NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

RICHARD PARKER, Plaintiff, Vs. STEVEN PARKER, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART UNION COUNTY DOCKET NO.: UNN-C-108-13 **MEMORANDUM** **OPINION**
STEVEN PARKER, individually and on behalf of Parker Interior Plantscape, Inc., and Parker Wholesale Florist, Inc. Counterclaimant, Vs. RICHARD PARKER, Counterclaimant Defendant.	

Trial in this matter was before the Court. The following attorneys and litigants appeared:

Alan S. Pralgever, Esq.
Greenbaum, Rowe, Smith & Davis, LLP
Attorneys for Plaintiff and Counterclaimant Defendant, Richard Parker

Yale Lazris, Esq.
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Attorneys for Defendant and Counterclaimant, Steven Parker, individually and on behalf of Parker Interior Plantscape, Inc., and Parker Wholesale Florist, Inc.

Dated: December 22, 2016

By: **Hon. Katherine R. Dupuis, P.J.Ch.**

The following is the court's opinion following trial in this matter.[1]

Plaintiff, Richard Parker, and Defendant, Steven Parker's parents started a wholesale flower business approximately 60 years ago and purchased property in Scotch Plains from which they ran their business. Approximately 25 years ago the brothers purchased the business from their parents. Richard is the president of Parker Interior Plantscapes ("PIP") which among other things installs and services live, silk and preserved plants and flower displays in commercial settings. Steven is the president of Parker Wholesale Florists ("PWF"), which was a wholesale plant business which he transformed into a garden center. Each are vice presidents of the other's company and are 50% stockholders in each enterprise. In addition, they each own one half of ELENBE Associates L.P. which owns the land and one half of S&R Realty which owns a warehouse in Plainfield used by PWF. Steven Parker agreed to close PWF on the first day of trial although it was not done for almost a year.

Both litigants seek to have the court remedy every injustice they perceive has befallen them over the last 25 years at the hand of the other. This, of course, cannot be done.

Both enterprises have operated out of the same premises in Scotch Plains, using the same offices and have shared overhead. The brothers almost exclusively managed their own enterprises with very minimal overlap. Each family receives $200,000 in salary from the company. Steven does perform work for the benefit of PIP such as handling insurance coverage and claims, dealing with the leasing of vehicles, the agricultural assessment and was historically involved in selecting the bank the companies used. PIP has received some benefit from PWF in that the land on which they operate is designated for agricultural use which has reduced real estate taxes.

Both parties contend they are an oppressed shareholder pursuant to N.J.S.A. §14A:12-7. They also allege breach of oral agreements, breach of implied covenants of good faith and fair dealing, breach of fiduciary duty and unjust enrichment. Count VI of Defendant's counterclaim seeks to require Richard Parker to share all information regarding PIP with him and to prohibit Richard Parker from making any major decisions without him. The count also accused Richard Parker of subverting Steven Parker's position as officer, shareholder, or employee of PIP or PWF.

PLEADINGS

Complaint

On October 21, 2013 Richard Parker filed his complaint in the present matter which plead five counts. The first count was for violation of N.J.S.A. §14A:12-7, shareholder deadlock and shareholder oppression of Plaintiff. The second count was breach of contract. The third count was for breach of implied covenants of good faith and fair dealing. The fourth count was for breach of fiduciary duties owed by Defendant. The fifth count was for unjust enrichment by Defendant.

In particular, the complaint alleges the following acts:

(1) Loss of an average of $348,000 for the last 20 years by PWF under Steven's direction.
(2) The writing of checks from PIP to cover PWF's losses.
(3) Failure to improve the financial position of PWF.
(4) Breach of fiduciary and good faith duties to operate PWF profitably.

[1] This trial was held on 35 days beginning on November 13, 2015 and ending June 3, 2016. Final briefing was received October 12, 2016.

(5) Failure to listen to the suggestions of Plaintiff, a successful businessman, including ignoring at least 9 emails written from December 21, 2002 to June 23, 2011 regarding suggestions for improving PWF.
(6) Failure to reduce expenses and salaries of employees at PWF.
(7) Failure to follow the suggestions of two independent consultants.
(8) Failure to reduce inventory.
(9) Failure to competently carry out the minor changes which the defendant has made.
(10) Failure to meet with prospective buyers for PWF.
(11) Failure to agree to sell both companies to an outside party.
(12) Failure to agree to Plaintiff's offer to sell the company to him for $1,500,000 on March 28, 2012.
(13) Failure to attend an August 29, 2010 shareholders meeting which Plaintiff scheduled to discuss sale and merger proposals.
(14) Failure to respond in any meaningful way to sale and merger proposals.

Counterclaim

On January 19, 2016 Steven Parker submitted his final answer and amended counter claims. The first count pleads violation of N.J.S.A. §14A:12-7, shareholder oppression of Plaintiff. The second count pleads breach of fiduciary duties. The third count pleads breach of contract. The fourth count plead breach of implied covenants of good faith and fair dealing. The fifth count pleads unjust enrichment. The sixth count, mistakenly labeled as Count V pleads for an order for information from Plaintiffs as well order granting control of PIP and various other relief.

Steven Parker's Counterclaim alleges Richard Parker:

(1) Richard failed to share information as to the DreamWorks contracts.
(2) Richard personally profited by obtaining patents.
(3) Richard directed employees of PIP not to give him information with regard to PIP's business, finances and operations.
(4) Richard instructed Greg Meacham not to respond to Steven's requests without Richard's approval.
(5) Steven has not been included in meetings, including off site meetings where he was not notified of the meeting.
(6) Richard masked PWF's actual expenses and revenuers by arbitrary allocating expenses between PIP and PWF including shared employees, administrative costs, real estate taxes, professional services and utilities.
(7) Taking PWF inventory for use in PIP.
(8) Subverting Hurricane Sandy claims.
(9) Alleging Steven knows nothing about PIP in light of the fact that Richard purposefully hid the information from him.
(10) Converting corporate opportunities and PIP's assets without telling Steven.
(11) Attempting to destroy PWF's value.
(12) Richard Parker made John Carter a Vice President without notice to him.
(13) Paid excess compensation to several employees.
(14) Assumed large financial burdens without notice to Steven Parker.
(15) Did not give him sufficient information to make proper decisions as to insurance coverage.

Affirmative Defenses

Both parties filed Affirmative Defenses which are discussed below.

Defendants plead twenty separate affirmative defenses:

(1) Plaintiff has failed to state a claim upon which relief can be based.
(2) Plaintiff has no standing to bring this action.
(3) Plaintiff is guilty of laches.
(4) Plaintiff, by his conduct, is estopped from bringing this action.
(5) Plaintiff has waived any claim he may have had.
(6) Plaintiff is guilty of unclean hands.
(7) Plaintiff is guilty of breach and anticipatory breach of contract.
(8) Plaintiff is guilty of breach of fiduciary duty.
(9) Plaintiff is guilty of engaging in ultra-vires acts.
(10) Plaintiff is guilty of bad faith and unfair dealings.
(11) Plaintiff is liable for diversion of assets.
(12) Plaintiff is guilty of abuse of discretion.
(13) Plaintiff is guilty of negligence and contributory negligence.
(14) Plaintiff is guilty of violation of the business judgment rule.
(15) Plaintiff is guilty of oppression against Defendant.
(16) The litigation brought on behalf of the plaintiff is frivolous and Defendant reserves the right to bring a claim under the Frivolous Litigation Statute.
(17) There was an accord and satisfaction between the parties.
(18) The conduct of the defendant was with Plaintiff's acquiescence.
(19) The conduct of the defendant was within his business judgment.
(20) Plaintiff is entitled to a setoff.

Plaintiff has pled ten separate Affirmative Defenses in response to Defendant's counterclaims:

(1) The Counterclaim fails to set forth a cause or causes of action upon which relief may be granted.
(2) Defendant's claims are barred, in whole or in party, by the Statute of Limitations.
(3) Defendant's claims are barred, in whole or in part, by reason of the equitable doctrines of laches, waiver, estoppel, settlement, accord and satisfaction and release.
(4) Defendant's claims are barred, in whole or in party, by the doctrine of set-off.
(5) Defendant's claims are barred by the terms of the Agreements executed or made by the parties.
(6) Plaintiff did not breach any contract, agreement, obligation or duty owing to Defendant and, therefore, Defendant's claims would be dismissed against Plaintiff in their entirety with prejudice.
(7) Defendant has failed to mitigate his damages and failed to report or account for any mitigation.
(8) Defendant's claims are barred by the fact that Defendant's damages, if any are the result Defendant's own willful actions and/or omissions.
(9) Defendant's claims are barred by the fact that Defendant's damages, if any, are a result Defendant's own negligent Acts and/or omissions.
(10) Defendant's claims are barred by the allegations of the Complaint which are fully incorporated herein by reference.

Trial Testimony

At trial extensive testimony was elicited from many employees of PIP.

Charles Boyer testified that he is the operations manager and has been with PIP for twenty years. He said Steven Parker does not have a role in PIP on a daily basis. He believed PIP and PWF operate separately although from time to time PIP would use PWF employees. He noted PWF had fewer customers over time and that the staff had nothing to do. He found Richard a good leader at PIP and felt extremely valued.

