STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. JOSEPH

JEFFREY FRANKS,
MICHAEL JOSEPH FRANKS,
WILLIS FRANKS,

Plaintiffs,

File No. 13-809-CBB

Hon. T. J. Ackert
By Assignment

v

NEWELL A. FRANKS, II, BRIAN MCCONNEL,
LEANN MCCONNEL, DAVID FRANKS,
LAWRENCE FRANKS, and BURR OAK
TOOL, INC.,

Defendants.
_______________________________________/

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Plaintiffs brought this suit against Defendants on September 3, 2013, pursuant to MCL 450.1489 alleging shareholder oppression based on actions taken by Defendants in their status as directors, officers, and voting shareholders, and those in control of Burr Oak Tool, Inc. On October 27, 2016, the trial court granted summary disposition for Plaintiffs on their oppression claim and determined that the remedy would be a redemption of Plaintiffs' shares. Judge Paul Stutesman held a trial on May 2, 2017 on valuation of Plaintiffs' shares. The Court determined that $712/per share was fair value under MCL 450.1489 and awarded interest and attorney fees.

After Defendants appealed, the Court of Appeals issued its published opinion on September 24, 2019 finding that issues of fact precluded summary judgment and vacated the lower court's decision. *Franks v Franks*, 330 Mich App 69 (2019).

The Court presided over an 11-day bench trial during which 13 witnesses testified and over 250 exhibits were submitted. The trial was conducted on the following dates in 2020: August 24 – 27; September 1 – 2, 14, 18, 21 and 23; and October 5. The Plaintiffs and Defendants submitted post-trial Findings of Fact and Conclusions of Law, together with responses to the other party's briefing.[1]

The Plaintiffs established by a preponderance of the evidence that the management team and Board took a series of actions to withhold payment of dividends to Plaintiffs in 2012 and 2013 with the intent to pressure the Plaintiffs to ultimately accept a $248.00 redemption offer. Although the Court believes the Board acted with a legitimate business purpose to offer the $248.00 price with a cap of $1 million per year in redemption payments, viewed in the totality of the circumstances, the management team and Board acted in bad faith to withhold payment of dividends 2012 and 2013, and Defendants are not permitted to afford themselves protection under the business judgment rule. As will be detailed herein, the actions taken by the management team and the Board constituted willfully unfair and oppressive conduct that substantially interfered with the Plaintiffs as shareholders.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of a "written opinion." MCR 2.517(A)(2) and (3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and the verdict.

The Court considered a plethora of evidence on the history of the events giving rise to the parties' dispute, financial documents relating to remedy, and an array of legal citations from courts around the country and legal commentators submitted by the parties. While the Court has not commented on the weight, if any, given to all evidence and legal authorities presented, the Court's discussion of facts and applicable law reflects the Court's consideration of the weight to be given to the evidence and the summary of the most relevant facts that bear on the ultimate resolution of the case. See generally, *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 156 (2017) (how much weight, if any, to accord a given piece of evidence is the sole prerogative of the fact-finder).

1 By request of Judge Stutesman and SCAO, the case was assigned to Judge Ackert prior to trial.

The Parties

Defendant Burr Oak Tool, Inc. (BOT or the company) is a privately-held, family owned company that manufactures heat transfer equipment whose headquarters are in Sturgis, Michigan. BOT has been a successful company that services a broad customer base including residential, commercial industry, transportation, and food preservation including customers like Carrier, Trane, Lennox, and Johnson Controls. (TT, 9/14/20 – B. McConnell, p. 129).[2] The company has an installation market in over 75 countries. (*Id.*).

BOT was founded in 1944 by Newell Franks, Sr. (Mr. Franks, Sr.) and until shortly before his death in 2007, he managed the company as a sole proprietor in complete control because he owned 90% of the company. (TT, 8/25/20 – N. Franks, p. 118). Mr. Franks, Sr. did not provide financial information regarding BOT to anyone including shareholders while he managed the company, including valuations of the company shares. (TT, 8/27/20 – N. Franks, pp. 66-67; 9/18/20 – B. McConnell, p. 30). That practice changed in 2006 when the younger Franks generation took control of operations and have routinely shared information and valuations with management and shareholders.

The parties in this case are all part of the Franks family and related to BOT as part of management and/or as shareholders. The Plaintiffs are brothers Jeff Franks and Willis Franks, and their cousin, Michael Franks is the successor trustee to his father's Trust. The Plaintiffs are all non-voting shareholders whose shares were gifted to them by Mr. Franks, Sr. and/or their fathers, and they are not involved in management or the Board. The Defendants are Newell Franks II, LeeAnn Franks (f/k/a McConnell), Brian McConnell, David Franks, and Lawrence ("Larry") Franks. The Defendants hold voting and non-voting shares and/or are involved in management.

Mr. Franks, Sr. had three sons, Lawrence (Larry) Franks, Richard Franks, and Tom Franks.

Larry Franks is a defendant and is the father of three children who also are defendants: Newell Franks, II, LeeAnn Franks (f/k/a McConnell), and David Franks. Larry Franks was the former President of both BOT and Oak Press Solutions, a related company, and is a current Board Member of BOT and voting shareholder. (TT, 9/2/20 – L. Franks, pp. 123-124).

Richard (Dick) Franks died in 2017 during the pendency of this lawsuit and his older son, Mike Franks became the successor trustee of the Franks Family Trust holding Dick's shares in BOT. (TT, 8/27/20 – M. Franks, pp. 193-194). The beneficiaries of the Trust are Mike and his siblings, Deborah and Linda. (*Id.*). Mike Franks is named as a Plaintiff as the successor trustee of the Trust.

Tom Franks died before the litigation. He is the father to Plaintiffs Jeffrey Franks and Willis Franks who are non-voting shareholders with no involvement in management or the Board.

Newell Franks is the Chairman of the Board, and the Chief Executive Officer of the Company. (TT, 8/25/20 – N. Franks, p 9). He is also a voting shareholder. Brian McConnell is the President and Chief Operating Officer of BOT, and a Board Member. (TT, 8/25/20 – N. Franks, p. 115; and 9/14/20 – B. McConnell, p. 37). David Franks is a Board Member and voting shareholder. (TT, 9/18/20 – D. Franks, p. 82). He is also a voting shareholder. (Id.). David is also the President and Chief Executive Officer of Oak Press Solutions, a related company. (D. Ex. EEE).[3] LeeAnn Franks was formerly married to Brian McConnell and is a voting shareholder. (TT, 9/2/20 – L. Franks, p. 7).

As of December 31, 2013, there was a total of 75,250 issued and outstanding shares of stock in BOT. (P. Ex. 97; TT, 10/5/20 - Oliphant, p. 38). BOT has three classes of shares: Class A, Class B, and Class C. Class A shares are voting shares. (TT, 8/25/20 – N. Franks, p. 133). Defendants Newell, Larry, David, and LeeAnn own all the Class A voting shares and control of the company.

Plaintiffs collectively own 37,678 shares. (TT, 9/21/20 - Frazee, p 131). Jeff Franks owns 7,604 Class B and 602 Class C shares. (TT, 9/14/20 – J. Franks, p. 24) Dick Frank's trust owns 15,208 Class B and 6,660 Class C shares (TT, 8/27/20 – M. Franks, p. 204). Willis Franks owns 7,604 Class B shares. (TT, 8/24/20 – W. Franks, p. 67). While Plaintiffs technically own a majority of BOT's outstanding shares, the shares are non-controlling, non-voting shares, and Plaintiffs are not involved in the management of BOT. (See D. Ex. YY for total of shares owned by each shareholder).

The three classes of stock came into being because Newell A. Franks wanted to create different classes to transfer as gifts for dividend purposes. The individuals who owned the voting

2 Trial testimony shall be referred to by Trial Transcript (TT), date, name of witness, and page number.

shares ended up purchasing those shares whereas the other classes were all gifts. Although they often referred to the nonvoting shareholders as the "minority shareholders," the holders of the Class B and C shares actually owned 52% of the company. Newell A. Franks established the Class B and C shares in the 1980s so that he could pay dividends to those whom he gifted Class C shares without paying himself a dividend as the owner of the Class B shares.[4]

In 2006, when Mr. Franks, Sr. was not as involved in the daily operations of BOT, the management of the company was centered in the team of Newell Franks, CEO and Chairman of BOT, Brian McConnell, COO, and David Franks (TT, 8/27/20 – N. Franks, pp. 77-78; 8/25/20 – N. Franks, pp. 131-132;). This "triumvirate" was a working group that addressed critical issues facing BOT through exchanging ideas, sharing counsel, and seeking resolution for decision. (TT, 8/27/20 – N. Franks, pp. 77-78; 9/21/20 – D. Franks, pp. 57-58; 9/23/20 – Lindsley, p. 221).

Burr Oak Tool's Redemption and Dividends History: 2006-2011

In 2007, the founder and long-time leader of BOT, Mr. Franks, Sr., died. As a result, BOT was obligated to redeem a large number of shares because of Mr. Franks, Sr.'s estate. For example, Mr. Franks, Sr. had gifted a portion of his BOT Class B shares to the Sturgis Area Community Foundation ("Foundation") with a provision that BOT would repurchase those shares over a period of years; these funds would fund the Newell A. and Grace A. Franks Fund at the Foundation. (P. Ex. 22, Newell Franks letter to shareholders prior to March 2012 BOT shareholder meeting). Similarly, a portion of Mr. Franks, Sr.'s Class B shares were gifted to an Annuity Remainder Trust ("Trust") with the beneficiaries being Richard Franks, Lawrence Franks, Willis Franks, and Jeff Franks. (*Id.*; TT, 8/25/20 – N. Franks, pp. 134-137). Mr. Franks, Sr. also designated a number of shares to be redeemed for payment to employees based on years of employment; the amount was $3.6 million, and the highest amount paid to employees was $12,000.00. (TT, 8/25/20 – N. Franks, p. 136).

In 2008, the Board of Directors began discussing a long-term plan to redeem the family members non-voting shares and retiring debt of the company, including payments to the

3 Plaintiffs' Exhibits shall be referred to as P. Ex. and Defendants' exhibits as D. Ex. Also, because of the frequency of the name Franks, the Court will at times refer to the party's first name for efficiency and ease in reading.

4 The history of the three classes of stock is taken from the Court of Appeals opinion in *Franks v Franks*, 330 Mich App 69, 83 (2019) because it is a succinct description and the facts are not disputed.

Foundation and Trust.[5] The Board determined, and the shareholders agreed, on a proposal to first retire the BOT debt and then redeem the non-voting Class B and Class C shares over a period of years starting with the oldest and continuing through with the youngest family member. (*Id.*; see also, P. Ex. 15, email from Newell Franks to David Franks and Brian McConnell, 9/9/11 re: Stock). The plan was subject to BOT having sufficient reserves to make the payments after managing the operations of the company including investment in research and development and necessary capital expenditures. (TT, 9/14/20 – McConnell, pp. 150-154; 8/27/20 – N. Franks, pp. 88-94, 103 regarding critical capital expenditure requirements that were put off while paying debt and needed to be funded starting in 2012).

BOT never set a share redemption price from 2006 through 2012 without the advice of a financial professional estimating the value of the company – and the corresponding share price – through an independent valuation appraisal or a calculation of value of the company. (TT, 9/14/20 – McConnell, pp. 42-43; TT, J. Franks, 8/27/20 - pp 271-272). Moreover, during this period, BOT did not offer a redemption share price below the price determined by a professional valuation. (TT, 9/14/20 – McConnell, p. 43-52). And each valuation of the shares included a discount for lack of control and lack of marketability applied to all shares. (*See, e.g.*, D. Ex. AAA, BOT Valuation of Common Stock as of April 30, 2008 by SRR, note Exhibit E.1, E. 2 and E.3 of the Valuation applying a 15% discount for lack of control and 30% discount for lack of marketability).

In 2006, the Board of Directors agreed to redeem 11,937 shares of the Foundation's Class B non-voting shares at $294.00 based on a valuation appraisal of the company as of December 18, 2006 performed by the accounting firm of Stout Risius Ross, Inc. ("SRR"). (P. Ex. 1, Unanimous Written Consent dated 12-21-2006). In January 2007, BOT redeemed 18,367 Class B shares from Mr. Franks, Sr. to fund the Newell A. Franks Charitable Annuity Trust at $298.50 per share based on an SRR valuation as of November 30, 2006. (P. Ex. 56, Letter from Newell Franks II to Jeff Franks, dated 2/11/13).

After the death of Mr. Franks, Sr., BOT again enlisted SRR to conduct an independent valuation of the company to value the shares for estate tax purposes. SRR valued the company share price at $248.00 as of April 30, 2008 and the Internal Revenue Service accepted this

5 Newell Franks reported that Mr. Franks, Sr. did not believe family members should be paid for shares they were gifted, and as the majority owner of BOT he did not authorize share redemptions for family members. (See P. Ex.

valuation. (D. Ex. AAA, BOT Valuation of Common Stock as of April 30, 2008 by SRR, note Exhibit E.3 of the Valuation; TT, 9/14/20 – McConnell, pp. 44-45). The remaining estate debt was redeemed for the $248.00 price per share.

In 2010, BOT desired for Larry Franks to retire from the management and operations of the business and agreed to redeem his shares in lieu of salary or severance; the redemption included redeeming Larry's shares on a quarterly basis until completed in 2018. (TT, 9/14/20 – McConnell, pp. 46, 52; 9/23/20 – Gorsky, pp. 157-158; P. Ex. 22, Newell Franks letter to Shareholders in preparation for 2012 annual meeting, Note 3: Larry Franks retired in Q4 of 2010, and "a condition of retirement the company agreed to retire $50,000.00 worth of his Class C or Class B per quarter if the company is in a financial position to do so."). The initial share price used for redemption of Larry Franks' shares was $279.00 based on a calculation of value conducted by accountant Bruce Gosling as of December 31, 2008. (TT, 9/14/20 – McConnell, pp. 51-58; P. Ex. 15, Email chain 9/8/11 to 9/9/11 between Newell Franks, David Franks, and Brian McConnell re: Stock). After approximately six quarterly payments, Newell Franks realized BOT was using the wrong valuation number, and should have used the $248.00 share price based on the SRR valuation as of April 30, 2008 approved by the IRS. (TT, 9/14/20 – McConnell, pp. 51-52; P. Ex. 15, Email chain 9/8/11 to 9/9/11 between Newell Franks, David Franks, and Brian McConnell re: Stock; (TT, 8/27/20 – N. Franks, pp. 83-84). The Board and Larry Franks corrected the share price to $248.00.

