreement between the parties, which deprived the Plaintiff of several of his membership rights, could constitute evidence of oppression pursuant to MCL 450.4515 was proper?

Plaintiff says: "Yes."
Defendants say: "No."

II. Whether the Court of Appeals' reliance on this Court's reasoning in *Frank v Linkner,* in holding that the capital call constituted evidence of oppression, and in finding that, in addition, MAF committed a breach of fiduciary duty, was proper?

Plaintiff says: "Yes."
Defendants say: "No."

III. Whether the Court of Appeals, regarding the safe harbors under MCL 450.4409, reached the proper result in holding that the Defendants had not established entire fairness and that the Circuit Court improperly placed the burden on the Plaintiff?

Plaintiff says: "Yes."
Defendants say: "No."

IV. Whether the Court of Appeals correctly found the Shoham Defendants liable for aiding and abetting?

Plaintiff says: "Yes."
Defendants say: "No."

V. Whether the equitable defenses claimed by the Defendants apply or are otherwise properly before the Court?

Plaintiff says: "No."
Defendants say: "Yes."

VI. Whether the Defendants have established grounds for this Court to grant leave for appeal, as required under MCR 7.305(B)?

Plaintiff says: "No."
Defendants say: "Yes."

INTRODUCTION

This Court should deny Defendants-Appellants' Application for Leave because review of the issues raised therein will not contribute to Michigan's jurisprudence, and the Application is based on fallacious premises. Indeed, after reviewing the record, the Court of Appeals, in an exhaustive 16-page unanimous decision, correctly decided the issues before it. Accordingly, Defendants have failed to establish any of the enumerated grounds in MCR 7.305(b) required to be shown in an application for leave. Furthermore, the Court of Appeals decided that the Opinion failed to meet any of the "Standards for Publication" under MCR 7.215(B) and therefore issued an unpublished opinion. The appellate court's decision to issue an unpublished decision is therefore in accord with Plaintiffs' contention that there is no reason for this Court to review the case.

The Defendants regurgitate the same failed arguments they raised on appeal, and in their motion for reconsideration. Nothing set forth in their application for leave undermines the correct findings and holdings of the Court of Appeals that (1) interference in corporate governance rights constitutes evidence of oppression and supports the remand with instructions for entry of a judgment; (2) these acts of oppression also constitute a breach of fiduciary duty; (3) calculable financial injury need not exist as to all manners of oppression in order to support a claim, consistent with Michigan Supreme Court precedent; (4) Defendants did not establish that their self-dealing was entirely fair under MCL 450.4409; and (5) nothing disturbs the Shohams' personal liability for aiding and abetting in the breach of fiduciary duties and corporate oppression scheme they perpetrated. The Plaintiffs respectfully request that this Court deny Defendants' Application for Leave to Appeal.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

I. Formation Of The Filter Depot.

Edward Castle, Jr. and Bill Down, who had both been in the air filter business for decades, formed Plaintiff, The Filter Depot, LLC, in 2000. (Ex. 3, 5/17 Tr., p 76). On April 1, 2000, the two men signed an operating agreement with each other in Filter Depot. (Ex. 6, Operating Agreement). Under the company's operating agreement, Mr. Castle owned 49% of the shares in Filter Depot, with Midwest Air Filter, Inc. ("MAF"), a Michigan Corporation wholly owned by Mr. Down, owning the majority, 51% of the shares. (Ex. 6 – Exhibit A thereto).

The division of labor between the partners was clear. Mr. Castle was responsible for generating the "revenue, the sales for the company," and to provide "[s]ales and service for the customers." (Ex. 3, 5/17 Tr., p 78). In exchange for working full time for the company, and in addition to the equal profit sharing discussed above, the company also paid Mr. Castle a modest salary for his employment, plus various expenses. (*Id*. at 79). In exchange for its 50% share of the profits, MAF provided what the partners called "the back-house services," including warehousing. (*Id*.). As Jonathan Shoham testified at trial, it was MAF's job to "get the product to the customer." (Ex. 4, 5/18 Tr., pp 126-127). This was relatively easy for MAF, as it already had the building, three delivery trucks and all the employees it would need. (Ex. 3, 5/17 Tr., pp 80-81). Since MAF could perform all of the agreed upon services through its existing infrastructure with its existing personnel and equipment, the incremental cost to MAF was very small. This was the synergy that entitled MAF to half the profits. (*Id.* at 99:8-14). It was what made the arrangement work. (*Id*. at 80-81).

Initially, in addition to its 50% profit share, The Filter Depot paid MAF a monthly fee for part of the wages for a clerical employee and a warehouse employee, as well as compensating

MAF for certain costs and delivery charges. (*Id.* at 79-80). In 2002, Mr. Down and Mr. Castle discussed and agreed upon terms for certain management fees to be paid by The Filter Depot to MAF in the amount of "[t]wo percent of gross sales per month," so that it would "cover incremental costs to Midwest Air Filter." (*Id.* at 86). This agreement and course of performance remained in place for the next 13 years – until, as will be explained below, Defendants Marcia and Jonathan Shoham unilaterally terminated it and imposed management fees over 6 times the original amount. (Ex. 3, 5/17 Tr., p 87; Ex. 4, 5/18 Tr., p 134).

II. The Shohams Accede To MAF's Majority Interest.

After Mr. Down's passing in 2013, his daughter and son-in-law, Marcia and Jonathan Shoham, purchased MAF from Mr. Down's trust that same year. (Ex. 3, 5/17 Tr., p 134; Ex. 4, 5/18 Tr., p 118). Marcia owns 51% of MAF and is the President; whereas Jonathan owns 49% and is the CEO. (Ex. 4, p 120). By purchasing MAF, the Shohams assumed majority control of The Filter Depot. With Marcia and her husband in control of MAF, they wasted no time decimating the historical structure established by Mr. Castle and Mr. Down, and which governed the organization for 13 years. The most profitable year in The Filter Depot's history was the year before the Shohams assumed control, and it has been on a downward spiral ever since. (Ex. 3, pp 88-89).

Initially, the Shohams began by harassing Mr. Castle about common business expenses, including, among other things, questioning his mileage and $30 lunches with major purchasers, and "singling him out" among the sales force in reporting requirements for expenses. (Ex. 3, 5/17 Tr., pp 91-93). Jonathan demanded that Mr. Castle provide all of his contact information for his customers, even though it was already available; and he even insisted that Mr. Castle (who had been in the business for decades) copy Jonathan "on every e-mail to your customer and supplier." (*Id.* at 97, 154-155).

It quickly became apparent that the new partnership did not have long term viability. By mid-summer of 2013, the Shohams were well on their way to eradicating the value of Mr. Castle's interest in the company so that they could freeze him out without paying him a dime, while diverting all of the profits in the company to MAF. In September 2014, Plaintiffs filed the underlying lawsuit in the Macomb County Circuit Court.

III. July 2013: Self-Dealing Without A Vote, Without A Meeting, And Over The Minority Member's Objection.

On July 3, 2013, without notice and without any vote of the membership, the Shohams drastically increased the management fees charged to The Filter Depot by its majority member, MAF. Specifically, the Shohams, unilaterally caused MAF to issue a "Consent Resolution" instituting a new management fee to be paid by The Filter Depot, which raised the costs from two (2%) percent of sales to approximately fourteen (14%).

The management fee was based on five categories of expenses: (1) Warehouse employee wages and benefits; (2) accounting and order entry staff wages and benefits; (3) executive wages and benefits; (4) transportation expenses; and (5) warehouse rent and building expenses. (Ex. 5, 5/19 Tr., pp 30-31). Under this new arrangement, The Filter Depot would henceforth pay a full "*pro rata*" share of MAF's *entire* overhead, both fixed and variable, including with respect to MAF's building rents and expenses, which were being paid to an LLC owned by the Shohams and Ted Heutsche, MAF's CFO. (Ex. 4, 5/18 Tr., p 142).

As stated, this new arrangement represented a sea change in the related party dealings. The fact that the services could be performed for small incremental costs was the essence of MAF's participation in the venture. Mr. Castle explained in his testimony how these new charges were imposed for the things that originally fell under the umbrella of the profit-sharing arrangement. (Ex. 3, 5/17 Tr., p 99). Nonetheless, revised Consent Resolutions were issued every quarter thereafter, squashing the company's profits (Exs. 7-19).

Since the "management fees" constituted payments by The Filter Depot to a company which was actually a manager of The Filter Depot, they constituted a "transaction involving an actual or potential conflict of interest between a Manager and the Company," and, thus, pursuant to section 6.1 of the Operating Agreement, all members in the company had the right to vote on the transactions. (Ex. 6, § 6.1). A meeting was not noticed, however, and a vote was not held. Moreover, since all of the profit was being transferred to MAF under this new arrangement, the transactions constituted "transfer[s] of all or substantially all of the Company's assets other than in the ordinary course of business," further requiring a vote of the membership, as opposed to consent resolutions. (*Id.*) Again, a vote was not held.

At trial, the Defendants did not call an independent expert to testify in support of the fairness of the management fees. Instead, they called Cynthia Lamain, MAF's former CPA, to testify in support of their burden in proving the fairness of the management fees. Defendants presented no building comparables, and Ms. Lamain admitted that no assessment was conducted by MAF to determine if the rates were fair. (Ex. 4, 5/18 Tr., p 55). Additionally, no evidence was presented to establish the actual amount of The Filter Depot inventory in the warehouse at any given time. Nor was there any evidence that outside vendors would have charged The Filter Depot as much or more for the same services.