He described the process with regard to the manufacture of the houses, including costs overruns. He said Steven Parker was never rude and did not interfere with anything they did but did handle insurance. He had no involvement with the DreamWorks projects until 2014. He also testified as to meetings in 2014 and 2015 regarding DreamWorks. He testified as to problems with Centerline.

Paul Gomes testified that he began working for Richard Parker as a driver 16 years ago and that he was now a "jack of all trades." He was responsible for the internal building, shipping and logistics of the DreamWorks project. He said building began in July of 2014 and units were shipped in September 2014. He said Richard Parker was a role model, having started him as a "kid" and having been given him an opportunity to build a career.

He did recall one time in the Plainfield warehouse when there was a meeting and Steven Parker was disruptive by grabbing a contract that someone was using and making a copy. That was the only time he saw Steven Parker in the warehouse. He never denied Steven Parker any information but he was not aware he wanted anything.

Thomas Walsh was hired thirty-two years ago as a routing manager. He has been the operations manager of the interior landscaping business and is involved in the green wall and green roof business. He found Richard Parker to be a good leader, always fair to him and allowing employees to run their own division. He did observe that PWF had too many staff members at times and had too much inventory. He believed the two companies shared utility, phone systems, greenhouses and accounts payable personal. He testified that Steven Parker was in charge of maintenance.

Jay Satava started as a management trainee in 1985. He now has three regional managers and 25 technicians working for him covering North and South Jersey and New York City. He found Richard to be a great boss who is challenging, with an open mind as to ideas and respectful of anyone who puts in the effort. He also said Steven Parker is not involved with PIP although he said there was a shared arrangement as to phone answering, trucks, location and the same facilities although he did not know how costs were allocated.

Greg Meacham has been with the companies for eleven years and was hired by both brothers. He is the controller and oversees the direct accounting, payroll, sales tax and accounts payable for both companies. In his opinion PWF has too much staffing in slow times, the purchase prices are too high and there was too much stock. Every month he prepared financial statements for each company, with line items for rent, utilities, sales and expenses etc., to arrive at net operating profit. He said that when PWF had insufficient funds a check would just be drawn on PIP funds at Steven Parker's request. The accounts payable person would then tell Richard. He found in 2010 that there was a 25% decrease in PWF sales and a 50% greater loss than the prior year. He testified that this was a pattern with each year seeing a decrease in sales.

He did participate in meetings and saw many emails on the topic of trying to get Steven to operate at less of a loss. He said Steven Parker never did anything significant to mitigate losses. He said he continued to order too much of the wrong kind of product, such as ceramic roosters.

He testified that Steven Parker never discussed shutting down PWF or making it smaller. He kept track of Steven Parker attendance, in 2014 when he was out of the office 100 days and in 2015 he was out of the office 80 days.

He said inventory was first taken during his tenure in 2013 and there was an inventory loss of $600,981.

He testified that he was unable to get anything done talking to Steven Parker since he would not take advice and that he normally dealt with Stephanie Mansilla who would listen to him for advice.

He testified as to an instance when Steven had difficulty signing on to the bank accounts. He had the password reset and it took Mr. Meacham a week and half to be able to get into the bank accounts.

He did testify to an instance when Steven Parker started badgering him and he believed Steven was being antagonistic. He said that Steven Parker had a way of being bullying when Richard Parker was not in the office. He said Steven Parker would do things he normally would not do when Richard Parker was not there. He would ask various departments for information. He said Steven Parker tried to take a $50,000 bonus one year late in the year. The witness contacted Richard Parker and believed the bonus was not actually taken.

He said Atlantic City was the most profitable division of PIP.

He said the employees notified payroll of their allocation of hours between companies and admitted he had no way of knowing if the breakdown was accurate. He testified that Steven Parker never indicated a concern as to the allocation of expenses until the lawsuit. He did say that Richard Parker did not want him to share information with Steven Parker without his approval.

He testified that in March 2015 when the line of credit was used he did not know if the companies had $9,000,000 in PNC. He said the line of credit was only used once but that Richard Parker thought it important to keep it open. He said there were times when they were late paying vendors and on occasion were concerned they would not make payroll.

He does recall being asked by both Parkers to prepare a scenario in the event PWF closed.

He said there were loans on the books from PIP to PWF. He described this as not really a loan but a transaction.

He testified that John Carter had the same 5% commission arrangement in 2013 when he earned $165,141, in 2014 when he earned $578,513 and in 2015 when he earned $1,522,890.

John Carter testified that after the DreamWorks agreement was signed in October 2013 for the prototype. It then took several months to first sell the DreamWorks house which began construction in March and April 2014. He said to his knowledge Steven Parker had nothing to do with negotiating the DreamWorks project.

The witnesses called by Richard Parker describe him as an excellent boss, with good management skills, creativity and vision. When he assumed ownership there were two full time and two-part time employees. Now there are over eighty employees.

Richard Duthie testified that the coverage never lapsed when insurance was switched from Samsung to a new insurance company. He admitted he could not tell if insurance was in place at all times for all actions of the Parker enterprises.

Richard Parker's Complaints

Richard Parker faulted Steven Parker for purchasing too many items, having excess help, especially in the off season, maintaining the warehouse in a messy condition and failing to follow through on the recommendations of hired experts. He also contended that inventory was not taken regularly.

He alleged Steven Parker attempted to file an insurance claim which was apparently in excess of $2,000,000 for Hurricane Sandy damage. He believed this to be fraudulent. He also believed Steven Parker was not properly handling insurance coverage issues noting that a policy for urban greenspaces had a mold exclusion and that there was no coverage for a shipment to China.

He objected to Steven Parker and family taking a $200,000 salary while running a losing business. He also objected to Steven's daughter handling the advertising remotely.

He vehemently objected to Steven Parker's withdrawal of funds from PIP without notice. He also objected to Steven Parker failure to attend work on many days in 2013 and 2014.

Richard Parker contended his brother was rude to employees and "barged in" at a meeting in the Plainfield warehouse and removed a document from someone's hand and nosily made a copy.

Richard Parker alleged Steven Parker fraudulently filled out receipts.

Richard Parker also alleged Steven Parker failed to meet with prospective buyers and failed to discuss merger of the companies. Richard Parker also contended he did not attend the August 29, 2016 shareholder meeting.

Richard Parker contended Steven Parker failed to negotiate in good faith sell or merge the companies, that he promoted his sons landscaping business at the checkout and that he usurped corporate opportunity by diverting the landscaping business to his son.

Counsel for Richard Parker seeks to have the court draw an adverse inference for Defendant's failure to call Stephanie Mansilla as a witness.

Steven Parker's Complaints

Steven Parker alleged he was excluded from business meetings. He contends Richard Parker instructed employees not to give him information with regard to PIP. He contended Richard Parker was profiting from PIP and from patents. He contended Richard Parker put the companies at risk by signing large contracts without his approval. He also contends he was brought to court twice with regard to signing a line of credit which was not needed.

He further contended that PWF was harmed by the arbitrary allocating of expenses, by PIP taking inventory from PWF and by attempting to destroy PWF value.

Steven Parker alleged Richard Parker tried to subvert the Hurricane Sandy claims and converted business opportunities.

He contended he was given insufficient information as to insurance needs.

He also contended that John Carter was made a vice president without his approval and that some PIP employees received excess compensation.

He alleged the expenses were unfairly allocated between PIP and PWF.

Finally, he alleged it is unfair of Richard Parker to allege he knew nothing of PIP when Richard Parker was purposefully hiding information from him.

Factual Findings

The court does find that Steven Parker hired excess help, ordered excess product, failed to regularly take inventory and refused to change the way he did business.

The court does not know precisely what documents were submitted to the insurance company but since the eventual payment was for $323,613 the court concludes the proposed $2,000,000 claim was overstated. The court does not find the failure to hire a public adjuster wrongful but does find the fact that the claim was settled without Richard Parker knowledge to be wrongful.

The court cannot determine from the evidence submitted whether Steven Parker failed to get proper insurance or whether he was given insufficient or incorrect information. Mr. Duthie testified there were no gaps in coverage when the parties switched from Samsung but could not say every company action was covered at any particular time.

The court cannot determine from the evidence submitted whether the line of credit was necessary. Mr. Meacham testified there were occasions when there was a concern to whether PIP would make payroll and there were occasions when suppliers were being paid late. The court does not believe the testimony that failure to obtain the line of credit would have cause PIP to close its doors. The 2013 tax return for PIP shows cash of $1,557,607 at the end of the year and liabilities of $1,397,000. (Ex. P-177). The court does not have proof of precisely the amount of money available and the bills due as of March 2015. Mr. Meacham was asked on cross examination if PIP had $9,000,000 in PNC bank as of March 2015 but the witness said he didn't know. There was therefore no affirmative proof as to bank accounts belonging to PIP nor the liabilities at that time.

The court does not find Richard Parker wrongfully profited from patents as alleged by Steven Parker. The patents were issued in the name of John Carter, who signed over his rights to PIP. Richard did not wrongfully profit from PIP. Both families received the same compensation.

Richard Parker objected to Steven Parker earning $200,000 a year while running a losing business. That was his agreement with his brother which was in effect at least eleven years since Mr. Meacham was hired and Richard Parker cannot now be heard to complain. Likewise, Richard Parker cannot now complain that his niece was being paid based on the agreement that she receive salary from her family's portion. Insufficient proof was provided for the court to determine whether or not it was appropriate for her to work remotely.