Jeff Franks wrote to Brian McConnel and the Board on December 9, 2011 expressing his desire to sell all his shares in BOT. (P. Ex. 16, Letter from Jeff Franks to BOT Board dated 9/9/11; TT, 8/27/20 – J. Franks, pp. 257-258, 261). In 2011, Jeff recognized that BOT was likely to pay off the outstanding debt in 2012 and wanted to inform the Board of his desire to sell his shares in BOT. (TT, 8/27/20 – J. Franks, pp. 257-258, 261; 9/14/20, p. 20). Jeff's request and the subsequent actions by the Board regarding offers to redeem the non-voting shares of BOT form the basis of the Plaintiff's complaint.

BOT did not pay dividends from 2008 through 2014. (TT, 8/24//20 – Willis Franks, pp. 89, 95). The Board's primary reason for not issuing dividends was the desire to pay off the outstanding BOT debt. While the Plaintiffs contest BOT's failure to pay dividends in 2012 and 2013, and/or redeem the non-voting shares, they do not seriously question the management of the

---

20, 2/20/12 email from Newell Franks to Jeff Franks re: 2012 Shareholders Letter).

company during the great recession beginning in 2007 while paying the debt, investing in research and development, and making necessary capital expenditures to maintain the competitiveness of the company. In 2008, Jeff agreed with the Board's decision not to pay dividends or redemptions until BOT paid off the outstanding debt including the redemptions of shares arising from the death of Mr. Franks, Sr. (TT, 8/27/20 – J. Franks, pp. 257-258, 261; 9/14/20, p. 20; 8/25/20 – N. Franks, p. 139, 8/27/20 – pp. 89, 135; See also, D. Ex. F – Email from Jeff Franks to Newell Franks dated 3/23/11 stating he "strongly" advocated to pay off the debt "before resuming stock dividends or redemption, and that debt was a "merciless taskmaster").

But Jeff Franks is also the only Plaintiff to have questioned the competence of the Board of BOT prior to 2012. He indicated he had had a personal disagreement with Newell Franks between 2003 and 2006, did not trust him, and therefore would only communicate with him in writing. (TT, J. Franks - 9/1/20). But in his prior deposition testimony, Jeff Franks stated that he trusted everyone on the Board prior to November 2012. (*Id.* and Dep. of J. Franks, 5/7/14, pp. 79-80). Jeff Franks also wrote his brother, Willis, in March 2010 expressing his belief that the company was losing money because of spending due to a failure in management, and he was contemplating a lawsuit for "gross incompetence." (D. Ex. D, March 10, 2010 email from Jeff Franks to Willis Franks, re Confidential; TT, J. Franks - 9/1/20). He considered the statement of "gross incompetence" to be merely "puffing," that he could not recall his disagreements with Newell Franks, and that he had become "fed up" with management about spending but not foregoing payment of dividends while paying down the debt. (*Id.*). His testimony was not credible regarding these so-called concerns. Newell Franks does not recall Jeff Franks ever raising concerns over the incompetence of the Board. (TT, 8/25/20 – N. Franks, pp. 142-143). Newell saw Jeff as insightful and knowledgeable about the business and finances during meetings of the shareholders. (*Id.* at p. 137-139). And Newell saw Jeff as the "spokesperson" for himself and his brother, Willis, and often Willis would send emails, but the tone and language was more like Jeff's language and manner of communication. (*Id.* at pp. 140-141).

Willis Franks did not see Jeff as seriously challenging the Board's decisions and management. Willis Franks believed as late as December 1, 2012 that the Board had done a "fantastic job" in managing the company through the recession and in retiring the debt. (D. Ex. X).

Between 2007 and 2012, BOT paid approximately $20 million to retire the debt. (TT, 9/14/20 – McConnell). In the process, BOT also took steps to fully fund the employee pension plan to secure the employee benefits at a cost of $5.5 million. (TT, 8/27/20 - N. Franks, p. 89-90). As a result, BOT delayed or deferred critical capital expenditures and research and development between 2007 and 2012. (TT, 9/14/20 – McConnell, p. 150; 8/27/20 – N. Franks, pp. 88-93).

Brian McConnell testified that in 2012 the Board believed the company faced declining production and competitive capacity if capital expenditures and research and development were further delayed. (TT, 9/14/20 – McConnell, pp. 150-153; 8/27/20 – N. Franks, pp. 88-93).[6] Due to the debt retirement, BOT delayed the normal cycle for replacement of production machinery, and this reduced efficiency and production, *i.e.*, development of the next generation of machinery creates more accuracy and production which enhances profitability. (TT, 9/14/20 – McConnell, pp. 150-153; 8/27/20 – N. Franks, p. 90). Also, as the company grew over the years, BOT expanded operations in a disjointed arrangement of five buildings adding to manufacturing and production inefficiencies, and the Board believed that operations, especially those involving the lathes, needed to be reorganized under one roof to improve efficiencies. (TT, 9/14/20 – McConnell, pp. 152-153). An effort to make the necessary upgrades had to focus on a new facility rather than upgrades in the various buildings which would further hamper production. (*Id.* at pp. 151-152). BOT's production of a new machine called the Triumph Hairpin Bender required it to be housed in the new facility. The Hairpin Bender was critical to maintaining and expanding BOT's relationship with Goodman, the largest manufacturer of air conditioners in the United States. (TT, 8/27/20 – N. Franks, pp. 90-93).

Important to the Board in weighing these capital investment decisions was the competitive pressures from China. Mr. McConnell outlined that in the coil fabrication and heat

6 In contravention of the Board's claims, Plaintiffs point to Mr. Gosling's notes in calculating the May 2012 valuation in which he noted his understanding reached "through an interview with Newell Franks" that BOT had "developed an excess capacity to facilitate growth." (Exhibit 162, p 422; TT, 8/2720 - Gosling, p 20-21). He also noted the company's equipment and facilities were "very up to date with excess capacity." (*Id.*). However, the testimony of Newell Franks and Brian McConnell highlighted that while the company was competitive in 2012 the industry technology advancements moved quickly over 5 year cycles therefore the company needed to invest in a new facility and update machinery to enhance manufacturing efficiencies and production goals. As is noted in this opinion, BOT did invest in a new facility that opened in 2014. While the Court acknowledges the notes of Mr. Gosling, that evidence did not provide the depth and nuance highlighted by Newell Franks and Brian McConnell on the issue, and the Court does not consider Mr. Gosling's notes as having much weight.

transfer industry multiple competitors are in China. The Chinese government subsidizes the companies reducing the Chinese companies' cost for labor and materials by approximately 30 percent. (TT, 9/18/20 – McConnell, pp. 42-45). The challenge is competing against a product that is substantially lower – as much as 1/3 - in price. (*Id.*). To do so, BOT focuses on quality and developing production machines that can double production levels. (*Id.*). Mr. McConnell stated China copies the design improvements in production machines once they are released in the marketplace therefore a U.S. manufacturer, like BOT, must innovate within a five year business cycle or lose the competitive edge. (*Id.*). BOT's debt retirement program from 2007 to 2012 resulted in BOT being at the end of a development cycle and needing to expand capital expenditures and research and development. (Id.; TT, 8/27/20 – N. Franks, pp. 88-93).

The Board believed that failure to invest would weaken the company's competitive position and further reduce production and profitability. The company could not continue to delay capital investment or it would weaken the long term preservation of the company. The Board believed these factors dictated that any shareholder redemption plan be structured at an appropriate price and term of years. (TT, 8/27/20 – N. Franks, p. 103). The Board believed the expenditure for redemptions should be capped at $1 million per year. (*Id.*). The company was considering redemption over a five to ten year period depending on economic conditions and financial availability to support the redemption payments. (P. Ex. 39; TT, 8/27/20 - N. Franks, pp. 88-94, 103; 9/23/20 - Gorsky, pp. 166-167; 10/5/20 – Halling, pp. 87-93).

BOT invested between $12 million and $14 million in capital expenditure and research and development between 2012 and 2014. (TT, 8/27/20 - N. Franks, p. 90-91). Notwithstanding that fact, the company's net earnings have fluctuated between 2011 and 2019 with negative earnings and cash flow in 2011, 2017 and 2019. BOT's chief financial officer, Debbie Gorsky, testified that BOT is engaged in a highly competitive business that is cash intensive. (TT, 9/23/20 – Gorsky, p. 205). The operations require cash to fund the manufacturing equipment. (*Id.*).

BOT remains a healthy company in a competitive market. It employs 290 individuals in Sturgis, (P. Ex. 22), and its customers and vendors rely on its performance in over 75 countries. Moreover, given the history of charitable giving within the community, BOT has been a key supporter to the Sturgis area community and growth.

The Redemption Offers and Consideration of Dividends: 2012 – 2013

As noted, on December 9, 2011, understanding that BOT would soon retire the debt obligations it began paying in 2007, Jeff Franks mailed a letter to Brian McConnel and the Board expressing his desire to sell all his shares. (P Ex. 16; TT, 8/27/20 - J. Willis, p 261, and 9/1/20, p 101). The letter did not explain the reasons for wanting to sell his shares and only asked the Board to contact him to discuss how the purchase could be completed. (*Id.*)

In September of 2011, as part of on-going Board discussions about possible redemption of shares because of earlier inquiries by the "outside" shareholders starting in 2008, the Board understood Jeff Franks and Willis Franks owned a total of 15,000 shares of Class B stock worth "approximately \$3.7 million." (P. Ex. 15, Emails of 9/8 and 9/9, 2011 between Newell Franks, Brian McConnell and David Franks re: Stock). This share value was based on the \$248 share value determined by SRR in 2008 after Mr. Franks, Sr. passed. (TT, 8/27/2020 – N. Franks, pp 148-149).

In 2011, Jeff and Willis Franks knew of Bruce Gosling \$279.00 share price valuation in 2008 and that BOT was redeeming Larry Franks' shares of per his retirement agreement at \$248.00 a share based on the 2008 SRR valuation. (TT. 9/1/20 – J. Franks, p 107; TT, 8/27/2020 – N. Franks, pp 80-82).[7] Jeff recalled that the BOT financial statements provided information regarding redemption transactions and that in 2011 Newell had fully disclosed the information about Larry's redemption as part of his retirement agreement. (TT. 9/1/20 – J. Franks, p 106-108; see also, P. Ex. 121, BOT Consolidated Financial Statements 2011 and 2010, Note 4 – Common Stock indicates the shares of stock redeemed in 2011 and 2010 by ¶which division indicates share price of \$279.00 per share).[8] Jeff and Willis had this financial information because in 2006

7 In late 2012, Willis Franks contacted Newell Franks to discuss the \$62.00 offer to purchase shares and inquired how the offer was calculated because Willis was aware that BOT was redeeming Larry Franks' shares at \$248.00. Newell did not recall telling Willis of the share price and communicated with Larry Franks to determine if he had shared the price. (P. Ex. 38). Larry had not shared the information and the reasonable inference is that the price information was available to Plaintiffs through the financial statements. (TT, 8/25/20 – N. Franks, p 42; 10/27/20 p. 179).

8 Plaintiffs suggest there was no agreement concerning Larry Franks' retirement. Plaintiffs provide no contradicting evidence to the record. Plaintiffs claim that the Board structured the deal over concern for Larry's spendthrift ways and not a retirement agreement. But this evidence was more anecdotal information from Larry's children and Plaintiffs present no evidence that the retirement was not an arms-length transaction. (Plaintiffs Brief, ¶¶ 185-186). The Court does not consider this material. Moreover, Jeff Franks acknowledged that he agreed with the arrangement because BOT would redeem Larry's shares for essentially the same price as his salary and related benefits. (D. Ex. O, email between Jeff and Willis Franks 2/17/12; TT, 9-1-20 – J. Franks, pp. 106-108, 132-133, 136-139). Jeff's testimony that he acquiesced to the transaction for family harmony but believed the redemption transaction was

the Board began providing shareholders the BOT annual financial statements before the annual meeting, and these contained information on stock redemptions. (*Id.*) Mr. Franks, Sr. did not share financial information of BOT when he was in charge and this sharing of financial information was a change of policy for the company. (*Id.*) Based on his knowledge of the company, Jeff stated he expected that a redemption of his shares would be higher than $279 per share because BOT had been paying off its debts according to the plan started in 2008. (TT. 9/1/20 – J. Franks, p 108).

After receipt of Jeff Franks' December 9, 2011 request to sell his share, the BOT management team - Newell Franks, Brian McConnell, and David Franks - continued discussing stock redemption and dividends. (P. Ex. 17, Email dated 1/31/12 from Newell Franks to David Franks and Brian McConnel re: stock redemption; TT. 9/14/20 - Brian McConnell, pp 53-55). Newell prepared the email for "brainstorming" options relating to redeeming shares or paying dividends. (TT, 8/27/20 – N. Franks, pp. 78-80). The three management leaders knew that redemption "was on the minds" of the outside shareholders and the email discussed budgeting $1.2 million to either continue redeeming shares based on the oldest shareholder first or to put towards dividends. (*Id.*; TT, 9/14/20 – B. McConnell, pp 56-57). However, at the time of the email, neither the three nor the Board had concluded that BOT could budget $1.2 million for redemptions or dividends. (TT, 8/27/20 – N. Franks, p. 79).

Newell Franks calculated the allocation of dividends based on a $1.2 million distribution for the shares owned by all shareholders. Dick, Jeff, and Willis collectively would have received $612,420.00 of the available $1.2 million dividend. (T, 9/14/20, B. McConnell, p 57). Larry would have received $313,929.00. (*Id.*). Defendants David Franks (and his wife Joan), Brian McConnell and Leeann Franks, and Newell Franks (and his wife Kelly) would have received $160,983.00 collectively. (*Id.*). This represents less than 15 percent of the total $1.2 million. (*Id.* at 20-22). By Newell Frank's calculations, if the Board had authorized a dividend in 2012, the majority would have been paid to Dick, Jeff, and Willis. (*Id.* at 58).