Carolyn Riegler, a highly qualified CPA and Certified Fraud Examiner – who was retained as an expert by Plaintiff to review company "documents to evaluate if there were any irregularities, unusual items, things that warranted further review" – testified concerning several significant concerns and criticisms both with the finances and book keeping of the company generally and, in particular, with the basis of the management fees. (Ex. 5, 5/19 Tr., pp 9, 11).

Riegler traveled to MAF's offices in Lansing to "sit down with the controller and the financial officer to go through documents there and try to get my questions answered." (*Id.* at 12). Riegler testified that MAF's officers failed to answer her questions and that they provided irregular answers concerning the financial interrelationship between MAF and The Filter Depot:

> *Q*. Do you recall what questions they were unable to answer?
>
> *A*. Most of the questions they were unable to answer related to anything that was on Midwest Air Filter Books as opposed to Filter Depot. And then they also were unable to answer for my questions about certain accounts in the tax returns such as note receivable, the equity account. And they didn't really have any answers for the capital call, and how those were computed, so there were some major things that they didn't have answers to. [*Id.* at 13-14].

In addition to these fundamental financial irregularities, Riegler specifically opined on several flaws in the cost accounting underlying the management fees. She testified that the warehousing calculations were fatally flawed because they included no consideration as to how much of the inventory in the warehouse was actually The Filter Depot's product versus MAF's product. (Ex. 5, 5/19 Tr., pp 33-35, 39). Further, Riegler testified that it would have been impossible to allocate for warehousing because "there was no inventory on Filter Depot's financial statement." (*Id.* at 97).

Riegler also concluded that the rent charged by MAF to The Filter Depot was excessive. (*Id.* at 81). Specifically, she opined that the average price per square foot for an equivalent warehouse was between $3.30 and $3.66 per square foot, but MAF was charging $6.43 per square foot, and was thus over average on the rent of $2.77 per square foot. (*Id.* at 81-83). MAF allocated 20% of the entire warehouse rent to the Filter Depot, which allocation Riegler testified is excessive and that no back up documentation exists to support it. (*Id.*).

Addressing the management fee, the Circuit Court determined that MAF had a conflict of interest, and therefore the issue was required to be submitted to a vote, such that the failure to do so (and instead, implementing the increased fee by consent resolution), violated the operating agreement. Despite this, the Circuit Court further found that this conduct was not "evidence of oppression under MCL 450.4515" because it had also determined that the management fees were fair.

On appeal, the Court of Appeals agreed with the Circuit Court that the issuance of the consent resolution, without a vote where there was a conflict of interest, violated the operating agreement. (Ex. 2, p 5). However, the Court of Appeals disagreed with the Circuit Court's finding that these actions did not constitute evidence of oppression. The Court's reasoning was twofold: (1) the Court of Appeals held that the violations of the operating agreement could support evidence of oppression:

> The trial court has already determined that the imposition of the management fee without a vote and its issuance of the capital call were violations of the OA. These actions are evidence of willfully unfair and oppressive conduct.
>
> * * *
>
> MAF, as landlord of the building, majority shareholder of Filter Depot and 100% owner of a company directly competing with Filter Deport, stands to benefit 100% from every unilateral action it takes as majority shareholder in Filter Depot and, indeed, does so by issuing consent resolutions without a vote. Even if Castle would be outvoted on a resolution, he has the right to and should be given the opportunity to vote on issues affecting Filter Depot. [Ex. 2, pp 10-11].

And (2) the Court of Appeals, after reviewing the record, held "the trial court clearly erred in finding that the entire management fee was fair," based in part on the fact that, with regard to the fifth category of fees, the Circuit Court "inappropriately place the burden on plaintiffs to establish that part of the management fee was unfair," and that these fees otherwise lacked support. (*Id.* at 10). Additionally, the Court of Appeals found that MAF breached its fiduciary duties by implementing the increased fee. (*Id.* at 14).

IV. May 2014: The First Capital Call.

With the management fees having "set the stage" by draining significant profits out of The Filter Depot for nearly a year, on May 13, 2014, Jonathan Shoham issued a "Consent Resolution" stating that Mr. Castle would be required to contribute $167,067.36 into the company. (Ex. 3, 5/17 Tr., p 190; Ex. 4, 5/18 Tr., p 163; Ex. 11). This capital call purported to be issued pursuant to section 3.2 of the Operating Agreement, which required legitimate need for the capital, notice, and detail as to the purpose and use:

> 3.2. **Additional Contributions**. In addition to the initial capital contributions [which were never required or paid by either party], the managers may determine from time to time that additional contributions are **needed to enable the company to conduct its business and affairs**. After making such determination, notice of it shall be given to all members in writing at least ten (10) days before the date on which the additional contributions are due. **The notice shall describe in reasonable detail, the purposes and uses** of such additional capital, the amounts of additional capital required, and the date by which payment of the additional capital is due . . . ."

(Ex. 6) (emphasis added). Pursuant to section 3.3 of the Operating Agreement, a failure to contribute capital in response to a valid capital call exposed a member to liability for the amount of the capital call. (*Id.*).

There was no notice. There was no meeting. There was no vote. There was not even a discussion concerning the capital call before it was issued. (Ex. 3, 5/17 Tr., pp 103-104, 105, 195). Further, there was no description of the additional capital required and what its purpose was; and there was not even a due date for the payment. (*Id.* at 105). Given these deficiencies, and other problems with the capital call noted below, Mr. Castle did not pay the capital demanded.

In October 2014, Filter Depot brought suit in a separate case against Mr. Castle alleging he breached the operating agreement by failing to contribute to a capital call issued by the May 2014 consent resolution and including allegations of breach of his fiduciary duties. The Circuit Court ordered that the matters would be consolidated for purposes of discovery and trial. (Ex. 2, p 2).

At trial, Jonathan admitted that he calculated the dollar value of the capital call – not based on the capital needs of the company to run its affairs – but rather by the amount of the profit distributions Mr. Castle and his son had previously received for the last five years. (Ex. 4, 5/18 Tr., p 148-149, 171-172; Ex. 20). Jonathan simply resolved that the prior distributions should be paid back, alleging that MAF had not been paid its share of distributions, which was false, as discussed below. In this capital call by consent resolution, Jonathan represented that MAF had already paid in its capital of "223,436.50." (Ex. 11) However, no evidence was presented showing that MAF paid in the capital it represented that it had. (Ex. 3, 5/17 Tr., p 104). In fact, Jonathan admitted that he did not even know whether MAF put up its share of the capital call, despite representing such in the Consent Resolution. (Ex. 4, 5/18 Tr., p 171, 176). Yet, later on in his testimony, he adamantly denied that MAF had taken any distribution. (*Id.* at 178). However, both Lamain and Jonathan admitted that MAF actually did take the distribution, as it had all the Filter Depot's money in its account at all times. (Ex. 4, 5/18 Tr., p 65; see also *Id.*, pp 127, 174).

The Circuit Court found that the capital call violated the operating agreement which required that notice of a capital call describe, in reasonable detail, the purposes and uses of such additional capital. However, the Circuit Court also held that because Mr. Castle did not answer the capital call he did not suffer any damages, and therefore the issuance of the capital call did not constitute willfully unfair and oppressive conduct. The Court of Appeals held that the Circuit Court's ruling that the issuance of the capital call did not constitute willfully unfair and oppressive conduct was in error. (Ex. 2, p 5).

STANDARD OF REVIEW

Before this Court exercises its discretion in deciding whether to grant an application for leave to appeal, Defendants are required to demonstrate that the case meets one of the six grounds set forth in MCR 7.305(B). Defendants do not specifically invoke any of these grounds but appear to rely upon MCR 7.305(B)(3) and/or (5).[1]

Neither of these grounds withstand scrutiny. Under MCR 7.305(B)(3), Defendants must establish that the issue(s) in the case "involves legal principles of major significance to the state's jurisprudence." MCR 7.305(B)(5) provides grounds under both subpart (a) and (b). Under MCR 7.305(B)(5)(a), Defendants must establish that the Court of Appeals decision "is clearly erroneous *and* will cause material injustice[.]" (Emphasis added). A finding is clearly erroneous when, on review of the whole record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Boyd v Civil Service Commission*, 220 Mich App 226, 234-235 (1996). "Material injustice" is not defined in Michigan appellate decisions. However, Black's Law Dictionary defines "injustice" as the "withholding or denial of justice." Black's Law Dictionary (6th ed). Accordingly, to establish grounds exist under MCR 7.305(B)(5)(a), in addition to clear error there must be a substantial denial of justice. MCR 7.305(B)(5)(b) provides grounds where "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals."

In construing the predecessor to MCR 7.305(B), (which is identical in content and merely differing by number) MCR 7.302(B), one commentator has provided the following guidance:

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[1] In their Application for Leave to Appeal, Defendants' make broad sweeping statements alleging that allowing the Court of Appeals' Opinion to stand would be a "gross miscarriage of justice," that the decision "conflict[s] with decision from this Court and one clear misapplication of a statute", and claiming the decision "involves several principles of major significance to the state's jurisprudence" yet fails to clarify which principles, offering only a statement that they exist "primarily in the area of corporate governance and the existence of a cause of action for aiding and abetting." (Defendants' Application, p 11).

> The grounds listed in MCR 7.302(B) reflect a basic policy of the Supreme Court that energies should be devoted to reviewing important matters, and policing the administration of the judicial system, rather than being dissipated in attempts to correct every possibility of error in the decisions of the lower courts. This basic policy can be implemented effectively only through the wise exercise of the Supreme Court's discretion in tis determination of which cases will be formally heard by the court. [6 Longhofer, Michigan Court Rules Practice, 7302.1, commentary, p 503].

It is not enough to state that an appeal involves jurisprudentially significant issues; the court rules mandate that jurisprudential significance is *shown*. MCR 7.305(B). As set forth below, Defendants have failed to establish any of these criteria, and therefore Defendants' Application for Leave should be denied.