The court does find that John Carter signed documents including an employment agreement as vice president but does not find there is any record of him officially being named as a Vice President. (Ex. D-50).

The court has insufficient evidence to determine whether problems with regard to insurance coverage are such as the failure to have mold coverage or coverage for various projects was the result of negligent acts of Steven Parker or the result of insufficient information being given to him.

The court does agree that Richard Parker entered into large contracts which exposed PIP to risk without Steven Parker's approval. This is consistent with the way the parties had operated for 25 years. They did not consult with one another. There is absolutely no proof that Richard Parker was attempting to destroy PWF value.

Richard Parker contended Steven Parker did little to assist PIP. The court finds Steven Parker arranged all insurance for both companies, managed the physical plant including the three houses on the property. He was instrumental in maintaining the farmland assessment. He leased or bought the vehicles need by both companies. He was well perceived in the industry and won numerous awards. He attended trade shows and kept abreast of developments in the market. He purchased plants for PIP. He attempted to bring in additional income such as from birthday parties and hay rides. Admittedly Steven Parker had far greater responsibilities for the PIP companies.

Steven Parker contended the allocation of costs between the two companies was not correct. The court finds this to be disingenuous in the extreme. Mr. Meecham prepared a monthly allocation report and Steven Parker virtually never complained. The court does not find Steven Parker's testimony is credible that he did not bother to complain because both companies were sharing the profits. The court finds this an example of Steven Parker disinterest in financial aspects of the business.

The court does not find the claim that excess compensation was paid to employees to be actionable. Every employee testified as to Richard Parker's business acumen, his excellent management style, where he gave people autonomy but was willing to jump back in if here was an issue. The length of time the employees have been with the company is nothing less than astonishing. Undoubtedly, John Carter has benefited greatly. But it was apparent to the court that he was part of the design team that is instrumental in making PIP a success. Richard Parker has shown good business judgment to date, having developed the Atlantic City business, the green wall business and the green roof business, with admittedly some setbacks with DreamWorks. The court will not second guess his determination as to compensation.

The court finds Richard did not provide Steven with all information with regard to PIP. The court finds Steven was not interested until shortly before the suit was filed. At that time Steven began overreaching, ordering employees to stop what they were doing and give him information, going in to employee's desks and generally being disruptive. The court for a time prohibited Steven from asking for the information from employees or attempting to go through desks to obtain the information. The court did lift that order after safeguards were put into place so that the company could operate in a businesslike manner.

It is undisputed that Steven Parker failed to attend the August 29, 2013 shareholder meeting which was just two months before the complaint was filed. There was no evidence of any other shareholder meeting being held.

There are other areas of dispute as to whether there were negotiations with potential buyers of PIP and PWF, whether Steven Parker negotiated good faith with regard to Steven Parker's offer to sell or merge the companies, Steven Parker's treatment of employees and Steven Parker alleged promoting of his son's business. There was insufficient evidence as to all of these facts for the court to determine the factual dispute. These disputed facts do not affect the court's decision.

Burden of Proof

In a civil trial, the plaintiff holds the burden to prove each claim, unless circumstances arise which shift that burden. Liberty Mutual Ins. Co. v. Land, 186 N.J. 163 (2006); N.J.R.Evid. 101(b)(1). Plaintiff must prove his case by a preponderance of the evidence. Id. at 168-169. Defendant must also prove the allegations of the counterclaim by a preponderance of the evidence.

First Count - Violation N.J.S.A. §14A:12-7 Shareholder Deadlock and/or Shareholder Oppression

Richard Parker contend he is an oppressed shareholder. N.J.S.A. § 14A:12-7 of The New Jersey Corporation Business Act which provides in pertinent part:

Involuntary dissolution; other remedies

> (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

A "minority shareholder" is any shareholder who possesses an interest in the corporation and does not have control of the corporate shares with respect to voting rights, regardless of his percentage of ownership interest. Berger v. Berger, 249 N.J. Super. 305, 317 (Ch. Div. 1991). A 50% shareholder of a corporation's stock can be considered a minority shareholder within the meaning of the statute. Bonavita v. Corbo, 300 N.J. Super. 179, 187-88 (Ch. Div. 1996). The issue is not specifically the percentage of ownership one person has but rather whether one stockholder" has "power to work their will" against the oppressed shareholder. Id. at 188. As a result, it is clear that the statute applies to the instant action.

In determining whether oppression is present, the statute expressly authorizes an examination of corporate conduct toward a minority shareholder in the role of shareholder, director, officer or employee. Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 153 (Law Div. 1979). Oppression is defined as frustrating "a shareholder's reasonable expectations." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). In close corporations the scope of the court's inquiry as to what can be considered oppressive conduct is broader than traditional corporate law rules. Exadaktilos v. Cinnaminson Realty Co., supra, 167 N.J. Super. at 154.

Relief pursuant to N.J.S.A. 14A:12-7(1)(c) can be granted where there is fraud or illegality. It can also encompass misconduct. Brenner v. Berkowitz, supra, 134 N.J. at 516. The court has the power to compel an involuntary purchase of stock. Id. at 513. N.J.S.A. § 14A:12-7(1)(c) authorizes a buyout of the shareholders of a close corporation representing the majority of corporate ownership by the minority shareholders whose rights have been oppressed by that majority. Muellenberg v. Bikon Corp., 143 N.J. 168, 183-184 (1996). Courts have held that in determining whether or not a minority oppressed shareholder should buy out the majority oppressor, courts have looked the involvement of the minority shareholder. In Musto v. Vidas, the Appellate Division reversed a minority buyout when the minority shareholder has not been involved in the company for years prior to the litigation. 281 N.J. Super. 548 (App. Div. 1995). However, the next year the New Jersey Supreme Court found that while a minority buyout was uncommon, it was appropriate because the minority shareholder was willing and able to buy out the oppressing majority shareholder and was the most active member in the operation of the company since its inception, making him the best option to maintain the existing operation. Muellenberg v. Bikon Corp., supra, 143 N.J. at 183.

In determining whether a course of conduct has oppressed a minority shareholder in violation of the CBA, courts should examine the parties' understanding in respect of their roles in corporate affairs. Id. at 179. These expectations include the security of long-term employment and financial return, a voice in the operation and management of the business and in the formulation of plans for future development. Id at 181. "Ordinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds." Id. at 180.

The loss of $500,000 a year by PWF for the last 5 years and the fact that money to cover the loss would be withdrawn at Steven Parker direction from PIP without Richard Parker's consent is not in dispute. Those two facts alone are sufficient for the court to conclude Richard Parker has suffered shareholder oppression.

Greg Meacham's internal financial reports indicate that PWF lost of the following amounts of money:

Year	Pre-Tax Loss
2009	($ 94,115)
2010	($107,653)
2011	($485,002)
2012	($475,000)
2013	($370,473)
2014	($539,208)
Total	($2,044451)

PWF's tax returns report the following ordinary business income between 2009 – 2014.

Year	Pre-Tax Loss
2009	$14,912
2010	($140,946)
2011	($160,347)
2012	($525,300)
2013	($608,187)
2014	($531,751)
Total	($1,951,619)

Steven Parker contends the losses are much less. On at least three occasions Greg Meacham was asked to prepare a document showing the effect of the closing of PWF upon PIP. If PWF shut down PIP would have to absorb some expenses such as taxes, utilities and insurance. The last version "Scenario 3" was created by Mr. Meacham after November 12, 2013 . It concludes $301,023 in overhead would have to be paid by PIP. This would reduce the losses which Richard Parker alleges were caused by PWF but the fact remains the losses are still considerable. The losses for six years totaled $2,546,453. If PIP had increased overhead of $1,806,138 ($301,023. * 6) it still would have lost $740,315.

There is no dispute that PWF has lost large sums of money for the past five years and that Defendant has withheld money from PIP without Richard Parker's approval. The court is satisfied that Steven's continual loss of hundreds of thousands of dollars in the operation of PWF and his continual withdrawal of money from PIP without notice constitutes shareholder oppression of Richard Parker. "The test of oppression must focus on the minority's 'reasonable expectations' and whether the actions of the defendants have frustrated those expectations." Bonavita v. Corbo, supra, 300 N.J. Super. at 194. The analysis of reasonable expectations should take "account the fact that shareholders in close corporations may have expectations that differ substantially from those from those of shareholders in close corporations may have expectations that differ substantially from those shareholders in public corporations. " Mullenberg v. Bikon Corp., supra, 14. N.J. at 179. Courts should be aware of minority shareholders, their vulnerability and the power of a majority shareholder when "wielding of this power by any group controlling a corporation may serve to destroy a stockholder's vital interests and expectations." Bonavita v. Corbo, supra, 300 N.J. Super. at 196(citing In re Kemp & Beatley, Inc., 484 N.Y.S.2d 799, 805 (N.Y. 1984). Here while both brothers had 50% interest, Steven parker acted as a managing partner in taking money without agreement and Richard Parker was powerless to stop this.

The magnitude of over $6,000,000 in losses over 20 years including almost $500,000 per year for the past 5 years is so great there is no need for the court to address the more "minor" instances of shareholder oppression, many of which are disputed. The loss of money alone, especially coupled with Steven Parker "taking" money from PIP without notice will suffice. The continual loss of money together with the unannounced withdrawal of money from PIP interfered with Richard Parker's reasonable expectation as a shareholder of PIP is sufficient to find Richard Parker is an oppressed shareholder.