---

discriminatory to other shareholders was not credible and appeared coached. (TT, 9/1/20 – J. Franks, p. 133; 9/14/20 – p. 18-19). Newell testified that Larry's retirement was structured based on advice of counsel and resulted in saving the company money by removing Larry from payroll and benefits. (TT, 8/25/20 – N. Franks, p. 77). Jeff informed

Redemption Offers and Negotiations

In preparation for the March 2012 annual shareholder meeting, Newell Franks sent a letter to all shareholders with information relating to the shareholder meeting. (P. Ex. 22). The letter outlined what BOT had accomplished since 2008 retiring debt and other cash outlays. In addition to retiring debt, Newell noted that BOT had also averaged $1.2 million per year in research and development projects and $3 million per year on new capital equipment. (*Id.*; TT, 8/27/20 – N. Franks, p. 151) Newell then expressed that the management team and the Board continued to follow the redemption plan discussed in 2008 to redeem shares based on the shareholders who had indicated their intent to sell shares starting with the oldest to the youngest. The shareholders who had requested to sell shares were Richard Franks, Larry Franks, Joyce, Franks, Willis Franks, and Jeff Franks. (*Id.*)

In May 2012, Newell Franks contacted Bruce Gosling, an outside licensed accountant to conduct a calculation of value of BOT for year-end 2011. Mr. Gosling had previously been contracted by BOT for various projects at the request of Mr. Franks, Sr. and the new management, including preparation of the 2008 calculation of value and tax returns for BOT and the Plaintiffs, to conduct a calculation of value for BOT. (TT, 8/25/20 – N. Franks pp. 20, 152; TT, 8/26/20 – B. Gosling, pp. 36, 39-40, 44).

Mr. Gosling explained that a calculation of value engagement consists of the valuation analyst performing procedures and using methodologies that are specifically agreed-upon between the analyst and the management of the entity, and provides substantially less than a full valuation engagement that would render an opinion of value such as the SRR independent valuation. (TT, 8/26/20 – B. Gosling, pp. 40-44). As a result, Mr. Gosling's May 21, 2012 calculation of value included written disclaimers that it was an estimate of value and cannot be used as an opinion of value, could not be relied on by third parties, and that the actual sale price of shares could be meaningfully less, or meaningfully more, than the calculation of value. (P. Ex. 27).

Mr. Gosling's calculation of value relied on the so-called "net asset" value of determining stock price, which contemplates the liquidation of the business as a going concern. Newell Franks did not want to engage an accountant like SRR to perform a $50,000.00 independent

Newell that the retirement plan and savings made "perfect sense." (*Id.*; D. Ex. O). Newell's testimony on this issue was credible.

valuation engagement to render an opinion of value as was done in 2008. (TT, 8/25/20 – N. Franks, p. 98; 8/27/20 – p. 155). In 2012, Newell Franks and Mr. Gosling agreed that Mr. Gosling would use the "net asset value method" to analyze the value of BOT's stock. (TT, 8/26/20 – B. Gosling, p. 50; TT, 8/27/20 – N. Franks, p.p. 184-185). Mr. Gosling had utilized this method in valuing BOT in the past. (TT, - 8/26/20, Gosling, p. 54, 137; and 8/27/20 p 11). Mr. Gosling stated that the "optimum value" is the "net asset value." (*Id.*). Newell Franks considered the calculation of value as providing a "rough estimate" of the value in preparation for a possible offer to purchase shares of BOT. (TT, 8/25/20 – N. Franks p. 155).

On May 12, 2012, Mr. Gosling prepared a calculated valuation report dated May 21, 2012 that estimated BOT's enterprise value as of 12/31/2011 was $46,125,355 on a marketable and controlling basis. (P. Ex. 27; TT, 8/25/20 – N. Franks, p 20). At trial, Mr. Gosling acknowledged that he had failed to include deferred income tax assets in his May 2012 valuation, but that he should have. (TT, 8/26/20, pp. 75-77; and 8/27/20 p 57). Mr. Gosling corrected his enterprise value as of 12/31/2011 to $53,481,716. (*Id.* at p. 13-14). This amounts to an undiscounted pro rata value of $598.70 per share, corrected at trial to $694.18 per share. (TT, 8/25/20 – N. Franks, p 21; TT, 8/26/20 - Gosling, p 55; and 8/27/20 p 15).

Because the Plaintiff shareholders are not involved in management and do not exercise control in the company, Mr. Gosling applied a discount of 15 percent for lack of control, and 30 percent for lack of marketability. (P. Ex. 27; TT, 8/25/20 – N. Franks, p 21).[9] The discounts were consistent with prior independent valuations conducted on BOT shares. (See e.g., D. Ex AAA, SRR Valuation as if 4/30/2008; TT, 8/26/20, p. 73). As a result, Mr. Gosling valued BOT's shares on a discounted basis at $356.22 per share, which Mr. Gosling corrected to $413 per share at trial to account for the deferred income assets that had been erroneously left out of Mr. Gosling's report. (P. Ex. 27; Tr., 8/25, p 21:24-25, 22:1-3; Tr., 8/27, Gosling, pp 15:19-16:6). The Gosling calculation of value was not provided to the Plaintiffs until December 2012, after the Board issued an offer to purchase shares at $62.00 per share.

9 Plaintiffs point out that in prior engagements to value BOT's shares, Mr. Gosling had not included discounts in the calculation. (Tr., 8/26, Gosling, p 70:5-13). The Court does not find this evidence material because the nature and scope of the engagement was not disclosed and the evidence presented at trial was clear that Mr. Gosling used his professional judgment in the calculation of value and used the same discounts as SRR applied in the 2008 independent valuation of BOT. (TT, 8/26/20 – Gosling, p. 72). Also, the courts in Michigan may consider applying discounts in determining fair value for purposes of remedy. *Franks*, 330 Mich App at 112-113.

The Board's $62.00 Offer to Redeem Shares

Prior to Newell Franks engagement of Mr. Gosling in May 2012, and following Newell's letter to the shareholders in preparation for the March 2012 annual shareholder meeting, Jeff Franks emailed Newell on February 17, 2012 to inquire about Newell's claim that the shareholders had agreed on an order of redemption in 2008 in which the oldest shareholders would be redeemed first if BOT was financially capable of redeeming shares. (P. Ex. 20). Jeff stated he was "not necessarily opposed to the order of redemption" but that he couldn't recall the discussion and was requesting minutes of the meeting. (*Id.*) Newell advised that the minutes only indicate who was at the meeting but no content, and that the consensus was developed in 2008 following the meeting as he had talked to the shareholders, including Jeff with whom Newell also had discussions about redemption in or around 2010. (*Id.*; TT, 8/25/20 – N. Franks, pp. 136-138). Newell also indicated that Willis Franks had recently called Newell and indicated that Jeff and Willis had questions, including about the order of redemption; Willis Franks told Newell that the proposal "seemed acceptable to him." (P. Ex. 20).

Newell Franks also reminded Jeff that Grandfather Newell Franks, Sr. had been opposed to buying back shares that had been gifted to shareholders because the shareholders did not pay anything for the shares. (*Id.;* TT, 8/25/20 – N. Franks, pp. 137-138) Newell confirmed the concept of redeeming shares of the oldest shareholders first related to the ages and health of the older shareholders. Newell also believed that barring unforeseen problems, BOT could redeem shares over a period of five years provided the economy and financial conditions remained favorable. (*Id.*; TT, 8/25/20 – N. Franks, pp. 18-19).

After engaging Mr. Gosling to conduct a calculation of value of BOT, neither the management team nor the Board presented or acted on payment of dividends or redemptions as discussed at the March 2012 annual shareholder meeting. On October 25, 2012, unaware of the Gosling valuation, Jeff again asked to redeem his shares, this time seeking to redeem only a portion of his Class B shares and without a stated price with 300 shares in 2012, 300 shares in 2013, 300 shares in 2014. (D. Ex. S; TT, 9-2-20 – J. Franks, pp. 83-84). Jeff also stated, contrary to his comments in February 2012, that he did not support a redemption order based on the oldest shareholder and believed BOT should consider each shareholder separately on a "case-by-case and year-by-year" basis. (D. Ex. S). Because prior redemptions had been based on contemporaneous valuations, Jeff expected that BOT would obtain a new valuation of the company. (TT, 9/14/20 – J. Franks, p 6).

On November 13, 2012, the Board of Directors voted unanimously (with Larry Franks abstaining) to offer the shareholders $62 per share to redeem their shares; the offer would remain open until midnight on December 31, 2012. (P. Ex. 32; TT, 8/25/20 – N. Franks, p 28). At the time, the Board Members were aware of Mr. Gosling's May 2012 calculation of value report valuing the shares at $598 undiscounted or $356 with discounts for lack of control and lack of marketability. (P. Ex. 56; TT, 8/27/20 – N. Franks, p 172). And the Board knew that Jeff had requested to sell a portion of his Class B shares. (TT, 9/14/20 – B. McConnell, p 66).

David Franks made the motion to redeem the shares at $62 per share and it was seconded by Brian McConnell. (P. Ex. 32; TT, 8/25/20 – N. Franks, p 28). Brian McConnell determined the share price but he did not base the offer on a valuation because "valuations can fluctuate wildly based on the underlying assumptions." (TT, 9/14/20 – B. McConnell pp. 67-68). Brian knew BOT was redeeming Larry Franks' shares at $248.00 but did not offer this amount as a discussion point at the Board meeting, and he denies he chose the $62.00 figure based on it being 25% of $248.00. (TT, 9/14/20 – B. McConnell pp. 66, 142).

While the Board approved the offer the members appeared divided on how to implement. David Franks initially believed the $62 offer was "on the low side" until Brian McConnell explained his strategy. (TT, 9/18/20 – D. Franks, p 112). Brian testified that he believed the negotiation with Jeff Franks would be difficult because Jeff had become angrier and more adversarial since approximately 2011. In Brian's mind, the $62.00 figure was a starting point to ongoing negotiations. (TT, 9/14/20 – B. McConnell, pp. 67-68, 142). Brian anticipated Jeff and other shareholders would want to settle for a high redemption value, so he needed to start the negotiations low anticipating a counter-offer. (*Id.* at pp. 67-68, 117-121). Brian acknowledged that he had no expectation any shareholder would accept the $62.00 offer, he did not believe any other Board member expected a shareholder would accept the offer, and his overall goal was to secure an agreement for redemption based on a price per share of $248.00 – the same as the SRR valuation on which Larry Franks redemption plan was based. (*Id.* at pp. 69-73).[10] Mr. McConnell likened the negotiations to dealing with a customer demanding a low price

10 Plaintiff's suggest Mr. McConnell selected the $62.00 figure because Mr. Franks, Sr. had once issued dividends that amounted to $62.00 per share and that Brian was attempting to redeem the Plaintiffs' shares for an amount equal to a past dividend amount which would be considerably less than the value of the shares. Mr. McConnell denied this theory because he did not remember the dividend payment, and had he remembered he would have only

and he had to negotiate against a tough customer. (*Id.* at pp 119-120).

Newell Franks believed the initial offer should have been $248.00 because the $62.00 would "enrage Jeff." (TT, 8/25/20 – N. Franks, pp. 29-30, 100). But while Newell had reservations about the $62.00 offer, he admits he did not voice his disagreement at the Board meeting, and he voted in favor of the resolution. (TT, 8/25/202 – N. Franks, pp. 30-32). Newell also believed that the negotiations to reach an agreement on price would be a long process. (*Id.* at pp. 96, 98). Newell acknowledged that there was no valuation to support the offer and he did not ask Brian McConnell how he determined the offer amount. (*Id.* at p 32).[11] On November 26, 2012, Newell Franks sent the $62.00 offer to all shareholders. (P. Ex. 34).[12]

Immediately upon receipt of the $62.00 offer both Jeff and Willis Franks believed the figure was wrong and contained a typographical error, i.e. missing a "3" in front of the "62." (TT, 8/27/20 – J. Franks, p. 255; 8/24/20 – W. Franks, p. 69). As noted, both Jeff and Willis knew BOT was paying Newell Franks and David Franks' father, Larry Franks, $248.00 per share – an amount four times the $62.00 offer - and the two were aware of the 2008 SRR independent valuation. (TT, 9/2/20 – J. Franks, p. 87; 8/24/20 – W. Franks, p. 71). Also, Jeff's wife, Rebecca, had sold shares of BOT at $280.00 in the past based on a SRR valuation that discounted the share value based on lack of control and lack of marketability. (TT, 9/14/20 –McConnell, p. 75; 9/18/20 –McConnell, p. 60). Accordingly, Jeff asked Willis to contact Newell Franks to discuss the redemption offer and determine the amount. (TT, 8/27/20 – J. Franks, p. 255; 8/24/20 – W. Franks, p. 69).

Willis emailed Newell on November 27, 2012 and asked if the $62.00 offer was correct. (P. Ex. 37). Newell responded on November 28, 2012 confirming the offer was correct. (*Id.*; TT, 8/24/20 – W. Franks, p. 71). Willis asked Newell why BOT was offering just $62 per share when

---

recalled the total payment he received and not the price paid per share. (TT, 9/14/20 – B. McConnell, p.142). Mr. McConnell's testimony was credible on this issue.

11 Plaintiff's refer to testimony from Mr. Gosling that the $62.00 offer was pulled "out of thin air" and that his May 2012 calculation of value did not support a $62.00 offer. While Mr. Gosling's calculation of value did not reference a $62.00 per share price, the Court does not give much weight to the comments because Mr. Gosling could not recall his discussions with Newell Franks about the $62.00 offer. Moreover, the record is clear that the three members of the management team all understood the $62.00 offer was low and would not be accepted by the shareholders.

12 Plaintiffs infer that Newell Franks and the Board acted to oppress Plaintiffs when issuing offers to redeem shares at a price that was not supported by a contemporaneous valuation. Plaintiffs note that Newell stated that board actions offering redemptions should be based on a valuation so that they are done fairly and professionally. (TT, 8/25/312 – N. Franks, pp. 71-72). As noted in this opinion, the $62.00 offer was not supported by a valuation but all other offers to redeem issued by the board were supported by valuation by either SRR or Bruce Gosling. In the

in 2010 and 2011 it redeemed Larry Franks' shares for $279.00 and then $248.00 per share. (P. Ex. 37; TT, 8/24/20 – W. Franks, pp. 72-73). Newell explained that the higher figures reflected both the SRR valuation approved by the IRS after Mr. Franks, Sr. died in 2007 and the calculation of value prepared around the same time by Mr. Gosling. Newell confirmed that all shareholders were being offered the $62.00 amount and the primary reason for the lower offer price was the need to continue to fund business operations such as funding capital equipment and normal operations. Newell also expressed the Board's concern that 2013 would be a bad economic year like 2008, therefore a "larger payout in 2012 did not make a lot of sense." (P. Ex. 37; TT, 8/27/20 – N. Franks, pp. 88, 170-171).