ARGUMENT

The Defendants' Application for Leave to Appeal is composed of six arguments, namely that: (1) the Court of Appeals' decision affirming the Circuit Court's factual finding that denying Mr. Castle the right to vote on the increased management fees, as well as issuing the capital call violated the operating agreement, but reversing the finding that these violations could constitute oppression and breach of fiduciary duties, are clearly erroneous and would cause substantial injustice to the Defendants; (2) the Court of Appeals misapplied *Frank v Linkner* and therefore erred in finding member oppression and an actionable breach of fiduciary duty; (3) the Court misapplied MCL 450.4409 and improperly reviewed whether the Defendants had met their burden thereunder; (4) the Court of Appeals made "factual mistakes" when reviewing the Circuit Court's findings regarding the management fees that would cause substantial injustice to the Defendants; (5) the Court of Appeals clearly erred in finding the Defendants liable for aiding and abetting which concerns legal principles of major significance to this state's jurisprudence; and (6) the Court of Appeals overlooked the applicability of equitable defenses.

As stated, although it is difficult to ascertain the grounds under which Defendants allege leave is appropriate, the issue is irrelevant because the Court of Appeals decision is correct and consistent with Michigan law. Defendants' arguments are addressed *in seriatim* below.

1. **The Court of Appeals Correctly, And Consistently With Michigan Law And Concepts of Corporate Governance, Held That Defendants' Derogation Of The Operating Agreement Was Evidence Of Oppression.**

The weakness inherent in Defendants' contention that the Court of Appeals overlooked Michigan law is evidenced by their overstated and inaccurate characterization of the Appellate Court's holding. In their "Questions Presented for Review," Defendants claim that the Court of Appeals held that valid consent resolutions could support a claim for breach of fiduciary duty and member oppression under MCL 450.4515. (Defendants' Application, p 2). In fact, the Court of Appeals held that the Defendants' conduct, although related to the issuance of consent resolutions, violated the operating agreement between the parties and therefore could constitute evidence of oppression. The consent resolutions relevant to this holding are: (1) the July 3, 2013 consent resolution, and subsequent quarterly consent resolutions, implementing the increased management fees; and (2) the May 13, 2014 consent resolution issuing the invalid capital call. (Exs. 7-19).

Concerning the consent resolutions raising the management fees the Circuit Court held not only that there was a "conflict of interest" with respect to the imposition of the terms and conditions of these fees, but also that the Defendants "violated section 6.1 of Filter Depot's operating agreement . . . by failing to submit the issue to a vote." (Ex. 1, p 4). Consistent with this holding, the Court of Appeals held that under the terms of the operating agreement between the parties the implementation of the increased management fees was required to go to a vote, and that, therefore, instituting the increased management fees through a consent resolution was not appropriate. To this end, the Court of Appeals held:

> The trial court further held that MAF violated the OA by failing to submit the issue of the management fee to a vote, as required by the OA. These decisions were

> supported by the record in that MAF, a company wholly owned by the Shohams, would benefit from charging and collecting a management fee from Filter Depot, a company they had only a 51% interest in. All members have the right to vote on issues involving a transaction involving an actual or potential conflict of interest between a manager and company under ¶ 6.1 of the OA. Castle was denied the right to vote. [Ex. 2, p 6].

Additionally, with regard to the capital call issued through the May 2014 consent resolution, the Court of Appeals further held in this regard:

> The trial court found that the capital call violated a provision in the OA which required that notice of a capital call describe, in reasonable detail, the purposes and uses of such additional capital. We find this ruling to be legally sound. [Ex. 2, p 5].

In fact, the Circuit Court concluded that the capital call was "very vague and provides no detail whatsoever" (Ex. 1, p 9), including failing to "identify why additional funds are needed to operate Filter Depot or provide specific ways in which the funds would be used," as required by "paragraph 3.2 of the operating agreement." Reviewing the Circuit Court's conclusion that "the capital call violated paragraph 3.2 of the operating agreement." (Ex. 1, pp 9-10), the Court of Appeals held:

> The capital call thus did not "describe in reasonable detail, the purposes and uses of such additional capital," or "the amounts of additional capital required" as required by ¶ 3.2….The trial court properly found the capital call violative of the OA" [Ex. 2, pp 15-16].

Accordingly, the Court of Appeals concluded that the issuance of the *capital call* – and not the consent resolution issuing the capital call, which "was undisputedly issued without a vote or meeting" (Ex. 2, p 5) – was evidence of oppression and could support a claim for breach of fiduciary duty. The Court of Appeals further reasoned that the denial of the right to vote, and the capital call which failed to provide appropriate notice, both rights provided for in the operating agreement, could support a claim for oppression. (Ex. 2, pp 10-11).

Additionally, the act of stripping a minority owner of one of the most fundamental of rights (voting) should weigh very heavily in favor of a finding of oppression. In *Franchino v Franchino*, 263 Mich App 172 (2004), well before this Court or the Supreme Court had commenced to define the contours of the oppression claim, this Court held that voting is absolutely a right of a shareholder or member. *Id.* at 184. This has never been in dispute, for the vote is how the company is governed. It is how members receive notice of company activity. It is how members assess the value of their ownership interest. The member vote should be characterized as nothing less than the *sine qua non* of ownership in a close corporation. Without it, the minority is guaranteed no control or involvement in the business, and, thus, it must be protected, not undermined, by judicial application of the oppression statutes. Allowing a controlling majority to act in derogation of the corporate documents, by unilateral consent without notice instead of a vote ***as** required by the corporate governance documents*, would greatly chill minority investment in this State's close corporations. Who would want to invest under a judicial regime that permits the transfer of all company profits to a related entity without a vote, when a vote is required under the corporate governance documents?

A. The Operating Agreement Between The Parties Specifically Required A Vote Where A Transaction Involves An Actual Or Potential Conflict Of Interest.

Defendants contend that the consent resolution was valid because no vote was required, since Section 6.4 of the Operating Agreement – which allows for permissive action to be taken by consent resolution by issuance of a proper writing – superseded Section 6.1, which establishes the right to vote on potential conflict of interest transactions. This is a simple issue. The language of the Operating Agreement in this case specifically gave their members the right to vote where there is a potential conflict of interest transaction. Here, the management fees clearly involved a conflict of interest transaction, and the Court correctly held that the right to vote specifically established through corporate governance documents in this context shall not be abrogated by another provision generally permitting action by consent. *Vill of Edmore v Crystal Automation Sys Inc*, 322 Mich App 244, 263; 911 NW2d 241, 252 (2017) ("[W]here a contract contains specific and general terms, the specific terms normally control over the general terms."). Accordingly, the parties specifically provided in the operating agreement a mandatory provision that a vote was required where there is a conflict of interest, and the language generally allowing consent resolutions does not override that.

The Court of Appeals decision is consistent with Michigan law on consent resolutions. While, as a general principle, consent resolutions allow for majority owners to bypass the processes of instituting a meeting or vote, in this case, the parties provided that consent resolutions may be had, but also specifically provided that a vote is mandatory under four scenarios. Nothing in the Court of Appeals opinion cuts against the "well-established role of a consent resolution in corporate governance." The Circuit Court and Court of Appeals merely assessed the particular language of the operating agreement between the parties in order to determine whether their actions were in line with the agreement between them. The Court of Appeals' decision does not render consent resolutions at risk of a "flood of challenges" since its holding was limited and specific to the language in the operating agreement between these parties. This has no effect on the viability of consent resolutions generally and would not affect a subsequent case where the parties have different provisions in their own Operating Agreement.

B. The Court Of Appeals Correctly Held, Consistent With This Court's Decision In *Madugula v Taub*, That Breach Of The Operating Agreement May Constitute Evidence Of Oppression.

In *Madugula v Taub*, the Michigan Supreme Court put to rest the question of whether the breach of corporate governance documents can be evidence of corporate oppression, holding as follows:

> This Court has never exhaustively listed the interests or rights that shareholders have as shareholders of a corporation. **However, we have recognized that "[t]he relation between a corporation and its stockholders is contractual in its nature" and that "[t]he charter of a corporation is its constitution.** It prescribes the duties of stockholders and directors within the limits of the charter in the exercise of the power conferred upon them." Beyond a corporation's articles of incorporation, we may also consider a corporation's bylaws and the governing statutes to determine a shareholder's interests.

Madugula v Taub, 496 Mich 685, 718 (2014) (emphasis added) (footnotes omitted), citing *Voigt v Remick*, 260 Mich 198, 204, 205 (1932); 12B Fletcher, Cyclopedia of Corporations, § 5715, p 23.

The right to vote and fair notice are fundamental shareholder rights. Consistent with the court's decision in *Madugula*, the Court of Appeals held that "the imposition of the management fee without a vote and its issuance of the capital call were violations of the OA" and that "[t]hese actions are evidence of willfully unfair and oppressive conduct." (Ex. 2, p 10). The Court correctly concluded that the unilateral consent resolutions regarding the management fees and the capital call violated the operating agreement and interfered with Mr. Castle's rights granted thereunder.

C. Even Actions Authorized By The Operating Agreement Can Be Evidence Of Oppression.

Furthermore, the Defendants' contention that the Court of Appeals offers contradictory analysis is wrong and takes a single sentence included in the opinion out of context. After dismissing the Plaintiff's breach of contract counts, the Court of Appeals summarily dismissed the Plaintiff's unjust enrichment claims, reasoning that, if a claim were to arise out of the Defendants failure to perform in conformance with the parties' expectations, a breach of contract claim would be the appropriate medium to bring such a claim since there was a written agreement on the issue – the operating agreement. The last sentence of the following portion from the Court of Appeals opinion is the alleged "contradictory analysis" upon which Defendants rely:

> As to plaintiffs unjust enrichment claim, "a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction." King v Ford Motor Credit Co, 257 Mich App 303, 327; 668 NW2d 357 (2003). An OA governs the parties' relationship on voting issues, the distribution of profits and myriad other issues. MAF, as majority shareholder, had the authority to render the consent resolution to impose the new management fee under the terms of the OA.