Nor does the fact that Steven did perform many acts for the benefit of PIP such as handling the physical plant, leasing vehicles, selecting bank accounts, purchasing insurance, handling the Hurricane Sandy claim and handling the agricultural assessments give rise to a defense to the charge of shareholder oppression.

For reasons expressed below this court does not find Steven's claim that he acted within the meaning of the business judgment rule to be a viable defense. In re PSE & G Shareholder Litigation, 173 N.J. 258, 276 (2002)(See Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 94 (App. Div. 1956))

In addition to shareholder oppression, Plaintiff makes a claim for shareholder deadlock under the same statute. The statute contains two deadlock provisions. N.J.S.A. § 14A:12-7;Bonavita v. Corbo, supra, 300 N.J. Super. at 185. N.J.S.A. § 14A:12-7(1)(b) is applicable:

> (b) The directors of the corporation, or the person or persons having the management authority otherwise in the board, if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5-21(2) is in effect, are unable to effect action on one or more substantial matters respecting the management of the corporation's affairs.

There has been very little case law which has interpreted deadlock under the oppressed shareholder statute in New Jersey. In Bonavita v. Corbo, the court found that there was no shareholder deadlock under this provision when Defendants refused the payment of a dividends or a buy-out of corporate stock. The court reasoned that it was inaccurate to describe the decisions as inacation while they were actually rejecting Plaintiff's demands. supra, 300 N.J. Super. at 186.

In the present matter, the court finds that Plaintiff has not satisfied his burden to show that the PIP and PWF were deadlocked. There was only testimony that Defendant failed to attend one shareholder meetings. Further there has been no evidence that either corporation had been unable to effectuate any corporate action they saw fit. The testimony had shown that the corporations had operated independently and were virtually unrestricted. In fact, part of the basis of Plaintiff's claim of oppression is the fact that Defendant had the power to make unrestricted decisions in regards to PWF and PIP. The only testimony that argues deadlock is Defendant's refusal to discuss a merger or buy-out. The court does not find this sufficient to constitute a deadlock of the corporations considering the lack of shareholder meetings and ability for both corporations to operate.

Second Count - Breach of Contract

The Second Count of complaint alleges a breach of contract between the two litigants based on various informal and oral agreements made over the years as well as the expired shareholders agreements. Since the shareholder agreements have expired they cannot form the basis for a claim. Plaintiff has not testified to any contract other than general complaints that Defendant did not act properly. Plaintiff alleges that the same bad acts committed by Defendant in the first count also serve as the basis for the second count and further alleges that the parties had a contract to use their best efforts to run as a profitable enterprise.

In order to assert a claim for breach of contract, "plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). "The essentials of a valid contract are: mutual assent, consideration, legality of object, capacity of the parties and formality of memorialization." Cohn v. Fisher, 118 N.J. Super. 286, 291 (Law Div. 1972). To be enforceable, a contract must be sufficiently definite in its terms that the performances to be rendered by each party can be reasonably ascertained. Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 599 (1952).

The main focus of contract interpretation is to determine "the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 184 (N.J. 1981). Specifically, in regards to oral contracts, the threshold question for the court in determining whether plaintiff's alleged oral contract is enforceable is whether the alleged agreement was "clearly, specifically and definitely expressed." Swider v. Ha-Lo Indus., 134 F. Supp. 2d 607, 618 (D.N.J. 2001)(citing Savarese v. Pyrene Mfg. Co., supra, 9 N.J. at 600-601). A contract may also be implied through actions when there is no oral agreement, "[j]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances." Troy v. Rutgers, 168 N.J. 354, 366 (2001)(citing Restatement (Second) of Contracts § 4 cmt. a (1981)). To be enforceable, however, a contract must be sufficiently definite in its terms that the performances to be rendered by each party can be reasonably ascertained. Savarese v. Pyrene Mfg. Co., supra, 9 N.J. at 599.

The court finds that Plaintiff has not met his burden of proof as to the existence of an enforceable written, oral or an implied contract with two exceptions. the July 2002 agreement which have expired and the agreement that each family would receive equal compensation. Plaintiff appears to expect the court to infer that simply because the brothers were 50% holders in each of their respective corporations that this necessitated the creation of numerous verbal and implied contracts. There is insufficient proof to reach that conclusion. As a result, the court finds that Plaintiff has not established a breach of contract by Defendant.

Third Count - Breach of Implied Covenants of Good Faith and Fair Dealing

The Third Count of Plaintiff's complaint alleges a breach of Breach of Implied Covenants of Good Faith and Fair Dealing with regard to the written and verbal agreements alleged in the Second Count.

"Every party to a contract . . . is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005). This duty "calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Id. at 224-25 (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)). When claiming a breach of the covenant of good faith and fair dealing, a party must show "proof of bad motive or intention . . . sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Id. at 225 (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001), and 23 Williston on Contracts § 63:22, at 513-14 (Lord ed. 2002)).

"An implied contract must be found before the [finder of fact] could find that the implied covenant of good faith and fair dealing had been breached." Wade v. Kessler Inst., 172 N.J. 327, 345 (2002). If a contract is implied its terms are determined from all the acts of the parties. National Premium Budget Plan Corp. v. National Fire Ins. Co., 97 N.J. Super. 149, 227 (Law Div. 1967).

The court finds that Plaintiff's claim fails because there is no contract as explained above. Thus there can be no allegations of breach of good faith and fair dealing with regard to the conflict.

Fourth Count - Breach of Fiduciary Duty

The Fourth Count of Plaintiff's complaint alleges a breach of fiduciary duty. Plaintiff alleges that Defendant has violated his fiduciary duties as a co-partner venturer and stockholder in PIP and PWF. Specifically, Plaintiff alleges defendant failed to use reasonable business measures to improve the performance or close PWF, took money from PIP for twenty years, failed to respond to requests for communications between Plaintiff and Defendant as well as a litany of other complaints.

A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. McKelvey v. Pierce, 173 N.J. 26, 57 (2002). The fiduciary's obligations to the dependent party includes a duty of loyalty and a duty to exercise reasonable skill and care. Ibid. The fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. Ibid. "A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 176 (2011).

As is the case here, the situation of closely held corporations frequently originates in the context of familial relationships and once those personal relationships are destroyed the viability of the business generally deteriorates. As a result, New Jersey imposes a fiduciary duty upon the majority requiring it to act with utmost good faith and loyalty in transacting corporate affairs. Bostock v. High Tech Elevator Industries, Inc., 260 N.J. Super. 432, 444 (App. Div. 1992). As stated in Bonavita v. Corbo, in the context of a minority shareholder, a 50% owner would have a fiduciary duty. supra, 300 N.J. Super. at 188. Additionally, New Jersey courts have applied partnership law principles to close corporations in New Jersey due to "the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation." 68th Street Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 560 (Law Div. 1976) (citing Donahue v. Rodd Electrotype Co. of New England, Inc. 328 N.E. 2d 505 (1975)). Stockholders in a close corporation must discharge their management and stockholder responsibilities with the utmost good faith and loyalty and may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. Ibid. (see also Sternberg v. Wolff, 56 N.J. Eq. 389, 394 (E. & A. 1898), Muellenberg v. Bikon Corp., supra, 143 N.J. at 177).

In the instant matter, the court finds that Steven Parker violated his fiduciary duties as a director in PIP and PWF. Steven Parker took money from PIP to cover the losses of PWF without notice or consent to Richard Parker, the only other shareholder. Steven Parker also violated his duties by following a business plan at PWF which resulted in an average loss of $500,000 per year for the last five years. The court recognizes that PWF and PIP shared certain overhead and PIP would incur additional costs if PWF closed but using the figures provided by Mr. Meecham in scenario three, PIP would have saved $740,315.

Defendant, Steven Parker has alleged that any violation of fiduciary duty is protected under the business judgment rule. The business judgment rule functions to protect corporate decision-makers to be free of unwarranted judicial intrusion when making business judgments on behalf of the corporation. In re PSE & G Shareholder Litigation, supra, 173 N.J. at 276. The business judgment rule serves to protect a director's corporate decisions. Seidman v. Clifton Sav. Bank, S.L.A., supra, 205 N.J. at 166 (2011). There is a rebuttable presumption that good faith decisions based on reasonable business knowledge by a board of directors are not actionable. Ibid. The American Legal Institute Principals of Corporate Governance articulate the business judgment rule as:

> (c)A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:
>
> > (1) is not interested [§ 1.23] in the subject of the business judgment;
> > (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
> > (3) rationally believes that the business judgment is in the best interests of the corporation.
>
> (d) A person challenging the conduct of a director or officer under this Section has the burden of proving a breach of the duty of care, including the inapplicability of the provisions as to the fulfillment of duty under Subsection (b) or (c), and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the corporation. Id. at 176 (citing Principles of Corporate Governance § 4.01 (Am. Law Inst. 2005).