On December 1, 2012, Willis emailed Newell, asking for the date of the last "Independent Valuation" of the company because he wanted to understand the value calculation and how it related to the $62.00 offer. (PP. Ex. 41; TT, 8/24/20 – W. Franks, p 74). Willis understood that, in the past, redemptions had been based on a prior valuation and expected a corresponding valuation to the $62.00 offer. (*Id.*). Newell advised Willis that he would send the SRR audit and Willis asked whether that was the most recent "Independent Valuation." (*Id.* at pp. 75-75). It was and Newell sent the SRR audit to Willis and the two spoke on the telephone on December 3, 2012 about the valuation during which Newell advised Willis of the May 21, 2012 Bruce Gosling calculation of value. (Id.). This was the first time Willis learned of the Gosling report and Newell forwarded Willis the report the very same day. (Id. at p. 76). Willis forwarded the Gosling report to Jeff at the same time. (TT, 8/27/20 – J. Franks, p 263).

Newell Franks stated that when the November 2012 redemption offer was sent to the shareholders, he expected to field questions regarding valuation and other inquiries. (TT, 8/25/20 – N. Franks, p. 96). Newell indicated that he initially sent the SRR "Independent Evaluation" to Willis without including the Gosling report because Willis specifically requested the latest "Independent Valuation" in his December 1 email, and that is different from a calculation of value as performed by Bruce Gosling. (*Id.* at pp. 93-94). In his request, Willis had specifically capitalized the words as a term of art, i.e. "Independent Valuation." (*Id.*). Newell did not believe Willis understood the difference, but he knew Willis was asking for Jeff who did know the difference. (*Id.*). Newell indicated that he was not trying to hide the Gosling report from Jeff and

context of the offers, the negotiation process, and the valuations, Plaintiffs' reliance on this testimony by Mr. Franks was out of context and not material.

Willis but was responding to their specific request. (*Id.* at pp. 103-105). When Newell and Willis talked on the telephone later in the day on December 3, Newell freely shared the information regarding the Gosling report and sent the report to Willis. (Id.; 8/24/20 – W. Franks, pp. 74-75).[13] Newell's testimony was credible on this point.

After reviewing Gosling's report in early December 2012, Jeff Franks wrote to Newell on December 11, 2012 declining "the redemption offer" because BOT history was to use the "latest independent valuation for setting stock price for redemption." (P. Ex. 47). Jeff indicated that the May 2012 Gosling calculation of value of $356.22 was the latest valuation, therefore he was "amending" his October 25, 2012 request to sell 300 shares in 2012 at $356.22 per share. (*Id.*). Jeff believed this value per share was fair and reasonable. (TT, 9/2/20 – J. Franks, p. 92-93). Jeff characterized his letter as an amendment rather than a counter-offer as part of negotiation, but the letter was sent to counter the BOT redemption offer and his testimony on this issue was not credible. (*Id.*, and 9/1/20 at pp. 143-145). Moreover, the Gosling report indicated that the calculation of value was performed to assist the "purposes of negotiations" for the repurchase of stock. (P. Ex. 27).

Likewise, Willis Franks also declined BOT's redemption offer by letter dated December 29, 2012. (TT, 8/24/20 – W. Franks, pp. 85-86; P. Ex. 48). Willis did not believe the offer was "fair and reasonable" because it was less than BOT was paying for the shares of Larry Franks and the Gosling report calculated the share value at $356.22 with discounts for lack of control and lack of marketability. (*Id.*).

The Board's $141.26 Offer to Redeem Shares

After November 26, 2012, Newell Franks commissioned Mr. Gosling to do an alternative method for calculation of value of the BOT shares, the discounted cash flow method. Mr. Gosling sent the updated calculation of value on January 21, 2013 and it has been identified as Appendix D to the original May 12, 2012 Gosling report. (Exhibit 52; TT, 8/26/20 - Gosling, p 97). The updated value, based on the discounted cash flow method, calculated a price per share of $141.26 per share after discounts for lack of control and lack of marketability. Newell immediately provided Appendix D to Willis Franks. (TT, 8/25/20, N. Franks, p 104; 8/24/20 – W

13 When Newell Franks sent the Gosling report to Willis on December 3, 2012 it did not contain Appendix D, as it did not yet exist. (TT, 8/2420, W. Franks, p 79). When Mr. Gosling completed the January 21, 2013 Appendix D, Newell Franks forwarded the Appendix to Willis and Jeff. (TT, 8/25/20, N. Franks, p 104; 8/24/20 – W Franks, pp. 90-92).

Franks, pp. 90-92).[14]

Mr. Gosling prepared Appendix D eight months after releasing his initial report, and two months after Defendants issued the $62 redemption offer. (P. Ex. 52; TT, 8/26/20 - Gosling, pp 97-98). The cash flow method of valuation measures a company based on the company's cash flow generated over the previous five years. (*Id.* at pp 97, 99, 101). Appendix D is based on an average of BOT's cash flows for the five years leading up to December 31, 2011, which included a period of economic recession and over which period BOT reported a $14 million cumulative net loss. (Id. at pp, 100, 108; and 8/27/20 – N. Franks, pp. 89-90). On February 5, 2013, the Board resolved to issue a redemption offer of $141.26 per share, based on Gosling's most recent calculation of value set forth in Appendix D. (P. Ex. 55; TT, 8/25/20 – N. Franks, p. 77; and 8/24/20 – W. Franks, p 90).

Willis Franks interpreted Appendix D as the Board attempting "to cover their tracks because of the $62 offer" and that it appeared that Newell "just wanted a lower valuation...from the original $356 valuation." (TT, 8/24/20 – W. Franks, p. 92). Similarly, Jeff Franks believed Appendix D was Newell's attempt to manipulate the share price based on a lower valuation number. (TT, 9/1/20 – J. Franks, p. 26).

The Board's $248.00 Offer to Redeem Shares

Plaintiffs filed suit on September 3, 2013. (TT, 8/25/20 – N. Franks, p. 108). On September 6, 2013, the Board issued a third redemption offer to BOT's shareholders in the amount of $248 per share, to be paid at $50,000 per calendar quarter until all accepting shareholders' shares were purchased. The Board could accelerate payments in any given year, or reduce payments where the United States economy was in a recession. (P. Ex. 76 and 77). The offer was based on the SRR independent valuation completed in April 2008. (TT, 8/27/20 – N. Franks, p. 106). Newell Franks testified that he believed the SRR valuation was the most accurate and proper method and that is why he had always supported a $248.00 redemption offer. (TT, 8/25/20 – N. Franks, pp. 98-99, 103-104). Neither Jeff nor Willis Franks accepted the offer and they, like with earlier offers, believed the offer was not fair and reasonable because it

14 It was determined at trial that Mr. Gosling included some but not all of BOT's non-operating assets in his 2013 calculation which would result in a lower value calculation. (TT, 9/21/20 – T. Frazee, p. 138). However, there was no evidence presented that Defendants knew of this fact or that Mr. Gosling acted intentionally to lower the value; in short, it was an error. Moreover, there was no evidence presented to establish the actual resulting difference in value due to the error.

was below the Gosling valuation price per share. (P. Ex. 79; TT, 9/1/20 – J. Franks, p. 66; and 8/24/20 – W. Franks, p. 95). The only BOT shareholder to accept the $248.00 redemption offer was Larry Franks. (TT, 8/25/20 – N. Franks, pp. 105-106). As noted, Larry Franks had already been redeeming his shares for $248.00.

As noted, BOT did not pay dividends from 2008 through 2011 because BOT was retiring a large amount of debt. Neither Jeff Franks nor Willis Franks disagreed with the decision of the Board and the company was financially healthier as a result. However, in 2012, the Board considered whether to redeem shares or issue dividends and decided to focus on redemption of shares because Jeff Franks had requested redemption and Dick Franks was amenable to either redemption of dividends. (P. Ex. 37, 11/28/12 email between Newell Franks and Willis Franks regarding Shareholders letter). The Board did not want to pursue both redemption and dividends because of the need for capital expenditure and research and development. (TT, 9/14/20 – McConnell, p. 150; 8/27/20 – N. Franks, pp. 79, 88-93).

As reported earlier, on January 31, 2012, Newell, Brian, and David engaged in a series of emails in which Newell stated that "[t]he Company could use the $1.2 million for 2012 to pay dividends on all shares of stock." (P. Ex. 17; TT, 8/2520 – N. Franks, pp. 12, 53). Newell considered this to be a brainstorming effort to consider all the options. Again, the Board elected not to pay dividends in 2012 and 2013. As a result, BOT neither redeemed shares nor paid dividends to shareholders.

II. Conclusions of Law

The Court must consider the facts as applied to the law to determine whether the Defendants acts or conduct in 2012 and 2013 in offering to redeem shares and not pay dividends constituted willfully unfair and oppressive conduct that substantially interfered with Plaintiffs as shareholders. As will be set forth in more detail, the evidence establishes that Defendants acted in concert to willfully and unfairly oppress the Plaintiffs as shareholders when Defendants offered to redeem Plaintiffs shares at a share price calculated from the lower range of value for the shares, and when the Plaintiffs did not accept the offers for redemption, the Defendants did not pay the shareholders dividends in 2012 and 2013 when BOT had the capacity to pay dividends. As a result, the actions taken by the Defendants willfully and unfairly pressured the Plaintiffs to accept the redemption offer because the Plaintiffs were not otherwise able to derive pecuniary benefit from their shares absent payment of dividends by BOT. *See generally*, *Franks*, 330 Mich at 103-105.

Plaintiffs argue that Defendants' actions in 2012 and 2013 in failing to pay a dividend and offering to redeem Plaintiffs' shares below the fair value of the shares were illegal because Defendants' breached their fiduciary duties to Plaintiffs and substantially interfered with Plaintiffs' shareholding interests. Plaintiffs claim these acts were "willfully unfair and oppressive" to the Plaintiffs.

It is well established under Michigan law that a business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed to that end. *Dodge v Ford Motor Co*, 204 Mich 459, 507 (1919). The corporate directors and those who control the company of a closely held, family owned corporation, like BOT, owe the minority shareholders fiduciary duties of good faith, due care, loyalty, and fair dealing. *See generally, Murphy v Inman,* 509 Mich 132, 148 (2022); *Miller v Magline, Inc*, 76 Mich App 284, 303-304 (1977); *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 49 (2005). And, because a corporation is carried on primarily for profit of its shareholders, the "essence of directors' fiduciary duties is to produce to each stockholder the best possible return for his or her investment." *Murphy*, 509 Mich at 148 (cleaned up).

According to Plaintiffs, Defendants' oppressive acts include engaging in a scheme to redeem Plaintiffs shares at a drastically reduced price below the most recent calculated value, concealed material and relevant information from the Plaintiffs regarding the value of BOT, issued a new valuation using a new calculation model to suppress the value of the shares, and failed to pay dividends when BOT had the financial ability to pay dividends, thereby attempting to force Plaintiffs to redeem their shares at the reduced value.

Plaintiffs contend that the Defendants actions constitute shareholder oppression under MCL 450.1489. "In that statute, the Michigan Legislature provided a cause of action to redress certain wrongs by those in control of a closely held corporation when the acts interfere with a shareholder's property rights:

> A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. MCL 450.1489(1)."

Franks v Franks, 330 Mich App 69, 92-93 (2019).

Accordingly, to establish oppression, Plaintiffs must prove: (1) they were shareholders of the corporation; (2) defendants were "directors" or "in control" of the corporation; (3) defendants engaged in acts; and (4) those acts were "illegal, fraudulent, or willfully unfair and oppressive" to the corporation or to them as shareholders. *Id.* at 99–100. To establish the Defendants' acts were "willfully unfair and oppressive" to them as shareholders, Plaintiffs must prove that: (a) the acts amounted to a "'continuing course of conduct or a significant action or series of actions that substantially" interfered with their interests as shareholders; and (b) defendants took those acts with the intent to interfere with their interests as shareholders. *Id.*

The facts are not disputed that Plaintiffs are shareholders of BOT. Plaintiffs own non-controlling, non-voting shares, and they are not involved in the management of BOT. All Defendants are officers, directors, and/or voting shareholders of the Company and, as such, exercise control over BOT and owe fiduciary duties to the Plaintiffs. (TT, 8/25/20 – N. Franks, pp 9-11; 9/14/20 – McConnell, p. 38).

The Court will first focus on Defendants acts in offering to redeem Plaintiffs shares and then address the issue of failure to pay dividends in 2012 and 2013.

In Michigan, shareholder's rights are "typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Franchino v Franchino*, 263 Mich App 172, 184 (2004). Corporations are also required at least once each year to provide the shareholders a financial report for the preceding fiscal year including a statement of income, its year-end balance sheet, and its statement of source and application of funds (if prepared). MCL 450.1901. Because Plaintiffs are non-voting shareholders their primary rights under the law are limited to examining the corporate books, receiving a financial report and corporate dividends.

Absent a written agreement between shareholders and the corporation, Michigan has not established the right of a shareholder to compel a corporation to purchase or redeem the shareholder's shares at any given time and at a price acceptable to the shareholder. *See, e.g.*, *Reget v Paige*, 242 Wis.2d 278, 290-291; 626 N.W.2d 302 (2001) (wherein the Wisconsin Court of Appeals found that a corporation and its directors are not required to create a market or redeem a shareholder's shares at a price acceptable to the shareholder); 1 O'Neal, Oppression of Minority Shareholders and LLC Members, Section 2.15: "Neither the controlling shareholder nor the corporation has an obligation to purchase the shares of minority shareholders who wish to dispose of their shares in the absence of a provision in the corporation's bylaws or a shareholder agreement." The Plaintiffs are not party to a shareholder agreement nor are there bylaws that obligate Defendants to purchase Plaintiffs' shares. (TT, 8/27/12 – N. Franks, p. 135). Nevertheless, the discussion of redemption of the BOT shareholders' shares began in 2008 pending payment of BOT's outstanding debt, and Newell Franks and Jeff Franks had additional discussions in 2010 regarding the proposed order of shareholders to redeem shares if, and when, BOT was prepared to redeem the shares. Both Newell Franks and Bruce McConnell stated that any redemption price had to consider the interests of the company including the need for capital expenditure, research and development, and maintaining adequate reserves in a highly competitive market.