(Ex. 2, p 13). The Court of Appeals found the consent resolution instituting the increased management fee violated the operating agreement, but nonetheless acknowledged that the majority shareholder would have the authority to take action by a ***proper*** consent resolution. However, that was not the case here.

Additionally, even assuming that both the Circuit Court and the Court of Appeals were mistaken in their interpretation of the operating agreement, such that the consent resolutions increasing the management fee and issuing the capital call were proper, the fact that an agreement authorizes particular action does not, alone, prevent these actions from being considered evidence of oppression, if they are otherwise wrongful. In fact, the Court of Appeals, in an unpublished opinion, concerning an oppression action brought under MCL 450.1489,[2] the majority shareholder-defendants argued on appeal that the trial court erred in finding a claim for oppression because "their conduct was authorized by the corporation's bylaws." *Berger v Katz,* unpublished per curiam opinion of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880), p *4. In fact, the agreement between the parties did authorize the defendants to perform these same acts that both the trial and appellate court reviewing the case agreed constituted shareholder

[2] Note that Section 4515 of the Limited Liability Company Act is identical in all material respects to the oppression statute in Section 1489 of the Business Corporations Act, and thus the holdings and statutory interpretation relating to the latter are entirely applicable to the former and are applied interchangeably in the case law and in this Brief. "It is well settled . . . that where the BCA and LLCA relate to common purposes, they should be interpreted in a consistent manner." *Frank v Linkner*, 310 Mich App 169, fn 6 (2015) *rev'd on other grounds* 500 Mich 133; 894 N.W.2d 574 (2017), citing *Duray Dev, LLC v Perrin*, 288 Mich App 143, 159 (2010).

oppression. The Michigan Court of Appeals held as follows:

> Although the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, ***that does not mean that defendants were permitted to act in a manner that produced a willfully unfair and oppressive result to plaintiff***, as a minority shareholder.

Id. at *4 (emphasis added). The Defendants' application for leave to appeal to the Michigan Supreme Court was denied.

Likewise, the 2006 Eastern District of Michigan case of *Bromley v. Bromley*, which concerned a shareholder oppression case under MCL 450.1489, reinforces this principle. In *Bromley*, the defendant unilaterally dictated corporate action, entered into interested transactions, and committed other acts for which the court found oppressive. *Bromley v Bromley*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 4, 2006 (Case No. 05-71798), p *9-10. Moreover, "the governing documents permit[ed] him to act unilaterally, with no checks on his power and without notice to other shareholders…. In other words [the Defendant], as the majority shareholder, was able to waive all notice, meeting and voting requirements, and amend [the Company's] bylaws as he saw fit." *Id*. at *1. Additionally, after the plaintiffs filed suit for shareholder oppression, the defendant removed the three plaintiffs from the board by amending the bylaws "to decrease the number of directors from seven to four." The defendant, relying on MCL §450.1489(3)[3] asserted that his actions were permitted by the governing documents, and as such were in compliance with the Michigan Business Corporations Act. Nonetheless, the court found that because of such action "Defendants are using their majority and control position to keep Plaintiffs out of corporate affairs. Individually, the amendments are

[3] Subsection (3) in part provides: "The term ["willfully unfair and oppressive conduct"] does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." MCL 450.1489(3).

legal, yet collectively they could be used oppressively. This substantially affects Plaintiffs' rights as shareholders." *Id*. at *6.

As the foregoing cases reiterate, even when conduct is permitted under an agreement between the parties, such conduct may nonetheless constitute evidence of oppression. Here, even assuming the consent resolutions were appropriate under the terms of the operating agreement, such action could still constitute evidence of membership oppression under Michigan law since their purpose was to implement a management fee that was not established to be entirely fair, as required under MCL 450.4409. (See discussion in Section 3 and 4, below).

2. The Court Of Appeals Correctly Applied *Frank v Linkner* In Holding That Oppression Can Occur Even In The Absence Of Calculable Financial Injury, And Properly Held That MAF Committed A Breach Of Fiduciary Duty.

In Section 3 and 4 of their Application for Leave, the Defendants' contend that the Court of Appeals erred in concluding that an attempted capital call could support a claim of oppression, arguing that the capital call "did not in any way interfere with Mr. Castle's interests as a member." (Defendants' Application, p 16). To support this contention, Defendants necessarily must argue that the rationale underlying this Court's decision in *Frank v Linkner* is not persuasive. Additionally, Section 4 of the Defendants' Application is premised on the argument that the consent resolution and capital call did not cause Plaintiff any damages, as required for a claim of breach of fiduciary duty. Since the two arguments are necessarily related with respect to a showing of damages, Plaintiffs address them together.

A. The Court Of Appeals' Reliance On *Frank v Linkner* Was Appropriate.

In reversing the Circuit Court's determination that issuance of the capital call, which violated the operating agreement, was not willfully unfair and oppressive conduct simply because the Plaintiff did not respond to the capital call, the Court of Appeals properly relied upon this

Court's decision in *Frank v Linkner*, 500 Mich 133; 894 NW2d 574 (May 15, 2017):

> The trial court found that the capital call violated a provision in the OA which required that notice of a capital call describe, in reasonable detail, the purposes and uses of such additional capital. We find this ruling to be legally sound. The trial court also found, however, that issuance of the capital call did not constitute willfully unfair and oppressive conduct because Castle did not answer the capital call (i.e., he suffered no harm). This ruling was based on an erroneous understanding of the law. [Ex. 2, p 5].

Under *Frank v Linkner*, the Michigan Supreme Court, in a unanimous opinion, held that a claim for oppression accrues even in the absence of "calculable financial injury." *Frank v Linkner*, 500 Mich 133; 894 NW2d 574, 587 (May 15, 2017). This opinion speaks directly to the issue of when an oppressed shareholder has actionable remedies for which he can – and, in fact, must, for statute of limitations purposes – file suit upon suffering any oppressive conduct, which, in the *Frank* case, involved the allegedly improper reformation of a corporate governance document. *Id*. The Court of Appeals summarized this Court's relevant conclusions as follows:

> As explained in *Frank v Linkner*, 500 Mich 133; 894 NW2d 574 (2017):
>
> > In summary, MCL 450.4515(1) provides a cause of action for members of an LLC when the managers' actions are "illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." " '[W]illfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL 450.4515(2). Once a plaintiff has "establishe[d] grounds for relief" by proving that a defendant has engaged in one of these prohibited behaviors, "the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to," monetary damages. MCL 450.4515(1). Thus, the "harm" that is actionable under MCL 450.4515 is the "substantial [ ] interfer[ence] with the interests of the member as a member."
>
> * * *
>
> Our Supreme Court explained, in *Linkner*, 500 Mich at 133, that "unlike an action for tortious injury to a person, an action for LLC member oppression does not necessarily accrue when a plaintiff incurs a calculable financial injury. Instead, it accrues when a plaintiff incurs the actionable harm under MCL 450.4515, i.e., when

> defendants' actions allegedly interfered with the interests of a plaintiff as a member, making the plaintiff eligible to receive some form of relief under MCL 450.4515(1)." The harm has been incurred, then, once a plaintiff proves that a manager engaged in an action or series of actions that substantially interfered with his or her interests as a member, whether or not money damages or a calculable financial injury have yet occurred. *Id*.

(Ex. 2, pp 4-6). Defendants purport to distinguish *Linkner* on the basis that the Supreme Court's decision focused upon the question of when a claim accrues for purposes of the statute of limitations. However, this is a distinction without a difference, which this Court noted in its Opinion, "[w]hile the *Linkner* Court was discussing when a harm occurred under MCL 450.4515 for purposes of applying the correct statute of limitations, its analysis of what constitutes 'harm' under MCL 450.4515 is relevant and persuasive." *Id*. at 6. The Court of Appeals further reasoned as follows:

> According to *Linkler* rationale, Castle's action for minority member oppression would accrue when he "incurs the actionable harm under MCL 450.4515, i.e., when defendants' actions allegedly interfered with the interests of [Castle] as a member, making [Castle] eligible to receive some form of relief under MCL 450.4515(1)." MCL 450.4515(1), in turn provides that relief is available when a member shows that a controlling member acted in a way that constituted willfully unfair and oppressive conduct toward the LLC or another member. The purpose of having an action for minority shareholder oppression, then, is to protect those rights a shareholder has simply by being a shareholder, such as voting. When the shareholder has been denied that right, he has incurred actionable harm under MCL 450.4515 regardless of whether financial impact occurred. The interference with member interests is the harm. The trial court thus erred in its determination that issuance of the capital call, which violated the OA, was not willfully unfair and oppressive conduct simply because Castle did not respond to the capital call. As will be discussed later, this determination is relevant to a determination of whether the violation of the OA, under the totality of the circumstances, signifies "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL 450.4515. [Ex. 2, p 5-6].

Not only does the Court of Appeals decision comport with precedent, but it renders the most logical and fair outcome. Imagine a precedent by which a six-figure capital call can be issued in violation of the corporate governance documents, subjecting the minority member to forfeiture of his or her ownership, then used as leverage to force the minority member to give up his shares for no payment, and it does not constitute evidence of oppression. Under the Defendants' analysis, this would not constitute oppression unless the minority member wrote a check to the majority, which is especially egregious in light of the fact that the evidence at trial established that there was absolutely no valid methodology employed to compute the capital call, and that it actually contained a false statement that the company had contributed capital.