New Jersey Courts presume that a Board of Directors' decisions are proper and in the best interest of the corporation, unless the challenging shareholders can show a breach of the board's fiduciary duties of care, loyalty, or good faith. Id. at 165. The presumption under the business judgment rule may be rebutted only if the challenged corporate actions are so far from the norm of responsible corporate behavior as to be unconscionable or constitute a fraud, impermissible self-dealing or corporate waste. Id. at 177. If a challenger rebuts the business judgment rule by showing bad faith or another disabling factor then, the presumption of good faith is reversed and the burden of proof shifts to the defendant to show that the transaction was, in fact, fair to the corporation. In re PSE & G Shareholder Litigation, supra,173 N.J. at 277. The entire fairness standard must be proven by clear and convincing evidence, and that absent such proof the transaction under scrutiny cannot receive the commendation of a Court of Equity. Daloisio v. Peninsula Land Co., supra, 43 N.J. Super. at 94 (citing Robotham v. Prudential Insurance Co., 64 N.J. Eq. 673, 712 (Ch. 1903)).

Given that Steven's conduct violated his fiduciary duties, the court must resolve if Steven's management decisions are protected by the business judgment rule. Plaintiff argues that Defendant's conduct demonstrates he had acted in "bad faith." Defendant must act "as reasonable men and in good faith toward their stockholders." Daloisio v. Peninsula Land Co., supra, 43 N.J. Super. at 89. In Daloisio the court found that director's actions acted in bad faith and were self-interested when they diverted ownership of a property to themselves over the corporation, and then were further unable to meet the heightened standard of entire fairness. Id. at 94. In analyzing corporate law issues, New Jersey Courts have looked to Delaware law. Lawson Mardon Wheaton v. Smith, supra, 160 N.J. at 398; (See also Pogostin v. Leighton, 216 N.J.Super. 363, 373, (App. Div.), certif. denied, 108 N.J. 583, cert. denied 484 U.S. 964,(1987)). As articulated by the Delaware Chancery Court, "in the area of director action, plaintiffs must prove by a preponderance of the evidence that the presumption of the business judgment rule does not apply either because the directors breached their fiduciary duties, acted in bad faith or that the directors made an 'unintelligent or unadvised judgment.'" In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 756 (Del. Ch. 2005).

In the present matter, the court finds that Steven Parker operated in bad faith, and thus does not qualify for the protection of the business judgment rule. The business judgment rule protects decisions made reasonably in good faith. The court does not require perfection, nor expect that mistakes will not be made, even undeniable stupidity can be protected by the business judgment rule. However, Steven Parker's pattern of conduct transcends any reasonable belief that would allow this court to find his actions were performed in good faith. Steven Parker consistently lost $500,000 a year for the last five years with a loss of $6,000,000 over twenty years. Even under scenario 3, he has lost $740,315. Further, evidence has been shown that for years while Steven was operating PWF at a loss he was taking money out of the PIP account without notice or approval and ignoring the objections of his brother. This cannot be defended as an appropriate use of business judgment.

If this pattern of losses had occurred over a two-year or three period, this court could reasonably find that conduct done in good faith and protected by the business judgment rule. However, no shareholder or director in a corporation would reasonably operate a business with sustained losses over twenty years while taking minimal steps to mitigate those losses and ignoring demands from other directors and employees in the corporation to remedy the situation. The court finds that any reasonable director or shareholder operating in good faith would have taken substantial steps to remedy the losses after a number of years or shut down the business.

The court finds, since Steven Parker has acted in bad faith the burden of proof shifts to him to "to show the intrinsic fairness of the transaction in question upon the showing of self-dealing or 'other disabling factor'." Grato v. Grato, 272 N.J. Super. 140, 152 (App. Div. 1994)(citing Maul v.

Kirkman, 270 N.J.Super. 596, 614 (App. Div.1994)). For the reasons stated above, this court finds Steven Parker has not presented clear and convincing evidence that his conduct was entirely fair to the organization as it had caused substantial hardship over the years.

Fifth Count Unjust Enrichment.

Plaintiff claims Steven Parker has been unjustly enriched by 1) failing to agree to reasonable business measures to improve or close PWF 2) utilizing PIP as a piggy bank to cover PWF losses for 20 years, exceeding $6,000,000 in total losses and obtaining improper corporate benefits for family members 3) failing or refusing to respond to request for communication from Plaintiff seeking to discuss the financial condition of the corporation 4) failing and or refusing to agree to a reasonable buyout methodology 5) equally sharing the profits of PIP without contributing meaningfully 6) refusing to attend a Board of Directors and/or shareholders meeting to discuss critical issues 7) refusing to take into consideration the recommendations of consultants 8) refusing to realize that the continued funding of PWF by PIP will eventually weaken PIP and destroy both businesses and 9) taking excessive compensation for himself and his family and/or capitalize PIP.

The doctrine of unjust enrichment is well established in New Jersey. Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376 (App. Div. 2009). The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Id. at 382. The most common circumstances "for an application of unjust enrichment is when a plaintiff has not been paid despite having had a reasonable expectation of payment for services performed or a benefit conferred. County of Essex v. First Union Nat. Bank 373 N.J. Super. 543 (App. Div. 2004.)

In essence Plaintiff is alleging that by not being a better businessman and a more cooperative director and shareholder Steven Parker has been unjustly enriched. This argument bears no relationship to the equitable doctrine of unjust enrichment. The benefit defendant received was the $200,000 salary paid to his family and any emoluments of employment. Defendant was half owner of PWF and PIP. Pursuant to the agreement of the parties he was to receive the $200,000 salary and benefits. This is not an instance where Richard Parker has not been paid and equity demands that he be compensated. The benefit received by Steven Parker, the salary, is a result of the agreement of the parties. Plaintiff cannot now seek to void that agreement and recoup monies paid to Steven Parker as a result of that agreement.

To the extent Plaintiff is arguing it is not fair that his brother did not work as hard or as successfully or that he could have been more cooperative the law does provide a remedy, the New Jersey Corporation Act, N.J.S.A. § 14A:12-7.

Defendant's Affirmative Defenses:

Defendant has alleged twenty separate Affirmative Defenses in his amended Answer and Counter claim to challenge Plaintiff's assertions. The court has considered many of these defenses throughout its opinion and thus no further discussion is required. The court has already discussed the Seventh Separate Defense (breach of contract); Eight Separate Defense (Breach of Fiduciary Duties); Tenth Separate Defense (bad faith and unfair dealings); Fourteenth Separate Defense, (violation of the Business Judgment Rule); Fifteenth Separate Defense, (Oppression), Eighteenth Separate Defense, (acquiescent to Defendant's conduct); and Nineteenth Separate Defense, (Defendant within his Business Judgment).

As to the remaining affirmative defenses the court finds that Plaintiff has set forth a claim upon which relief can be granted, (first affirmative defense). Plaintiff, as an oppressed shareholder, has established standing to bring this action (second affirmative defense).

The court finds that Defendant has failed to prevail on his third affirmative defense (laches). Laches operates as an Affirmative Defense that precludes relief when there is an "'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012)(citing Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998). The doctrine is involved when a party slept on their rights to the detriment of others. See Div. of Youth and Family v. FM, 211 N.J. 420. (2012). There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party. Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 140 (2001). Defendant argues that Plaintiff waiting twenty years from the time that Steven Parker began losing money in PWF has acquiesced to his conduct and bringing this claim implicates laches. While it is true that both action and non-action can be sufficient to justify a finding of laches, the court does not find that laches is applicable here. L.V. v. R.S., 347 N.J. Super. 33, 40 (App. Div. 2002). Laches, like all equitable doctrines operate to achieve fairness. Fox v. Millman, supra, 210 N.J. at 422. The court does not find that Richard Parker's delay in bringing the matter is unexplained, unexcused or unreasonable and it would be unfair to bar his claim under a theory of laches. A close corporation, managed under two brothers who inherited the business from their parents presents different, and complex family and business dynamics which are vastly different from traditional corporate governance. Richard Parker has explained his delay as not wanting to upset his elderly mother. The court any delay by Richard Parker was not unreasonable and laches is not implicated here. Further Steven Parker must also show that he was harmed or prejudiced by the delay. He continued to earn $200,000 a year while losing money year after year. There has been no harm suffered.

As his Fourth Affirmative Defense, Defendant claims that Richard Parker's claim is barred by the principles of estoppel. Equitable estoppel is an equitable doctrine which denies a party the right to repudiate an act done or position assumed where such repudiation would work injustice to another whom rightfully relies thereon. Highway Trailer Co. v. Donna Motor Lines, Inc., 46 N.J. 442, 449 (1966), certif. den.; Mt. Vernon Fire Ins. Co. v. Highway Trailer Co., 385 U.S. 834 (1967). Equitable estoppel operates to prevent a party from disavowing its previous conduct if such repudiation would violate the demands of justice and good conscience. Carlsen v. Masters, Mates and Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979). To bring a successful claim, estoppel also requires the moving party to show that they there was detrimental reliance and the moving party acted in a manner that changes their position for the worst. Clark v. Judge, 84 N.J. Super. 35, 54 (Ch. Div. 1964). "[C]ourts have applied the equitable concept of estoppel to bar relief when a shareholder or director had or should have had knowledge of alleged misconduct but failed to act." Brenner v. Berkowitz, supra, 134 N.J. at 510. The burden of proof of a claim based on principles of equitable estoppel is on the party asserting estoppel. Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000). The court finds that Defendant has not met his burden to establish equitable estoppel. Defendant argument, similar to his argument for laches, that Plaintiff has slept on his rights, and the present suit should be barred as a contradictory position because Plaintiff acquiesced to Defendant's conduct's. Defendant's argument fails for similar reasons. The present scenario is not one where Plaintiff knew of the misconduct and failed to act. The evidence has shown that he in fact took steps over the years via emails to object to Defendant's conduct. While Defendant in his brief argued that Plaintiff was able to prevent Defendant from taking money from PIP, evidence has shown as equal shareholders in both companies Plaintiff was unable to stop Steven from taking money. Further, Defendant's delay in bringing the present claim does not implicate equitable estoppel as the unique family dynamics in a close corporation which is a family business is a far cry from the director acquiescence contemplated in Brenner. Defendant has also presented no evidence that he relied upon Plaintiff's previous position, nor did he changed his position to his detriment in any way. Once again, he continued to earn $200,000 a year while PWF consistently lost money. He suffered no harm. As a result, Defendant has not established that Plaintiff's claim should be barred by equitable estoppel.