In December 2011, Jeff Franks wrote the Board and expressed his interest in selling his shares because he anticipated BOT would soon retire the outstanding debt arising from Mr. Franks, Sr's death. In preparation for the March 2012 annual shareholder meeting, Newell Franks informed the shareholders that the management team and the Board were continuing to follow the 2008 redemption plan based on the shareholders who had indicated their intent to sell shares starting with the oldest to the youngest. The shareholders who had requested to sell shares were Richard Franks, Larry Franks, Joyce, Franks, Willis Franks, and Jeff Franks. (P. Ex. 22). However, Newell Franks expressed the caveat that redemption of the shares over a five year period would depend on whether BOT's financial health could continue to fund nearly $21 million in cash outlays above normal business operation requirements as it had since 2006 to retire the debt. (*Id.*). Newell had had discussions with Willis and Jeff Franks that indicated they wanted a large payout on their shares over a short period of time but Newell had told Bruce Gosling that the redemption period had to be over a period of years because of the number of shares involved and the need to continue to operate the business. (TT, 8/25/12 – N. Franks, pp. 151-153).

As such, the 2012 shareholder meeting and the retirement of the BOT debt renewed a discussion around redemption of shares. The Defendants owed a fiduciary duty to each of the Plaintiffs to disclose all material facts within their knowledge that may influence a shareholder's decision to accept or reject redemption terms, and to seek the best possible return on the shares based on the long term preservation of BOT given the financial needs and challenges of the corporation. *Murphy*, 509 Mich at 148, 151-152. However, the Defendants are not, and were not in 2012, required to obtain the "highest value share price reasonably available." *Id.* at 152. In considering a redemption price and terms, the directors must also consider the preservation of the financial health of the corporation, the need to reinvest corporate profits for long-term returns, and any other purpose aimed at serving the interests of the corporation in considering a price for redemption of shares. *Id.* at 152-153.

The Board understood in 2012 that after paying nearly $20 million in debt retirement and funding the employee pension plan, the company had to invest in long-term returns through capital expenditures and research and development. The Board was interested in securing a reasonable purchase price to redeem shares over a period of years with a cap of $1 million per year in redemption payments to allow both redemption and capital expenditures including the building of a new facility.[15] The is a legitimate business purpose and the Board sought to negotiate a price the parties could agree to and allow BOT to engage in much needed capital investment to ensure long term results.

On May 21, 2012, Bruce Gosling issued a calculation of value report of BOT based on the net asset model. Mr. Gosling's report estimated BOT's enterprise value as of 12/31/2011 was $46,125,355 on a marketable and controlling basis, with a price per share of $598.70, and $356.22 per share after discounts for lack of control and marketability.[16] BOT completed payment of the outstanding estate debt in August 2012. (P. Ex. 32). In October, Jeff Franks revised his prior request to sell his shares by stating he wanted to sell only 300 shares of his Class B shares in 2012, 2013, and 2014; he did not indicate a price.

In November 2012, the Board unanimously approved the resolution to offer to purchase any shares of BOT for $62.00 per share with a total expenditure of up to $1 million for stock

15 In *Murphy, supra*, the Michigan Supreme Court emphasized its decision regarding a director's heightened duty to "maximize shareholder value by securing the highest value share price reasonably available" applied only in the narrow context of a cash-out merger. 509 Mich. at 151. In that context, the sale or dissolution of the target corporation is "a forgone conclusion" and the "long term interests of the target corporation as an entity are of no concern." *Id.* "Instead, the sole focus of the board of directors is to maximize the sale price of the target corporation for the *shareholders'* benefit – not to preserve the target corporation, reinvest corporate profits for long-term returns, or further any other purpose aimed at serving the interests of the *corporation.* Id. at 151-152 (emphasis in the original). Here, when addressing the redemption of shares, the directors of BOT must consider the best price – not the highest available price – which includes consideration of the long-term interests of BOT including the need to reinvest corporate profits for long-term returns.

16 As previously noted, the report was corrected at trial because the original report erroneously failed to include deferred income tax assets in his May 2012 valuation. The correction increased the undiscounted price per share to

redemption in 2012. (P. Ex. 32). Neither the management team nor the Board provided any of the outside shareholders with a copy of the Gosling report prior to the Board resolution. The management team did not believe any shareholders would accept the offer because they knew the shareholders were aware of the 2008 SRR Independent Valuation of $248.00 and the redemption of shares at that price or similar prices. Bruce McConnell believed that the $62.00 offer was the start of negotiations to seek a final agreement at or near the $248.00 per share price, if possible.

After the Board approved the $62.00 offer, Newell Franks forwarded the offer amount to Bruce Gosling and inquired whether he had any comments. (P. Ex. 33). Mr. Gosling stated he did not have any "material" comments and indicated that if the shareholders agreed with the price then "it should be a good plan." Mr. Gosling was not asked, and he did not indicate that the price was fair or reasonable but only expressed that if the shareholders agree to the price then it would be a very reasonable price to redeem shares. (Id.; TT, 8/26/20 – Gosling, pp. 82-86, 111-114). In that regard, Mr. Gosling acknowledged that some shareholders might recognize that shares had been redeemed at a higher price following the death of Mr. Franks, Sr.

Contrary to Plaintiffs claim, Mr. Gosling did not "caution" Newell Franks about the offer. Newell already knew the shareholders would not accept the offer. Newell and the Board were intending to engage in negotiations concerning an acceptable share price to redeem shares at an acceptable price over a term of years, and the starting point - $62.00 – was selected without regard to reasonableness.[17] Mr. McConnell considered the negotiations like negotiating with a customer but this ignores that a customer is not owed fiduciary duties by the seller, and both the seller and buyer can take advantage of the market vagaries absent fraud. Mr. McConnell, Newell Franks, and David Franks all knew that the $62.00 figure was a low offer that was not supported

---

$694.18 and discounted to $413.00 per share. There was no evidence to indicate this error was intentional or directed by Defendants.

17 Plaintiffs contend that Defendants cannot rely on the business judgment rule because they did not rely on the advice of Mr. Gosling. But Plaintiffs have not produced evidence that Mr. Gosling advised or directed the Defendants on the negotiations in direct contradiction of their actions. The Defendants considered many factors in weighing how to negotiate and the ultimate price at which they hoped to secure a redemption agreement. Mr. Gosling's own report states that "the selection of price requires consideration of factors beyond the information" that Mr. Gosling provided Defendants. (P. Ex. 27). Plaintiffs cite *Est of Detwiler v Offenbacher*, 728 F Supp 103, 150 (SDNY 1989) for the proposition that Defendants may not rely on the business judgment rule because they "ignored" the advice of Mr. Gosling. But *Detwiler* states directors may rely on a business advisor "provided they may not do so blindly;" meaning that directors cannot only rely on an advisor but must consider all circumstances and information in exercising their duty including the long term needs of the company. Defendants considered many factors in negotiating the price for redemption including Mr. Gosling's Appendices C and D that averaged a share price of $248.00 with discounts. Contrary to Plaintiffs claim, the Defendants interaction with Mr. Gosling does not preclude the application of the business judgment rule.

by any valuation obtained by the company.

As noted, the Defendants owed Plaintiffs a duty disclose all material facts within their knowledge that may influence a shareholder's decision to accept or reject redemption terms. *Murphy, supra*. Under this materiality standard, courts have considered omitted facts material "if there is a substantial likelihood that a reasonable stockholder would consider them important in deciding how to vote." Stated another way, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available." *Krieger v Gast*, 122 F. Supp.2d 836, 849 (W.D. Mich 2000).[18]

Plaintiffs contend the Gosling report was material to the Board's offer to redeem shares at $62.00 per share and the Board's failure to disclose the report was oppressive and a substantial interference with Plaintiffs' shareholder interest. The Court does not find there was a substantial likelihood disclosure of the Gosling report would have significantly altered the information available to Plaintiffs to consider whether to accept or reject the offer to purchase. The Plaintiffs had access to financial statements of the company that allowed them to calculate prior redemption prices, they were aware of the 2008 SRR Independent Valuation, and that BOT was redeeming shares since 2008 for at least $248.00 per share. In 2012, Jeff Franks believed the company was worth more than the 2008 SRR valuation because the company had been paying down the debt. The Plaintiffs had received adequate financial information to allow them to make an informed decision whether to accept or reject the offer. *See e.g.*, *Krieger,* F. Supp.2d at 849-850. (in finding that the corporation in *Krieger* failed to disclose material appraisal information in the cash-out merger because it had not provided financial information to the minority shareholders, the Michigan federal district court drew comparison to the close corporation in *Skeen v. Jo–Ann Stores, Inc.*, 750 A.2d 1170 (Del.2000), wherein the court found the corporation did not breach its duty to disclose when it did not provide the minority shareholders a range of the target corporation's fair value as determined by the investment banker, financial projections

18 Defendants argue that in an arms' length negotiation they could have lawfully offered to buy Plaintiffs' shares at any price regardless of appraisals or other offers. Defendants primarily rely on *Glass v Glass*, 228 Va 39; 321 SE2d 69, 75 (1984) in support of this proposition. However, this general rule applies only to arm's length transactions between shareholders and not when a closely held corporation seeks to redeem the shares of minority, non-voting shareholders as in this case. *See, Colgate v The Disthene Group, Inc,* 85 Va Cir 286 (2012). The Court believes this is the applicable in law in Michigan where it has been noted that the relationship between those in control of a closely held corporation and the minority, non-voting shareholders requires a higher standard of fiduciary duty. *See, e.g., Estes v Idea Engineering*, 250 Mich App 270, 281 (2002) (citations omitted).

and reports because the minority shareholders in *Skeen* had received adequate financial information to allow them to make an informed decision whether to exercise their appraisal rights).

As expected, upon receipt of the November 26, 2012 offer to purchase, Jeff Franks and Willis Franks immediately believed the offer price was a mistake. Willis, on behalf of himself and Jeff, emailed Newell and confirmed the $62.00 price per share. Willis asked why the price was $62.00 when BOT was redeeming Larry Franks' shares in 2010 for $279.00.[19] On November 28, 2012, Newell responded by explaining the redemption history, identifying the two valuations performed by SRR in 2007 and 2008, and that all shareholders were offered the same price. (P. Ex. 37). Newell further explained that the "primary reason" for the lower price was because a redemption of shares will reduce the funds available to operate the business and continue with necessary capital expenditures to replace equipment and facilities. (*Id.*). He indicated that a "secondary consideration" was that the Board believed 2013 would be a bad year like 2008. (*Id.*).[20]

Newell knew Jeff and Willis did not agree with the price. On December 1, 2012, Willis requested information about the most recent Independent Valuation of BOT. Newell understood this to mean the SRR report from 2008. Newell forwarded the SRR report to Willis but while the two talked on the telephone later that day about the report and the offer, Newell also shared with Willis the Gosling report and valuation.[21] Newell immediately sent the Gosling report to Willis

19 This was the price BOT paid Mr. Franks for approximately six months until realizing the error and corrected the price to $248.00 consistent with the SRR valuation.

20 Plaintiffs' contend that Newell believed redemption was harmful to the interest of the business. Newell Franks' testimony was consistent that the company had to consider the need to address necessary capital expenditures that had been delayed, including the building of a new facility, because of the aggressive debt retirement plan undertaken in 2008. The primary concern was the competitive strength of the business and he did not believe redemption was in and of itself bad for the company. (See TT, 8/27/20 – N. Franks, pp. 88-93, 102-105). Mr. Franks' testimony was credible on this issue.

21 Plaintiffs infer that Newell Franks intended to conceal the Gosling report and oppress the Plaintiffs because he only sent the SRR report when Willis Franks asked for the latest "Independent Valuation." While Newell assumed Willis would have interest in the Gosling report, Willis only asked for the latest "Independent Valuation" which was the SRR report. Newell knew that Jeff understood the difference between Independent Valuation and a calculation of value performed by Gosling. But it was clear that Newell was not trying to conceal the Gosling report because on the very same day he produced the SRR report to Willis, Newell spoke to Willis on the telephone and shared the valuation from Gosling. Newell sent the Gosling report on the same date, December 3, 2012. Newell Franks' testimony was credible on this issue. Also, this exchange of financial information and telephone conversations with the shareholders was consistent with past practices of the Board and reflected the Board's openness to discuss questions. *See, e.g.*, D. Exs. B, C, and F – email exchange of financial information between Newell and Jeff in 2009, 2010, and 2011, and P. Ex. 22 – Letter to shareholders re 2012 annual meeting inviting shareholders to call or email with questions.

on the same day, December 3, 2012. Therefore, even if the Board's failure to provide the Plaintiffs with the Gosling report in November 2012 was a breach of its duty to disclose, the Defendants corrected that error when Newell produced the report on December 3, 2012. As of December 3, 2012, the Plaintiffs had the material valuation information that the Board had when approving the redemption offer.[22]

Jeff and Willis Franks declined the $62.00 redemption offer. On December 11, 2012, Jeff Franks counter-offered and requested the Board to redeem 300 shares in 2012 at $356.22 per share in accordance with the Gosling valuation. (P. Ex. 47).[23] He believed the Gosling valuation of $356.22 per share that included discounts was fair and reasonable. (TT, 9/2/20 – J. Franks, p. 92-93). On December 8, 2012, Willis asked Newell whether the company would pay dividends if all shareholders declined the offer; Newell stated that he did not know because the Board did not discuss dividends when it approved the redemption offer in November. (P. Exs. 46, 49).

Contrary to Plaintiffs claim, it was not oppressive and a substantial interference with the Plaintiffs' shareholder rights by offering the $62.00 offer to redeem shares when the Board knew the Gosling report valued the company at $356.22 per share. The Board also had the 2008 SRR Independent Valuation that is an opinion of value; the Gosling report was only a calculation of value. The report contains disclaimers that establish it is an "estimate" and "cannot be used or represented as an opinion or conclusion of value," and that an "actual transaction involving the subject business might be concluded at a higher value or at a lower value." (D. Ex. R). The Board anticipated a tough negotiation to secure a redemption price at or near their target price of $248.00 and they offered an initial number they knew would be rejected but start the negotiations. Jeff Franks counter-offered requesting his shares be purchased at $356.22 pursuant to the Gosling report. The parties were involved in negotiations.