The absence of definite and identifiable financial damages is of no consequence here. As the Michigan Supreme Court recognized in *Frank*, the oppressed shareholder has other, non-economic remedies (including, of course, the right to a buyout of his interest at fair value) which he can, and in fact must (to meet the statute of limitations), seek upon being oppressed. (*Id*. at 4). Defendants' contention that corporate oppression cannot arise without actual financial damages, as in the case of the unpaid capital call, belies the Court's correct application of the holding in *Frank v Linkner*, finding that "[t]he interference with the member interests *is* the harm" and the claim may arise "whether or not money damages or a calculable financial injury have yet occurred." (Ex. 2, p. 6). This articulation of the law in this context is perfectly consistent with holding in *Linkner*, and Defendants' contention that an improper capital call does not interfere with membership rights is absurd.

B. The Court Of Appeals Correctly Found That MAF Committed A Breach Of Fiduciary Duty.

In rejecting the *Frank* rationale, Defendants argue that because there were no calculable financial injury associated with the consent resolutions implementing the higher management fee, nor with the improper capital call, that there can be no such claim for a breach of fiduciary duty. Defendants' argument that the Court of Appeals erred in finding a breach of fiduciary duty, is premised upon their "no harm, no foul" theory to support their contention that no damages were suffered. Defendants' contention that direct monetary loss must be suffered for there to be damages is inaccurate as it grossly oversimplifies this element of a cause of action.

As discussed more fully below, the Court of Appeals correctly concluded that Defendants' self-dealing was not shown to be entirely fair, and the Defendants' violations of the operating agreement damaged the Plaintiff, thereby constituting evidence of oppression. By extension, this conduct also constitutes a breach of fiduciary duty. See *Bromley v Bromley*, unpublished opinion of the United States District Court for the Eastern District of Michigan, Southern Division, issued October 4, 2006 (Docket No. 05-71798), p 5 (holding that "[I]t is reasonable to conclude that the type of conduct amounting to a breach of fiduciary duties in close corporations is the type of conduct prohibited by § 450.1489"). The Court of Appeals found that the attempted capital call and the implementation of the management fees could support a claim for breach of fiduciary duty.

Defendants' contention that the denial of the right to vote did not result in any damage to the Plaintiff, is based upon their misconception that financial injury must have occurred. Defendants have argued that, were a vote had, the Plaintiff would have nonetheless been outvoted and the management fees would have been increased. Even if the minority member could not outvote the majority, to apply a "no harm no foul" standard in this context would be as absurd as arguing that a citizen's vote for President has no value because it was not the deciding vote. Moreover, and as discussed above, this Court in *Frank* establishes that theory is without merit.

Defendants likewise argue that the capital call, even though invalid, did not result in any damages to the Plaintiff because he did not answer the call.[4] However, the improper capital call is

[4] The Defendants' citation to the Court of Appeals' statement that the "trial court found the capital call invalid, thus giving plaintiffs all of the benefits and relief it would have been entitled to" takes out of context what the Court acknowledged in its short analysis concerning only the Plaintiff's breach of contract claims. Here, the Court of Appeals was considering a measure of damages peculiar to a claim for breach of contract. As such, the Court of Appeals, noted, "The proper

intrinsically entwined with the unfair management fees, in that the former was implemented in an attempt to fund the latter, and, thus, it is part of a larger scheme to divert money out of Filter Depot into MAF. Additionally, financial damages do in fact follow the issuance of the capital call as evidenced by Defendants' attempted to sue Plaintiff on the invalid capital call. In addition to the lawsuit dismissed by the Circuit Court and affirmed by the Court of Appeals, Defendants have filed a new lawsuit based on subsequent consent resolutions for management fees and a capital call.[5] Legal fees incurred in prosecuting or defending litigation caused by another persons tortious conduct are recoverable as damages. See *Birkenshaw v Detroit*, 110 Mich App 500, 510; 313 N.W.2d 334 (1981); see also 4 Restatement Torts, 2d, § 914. Because a breach of fiduciary duty sounds in tort, Plaintiff may also seek recovery of its litigation expenses incurred in the action under its claim for breach of fiduciary duty. See *Miller v Magline Inc*., 76 Mich App 284, 313; 256 N.W.2d 761 (1977). The fact that Plaintiff may seek compensation for the litigation costs incurred in the action as damages proximately caused by Defendants' breach, is an example of economic damages. *See Lansing Pavilion, LLC v Eastwood, LLC*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2006 (Docket Nos. 265970), p *2.

C. Even An Attempted Abuse Of Power By A Majority Owner May Be Evidence Of Oppression.

Additionally, in *Schimke v Liquid Dustlayer*, the Michigan Court of Appeals in an unpublished opinion held that attempts to abuse majority power may be evidence of oppression. *Schimke v Liquid Dustlayer*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2009 (Docket No. 282421), pp *9-10. In *Schimke* the Court of appeals affirmed the

measure of damages for a breach of contract is 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.'" (Ex. 2, p 13) (citations omitted).

[5] The pending lawsuit was admitted to the record by the Court of Appeals.

trial court's finding of oppression where majority owners attempted to implement an abusive stock redemption plan, rejecting the defendant's position that "the redemption was merely a hope or a dream that had not been finalized, not a real plan". *Id.* at *3.

Defendants' statement that "following the Court of Appeals' logic, a minority member who is asked to take certain action but decides not to would still be able to pursue an oppression claim based on the request" (Defendants' Application, p 17) lacks a rational application of the facts of this case. First, the issuance of a capital call is not properly likened to merely "asking," but is effectively a demand by the entity for which noncompliance risks serious consequences affecting the membership interest. Second, it is not the "request" alone that constitutes evidence of oppression but the fact that this "request" was issued in violation of the operating agreement.

D. Oppression Claims Are Based On A "Continuous Course Of Conduct," And Therefore Are Properly Assessed As Part Of A Larger Scheme.

Furthermore, the nature of member oppression actions, which expressly contemplate the existence of a "continuous course of conduct," in determining whether oppression occurred, is such that the acts that a minority member claims are oppressive are to be viewed as part of a larger scheme. That is to say that, evidence of oppression must be analyzed in light of the circumstances and evidence in totality, not merely as isolated oppressive acts. See, e.g, 18A Am Jur 2d Corporations § 767 (1985) ("The existence of oppression must be determined on a case by case basis taking into account the specific facts of each case."); *Landstrom v Shaver*, 561 NW2d 1, 9 (SD, 1997) ("Oppression is based on the totality of factual circumstances and is not relegated to a bright-line rule or implementation of a checklist."). In fact, in denying the Defendants' motion for summary disposition as to portions of Plaintiff's claims related to his termination, the Circuit Court correctly noted, "when reviewing a claim under MCL 450.4515(3), the court is required to take into account *the entire factual landscape*, not one particular action, as the statute provides that oppression can be formed through 'a continuing course of conduct.'" (Ex. 21, January 21, 2016 Opinion and Order, pp 6-7) (emphasis added).

3. The Court Of Appeals Correctly Found The Shoham Defendants Liable For Aiding And Abetting.

Additionally, the Court correctly held that Defendants Marcia and Jonathan Shoham aided and abetted in the wrongful conduct of MAF. (Ex. 2, p 14). In concluding so, the Court of Appeals cited language from the Restatement:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

(Ex. 2, pp 14-15; citing Restatement (Second) of Torts § 876 (1979)).

Defendants contend that the Court of Appeals improperly relied upon language describing conspiracy law, under section 876(a) of the Restatement, and therefore erred in finding the Shoham's liable under a theory of aiding and abetting. To this end, Defendants rely upon the following *single sentence* from the Court of Appeals' Opinion: "They thus acted in concert with MAF in its membership oppression and breach of fiduciary duties and are liable for aiding and abetting in the same." (Ex. 2, p 15). Since the Court of Appeals decision included this single statement, the Defendants allege that the Court improperly relied upon subsection (a) and, in effect, recognized a claim for aiding and abetting under an "in concert" theory.

However, the Court of Appeals did not expressly rely upon subsection (a). There is no discussion, nor is there any particular citation to this subsection (a). Defendants' rely on the single mention by the Court of Appeals that the Shohams acted "in concert" with MAF, in order to contend that the Court incorrectly applied a standard applicable to conspiracy claims. However, the Court merely cited this entire section 876 of the Restatement, which falls under the heading of "Persons Acting in Concert." The Court's reference to this entire section of the Restatement, paired with its placement and its heading in particular, clearly shows the Court's reference as short-hand for aiding and abetting liability under the Restatement.

A. Aiding And Abetting A Breach Of Fiduciary Duty Is Recognized Under Michigan Law.

With respect to aiding and abetting a breach of fiduciary duty, the Michigan Court of Appeals in *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 445; 683 NW2d 171 (2004), rev'd in part on other ground, 472 Mich 192 (2005), held that:

> Michigan law does provide for a cause of action for aiding and abetting the breach of a fiduciary duty. Our Supreme Court has stated that a person who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise.

Based on the holding in *Echelon*, Defendants' position with respect to Plaintiffs' aiding and abetting breach of fiduciary duty claim is without merit. Michigan courts have repeatedly recognized aiding and abetting liability for these types of claims in the past. See, e.g., *Echelon Homes LLC v Carter Lumber Co*, 261 Mich App 424, 445 (2004) ("Michigan law does provide for a cause of action for aiding and abetting the breach of a fiduciary duty") (rev'd on other grounds); *Prime Financial Services, LLC v Vinton*, 279 Mich App 245, 276 (2008) ("A person may be liable for conversion 'by actively aiding and abetting or conniving with another in such an act"); *Kraniak v Cox, Hodgman & Giarmarco, PC*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2002 (Docket No. 230028), p *3. (dismissing Plaintiff's aiding and abetting a breach of fiduciary duty claim, because the Plaintiff had not brought a claim for breach of fiduciary duty and therefore finding "there is no underlying breach of fiduciary duty in this case in which plaintiff may attach his 'aiding and abetting' a breach of fiduciary duty claim.")