Defendant's Fifth Affirmative Defense claims Plaintiff has waived his rights. "Waiver is the voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based." State v. Mauti, 208 N.J. 519, 539 (2012). A waiver must be the product of objective proofs, the intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. Sroczynski v. Milek, 197 N.J. 36, 63-64 (2008)(internal citations omitted). A claim for waiver is distinct from estoppel in that it does not require reliance. Country Chevrolet, Inc. v. North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983). In the present matter, Defendant argues that Plaintiff's delay in bringing this matter after years of losses amount to a waiver. To the contrary, Plaintiff continually expressed his dissatisfaction. He cannot be deemed to have acquiesced to Defendant's behavior. Therefore, the court finds that there has been no waiver.

Defendant's Sixth Affirmative Defense is that the plaintiff is guilty of unclean hands. The Defense of unclean hands is an application of the maxim that a "suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949). "[A] court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 158 (2001)(citing Faustin v. Lewis, 85 N.J. 507, 511, (1981). Equity will not open its doors to one who seeks its aid for the purpose of violating a contract, or who seeks to enforce alleged rights arising from a contract which he himself breached. Pollino v. Pollino, 39 N.J. Super. 294, 299 (Ch. Div. 1956)(citing Vulcan Detinning Co. v. American Can Co., 72 N.J. Eq. 387 (E. & A. 1906). Application of unclean hands is "discretionary on the part of the court." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, supra, 169 N.J. at 158(Heuer v. Heuer, 152 N.J. 226, 238, (1998)). Defendant has made assertions in his counterclaims that raise the defense of unclean hands based on Richard Parker's failure to disclose document. While the court has noted that Plaintiff's decisions were not ideal, they do not permit a finding of unclean hands as they were a reasonable response to Defendant's disruptive conduct.

Defendant's Ninth Affirmative Defense claims is that the plaintiff is guilty of engaging in ultra-vires acts. The doctrine of ultra-vires may be raised in a corporate context if a corporation acts outside the object of its creation as defined in the law of its organization. Samuel v. Wildwood, 47 N.J. Super. 162, 168 (Ch. Div. 1957)(citing Central Transp. Co. v. Pullman's Palace-Car Co., 139 U.S. 24, 59 (1891)). Ultra vires contracts are "unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it." Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 60 (1891). There is nothing on the record that would indicate that either Richard Parker, or PIP engaged in acts which are outside of either's powers. The court does not find that Ricard Parker has diverged any assets, (Eleventh Separate Affirmative Defense), nor has there been an abuse of discretion by the plaintiff, (Twelfth Separate Defense).

Defendant's Thirteenth Affirmative Defense claims that Richard Parker is guilty of negligence. Negligence is the basis for liability under tort law principles. A claim of negligence requires a showing of: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach." Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1997). "[N]egligence is a fact which must be proved and which will never be presumed; nor will the mere proof of the occurrence of an accident raise a presumption of negligence." Nelson v. Fruehauf Trailer Co., 11 N.J. 413, 416 (1953). While the court agrees with Defendant, that the first factor is satisfied, it is clear that Richard Parker owes a duty, the court does not find that he committed a breach of that duty. A breach of fiduciary duties would establish negligence but this court has found no such breach.

Defendant's Thirteenth Affirmative Defense also states Plaintiff is guilty of contributory negligence. N.J.S.A. § 2A:15-5., controls Defendant's affirmative defense and codifies the modified comparative negligence standard, that a plaintiff may recover all damages provided his/her negligence is not greater than the party or parties against whom recovery is sought, that is not greater than 50%. Waterson v. GM Corp., 111 N.J. 238, 267 (1988). This statute allows Defendant to offset damages if the court finds Plaintiff contributorily negligent. The court finds that there has been no showing of contributory negligence on the part of the plaintiff.

Defendant's Sixteenth Affirmative Defense claims that the action brought by Plaintiff is frivolous and Defendant reserves the right to bring a claim under the "Frivolous Litigation Statute." N.J.S.A. §2A:15-59.1. A claim is frivolous when no rational argument or evidence can support it and a reasonable person could not anticipate its success, or it is completely untenable. Belfer v. Merling, 322 N.J. Super. 124, 144-45 (App. Div. 1999). The court finds that Defendant's claim of frivolous litigation is not a defense to this action. Further, there needs to be compliance with the procedures of the Frivolous Litigation Statute and the New Jersey Court Rules. N.J.S.A. §2A:15-59.1; R: 1:4-8.

Defendant's Seventeenth Affirmative Defense claims that there was an accord and satisfaction between the parties. The three essential elements of accord and satisfaction are (a) a bona fide dispute as to the amount owed; (b) a clear manifestation of intent by the debtor to the creditor that payment is in satisfaction of the disputed amount, and (c) acceptance of satisfaction by the creditor. Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 144 N.J. Super. 556, 564-565 (Law Div. 1976). Defendant has failed to show any evidence of payment from himself to Richard Parker meant as satisfaction or accord.

Defendant's Amended Counterclaims

Count I – Shareholder Oppressions under N.J.S.A. § 14A:12-7

Defendant alleges that he was an oppressed shareholder under the New Jersey Oppressed Shareholder Statute due to Richard Parker withholding business and financial records, instructing employees not to provide him with information, converting corporate assets, using PIP funds to pay for patents which Richard holds personally, damaging PWF by allocating a greater overhead burden and subverting Hurricane Sandy insurance claims. The court has already discussed the law in regard to the oppressed shareholder statute and its repetition is unnecessary.

The court finds that Defendant has not successfully brought a claim of shareholder oppression under N.J.S.A. § 14A:12-7. Defendant alleges that he was oppressed because he was denied access to the books and records of PIP and was additionally denied access to employees by Plaintiff. Defendant has characterized Plaintiff's actions as an attempt to intentionally and systematically keep information from him and ridicule him in front of PIP employees.

The court does not find that Plaintiff systematically kept information from Defendant, rather for a vast majority of the past twenty-five years the parties were content with allowing each brother to independently run their business. This is not shareholder oppression as both brothers agreed to the arrangement

Only shortly before this litigation did Defendant begin to take an interest in PIP's management. At that time Defendant began overreaching, ordering employees to stop what they were doing and give him information, going in to employee's desks and generally being disruptive.

On February 10, 2015 this court denied a motion to compel employees to cooperate with Steven Smith. The order prohibited the defendant from going into the desk of any PIP employees. The order also set up a plan where by Steven Parker and Richard Parker would meet weekly on a Wednesday and Steven Parker was to supply a list of information he was seeking, which had to be produced by the following Friday Richard Parker testified that Steven Parker did not avail himself of this process.

Plaintiff filed a notice of motion for sanctions as a result of Defendant's alleged violation of the February 10, 2015 order of the court. Plaintiff certified that while he was visiting his mother in Florida Defendant continued with a series of disruptions and breaches of the February 10, 2015 order. He alleged Defendant took items from his inbox and Defendant alleged his signature as needed on the documents. The court denied the request for sanctions April 16, 2015.

On August 29, 2014 an order was entered for mutual exchange of documents. On October 9, 2014 another order was entered requiring exchange of documents from both parties.

On November 19, 2014 an order was entered requiring both parties to turn over all information they had regarding the Hurricane Sandy claim. Defendant was also ordered to turn over emails from the PWF employees as well as all his email on the PWF computer server. Both brothers were instructed to turn over personal emails. Steven Parker was required to certify that documents he had removed from the office were personal. Documents relating to credit cards and any DreamWorks subcontractors were to be turned over.

On July 31, 2015 an order entered permitting Steven Parker to obtain any information he deemed necessary or to speak to any PIP or PWF servant, agent, employee or accountant or lawyer.

On August 5, 2015 Steven Parker was restrained from turning off the surveillance camera and ordered to return all items taken from PIP office.

An Amended Answer and Counterclaim were filed January 19, 2016. Steven Parker was permitted to reopen discovery to take the depositions of attorneys who dealt with patents.

On January 13, 2016 an order entered to allow a third party to restore Steven Parker access to the "H" drive and to require NCI to provide Steven Parker access codes for employee email. Further orders entered on January 4, 2016 and January 15, 2016 dealing with privilege logs and restraining plaintiff's attorney from interfering.

Plaintiff failed to turn over 70,000 emails until shortly before trial. The issue of the late delivery of the emails by plaintiff was dealt with by the court in its September 15, 2016 letter opinion. The court found the late delay purposeful but found there was no harm to the defendant, save any costs incurred by his attorney to review the documents on an emergent basis. The court also concluded that Steven Parker failed to turnover insurance documents.

As can be seem from the history of discovery orders, the court endorsed Richard Parker's argument that Steven Parker was being disruptive and denied his access of the documents for a time. The court put in a plan of procedure for the orderly exchange of information and Steven Parker declined to follow. The court order of July 31, 2015 allowed full access to the documents.