---

22 Plaintiffs provide no evidence that receipt of the Gosling report prior to December 3, 2012 would have had "a substantial likelihood" of "significantly altering" the "total mix of information" available to decide whether to accept or reject the redemption offer. *Krieger, supra.* The reasonable inference from all evidence is that Jeff and Willis Franks would have rejected the offer regardless of the Gosling report. Willis advised the Board he was declining the $62.00 offer because he did not believe it was "fair and reasonable" without referencing the Gosling report. (P. Ex. 48). While Jeff advised the Board they were rejecting the $62.00 offer because the latest evaluation was the Gosling report, he also believed at the time of the Board's offer that the company's value was greater than the 2008 SRR $248.00 valuation because the company had paid down debt.

23 Jeff Franks states that his communication to the Board was an amendment to his prior request to sell shares and not a counter-offer to negotiate the $62.00 redemption offer. His testimony was not credible on this issue.

None of the shareholders accepted the November 2012 redemption offer.[24] In January 2013, Newell Franks commissioned Mr. Gosling to use an alternative method for calculation of value of the BOT shares using the discounted cash flow method. Newell stated that he thought the 2008 SRR valuation was the best method because it utilized the discounted cash flow method whereas the Gosling May 2012 report used the net asset method. (TT, 8/27/20 – N. Franks, pp. 68-69; D. Ex. AAA 2008 SRR Valuation of BOT). Brian McConnell also believed a discounted cash flow method was a better measure of value because BOT was a cash intensive business. (TT, 9/18/20 – McConnell, p. 77). Based on Goslings calculation of value using the discounted cash flow method the price per share was calculated to be $141.26 per share after discounts for lack of control and lack of marketability as of December 31, 2011. Newell immediately provided this updated report as Appendix D to the Gosling report to Willis Franks. (TT, 8/25/20, N. Franks, p 104; 8/24/20 – W Franks, pp. 90-92).

The cash flow method of valuation measures a company based on the company's cash flow generated over the previous five years. (TT, 8/26/20 – Gosling, pp 99, 101). Appendix D is based on an average of BOT's cash flows for the five years leading up to December 31, 2011, which included a period of economic recession and over which period BOT reported a $14 million cumulative net loss. (*Id.* at pp, 100, 108; and 8/27/20 – N. Franks, pp. 89-90). Mr. Gosling confirmed that while the asset based calculation of value might generate the "optimum" value it would be based on the liquidation of the company and that value would not likely be realized. (TT, 8/26/20 – Gosling, p. 105, and 8/27/20 – Gosling, pp 32-37; see also, P. Ex. 68). As such, Mr. Gosling agreed that using the discounted cash flow method of calculation would be an appropriate model in considering redemption of shares because it is based on a value that can be expected to be realized by BOT from continuing the business operations. (TT, 8/27/20 – Gosling, pp 34).[25] It was not oppressive and a substantial interference in Plaintiffs' shareholder

24 The Court notes that Mike Franks was not the trustee of the Plaintiff Trust in 2012 or 2013. The Trust did not accept the valuations and redemption offers in 2012 and 2013 because it considered the offers unfair. Mike Franks did not have much substantive evidence to present to the Court aside from the fact that as the Trustee, and shareholder, he receives financial statements from the Board before each annual meeting, that the Trust has been receiving dividends when paid by BOT (including 2015 – 2019), and that he wants "justice" for the non-voting shareholders in redemption of their shares for a fair value. Dick Franks, before his death, testified in deposition that Jeff Franks kept him informed of the issues through emails. (P. Ex. 89, p. 35). Again, the Court draws a reasonable inference from the evidence in concluding that Jeff Franks served the role as the primary advocate for the benefit of the Plaintiffs.

25 Plaintiffs question the reasonableness of BOT securing a calculation of value based on the discounted cash flow method as an alternative means of doing a calculation value. The discounted cash flow model has been an accepted

rights for the Board to request an additional valuation that was based on the discounted cash flow method when the nature of its business was cash intensive manufacturing. Moreover, the Board provided the valuation report to the Plaintiffs upon receipt from Mr. Gosling.

On February 5, 2013, the Board resolved to issue a redemption offer of $141.26 per share, based on Appendix D. (P. Ex. 55; TT, 8/25/20 – N. Franks, p. 77; and 8/24/20 – W. Franks, p 90). Willis Franks interpreted Appendix D as Defendants attempt "to cover their tracks because of the $62 offer" and that it appeared that Newell "just wanted a lower valuation…from the original $356 valuation." (Trial Tr., 8/24, Willis, p 92:13-16). Jeff Franks similarly interpreted the creation of Appendix D as manipulation by Newell to come up with a lower valuation number. (Trial Tr., 9/1, Jeff, p 26:6-21). No shareholders accepted the offer of redemption at the $141.26 price per share.

During the negotiations leading up to and during the Board's offers to redeem shares in 2012 and 2013, Willis and Jeff Franks had communications with both Newell Franks and Brian McConnell. As noted, Newell advised Jeff Franks the intent of the Board to redeem shares at a price and period of years that would allow value to the shareholders and permit BOT to continue with long-term capital investments. Newell shared the 2008 SRR report and the Gosling report with Willis resulting in the Plaintiffs possessing all the financial valuation reports the Board had when issuing the offers to redeem. As noted, by the first deadline to respond to the Board's offer to redeem shares at $62.00 per share the Plaintiffs had all material information to respond to the offer. This was true for each of the offers.

In response to Jeff Franks' inquiries in February 2013, Newell provided Jeff with a history of the BOT redemptions and made the corporate minutes and stock books available to Jeff for his viewing at the company. (P. Ex. 56). Similarly, Brian McConnell responded to Jeff's inquiry as to how Brian "arrived" the $62.00 per share redemption offer. (P. Ex. 57). Mr. McConnell did not give any detail other than to state it was a number to start negotiations. (P. Ex.58). Mr. McConnell acknowledged he should have encouraged another counter-offer but he

model for valuation. *See, e.g.*, Calio, "New Appraisals of Old Problems: Reflections on the Delaware Appraisal Proceeding," 32 Am Bus L J 1, 48-49 (1994) ("[c]onsistent with its general acceptance and vast application in the financial community, the 'discounted cash flow' method has become the valuation 'methodology of choice' in Delaware appraisal proceedings"); *In re: Radiology Assocs., Inc. Litigation*, 611 A.2d 485, 490 (Del. Ch. 1991) ("[t]he Delaware courts have affirmed the validity of this [discounted cash flow] method of valuation repeatedly"). The Court does not consider Newell Franks' request for a calculation of value as unreasonable or as an act intended to oppress the Plaintiffs. Mr. Franks' testimony that he was attempting to secure a calculation like the 2008 SRR valuation was credible.

believed he clearly expressed to Jeff that the $62.00 offer was just a starting point. (TT, 9/14/20 – McConnell, pp. 82, 120-121).

Plaintiffs filed suit on September 3, 2013. Prior to the lawsuit the Board was contemplating an offer to redeem shares based on the SRR valuation and upon which the Board based the redemption to redeem shares to retire debt between 2008 and 2012. On September 6, 2013, the Board issued the third redemption offer to BOT's shareholders in the amount of $248 per share, to be paid at $50,000 per calendar quarter until all accepting shareholders' shares were purchased. The Board could accelerate payments in any given year or reduce payments where the United States economy was in a recession. (P. Ex. 76 and 77).

The $248.00 figure represents an average of the Gosling Appendix C calculation of value based on the net asset value method of $356.22 per share, as discounted, and Appendix D based on the discounted cash value method of $141.26 per share, as discounted. There was no evidence presented that anyone at BOT instructed or directed Mr. Gosling to prepare the valuations to intentionally produce an average price per share, as discounted, of $248.00. (TT, 918/20 – McConnell, p. 76-78, the Board did not instruct Mr. Gosling to complete the evaluation to net a $248.00 price per share). Mr. Gosling noted that the two price per shares in Appendix C and Appendix D "interestingly" – as by coincidence - averaged to the $248.00 price per share. (P. Ex. 52).

As with all prior offers, the $248.00 offer to redeem shares was made to all shareholders. Neither Jeff nor Willis Franks accepted the offer and they, like with earlier offers, believed the offer was not fair and reasonable because it was below the Gosling valuation price per share. (P. Ex. 79; TT, 9/1/20 – J. Franks, p. 66; and 8/24/20 – W. Franks, p. 95).[26] The Trust did not accept the offer. Larry Franks was the only shareholder to accept the $248.00 redemption offer. (TT, 8/25/20 – N. Franks, pp. 105-106). As noted, Larry Franks was already redeeming his shares for $248.00.

Both offers to redeem shares at $141.26 and $248.00 were based on recent valuation reports received by the company in recent years. The February 5, 2013 offer of $141.26 was

26 After the $141 redemption offer, and before Plaintiffs filed suit, the parties received other valuations which valued BOT in the mid-$700 per share range without discounts. (TT, 8/24/20 – W. Franks, p. 93). Mr. Gosling prepared calculated value report as of December 31, 2012 at $57,491,764 or $755.00 per share undiscounted and $449.76 discounted for lack of control and lack of marketability. (P. Ex. 68). Plaintiffs obtained a litigation valuation report from Baker Tilly estimating value as of $755.00 without discounts. (P. Ex. 79).

based on Gosling's January 2013 Appendix D discounted cash flow model. The $248.00 offer reflected both the average of the 2012/2013 Gosling report, Appendices C ($356.22) and D ($141.26), and the 2008 SRR Independent Valuation with a redemption price of $248.00. While the $248.00 offer was on the low end of the range of values presented to the company, it was within a reasonable range of those values. The $248.00 price per share also represented the redemption price the Board hoped to secure an agreement to meet both the best value for the shareholders while considering the long-term interests of BOT including the need to reinvest corporate profits for long-term returns such as capital expenditure investments to sustain the competitive market presence of BOT products. *See*, *Murphy*, *infra,* and fn. 15, infra.[27]

As noted, the Defendants did not conceal material information from the Plaintiffs during the negotiations to consider whether to accept or reject the offers. Even if this Court concluded it was a breach of fiduciary duty to issue the $62.00 redemption offer without providing the Plaintiffs the Gosling May 12, 2012 valuation report, that error was corrected within days of the offer when Newell Franks freely discussed the report with Willis Franks and sent a copy of the report on the same day, December 3, 2012.

In further support of their oppression claim based on concealment of information, Plaintiffs argue the Defendants engaged in an on-going scheme to withhold company valuation reports while offering a redemption price substantially lower than the valuation report with the intent to oppress the shareholders. Plaintiffs say the proof of the scheme is found in the actions taken by Newell Franks to secure a redemption price "under very similar circumstances" involving an affiliated company, Oak Press Solutions ("OPS"), in which OPS redeemed the shares of Larry Franks at a share price equal to one-fifth of the valuation report. Plaintiffs request the OPS evidence be admitted and considered by the court under MRE 404(b)(1) as proof of the Defendants' scheme to oppress the shareholders.[28] The Court finds the two situations are not

27 In *Ginnard v Advanced Design & Prototype Techs, Inc.*, unpublished opinion of the Court of Appeals, issued September 27, 2012 (Docket No. 303162), 2012 WL 4465191 *2, the court recognized that it is difficult for courts to assess valuation of stock in considering damages, stating: "The valuation of stock in a closely held corporation is often a difficult task. Because of the difficulty in determining the value of stock in a closely held corporation, the trial court is given great latitude in determining the valuation. There is no error in the valuation if the determination falls within the range of the evidence presented." (citations omitted). Likewise, directors exercising their fiduciary duty of good faith must consider the range of values presented to it and the factors that weigh in setting a price and term for payment including consideration of the long-term goals of the company.

28 On March 9, 2020, Plaintiffs filed a motion in limine addressing multiple evidentiary issues including their request that the court admit the OPS evidence under MRE 404(b)(1). Plaintiffs' Motion in Limine, request #5 regarding OPS and Larry Franks, pp. 13-18. Defendants objected to the motion. The Court held the decision in

"sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system" and the evidence is excluded from the Court's consideration. *People v Sabin*, 463 Mich 43, 63 (2000).

Larry Franks had been an officer and director of OPS. (TT, 9/2/20 L. Franks, p. 123). In May 2012, he owned 78% of OPS. (TT, 8/25/20 N. Franks, p 23). Larry informed Newell Franks that he was interested in selling his OPS shares. (*Id.* p. 24). Newell understood Larry wanted to receive the same price per share as Larry's father, Mr. Franks, Sr, and this was consistent with the long relationship between father and son. (*Id.* at pp. 129-132). Based on that understanding, Newell offered Larry to have OPS redeem his shares at the same price OPS redeemed Mr. Franks, Sr's shares, $1,431.00 per share. (P. Ex 24).

At the same time, Mr. Gosling was preparing a valuation of OPS and concluded that while OPS' company value was the same as when Mr. Franks, Sr.'s shares were redeemed the price per share increased by approximately 5 times because there were fewer shares. (Id.; (Tr., 8/27, Gosling, pp. 10-11). As a result, the value of the redemption of Larry's shares would increase from $1,230,000 to $5,600,000. (Exhibit 24; TT, 8/25/20 – Gosling, pp. 24-25). Newell Franks did not provide this valuation figure to Larry Franks and OPS redeemed his shares for $1,230,000.

Notwithstanding the difference between the price Larry Franks redeemed his OPS shares and the price Mr. Gosling estimated was the OPS share value, Larry testified that having the Gosling estimation of value before completing his transaction would not have made a difference. (TT, 9/2/20 – L. Franks, pp. 140-141). Larry stated that he was satisfied with the transaction he agreed to and that he would not have wanted to receive the Gosling information before the transaction because it wouldn't have changed his agreement on the sale price. (*Id.*) While Larry Franks had some difficulty recalling details of discussions and emails exchanged approximately 8 years before his trial testimony, the Court found his testimony on this issue credible and forthright.

abeyance pending receipt of the evidence at trial to determine whether the evidence established sufficiently similar circumstances for admission and consideration by the Court under MRE 404(b)(1). The evidence was presented at trial understanding the Court would address the admissibility under MRE 404(b)(1) in its findings of fact and conclusions of law. However, to avoid waste of time and resources at trial, it was agreed under MRE 403 that the parties would not engage in a trial within a trial regarding the nature and scope of the OPS operations, financial management, and redemption history, and Plaintiffs would only pursue a limited inquiry regarding the agreement reached between OPS and Larry Franks for redemption of his shares. In a bench trial, the fear of unfair prejudice under MRE 403 in reviewing the evidence is not present. *People v Jones*, 168 Mich App 191, 194 (1988).