B. Claims Of Oppression Are Rooted In The Law Governing Breaches Of Fiduciary Duty, Recognized As A Tort.

That a breach of fiduciary duty may support an aiding and abetting theory of liability is clear. It is from the principles of fiduciary law, that the oppression claims arose. In *Bromley v Bromley*, Judge Zatkoff aptly described the oppression claim as follows:

> Michigan courts have consistently held that the purpose of § 450.1489 is to protect minority shareholders, particularly in close corporations, from overreaching and heavy handed actions by the majority. [*Bromley*, unpub op at *14 citing *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 284 (2002)].
>
> *   *   *
>
> Therefore, **it is reasonable to conclude that the type of conduct amounting to a breach of fiduciary duties in close corporations is the type of conduct prohibited by § 450.1489.** [*Bromley*, unpub op at *16 (emphasis added)].

As the common law on partnership and corporate duties developed throughout the 20th Century, the case law articulated fundamental fiduciary principles, which underlie the statute pursuant to which this litigation is brought, MCL 450.4515, which permits a direct cause of action for what has become known as corporate or minority oppression.

Since the adoption of this standard by the Michigan Supreme Court, the fiduciary obligation has been refined by Michigan courts to include specific shortcomings between fiduciaries, which trigger causes of action under both the common law and the oppression statutes. For example, in *Wagner Electric Corp v Hydraulic Brake Co*, 269 Mich App 560, 566 (1934), the Michigan Court of Appeals held that the duty of loyalty requires the fiduciary to place the interests of his counterpart *ahead of his own* and prohibits the fiduciary "from acting in any antagonistic position whether for [his] own personal benefit or for the benefit of other competitive corporations." This duty "is typically implicated when directors engage in self-dealing, or when they take personal benefits not shared with all the shareholders." Gold, *The new concept of loyalty in corporate law*, 43 UC Davis LR 457, 459 (2009).

In 1993, the legislature essentially codified these and other fiduciary principles when it enacted MCL 450.1489, establishing a cause of action for "willfully unfair and oppressive conduct" as to business corporations, and, later, in 1997, when it enacted MCL 450.4515, a corollary statute applicable to limited liability companies. The Legislature enacted the oppression statutes in order "to give a statutory cause of action to shareholders who are abused by controlling persons." *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 284 (2002). With the oppression statutes, the Legislature provided a special statutory cause of action in favor of minority or non-controlling members of Michigan limited liability companies, who have been subjected to illegal, fraudulent, or willfully unfair and oppressive conduct.

Defendants cite to no binding Michigan precedent that says aiding and abetting liability can only attach to a tort, and, even so, it is clear that the conduct that underlies a breach of fiduciary duty is the same conduct underlying a claim of corporate or member oppression. As breaches of fiduciary duty have long been recognized as torts, then, it follows that these actions – the same actions underlying the claim of oppression – is certainly tortious. *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761, 774 (1977) ("Plaintiffs' action is premised upon a breach of fiduciary duty, which sounds in tort"). Defendants' reliance on *Madugula v Taub*, 496 Mich 685 (2014) is misplaced. The *Madugula* Court was not concerned with whether minority oppression claims were tort claims, rather, the issue before the court was whether a claim for minority oppression is accompanied by a right to a trial by jury. Since the statute did not expressly provide for a right to a jury trial, the court inquired whether there was a constitutional right to a jury trial. The answer depended upon whether it would have been considered equitable in nature at the time the constitution was adopted. The Court concluded "that a § 489 claim, given its similarities to equitable shareholder derivative claims and claims for dissolution, would have been denominated equitable in nature at the time the 1963 Constitution was adopted." *Madugula v Taub*, 496 Mich 685, 711; 853 NW2d 75, 89 (2014).

Additionally, aiding and abetting is a theory of joint liability rather than a substantive cause of action. As such, the Court of Appeals did not recognize any cause of action regarding aiding and abetting that is new to Michigan jurisprudence.

4. **The Court Of Appeals' Discussion Regarding The Safe Harbors Under MCL 450.4409 Reached The Proper Result By Finding The Defendants Had Not Established Fairness.**

MCL 450.4409 states, in relevant part:

> (1) Except as otherwise provided in an operating agreement, a transaction in which a manager or agent of a limited liability company is determined to have an interest shall not, because of the interest, be enjoined, be set aside, or give rise to an award of damages or other sanctions, in a proceeding by a member or by or in the right of the company, if the manager or agent interested in the transaction establishes any of the following:
>
> (a) The **transaction** was fair to the company at the time entered into. [Emphasis added].

In determining fairness as referenced in MCL 450.4409(1)(a), the case law invokes considerations far beyond simply the price charged and involves analysis of the entire business structure surrounding the transaction and the industry in which the business is situated. The interested party must offer concrete evidence from within the industry to substantiate the alleged fairness of the transaction. *See Patrons' Mut Fire Ins Co v Holden*, 245 Mich 493, 499 (1929). The fairness requires more than merely an analysis of the price and a comparison to the market rates –

it requires that the transaction be fair in light of the interests of the corporation. *Fill Buildings, Inc v Alexander Hamilton Life Ins Co of Amer*, 396 Mich 453, 461 (1976). With respect to this, the Court of Appeals cited *Fill Buildings* favorably:

> As stated in *Fill Bldgs, Inc v Alexander Hamilton Life Ins Co of Am*, 396 Mich 453, 461; 241 NW2d 466 (1976):
>
> > Given an instance of alleged director enrichment at corporate expense such as in this case, the burden to establish fairness resting on the director requires not only a showing of 'fair price' but also a showing of the fairness of the bargain to the interests of the corporation. Only when a convincing showing is made in both respects can 'fairness' under the statute be said to have been established. [Ex. 2, p 10].

Additionally, under *Fill Buildings*, the standard and burden of proving "fairness" in this context is heavy, and a proper application of it establishes that the singular finding concerning the amount of the charge, as in the Circuit Court's analysis, is insufficient. In *Fill Buildings*, the Michigan Supreme Court affirmed a trial court's holding that a lease agreement between a corporation and one of its fiduciaries was unenforceable because the fiduciary failed to carry his burden at trial that it was fair to the corporation, even where there was evidence that the rental rate in the challenged lease was "was reasonable compared to similar properties." *Fill Buildings,* 396 Mich at 468.

This means that, in addition to a fair price terms, the court is to consider the fairness of the additional attributes of the transaction. Because the Circuit Court improperly focused solely on the "price" term of the management fee, the Court of Appeals noted:

> With that framework in mind, we thus take on the heavy first task of determining whether the management fee was, in fact, fair to Filter Depot, as argued by defendants and found by the trial court. It is not until that determination is made that we can tackle the next step and review whether, if the fee was indeed fair to Filter Depot, it nevertheless constituted "willfully unfair and oppressive conduct toward the limited liability company or the member." MCL 450.4515(1). [Ex. 2, p 7].

Therefore, rather than evaluating the term "fair" in a single step, the Court of Appeals described a two-step analysis first turning on whether there is a fair price (or "fee"), and, if so, considering whether the transaction is fair to the interests of the entity (as illustrated in *Fill Buildings*) or whether it is unfair or oppressive. The Court of Appeals recognized that the Circuit Court analyzed only the price term, and, after finding the fee was fair did not appropriately consider the other circumstances of the transaction to determine whether "fairness" under the statute was established.

In its discussion of the statute, the Court of Appeals likened only fair price with subsection (1)(a) but conflated the additional factors relevant to the fairness of a transaction (inherent in (1)(a)), with subsection (4). Defendants contend that the Court of Appeals misapplied MCL 450.4409(4).[6] However, the Court of Appeals did not apply subsection (4) at all because, after concluding the price/fee was not shown to be fair, it was not necessary for the Court of Appeals to move beyond (1)(a). MCL 450.4409(4) therefore is not implicated under any reading of the statute. Even assuming there was a viable argument that the Court of Appeals applied subsection (4) in this case, it nonetheless reached the correct result in finding the Defendants failed to meet their burden of establishing the transaction was fair.

5. **The Court Of Appeals Properly Held That The Defendants Did Not Meet Their Burden Of Establishing Entire Fairness Of The Transaction.**

In Plaintiffs' Brief on Appeal, they alleged the Circuit Court erred in finding the management fees were fair, because in doing so the court had improperly shifted the burden to the Plaintiffs to show the fees were unfair, and because Defendants otherwise had failed to meet their

[6] It is unclear under what theory Defendants allege a misapplication of statute would be grounds for the Supreme Court to grant leave to appeal. In fact, MCL 450.4409(4) was not applied in this case since the Court of Appeals determined that the fee was not established to be entirely fair, and therefore, the Court's discussion regarding subsection (4) are merely dicta.

burden under MCL 450.4409.[7] Regarding the fifth category of management fees, concerning building rent and other expenses, the Court of Appeals agreed and found clear error where the "trial court did, in fact, inappropriately place the burden on plaintiffs to establish that part of the management fee was unfair." (Ex. 2, p 10).