Defendant further argues that Plaintiff has attempted to keep him out of any decision making processes. The evidence presented has shown that both companies were run independently in regards to all aspects of management. There was some involvement in PIP by Steven Parker with regard to insurance and farmland assessments but his involvement was strictly limited to these areas. Any intermingling between the two companies resulted from them occupying the same physical plot of land rather than any meaningful co-ownership by both parties.

Oppression is defined as "as frustrating a shareholder's reasonable expectations." Sipko v. Koger, Inc. 214 N.J. 364 (2013). A controlling shareholder in a close corporation has an expectation of access to documents, records and employees but Defendant's methods when he was seeking information about PIP and the DreamWorks agreement went far beyond reasonable. The court is satisfied all documents were turned over.

Additionally, the court does not find Defendant's claim that he was prevented from sharing in the decision making process of PIP as shareholder oppression under N.J.S.A. § 14A:12-7. Evidence has shown that both parties allowed each company to largely operate separately. Neither participated in the management of other party's company in any meaningful way for the better part of twenty-five years. Based upon this pattern of conduct, the court does not find that Defendant's reasonable expectation had been violated. Defendant cannot ignore PIP, effectively using it merely as a source of funds for years, then upon the commencement of this action, demand the right to participate in its management on his own terms. As a result, the court finds that Defendant is not an oppressed minority shareholder under N.J.S.A. § 14A:12-7.

The court has also concluded Richard Parker did not convert corporate assets, did not use PIP funds to pay for patents owned personally by Richard Parker, did not wrongfully allocate overhead and did not subvert the Hurricane Sandy Claims.

Count II– Breach of Fiduciary Duties.

Count II of Defendant's Counterclaim alleges that Plaintiff breached his fiduciary duties to Defendant, PIP and PWF. Specifically, Defendant contends that information has been withheld from him that, he has been removed from management, that Plaintiff had converted corporate opportunities and assets by acquiring patents in his name using PIP funds, that Plaintiff was damaging PWF by overstating overhead and subverting Hurricane Sandy claims. The court has discussed the law regarding fiduciary details above, thus it is not necessary to repeat it here.

The court does not find that Plaintiff breached his fiduciary duties and his actions are protected by the business judgment rule. The fiduciary's obligations are a duty of loyalty and a duty to exercise reasonable skill and care. McKelvey v. Pierce, supra, 173 N.J. at 57. The court finds that neither the duty of loyalty nor duty of care was breached by Plaintiff.

The Supreme Court in New Jersey have identified four factors relevant to the determination of whether an employee-agent breached his or her duty of loyalty to the corporation:

> (1) the existence of contractual provisions relevant to the employee's actions; (2) the employer's knowledge of, or agreement to, the employee's actions; (3) the status of the employee and his or her relationship to the employer, e.g., corporate officer or director versus production line worker; and (4) the nature of the employee's conduct and its effect on the employer.
>
> [Kaye v. Rosefielde, 223 N.J. 218, 230 (2015) (internal citations omitted).]

The duty of loyalty requires a fact-intensive analysis and is commonly breached when an employee or director assists a competitor or engages in self-dealing. Cameco, Inc. v. Gedicke, 157 N.J. 504, 516 (1999). There has been no evidence presented that that Plaintiff has engaged in any self-dealing which would implicate his duty of loyalty to either PIP or PWF. Richard Parker did not benefit from the patent, he did not subvert the Hurricane Sandy Insurance claims and he did not inflict PIP expenses on PWF. At most Plaintiff withheld documents for a period of time from another shareholder, the defendant, which does not implicate the duty of loyalty.

As stated previously, in analyzing corporate law issues, New Jersey courts find Delaware law to be helpful. Lawson Mardon Wheaton v. Smith, supra, 160 N.J. at 398. The Delaware Court of Chancery articulated the duty of care as requiring that directors use that amount of care which ordinarily careful and prudent men would use in similar circumstances." In re Walt Disney Co. Deriv. Litig., supra, 907 A.2d at 749. Under the business judgment rule, decisions made by directors are presumed to be proper and in the best interest of the corporation, unless the challenging shareholders can show a breach of the board's fiduciary duties of care, loyalty, or good faith. Seidman v. Clifton Sav. Bank, S.L.A., supra, 205 N.J. at 165. The court finds that Plaintiff's actions as described above do not amount to a violation of his duty of care to Defendant nor is Defendant able to overcome the presumption of the business judgment rule. As stated previously, the status quo of each company operating separately existed. It was only shortly prior to this present litigation that Defendant began seeking documents, records and access to Plaintiff's employees. The manner in which Defendant sought these documents was disruptive and detrimental to the operation of PIP. While Plaintiff's actions were not entirely proper, the steps taken by Plaintiff in restricting Defendant's access to these documents cannot be characterized as a violation of the duty of care. In short, Plaintiff has not violated his fiduciary duties, Defendant's claims do not overcome the protections of the business judgment rule. Richard Parker's decisions during the relevant period of time were a proper exercise of business judgment.

Count III - Breach of Contract

Count III of Defendant's counterclaim alleges that Defendant breached various verbal or informal agreements regarding the management of PIP and PWF and the written shareholder agreement executed on July 2, 2002. The law regarding breach of contract has already been discussed. As previously stated, the July 2, 2002 agreements have expired and any argument regarding them are moot.

Defendant's arguments for breach of contract fails under the same rational as Plaintiff's arguments did. A contract must be sufficiently definite in its terms that the performances to be rendered by each party can be reasonably ascertained. Savarese v. Pyrene Mfg. Co., supra, 9 N.J. at 599. Defendant has not presented any proof that would allow the court to find that there has been an enforceable contract formed between the parties. Defendant's argument that there are various verbal and informal contracts lack definiteness and are therefore not reasonably ascertainable by this court. The sole exception is the agreement to have equal salaries which has not been breached. Defendant has not shown that Plaintiff has breached a contract.

Count IV – Breach of Implied Covenant of Good Faith and Fair Dealing

Count IV of Defendant's counterclaim contends that Plaintiff breached the implied covenant of good faith and fair dealing. The law for this count has been discussed above.

The court finds Defendant has failed to satisfy his burden of proof. Defendant is required to show the existence of a contract, either written, verbal or implied in order to give rise to Plaintiff's duties under the implied covenant of good faith and fair dealing. As shown above, Defendant has failed to show that there is either a written or verbal contract between the two parties. Further, Defendant has presented no proof that there has been a course of conduct which would allow the court to find there is an implied contract between the parties. As a result, the court finds that Defendant did not meet his burden of proof to show Plaintiff breached an implied covenant of good faith and fair dealing. The only exception is the agreement as to salaries which has not been breached.

Count V – Unjust Enrichment

Count V of Defendant's counterclaim alleges that Plaintiff have been unjustly enriched. Defendant's counterclaim alleges a number of bad acts including withholding business and financial information, instructing employees to not provide Defendant with information, converting business assets by using PIP to purchase a patent in Richard's name, damaging PWF by allocating overhead and subverting the companies' Hurricane Sandy related claims. The law in regards to unjust enrichment has been discussed previously.

The court finds Richard did not personally benefit and did not convert assets. He did not subvert the Hurricane Sandy Claims. Richard Parker did, for a time, restrict assets regarding financial information in the exercise of his business judgment. The court finds that none of the claims made by Defendant arise to unjust enrichment. Defendant must show both that Plaintiff received a benefit and that retention of that benefit would inequitable. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994).

Count V – Access to Information

Count V in Defendant's Counterclaim contends that Defendant is entitled to all information regarding PIP activities and documents, an order requiring all employees to cooperate, enjoining Plaintiff from making any major business decisions such as employment or major expenditures, enjoining Plaintiff from subverting Defendant's position as officer and director of PIP and PWF. Count V also contains an order granting Defendant control of PIP or an Order requiring the payment of fair value to Steven for his interest in PIP and PWF, as well as an accounting and damages, punitive damages and attorney's fees.

For the reasons stated below as to the valuation date this court finds Defendant has no interest in PIP after October 24, 2013, nor in its contracts with DreamWorks. Defendant is entitled to and has received information regard to PIP up to December 31, 2015. He also has received additional information which provides the details of the contract between PIP and DreamWorks. He no longer has an interest in PIP after December 31, 2016.

Plaintiff's Affirmative Defenses to Defendant's Counterclaims.

In reaching its decisions on the counterclaims the court considers Plaintiff's affirmative defenses, Plaintiff has alleged ten separate affirmative defenses.

Plaintiff's First Affirmative defense is that the counterclaim fails to set forth a cause or causes of action upon which relief may be granted. The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In determining if a cause of action has been plead the reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). In light of this extremely relaxed standard, the court finds that Defendant has plead a cause of action upon which relief may be granted. However, the court has found that Defendant has failed to succeed under Counter Claim, shareholder oppression (Count 1), breach of fiduciary duties (count 2), breach of contract (count 3), breach of implied covenant of good faith and fair dealing (count 4) and, unjust enrichment (count 5).