In an email to Brian McConnell and David Franks on May 21, 2013, Newell Franks advised he had received Bruce Gosling's initial valuation of BOT with an estimated price per share of approximately $352.00. (P. Ex. 28). Newell stated that he did not want to increase that price and wondered whether they could "attempt" to do what they did "with OPS stock" because he suspected that "Willis and maybe Jeff, Dad, and Uncle Dick might be willing to accept some lower price per share for cash today." (Id.). Newell explained that his intent was to determine whether any of the shareholders would accept a lower price for a cash payout similar to his father and the OPS transaction. (*Id.*, TT, 8/25/20 – N. Franks, p. 27). He did not intend to suggest that BOT would not disclose valuation information to the shareholders. (*Id.*).

Plaintiffs claim this evidence reveals Defendants engaged in an on-going scheme to withhold company valuation reports while offering a redemption price substantially lower than the valuation report with the intent to oppress the shareholders at both OPS and BOT. Proof of intent, motive, and scheme are proper purposes under MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 74-75, amended 445 Mich 1205 (1994). But to be admissible for such use the evidence Must be "closely scrutinized" to ensure a "logical relationship between the proffered evidence and the ultimate fact sought to be proven." *People v Crawford*, 458 Mich 376, 387-388 (1998). As noted, the compared acts or conduct must be sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin*, supra. A "general similarity between the charged and uncharged acts does not…, by itself, establish a plan, scheme, or system used to commit the acts. *Id.* at 63. Rather, "to establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts." *Id.* at 65 (cleaned up).

The Plaintiffs evidence shows, at best, a general similarity of acts and they are not sufficiently similar to support an inference of a scheme to oppress. Mr. Franks was an officer, director, and voting shareholder of OPS and, by that status, had a general knowledge of the value of OPS and past redemptions, including the redemption of his father's shares. Mr. Franks desired to redeem his shares for the same price as his father and he did not desire to have any other information provided for him to confirm his decision to redeem the shares. Newell Franks implemented the OPS redemption based on his understanding that his father desired to sell his OPS shares for the same price as his father, Mr. Franks, Sr.

Newell did not provide the Gosling valuation estimate to Larry Franks because he believed there was no need because his father wanted to complete the transaction at the same price his father's shares were redeemed approximately five years earlier based on an independent evaluation. (TT, 8/27/20 – N. Franks, p. 132). And, in fact, this was true as recounted by Larry Franks at trial. In considering redemption of BOT shares in May 2012, Newell wondered whether the shareholders would be willing to accept a cash purchase for a lower price than valued similar to what his father did with the OPS shares. That is the extent of the similarity.

Most notably, this Court has found that the Defendants did not conceal the Gosling May 2012 report but disclosed the report as requested prior to the deadline to accept or reject the initial $62.00 offer. Moreover, the Plaintiffs had sufficient information before receiving the Gosling report that the $62.00 offer was lower than the redemption price BOT used between 2008 and 2012 to pay down the estate debt. Again, the Plaintiffs had all the information the Board had regarding the value of BOT when they decided to reject the $62.00 offer in December 2012. Additionally, the Defendants disclosed to Plaintiffs Gosling's Appendix D valuation in January 2013 that supported the $141.26 redemption offer. The OPS evidence does not establish a scheme to oppress the Plaintiffs and the evidence shall not be considered by this Court in considering Plaintiffs' claim of oppression.

Defendants first offer to redeem Plaintiffs' shares at $62.00 per share when the company was redeeming Larry Franks' shares at $248.00 per share beginning in 2010 was not oppressive or a substantial interference with Plaintiffs' shareholder interests. As noted, the redemption agreement with Larry Franks was based on an agreement for his retirement that saved the company money, and by implication, increased the value of the company. Plaintiffs did not present credible evidence to contradict these facts and, notably, the Plaintiffs did not object to the agreement in 2010 or any year until this litigation. Jeff and Willis Franks affirmatively voiced approval of the agreement and believed it made sense.

Moreover, the parties engaged in negotiations that resulted in Defendants offering to redeem Plaintiffs' shares at $248.00 per share, the same price being paid Larry Franks. It is also the price at which the Defendants hoped to secure a redemption agreement with the Plaintiffs. The Court does not believe these facts constitute willfully unfair and oppressive to the Plaintiffs.

The Court finds the evidence does not support Plaintiffs' claim that Defendants' offers to redeem the Plaintiffs shares between November 2012 and September 2013 were willfully unfair and oppressive to the Plaintiffs' shareholder rights. After completing a multiyear debt-reduction plan, including the completion of obligations arising from Mr. Franks, Sr.'s estate and fully funding the company pension plan, the Defendants were prepared to consider share redemption or payment of dividends to shareholders. The debt reduction plan significantly reduced earnings available to pay shareholders dividends between 2007 and 2011. The shareholders, including the Plaintiffs, agreed with this plan.

The debt-reduction plan also delayed necessary investments in capital expenditures and research and development for the long-term interests of the company. To maintain BOT's competitive place in the market, the Board believed it had to invest in a new facility, new machinery, and additional innovations. The Board recognized that any redemption plan would have to be executed at a reasonable price over a period of years, possibly up to 10 years, to permit the company to continue necessary investments. The Plaintiffs presented no evidence to contradict the need for capital expenditure and research and development that had been delayed during the debt reduction plan years.

In 2012 when the Board embarked on a negotiation to secure a redemption agreement, the Board had three valuations of the company. The 2008 SRR Independent Valuation as of April 30, 2008 for \$248.00 per share, the Gosling December 31, 2008 calculation of value of \$279.00 per share, and the May 2012 Gosling calculation of value that for \$356.22 per share. The Plaintiffs were aware of the redemption of shares at \$248.00 prior to 2012 based on the SRR Independent Valuation. Plaintiffs were also aware that Larry Franks' shares were initially redeemed at \$279.00 per share based on the 2008 Gosling calculation but was later corrected to reflect the \$248.00 per share. Plaintiffs were not aware of the 2012 Gosling report when the Board issued the \$68.00 redemption offer but Newell Franks provided the SRR valuation and the Gosling report within days of the Board's offer. Therefore, the Plaintiffs had all the valuation information that the Board had prior to the Plaintiffs' deadline to respond to each of the offers to redeem shares in 2012 and 2013.

Absent a written agreement between shareholders and the corporation, Michigan has not established the right of a shareholder to compel a corporation to purchase or redeem the shareholder's shares at any given time and at a price acceptable to the shareholder. Following the negotiations including offers, counter-offers, and rejections, the Board issued its final offer to redeem shares at \$248.00. This price represented the average between the Gosling reports, Appendices C and D, and the 2008 SRR independent valuation. While the $248.00 offer was on the lower range of value it was supported by the average of these reports. As noted, the Board acted with a legitimate business purpose to offer the $248.00 price with a cap of $1 million per year in redemption payments to permit the company to enhance its delayed capital expenditures including a new facility, and continued research and development.

But the Court must look to the totality of the circumstances when considering whether oppression has occurred. *Franks,* 330 Mich at 101; *Castle v Shoham*, unpublished opinion of the Court of Appeals, issued August 7, 2018 (Docket No. 337969), 2018 WL 3746550, p *2. Here, the evidence establishes that Defendants acted in concert to willfully and unfairly oppress the Plaintiffs as shareholders when Defendants offered to redeem Plaintiffs shares at a share price calculated from the lower range of value for the shares, and when the Plaintiffs did not accept the offers for redemption, the Defendants did not pay the shareholders dividends in 2012 and 2013 when BOT had the capacity to pay dividends. As a result, the actions taken by the Defendants willfully and unfairly pressured the Plaintiffs to accept the redemption offer because the Plaintiffs were not otherwise able to derive pecuniary benefit from their shares absent payment of dividends by BOT. *See generally*, *Franks*, 330 Mich at 103-105.

BOT did not pay dividends from 2008 through 2013.[29] While the Court has found that BOT's decision to forego payment of dividends between 2008 and 2011 to permit the company to retire debt arising from Mr. Franks, Sr.'s estate obligations was a legitimate business purpose not intended to willfully and unfairly interfere with Plaintiffs as shareholders, the fact remained that the Plaintiffs had not received a pecuniary benefit from the company during that time. Jeff Franks agreed with the debt retirement plan but in 2011 he advised the Board he wanted to sell his shares. The discussions about share redemption had started in 2008 and Jeff believed the company would likely retire the last of the debt in 2012, therefore he wanted to revive the discussions. In early 2012, BOT's management team began to discuss stock redemption and

29 The Plaintiffs' complaint sought redress for Defendants acts of oppression in 2012 and 2013. The Court ruled that for purposes of valuation the parties' experts should use December 31, 2013 because that was the end period of the alleged oppression. While Plaintiffs have discussed the fact that dividends were not paid in 2014, and their expert, Tom Frazee, opined that BOT had capacity to pay dividends in 2012 and 2013, there was no evidence to indicate that BOT had the capacity to pay dividends in 2014. (Mr. Frazee opined that BOT had capacity to pay dividends in 2012 and 2013. (P. Ex. 95; TT, 9/21/20 – Frazee, pp. 93, 113). Moreover, courts have recognized that a company may decide not to issue dividends when litigation between parties begins, and in this case the case was filed in September 2013 with the focus of litigation in 2014. *Blankenship v Superior Controls, Inc*, 135 F. Supp. 3d 608, 621 (E.D. Mich). Accordingly, the Court considers the period of oppression for non-payment of dividends to be 2012 and 2013.

dividends. (P. Ex. 17, Email dated 1/31/12 from Newell Franks to David Franks and Brian McConnel re: stock redemption; TT. 9/14/20 - McConnell, pp 53-55). The team contemplated budgeting $1.2 million to redeem shares or pay towards dividends. (*Id.*; TT, 9/14/20 – B. McConnell, pp 56-57).

Again, while the Court has found BOT's negotiation to redeem shares at a share price calculated from the lower range of values presented to BOT did not, on its own constitute oppression, the conduct in the negotiation must be considered in the totality of the circumstances facing BOT and the shareholders. The Defendants continued to owe Plaintiff's a duty of good faith and fair dealing while they negotiated the redemption terms and that included paying dividends to the shareholders if BOT had capacity to pay.

The management team understood there was substantial cash on hand to warrant consideration of budgeting $1.2 million for redemptions or dividends. Newell Franks acknowledged that BOT had $20 million cash on hand after paying off the outstanding estate debt in August 2012. (TT, 8/25/20 – N. Franks, p. 16). While Newell indicated a portion of the cash was allocated to customer advances and there were on-going capital expenditures, his testimony was not credible that BOT could not afford payment of $1 million in dividends in 2012.

Significantly, Defendants caused BOT to lend $1 million to Sturgis Bank, where David Franks is a director and shareholder. (*Id*, pp. 16-17; P. Ex. 18). While this loan was short term at 5.5% interest and collateralized, the Board believed it could risk use of $1 million towards a bank on which a Board member was a director and shareholder rather than apply the funds to dividends.

In December 2012, while Plaintiffs were considering the $62.00 redemption offer, Willis Franks asked Newell if the shareholders rejected the redemption offer would the Board approve $1 million for payment of dividends. (P. Ex. 46). Newell advised Willis that he did not know. (P. Ex. 49). The management team and Board knew Plaintiffs would not accept the $62.00 offer and knew that Plaintiffs were interested in receiving value for their shares after four years without dividends. But the management team would not commit to considering dividends notwithstanding they knew there was capacity to pay $1 million in dividends. The Board properly engaged in negotiations to seek the best price available for shareholders considering the long term interests and results for the company. *See, fn. 15, infra.* But the Board understood the

Plaintiffs would reject the initial low offer to redeem shares and this required the Board to exercise due care, good faith, and fair dealing by considering payment of dividends to avoid pressure on the shareholders to cash in on the next offer because they have no other recourse to secure a pecuniary return on their shares. It is not enough to suggest the Board was reserving funds to pay dividends when the Board understood the initial rounds of negotiations would not likely result in redemption; to do so would be akin to treating the Shareholders as customers and not with the due care, good faith, and fair dealing required by their fiduciary duty.[30]

At year-end 2013, BOT likewise had approximately $20 million of cash on hand. BOT had increased its capital expenditures from approximately $2 million to $8.5 million as anticipated to address the deferred expenditures during the efforts to retire debt beginning in 2008. (TT, 10/5/20 – McConnell, p. 127-128). Brian McConnell testified that given the intensive cash needs of the company, the Board and managers developed a rainy day fund rule: reserve 10% of net sales to operate the company given the cyclical swings of cash flow, cover some capital expenditures needs but exclude cash needed to cover customer advances. (*Id.* at pp. 127-130).

In applying the 10% rule, BOT had at least $5.9 million of cash on hand at end of 2013. (*Id.*). BOT had $19.5 million cash and net sales totaled $59 million. Applying 10% to the net sales figure allowed for a rainy day fund of $5.9 million dollars. Customer advances equaled $10.3 million and subtracting that from $19.5 million left $9.2 million in cash to cover the rainy day fund and operations. (*Id.*). Accordingly, approximately $5.3 million was available for some allocation of dividends in 2013 understanding the entire fund could not be applied to dividends to permit cash on hand for required funds as is the standard operation of the company as testified to by Mr. McConnell. While Mr. McConnell's testimony on competitive pressures facing the business and the nature of cash swings resulting from the cash intensive business was credible, his testimony on the lack of availability of funds to pay dividends in 2012 or 2013 was not credible. Plaintiffs' expert, Mr. Frazee, concluded BOT had the ability to make dividend payments in 2012 and 2013 of at least $1 million in each year. (P. Ex. 95; TT, 9/21/20 - Frazee, pp. 93, 113).