Defendants take issue with the Court of Appeals' review of the record in this regard, alleging that the Court not only overlooked critical evidence, but also failed to apply a clear error standard of review. (Defendant's Application, p 27). As the Court of Appeals noted:

> A factual finding is clearly erroneous if there is no substantial evidence to sustain it or if, although there is some evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

(Ex. 2, p 3) (citations omitted). Upon review, the Court of Appeals was tasked with determining whether an error was made by the Circuit Court in allocating the burden of proving fairness, and, subsequently, in determining whether there was sufficient evidence to support finding the burden was satisfied. It is axiomatic that, to an extent, reviewing for clear error necessitates a review of the evidence. This argument in Defendants' Application for Leave makes the same fatal flaw the Circuit Court had made in this regard, by failing to properly assign the burden.

A. The Burden Of Establishing The Fairness Of The Transaction Is On The Defendants.

The Circuit Court was wrong to view any component of the entire fairness question as being Mr. Castle's burden to prove or disprove. When a fiduciary of a corporation engages in self-dealing, as the Shohams have caused MAF to continuously and rampantly do in this case, the burden of establishing that the fiduciary's self-dealing is fair, and thus not actionable, is carried

[7] As Plaintiffs argued on appeal that the Circuit Court had improperly shifted the burden, and that the transaction was not shown to be fair, Defendants' argument that the Circuit Court *sua sponte* considered the fact that certain reports were not introduced, or otherwise improperly considered the sufficiency of the evidence, is incorrect. (Defendants' Application, p 30).

only by the interested, self-dealing fiduciary. This shifting burden of proof with respect to self-dealing by interested members is directly codified in Michigan law. Section 4409 of Michigan's Limited Liability Company Act provides that a transaction involving an interested manager or agent of the corporation shall not be set aside or give rise to an award of damages *if the person interested* in the transaction *establishes* that the transaction was fair, the transaction was approved by independent managers upon disclosure of all material facts, or the transaction was approved by the members upon disclosure of all material facts.

Therefore, the burden of establishing that one of the 4409 safe harbors applies falls entirely on the interested managers or agents. As stated, "Michigan requires that the interested person demonstrate that the transaction was validated in one of the ways permitted by statute." *Camden v Kaufman*, 240 Mich App 389, 398 (2000), citing ABA Model Bus Corp Act (3d ed, 1997 Supp), § 8.61, p 407. "[I]n situations where directors themselves engage in direct dealings with the corporation, it becomes *their burden* to prove that the transaction was fair and reasonable." *Christner v Anderson, Nietzke & Co.*, 156 Mich App 330, 340 (1986), *rev'd in part on other grounds*, 433 Mich. 1 (1989) (emphasis added). "The director has the burden of proving the fairness and honesty of his dealings with the corporation." *Barber v Kolowich*, 283 Mich 97, 104 (1938). When a plaintiff alleges self-dealing by a defendant, the burden shifts to the defendant to show that the conduct was fully disclosed and fair. See *Dolan v Crutcher*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2003 (Docket No. 231604), p *2. Only if the interested officer can prove that "his acts are open and fair and known to the directors and stockholders" can the officer deal with the corporation. *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 522 (1910).[8]

Importantly, applying this standard, the court in *Fill Buildings* held that even though a "fair price" – one commensurate with comparable transactions – was established and the interested parties were even "entitled to make a profit," the interested transaction was void as unfair because necessary proofs were not adduced at trial "to rebut the statutory presumption of insider enrichment at corporate expense." *Id.* at 641-42. In the instant case, not only was a meeting and vote not held in this regard, but the Defendants failed to properly support this burden, as defined by Michigan precedent, and the Circuit Court improperly turned the tables and made it Plaintiff's burden, while focusing solely on the "price" term of the management fee.

B. The Self-Serving And Unsupported Testimony Of MAF's Owners And Accountants Was Insufficient To Satisfy Defendants' Burden Of Establishing Fairness.

Defendants' argument in their application for leave appears to rely on the premise that, Defendants had introduced sufficient evidence to meet their burden and that since the Court of Appeals found otherwise it must have either failed to apply the appropriate deferential standard of review, and/or have completely overlooked several pieces of evidence in the record.

The relevant category of expenses related to the management fee involved two key

[8] See also, *Dittrich v. Cabana Mfg. Corp.*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 1998 (Docket No. 185155), p *4-6 ("Where a corporation enters into a transaction in which a director or officer is determined to have an interest, the transaction should be set aside unless the director or officer establishes that 'the transaction was fair to the corporation at the time entered into'"). The interested party must offer concrete evidence from within the industry to substantiate the alleged fairness of the transaction. See *Patrons' Mut. Fire Ins. Co. v. Holden*, 245 Mich 493, 499 (1929) (insurance agency's assurance that provision of transaction granting them perpetual right to commissions was fair and in accordance with usual practice of insurance agents was not sufficient to carry the burden of establishing fairness). A manager's conduct must be measured by the most exacting standard of fairness to the corporation. *Buck v. Northern Dairy Co.,* 364 Mich 45, 59 (1961).

components: (1) the percent of rent being allocated to the the Filter Depot, and (2) the price of the underlying rent. In finding this portion of the management fees to be fair, the Circuit Court provided:

> In this case, Mr. Shoham testified that he asked Ms. Tremain and other MAF staff to determine what MAF's costs were that were attributable to Filter Depot, but to err on the conservative side. Further, Ms. Tremain cited to the support of her determination, and testified that she repeatedly gave Plaintiff Castle opportunities to ask questions regarding the allocation and to review the materials she relied upon. While Ms. Rieger questioned some of Ms. Tremain's conclusions, she did not testify that Ms. Tremain's allocations were unfair; rather, Ms. Rieger simply testified that she did not have enough information to make her completely comfortable with the allocation.

(Ex. 1, p 7). Evidently, the Circuit Court relied on (1) Defendant Jonathan Shoham's testimony that he told Ms. Lamain to err on the conservative side; (2) that Ms. Lamain cited to support for her determination (the "Take Stock Reports"); and (3) that Plaintiff's expert, Ms. Riegler, could not conclusively say the rent allocation was unfair.

In effect, the Circuit Court held the self-dealing was fair to the company because two interested (and non-independent) witnesses "testified that the consent resolutions merely passed along the true costs of the services MAF was providing[,]" and that Ms. Riegler "did not go so far as to opine that the charges were unfair or inaccurate." (Ex. 1, p 8). In addition, the Circuit Court held that "in order to establish that denying his right to vote constituted oppression within the meaning of the statute, Plaintiff would need to establish that raising the management fee was unfair[.]" (*Id.* at 4). The Court then focused on the unsubstantiated testimony of the company's owner and former CPA that it was simply a cost pass-though, with no documentation to back up the contention. It ignored the substantial testimony of Mr. Castle's expert that there were substantial irregularities on the books, and major discrepancies in establishing the basis of the fees, including that the fixed overhead was being allocated principally to The Filter Depot, while other of the Shohams' businesses were benefitting from it.

In reviewing whether the trial court committed clear error in finding that the Defendants had met their burden, the Court of Appeals was required to consider the evidence in the record. The Court of Appeals found that there was no real support in the record for the allocation of rent, nor did the Defendant present any evidence to show that the price of the underlying rent was fair. (Ex. 2, pp 9-11). Ultimately, the Court of Appeals concluded that the unrebutted evidence provided by Ms. Riegler established that with respect to several components of the management fee, Defendants failed to sustain their burden of proving that it was fair. (Ex. 2, p 10).

a. 20% Allocation of Rent

The Defendants contend that the testimony at trial established that the percentage of rent that was allocated to the Filter Depot was established as fair. Specifically, Defendants contend that (1) the testimony of MAF's former bookkeeper, Ms. Lamain, provided the basis for these numbers, and that (2) the testimony of Defendant Jonathan Shoham, paired with trial Exhibit 102 (attached hereto as Exhibit 22) - which Defendants purport is a summary of the inventory data - is dispositive.

As noted, the Defendants did not present evidence of an independent expert to testify to these allocations, but rather, relied in part on the testimony of Ms. Lamain. Defendants contend that she testified they used a lower, conservative number of 20%. (Defendants' Application, p 26).

However, this mischaracterizes the strength, and clarity, of Ms. Lamain's testimony. She did not testify that the 20% allocation was low, she merely contemplated that it *could* have been, (Ex. 4, 5/14 Tr. p 34:9-13 "[t]hat was in terms of the percentage and felt that 20 percent seemed fair. It might have been actually a little bit low but it was -- It would be a hard number to be exact.") Additionally, she testified that the allocations were not based on sales numbers, and that the "Take

Stock" software allowed the running of reports to determine inventory purchased:

> *Q.* Well, you said that the way you determined how much inventory the Filter Depot had as opposed to the Lansing branch was based on the sales numbers?
> *A.* Actually no. The inventory Take Stock software allowed us to run a report of the inventory purchased by branches.
> So we would at the end of the month I would run a report for Lansing and all the purchases that Lansing purchased for that particular month, and I could run the same report for Detroit.
> So at the bottom of, at the end of the report it would tell me exactly how much inventory was purchased for both those warehouses together. That made the total. And then whatever the portion, you know, ***if*** Detroit had purchased 47 percent of the total inventory for the month, then that is how I would pro-rate that.

(Ex. 4, 5/18 Tr., p 53:2-21) (emphasis added). Furthermore, Lamain did not testify that at any point the allocation was 47%. She merely used that percentage as an example of what the reports *could* produce. However, as the Court of Appeals noted, these reports were never introduced into the record.

> Tremain testified that reports would allow them to see what inventory was purchased for Filter Depot, **though they were not made part of the record.** Tremain further testified that it would be hard to be exact and they felt that 20% allocation to Filter Depot for warehouse space would be fair.