During the negotiations both Jeff Franks and Willis Franks had told Newell that they did not believe the redemption offers in 2012 and February 2013 were fair or reasonable. While the

30 There is no evidence the Board was reserving cash for repurchase of the Plaintiffs shares during the negotiations.

February 5, 2013 offer reflected Goslings calculation of value based on discounted cash flow of $141.26, both Jeff and Willis believed it was an effort to justify a lower redemption price. Good faith and fair dealing required the Board ensure fairness in treating the shareholders who had not received dividends for a number of years and consider payment of dividends when there was financial capacity to pay and it appeared the negotiations would not result in a redemption agreement in the short term.

In January 2013, Newell acknowledged that he did not believe the management team would accept the $356.00 counter-offer from Jeff Franks because Brian McConnell and David Franks were opposed to a redemption in that range because the outside shareholders did not purchase the stock but received it as a gift, Mr. Franks, Sr. did not intend for the stock to be put outside of the company and risk a bad financial position as a result, and the outside shareholders had been receiving large amounts of money from the annuity trust and the had "already received quite enough." (P. Ex. 51). Newell testified he couldn't remember what the two other managers said regarding these issues and his testimony was not credible. (TT, 8/27/20 – N. Franks, pp. 174-175). Both Brian McConnell and David Franks did not credibly explain away their comments that expressed a strong desire for the family to be grateful for the benefits received from the company and put the needs of the company first.

In February 2012, David Franks recounted for the management team a conversation with Jeff Franks in which David recalled feeling "sick and tired of us having to put stock buy-back first before all else and ourselves at the bottom of the trough." (D. Ex. P, email to Newell Franks and Brian McConnell dated February 18, 2012 re: Jeff). While Brian credibly explained the "us" did not just mean the management team and Board but the entire company, the communication revealed a family tension and a belief the family should be accepting of the privilege of being a recipient of the benefits of the company. In April 2013, Newell Franks spoke with his father, Larry, to encourage him to consider accepting the $141.26 offer as that could "motivate others" to accept, especially Willis and Dick Franks. (Exhibit 64; TT, 8/25/20 – N. Franks, p. 85). Larry did not accept the $141.26 offer. This attitude is similar to the family pressure invoked by Mr. Franks, Sr.

The Plaintiffs established by a preponderance of the evidence that the management team and Board took a series of actions to withhold payment of dividends to Plaintiffs in 2012 and 2013 with the intent to pressure the Plaintiffs to ultimately accept the $248.00 redemption offer.

A cause of action for oppression does not accrue when a plaintiff incurs a calculable financial injury but when the defendant's actions cause interferes with the interests of the plaintiff as a shareholder. *Frank v Linker*, 500 Mich 133, 152-154 (2017). Although the Court believes the Board acted with a legitimate business purpose to offer the $248.00 price with a cap of $1 million per year in redemption payments to permit the company to invest in much needed capital expenditures and research and development delayed during the debt retirement plan, the management team and Board nevertheless acted in bad faith to withhold payment of dividends in 2012 and 2013. The Defendants are not permitted to afford themselves protection under the business judgment rule when they have acted in bad faith. *Franks*, 330 Mich App at 100 (citations omitted); *see also*, *Blankenship v Superior Controls, Inc*, 135 F. Supp. 3d 608, 621 (E.D. Mich) (when a company has ability to pay dividends but fails to pay, the conduct is oppressive and not protected by the business judgment rule). The actions taken by the management team and the Board constituted willfully unfair and oppressive conduct that substantially interfered with the Plaintiffs as shareholders.

Liability of Leeann McConnell

Leeann McConnell is one of four voting shareholders along with Newell Franks, David Franks, and Larry Franks. Ms. McConnell is not a director and did not vote for nor participate in the actions that Plaintiffs allege constitute oppression by the Board. Rather, Plaintiffs contend that Ms. McConnell's votes for each of the directors for a position on the Board constituted willfully and oppressive conduct that substantially interfered with the interests of the Plaintiff shareholders.

The evidence supports that BOT was well managed from 2006 through 2013 navigating the great recession, retiring the debt caused by Mr. Franks, Sr.'s death, and maintaining its market presence in a competitive industry. Absent evidence that Ms. McConnell participated in the oppressive conduct, and supported election of the directors to the Board to squeeze out the Plaintiffs as shareholders, it is equally as plausible that she chose to cast her vote for the Board because the Board managed the company well both in the United States and internationally during a difficult economic period. A shareholder who is not a director is entitled to vote her own interest without regard to its impact on non-controlling shareholders without imposing liability. 1 O'Neal, Oppression of Minority Shareholders and LLC Members, Section 4.2. The evidence, or lack thereof, does not preponderate that Ms. McConnell intended to act willfully and oppressively to substantially interfere with the interests of the Plaintiff shareholders when she voted for the directors. The Court finds there is no cause for action against Leeann McConnell.

Remedy

The Court of Appeals held that this Court has "broad discretion to fashion a remedy to fit the equities of the case." *Franks*, 330 Mich App at 108. "The Legislature provided the circuit court wide discretion in deciding what relief, if any, should be awarded after shareholder oppression is established...[S]uch wide latitude to fashion relief is consistent with an action in equity." *Madugula v. Taub*, 496 Mich. 685, 702 (2014). Indeed, the Legislature chose the broadest possible language in vesting trial courts with wide discretion to fashion a remedy: "the circuit court may make an order or grant relief as it considers appropriate[.]" MCL 450.1489(1) *See also, e.g., Franks*, 330 Mich App at 107.

The Court finds the most equitable remedy is payment of dividends to the Plaintiffs and the appointment to the Board of an outside director(s) with experience working with family owned businesses. The Court finds BOT could have paid $1 million towards dividends in 2012 and $2.5 million towards dividends in 2013. The $2.5 million in 2013 would still allow funds to be maintained in the "rainy day fund" which the Court found to be an acceptable business practice. The $3.5 million of dividends will be allocated by the percentage of shares owned by each Plaintiff as if BOT issued the dividends to all shareholders in 2012 and 2013.

The payment of dividends focuses the remedy on the Defendants' primary breach of duty: withholding payment of dividends to cause undue pressure on Plaintiffs to consider accepting the redemption offer. In equity, the remedy for a breach of fiduciary duty must be proportional to the breach. *See generally, Brodie v Jordan,* 447 Mass 866, 872-873 (2006); *In re Sloman's Estate,* 186 Mich 440, 441 (1915) (The court of equity should not do an unnecessary thing") (cleaned up).

The oppressive conduct took place over two years and the Court found no evidence of other oppression. Plaintiffs had not received dividends for several years because the company had embarked on a legitimate effort to retire debt requiring the withholding of dividends. Plaintiffs only pecuniary benefit from the shares was receipt of dividends and they were entitled to be treated fairly and with good faith when money became available to pay dividends in 2012 and 2013. The refusal to pay dividends was intended to add leverage to Defendants negotiations towards a redemption agreement. The Defendants pressure was magnified by Defendants attitude that family shareholders should be grateful for the benefits they receive from the company and put the company's interest first.

It is not equitable to force Defendants to purchase the Plaintiffs shares. The Defendants did not engage in actions that reduced the value of the company for the benefit of the Defendants while excluding the Plaintiffs such as paying large salaries or bonuses to themselves and not declaring dividends, looting corporate assets for personal use, or amending the bylaws to create a class of shares to pay themselves dividends not to Plaintiffs. Where such direct self-dealing is present the forced purchase of shares would be appropriate.

In *Matter of Dissolution of Twin Bay Village*, 153 AD 2d 998, 2017 NY Slip. Op. 06024, the Court entered a decree of dissolution and required plaintiffs' stock to be repurchased where the defendant directors had looted corporate assets; had used corporate assets for personal purpose; had called shareholder meetings but did not invite the shareholder plaintiffs, had not declared dividends for nearly 20 years, and had passed a resolution entitling themselves to $80,000 a year in bonuses regardless of the financial performance of the company. In *Royals v Piedmont Electric Repair Co*, 137 NC App 700 (2015), the majority shareholders cut off the minority shareholders' compensation and paid themselves in the form of additional compensation the difference between what they had received for their stock when they sold it and the stock's fair market value. In *Schimke v Liquid Dustlayer, Inc*, 2009 WL 3049723, unpublished per curiam decision of the Michigan Court of Appeals, (Sept. 24, 2009), the controlling shareholder devised a plan to redeem his own shares at full value but refused to redeem the shares of the other two shareholders. In Berger v Katz, 2011 WL 3209217 (unpublished per curiam decision of the Michigan Court of Appeals), the controlling shareholders stopped paying the minority shareholder an advance against profits pursuant to agreement because, it claimed, the company was losing money, but then they raised their own salaries.

The purchase of the Plaintiffs shares would unduly damage the company and those third parties who rely on the company. *Franks*, 330 Mich App at 108. Plaintiffs' expert Mr. Frazee estimated the company value on December 31, 2013 as $53,542,890.00. The Plaintiffs shares were valued at $26,826,736.00, therefore the purchase of those shares would remove 50% of the value of the company. Plaintiffs argue discounts are not appropriate. Even if the Court applied discounts for lack of control and lack of marketability of 40% as applied by Defendants' expert, Mike Oliphant, the purchase of shares would remove $16,096,042 of value or 30% of the overall value of the company.[31]

The payment of the shares even over 5 years would tax the cash flow and expenditures of the company. Mr. Frazee opined BOT's customer advances did not significantly impact cash needs of the company because the cash liability to build the machine was offset by the inventory as the machine is built. However, Mr. Frazee was not able to account for the swings in cash flow and negative earnings through the years. Mr. McConnell and Ms. Gorsky testified that the competitive business required the company to maintain cash reserves to manage the competitive pressures of the market and the delays in customer projects. For example, while Mr. Frazee was aware BOT operations set a goal of reducing production time between the start and completion of a project by 2014 he was not aware of the need for BOT to accumulate cash reserves to outsource machine parts to respond to the market changing over to aluminum tube coils. Mr. Frazee had little knowledge of the competitive pressures on the cash needs of the company. (TT, 9/23/20 – Frazee, pp. 28-31).

Ms. Gorsky testified that BOT would experience swings in cash flow and negative earnings. From 2011 through 2019, BOT experienced a third of the years in negative earnings and cash flow. (D. Ex. SS). Mr. McConnell noted that the higher than normal cash reserve in 2013 was reversed in approximately 6 months. (TT, 10/5/20 – McConnell, p. 128). Removing the significant value of the company through repurchasing of Plaintiffs' shares would create greater cash flow and earnings pressure on BOT in an increasingly competitive market. As a result, the financial health of the company, the job security of 290 employees, and the customer and vendors who rely on BOT in a competitive market would be negatively impacted. Repurchase of the Plaintiffs shares is not equitable or proportional to the wrongful conduct in this case.[32]

Plaintiffs argue that only a complete divorce would satisfy the parties because of the oppression. However, this suggests that in every instance of oppression the force repurchase of shares is necessary to separate the oppressed from the oppressor. The Court has a firm belief that the close family dynamics of the various shareholder families under the Franks umbrella, and the

31 These figures do not include pre-judgment and judgment interest on the award which would further decrease the value of the company.

32 Because the Court finds the forced repurchase of Plaintiffs shares is not equitable, the Court need not provide an analysis of both the Plaintiffs' and Defendants' expert opinion of valuation.

heavy reliance on family members on the Board has created family squabbles and strained communications. However, the evidence indicates the parties can share information and exchange ideas and engage in questions.

The Court believes the addition of an independent outside director with experience working with closely held, family owned businesses would benefit the operations and exchange of information in a more businesslike manner. *Franks*, 330 Mich App at 109 (appointment of a disinterested director is an available remedy to oppression). BOT is still growing out of the dominant years of Mr. Franks, Sr. that has shadowed the corporate mentality. But the management team and Board has made strides to expand sharing of financial information and being open to questions and inquiries from family members since 2006. That growth in corporate culture will improve with the addition of an independent, outside director.

If Director James Lindsley is prepared to retire the Court shall appoint a replacement with input from the Plaintiffs and Defendants. If not, then the Board will appoint two directors to provide for an uneven number of directors on the Board to avoid deadlock. BOT shall compensate each appointed director with a reasonable director stipend and provide indemnification coverage for acting in the role of a director. The Court desires to complete the appointment process by December 31, 2023.[33]

III. Verdict

For the reasons stated in the Court's findings of fact and conclusions of law, the Court renders the following verdict:

1. Defendants Burr Oak Tool, Inc, Newell A. Franks, II, Brian McConnell, David Franks, and Lawrence Franks, jointly and severally, shall pay Plaintiffs Jeffrey Franks, Michael Joseph Franks Successor Trustee of the Franks Family Trust, and Willis Franks damages representing dividends in the amount of $3.5 million to be allocated by the percentage of shares owned by each Plaintiff as if BOT issued the dividends to all shareholders in 2012 and 2013. The dividends shall be paid within 120 days of the date of this verdict.
2. Prejudgment interest shall be applied to the payment of dividends from the date of the filing of the complaint.

33 Jeff Franks declined an invitation to join the Board in 2009. The Court would consider appointment of Jeff Franks if an independent director is not willing to serve. Both Newell and Brian McConnell testified Jeff has knowledge of the business operations and financial records. However, Jeff would have to participate in further training on responsibilities of a director including the role within a closely held, family owned business.

3. The Court shall appoint one independent outside director with experience working with closely held, family owned businesses to replace James Lindsley. If Mr. Lindsley is not retiring or has been replaced by a Board member, the Court shall appoint two independent outside directors. The Court will schedule a status conference with the attorneys to discuss the appointment process. The Court intends to finalize the appointment by December 31, 2023.
4. The Complaint against Defendant Leeann McConnell is dismissed for no cause of action.
5. The Court invites the Plaintiffs' attorneys to prepare a judgment in accordance with this verdict.

IT IS SO ORDERED.[34]

June 12, 2023

T. J. Ackert

Hon. T.J. Ackert, Kent Co. Circuit Judge,
By assignment

34 The Court apologizes to the parties and counsel for the delay in issuing this opinion and order. The delay was caused in large part by the demands of the docket following the pandemic and that this Court does not have the aid of a legal clerk to provide research and writing. While the Court was attempting to remain current with ongoing litigation and keep the parties informed as to the status of this opinion, the opinion took longer than anticipated. The Court is taking actions to remedy these issues but expresses its appreciation for the parties' and counsels' patience and understanding.