(Ex. 2, p 9) (emphasis added). These reports the Court of Appeals referenced, are the Take Stock reports Ms. Lamain mentioned. (Ex. 4, 5/18 Tr., p 54:12-13 "The Take Stock software allows us to narrow down the parameters of what was purchased.") Defendants' contend that their failure to introduce the Take Stock reports was a non-issue because (1) Plaintiff could have accessed them, and (2) a summary of the reports was introduced as trial exhibit 102. (Defendants' Application, p 30).

Defendants repeatedly argue that Plaintiff could have accessed the reports. However, whether Mr. Castle had the opportunity to review any reports allegedly supporting the 20% allocation is irrelevant for purposes of determining whether the Defendants had met *their burden* of showing the transaction was fair under MCL 450.4409(1)(a).

Additionally, exhibit 102 is not a summary of the reports the Court of Appeals expressed concern over the absence of. Ms. Lamain testified regarding the "Take Stock" reports. (Ex. 4, 5/18 Tr., p 53). The testimony regarding these reports provided they are not based on sales numbers. (*Id.*). Mr. Shoham never testified that exhibit 102 is a summary of the Take Stock reports, or a summary of the data that Ms. Lamain relied upon. In contrast, based upon Mr. Shoham's testimony regarding exhibit 102, the document was "Filter Depot's drop ship sales analysis," and was based entirely on sales numbers. (*Id.* at 223). The extent of Mr. Shoham's testimony regarding exhibit 102 reads as follows:

> *Q*. Okay. Now look at Exhibit 102, and tell the Judge what that is?
> *A*. This is Filter Depot's drop ship sales analysis.
> *Q*. Now, this has to do with the proper allocation of the consent resolution dollars to warehouse space?
> *A*. Yes, sir.
> *Q*. And there has been some testimony about whether the warehouse is needed or not needed and whether parts are drop shipped or ship. What did you do to perform the analysis?
> *A*. I actually took the two biggest customers of drop ship that accounts for 99 percent of the drop ship items.
> *Q*. In Detroit?
> *A*. In Detroit.
> *Q*. And took --
> *A*. And took that out of the sales to account. It wasn't in inventory.
> *Q*. I would assume that the rest is inventory?
> *A*. Yes.
> *Q*. You took out the drop ship?
> *A*. Yes, sir.
> *Q*. And tell the Judge what you come up with there in the bottom?
> *A*. If you look at July '12/ June '13, the share of Detroit space used for our inventory was actually 46.6 percent. In July '13 through June '14 it was 39.5 percent. We did the content resolution we were charging 20 percent now since because the sales are down. So much it is down to 22.1 percent the 20 percent allocation on the inventory and the overhead of the warehouse was actually low, and that is what this shows. That the actual, or I would say 99 percent, as close as you can get. 39.5 percent, that is probably what it should have been charged for overhead, and then encompass the rent and insurance and everything, but we were charging 20 percent. [Ex. 4, 5/18 Tr., p 223:5-224:21].

Additionally, even if exhibit 102 represented the Take Stock reports, it is far from dispositive. Mr. Shoham testified that he calculated the sales from inventory by taking the total from all sales and then backing out sales from Filter Depot's two largest drop ship customers.[9] (*Id.* at 223:12-224:2). He testified that these two customers accounted for 99% of the Filter Depot's drop ship sales. (*Id.* at 224:16-17). Clearly, then, not all of the drop ship sales were extracted from the sales numbers, leaving the numbers in Exhibit 102 artificially inflated. This is relevant because Defendants claim that the rent was proportional to the amount of space in MAF's Lansing Warehouse that the Filter Depot used to store its inventory. No other data or documentation was introduced to support these numbers.

Additionally, however, exhibit 102 appears unreliable on its face. Defendants claim that "Exhibit 102 shows that even in the worst year of the four, Filter Depot's percent use of the warehouse was 22.1%. But in no time during the four years did the actual percentage drop below 20%." (Defendants' Application, p 29). However, as explained below, even assuming the sales numbers in exhibit 102 were accurate, the actual percentage did drop below 20%.

Defendants calculation purports to take the sales total from Filter Depot, labeled "DT Sales from Stock (LN) Warehouse" over the total number of sales from the Lansing Warehouse, "TOTAL DT/LN Stock Warehouse Sales." (Ex. 22). In theory, assuming the numbers were accurate, this would yield the ratio of sales made by the Filter Depot from the Lansing warehouse to the sales made by MAF from the Lansing warehouse. Defendants contend this ratio yields the percent of inventory space in the Lansing warehouse attributable to the Filter Depot, denoted as "DT% of Space Used." The corresponding percent, for the portion used by MAF, is denoted as "LN% of Space Used." In the first two columns of Exhibit 102, the DT% of space and the LN% of space, add up to 100%, as expected. (*Id.*). However, these same categories in the right two

[9] The "drop ship sales" are sales made other than from inventory in the Lansing warehouse.

columns add up to over 100%. (*Id.*). This then, begs the question of how the percentages were created.

Looking at the numbers provided on the chart, it is clear that the "DT Sales from Stock (LN) Warehouse" were taken over the sales numbers for MAF ("LN Sales from Stock (LN) Warehouse"), not the sales numbers of the Lansing warehouse as a whole. (*Id.*). The effect is that the percentages attributable to the Filter Depot were artificially inflated. In fact, taking the "DT Sales from Stock (LN) Warehouse" in the 2015-2016 year column over the total number of sales from the Lansing warehouse ("TOTAL DT/LN Stock Warehouse Sales"), yields 18%, not 22.1%. (*Id.*). Therefore, even assuming the sales numbers provided in exhibit 102 were accurate, and that Filter Depot's drop ship sales were properly extracted from the sales numbers, allocating 20% would be charge a proportion to Filter Depot that was actually *higher* than its proportional use.

b. $6.43 Per Square Foot Rent.

Furthermore, even assuming the fairness of the 20% allocation was established, the Defendants were also required to establish the underlying price of the rent was fair in order for this entire transaction to meet the safe harbor under MCL 450.4409(1)(a).

The Court of Appeals ultimately concluded that the unrebutted evidence provided by Ms. Riegler established that Defendants failed to sustain their burden of proving that it was fair. To this end, the Court of Appeals correctly acknowledged that the "only testimony concerning the rent and building overhead came from Riegler, who is also a real estate agent." (Ex. 2, p 10). Defendants did not offer any evidence to support their contention, and to meet their burden, that the rent price was fair.[10] Contrary to Defendants' contentions, Riegler did not testify that the *only*

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[10] Defendants' witness, Ms. Lamain, acknowledged that no review or assessment was done to determine whether the rent rate was fair [Q. "You didn't check outside rent? Was there any independent review or audit to see whether the rents that were charged to Filter Depot were fair?"

comparable property was priced at $6. In fact, the Plaintiff's expert testified that she found ***eight*** comparable properties and that the average rent for these comparable warehouses was $3.30-$3.60. (Ex. 5, 5/19 Tr., p 81). In finding clear error by the Circuit Court regarding the fairness of the rent, the Court of Appeals found: "[t]here was no other testimony concerning the rent and no support for an allocation of inventory space, such that the trial court did, in fact, inappropriately place the burden on plaintiffs to establish that part of the management fee was unfair." (Ex. 2, p 10). The Court of Appeals, after reviewing the evidence, was left with a firm conviction that an error was made and, therefore, correctly found clear error in the Circuit Court's finding that the entire management fee was fair.

6. The Circuit Court Correctly Held Equitable Defenses Do Not Apply.

Defendants contend that the Court of Appeals, in its order remanding the case to the Circuit Court, overlooked the Defendants' equitable theories as a defense to Plaintiff's claims.[11] However, the Court of Appeals adequately addressed Defendants' argument when it upheld the trial court's finding of no cause of action on Defendants' cross-appeal and found that the "trial court correctly ruled that Filter Depot failed to show that Castle breached fiduciary duties owed to it." (Ex. 2, p 16). As such, there was no wrongdoing established on the part of the Plaintiff that would enable the court to consider these defenses,

Additionally, the Circuit Court already considered and subsequently denied Defendants' laches argument. In its opinion and order regarding the Defendants' Motions for Partial Summary Disposition, the Circuit Court said that "the Court is convinced that Defendants may not utilize the

A. "No." (Ex. 4, 5/18 Tr., p 55:2-6)].

[11] It is unclear in the single paragraph that the Defendants devote to this contention, under what grounds this should enable the Supreme Court to grant leave. Additionally, the issue, while raised on appeal, is not adequately briefed and should be considered abandoned.

doctrine of laches to defeat Plaintiff's shareholder oppression claim." The Circuit Court's conclusion was based on the fact that if a claim for oppression was established the Plaintiff "will have established that Defendants acted in an inequitable manner, and therefore "since laches is an equitable doctrine, a defendant with unclean hands may not assert the defense" (Ex. 21, p 7).

CONCLUSION

Contrary to Defendants' assertion, the Appellate Court's opinion is not only consistent with prior Supreme Court and Court of Appeals decisions but is accurate and correct in its legal reasoning and analysis, with the result that the correct decision was rendered. Therefore, no injustice, let alone material injustice, results from leaving the opinion of the Court of Appeals undisturbed. Accordingly, Defendants cannot establish any grounds for which leave to appeal to the Supreme Court would be appropriate, and, as such, leave should be denied.

Respectfully Submitted,

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Dated: November 5, 2018

CERTIFICATE OF SERVICE

I, Danielle Sawa, of the law firm of Rossman Saxe, P.C., hereby certify that, on November 5, 2018, I caused Plaintiffs-Appellees' Answer in Opposition to Defendants' Application for Leave to Appeal to be filed with the Clerk of the Michigan Supreme Court through the electronic filing system, which will send same to all counsel of record.

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