Plaintiff's Second Affirmative Defense states that the claims are barred by the statute of limitations. The legislature has enacted a general statute of limitations authorizing commencement of a cause of action within six years of accrual under N.J.S.A. § 2A:14-1. Fox v. Millman, 210 N.J. 401, 414 (N.J.). N.J.S.A. § 2A:14-1 sets the statute of limitations for contracts of six years and accrues from the date of violation. The statute of limitations for a breach of fiduciary duty which result in purely economic loss is controlled by the substantive law governing the relationship and is typically six years. Balliet v. Fennell, 368 N.J. Super. 15, 22 (App. Div. 2004). The court has only made a finding as to events in the last six years prior to the filing of the complaint. Comments made regarding later dates are for context.

Plaintiff's Third Affirmative Defense states that Defendant's claims are barred by the equitable doctrine of laches, waiver, estoppel, settlement, accord and satisfaction and release. The court has discussed each one of these legal theories and in its opinion Defendant's claims are wholly unsuccessful. The court does not find a viable claim with regard to the equitable doctrine of laches, there was a delay prior to Steven Parker alleging the claims in this counterclaim and Plaintiff has not articulated how he was harmed or prejudiced by Steven's delay. Similarly, the court does not find that Steven is estopped from bringing any of his claims, Plaintiff has not shown what act or position Steven Parker assumed which is currently estopping him, nor has Plaintiff shown any detrimental reliance. There has been no proof presented that there has been an act which can constitute a waiver. There was no proof of an accord or satisfaction and there has been no detrimental reliance as regard to laches. Finally, Plaintiff has not presented any evidence that there has been a release.

Plaintiff's Fourth Affirmative Defense alleges set-off. Plaintiff has provided no testimony regarding set off at any point during trial. As a result, this affirmative defense is must fail.

Plaintiff's Fifth Affirmative Defense states that Defendant's claims are barred by the terms of agreements executed or made by the parties. The only written agreements signed were July 2002 agreement and the parties agreement to honor the $200,000 salary per family agreement. Both are no longer in effect. Therefore, the affirmative defense is must fail.

Plaintiff's Sixth Affirmative Defense states that Plaintiff did not breach any contract to Defendant. The court has determined that there were no contracts but for the salary agreement between the two parties, therefore Plaintiff's affirmative defense must fail.

Plaintiff's Seventh Affirmative Defense alleges that defendant failed to mitigate his damages and failed to report or account for any mitigation. There was limited testimony with regard to mitigation at trial related to (a) Centerline and (b) DreamWorks. Plaintiff testified that he did not pursue Centerline because to do so would not result in a financial gain. No proof was produced that it would be beneficial to sue Centerline. The court determines that Defendant does not have an interest in the DreamWorks contract and cannot be heard to argue as mitigation.

Plaintiff's Eighth Affirmative Defense claims that Defendant's claims are barred by the fact that Defendant's damages are the result of Defendant's own willful actions and/or omissions. The court has not found Defendant to be successful on any of his claims, therefore this affirmative Defense is moot.

Plaintiff's Ninth Affirmative Defense claims that Defendant's claims are barred by the fact that Defendant's damages are the result of Defendant's own negligent actions and/or omissions. The court has not found Defendant to be successful on any of his claims, therefore this affirmative Defense is moot.

Finally, Plaintiff's Tenth Affirmative Defense is that Defendant's claims are barred by allegations of the complaint. All issues in regard to Plaintiff's complaint have been discussed above.

Legal Standards as to Valuation

Valuation of a closely held corporation has historically been held to be a difficult task for Courts. Lavene v. Lavene, 148 N.J. Super. 267, 275, (App. Div.), certif. denied., 75 N.J. 28, (1977). N.J.S.A. § 14A:12-7(8) provides the court with the power to value and sell the shares of a corporation, in relevant part the statute states:

> (8) Upon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation or the moving shareholder or shareholders, whichever is specified in the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.
> (a) The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12-7(1)(c).

The valuation of a closely held corporation is an inherently fact-based analysis and proof of value by any techniques or methods which are generally acceptable in the financial community are admissible in court. Balsamides v. Protameen Chems., 160 N.J. 352, 368 (1999)(internal citations omitted). "There is no single formula that will apply to each enterprise: 'Each case presents a unique factual question, the solution to which is not within the ambit of any exact science.'" Bowen v. Bowen, 96 N.J. 36, 44 (1984)(citing Lavene v. Lavene, supra, 162 N.J. Super. at 193). "Of these techniques, there are '[t]hree principal methods which can be used for developing a value for ownership in a closely held corporation; these include income or capitalized earnings method, the market approach method, and the cost approach method." Steneken v. Steneken, 183 N.J. 290, 297 (2005) (citing Lavene v. Lavene, supra, 162 N.J. Super. at 197). In determining a fair value for the corporation, the court may use any accepted method to calculate the value, but must determine the chosen method yields the fair value of the shares. Torres v. Schripps, Inc., 342 N.J. Super. 419, 434 (App. Div. 2001). "The reasonableness of any valuation depends upon the judgment and experience of the appraiser and the completeness of the information upon which his conclusions are based." Bowen v. Bowen, supra, 96 N.J. at 44(citing Lavene v. Lavene, supra, 162 N.J. Super. at 193). Commentators of the New Jersey Corporate law and the Oppressed Shareholder Statute have noted that a study of the case law precedents in New Jersey leads to varying definitions of fair value under a dissolution statute as under the dissenting stockholder's statute. Shannon Pratt & Alina V. Niculita, The Lawyer's Business Valuation Handbook, 6, (2nd ed. 2010).

There is a distinction between "fair value" and "fair market value." Fair value is not defined within the confines of the statute and there is no inflexible test for determining fair value. Torres v. Schripps, Inc., supra, 342 N.J. Super. at 434(citing Lawson Mardon Wheaton, Inc. v. Smith, supra, 160 N.J. at 397). Fair market value is the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Balsamides v. Protameen Chems., supra,160 N.J. at 374. Fair value is not synonymous with fair market value, as the valuation analysis of a closely held corporation is meant to compensate the shareholders fairly, not represent the current market value. Casey v. Brennan, 344 N.J. Super. 83, 111 (App. Div. 2001). In 1968, the New Jersey Corporation Law Revision Commission rejected the previous restrictive standard which required a valuation to determine the fair market value and replaced it "in favor of the broader and more flexible test of 'fair value' found in the [ABA's] Model [Business Corporation] Act." (Lawson Mardon Wheaton v. Smith, supra, 160 N.J. at 396-397(citing 1968 Commissioners' Comment to N.J.S.A. 14A:11-3). "Fair value" carries with it the statutory purposes that shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value. Lawson Mardon Wheaton Inc. v. Smith, 315 N.J. Super. 32, 48 (App. Div. 1998). This is particularly appropriate in the close corporation setting where there is no ready market for the shares and consequently no fair market value. Ibid.

The valuation of the stock of a closely held corporation requires an entirely different approach than the valuation of any other asset. Lavene v. Lavene, supra, 162 N.J. Super. at 193. The Court has adopted the IRS's Revenue Ruling 59-60 as a guide in valuing corporations. Bowen v. Bowen, supra, 96 N.J. at 44. In analyzing the value of a close corporation the Courts examine factors including:

> the history of the firm, the nature of the company, the outlook for the industry, the book value of the stock, the size of the block to be valued, the earning and dividend-paying capacities of the company, and the existence of goodwill or other intangible assets. Generally, greater weight will be given to earnings factors for those companies that sell products or services, and to asset values for investment or holding companies. In addition, earnings factors must be capitalized. Choosing the appropriate capitalization rate is "one of the most difficult problems in valuation." at § 6. Among the considerations that go into a capitalization rate are the nature of the business, the risk involved, and the stability of earnings."
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> [Ibid. (citing Rev. Rul. 59-60, 1959-1 C.B. (I.R.S. 1959).]

A marketability discount reflects the decreased worth of shares of stock in a closely-held corporation, for which there is no readily available market; a decrease due the lack of liquidity. Balsamides v. Protameen Chems., supra, 160 N.J. at 375. Since N.J.S.A. § 14A:12-7 provides that the purchase price shall be a "fair value" "deemed equitable by the Court, the Court has "substantial discretion to adjust [the company's] purchase price" to reflect a marketability discount. Id. at 377. In determining whether or not to apply a marketability discount the court must analyze whether the resulting value is "fair and equitable." Ibid.

The New Jersey Supreme Court has held that marketability discounts should not be applied in determining the "fair value" of a dissenting shareholder's share in an appraisal action. Lawson Mardon Wheaton v. Smith, supra, 160 N.J. at 402. A marketability discount that fails to accord minority shareholders the full value of their shares enriches the majority shareholder who may reap a windfall from the appraisal process by cashing out a dissenting shareholder. Ibid. As a result, a marketability discount should only be used in extraordinary circumstances where equity compels another result. Ibid. The Court in Lawson adopted the ALI principals and held that extraordinary circumstances exist when "circumstances require more than the absence of a trading market in the shares; rather, the court should apply this exception only when it finds that the dissenting shareholder has held out in order to exploit the transaction giving rise to appraisal so as to divert value to itself that could not be made available proportionately to other shareholders." Id. at 403. However, the Court in Balsamides, examined marketability discount specifically in reference to oppressed shareholders stock in closely-held corporations and adopted a broader view holding that when there is shareholder oppression, courts have "substantial discretion" to apply marketability discounts to determine what is fair and equitable "particularly when courts actions are filed on account of oppression – as opposed to deadlock." supra, 160 N.J. at 377. Subsequently, however, the Appellate Division found that the Court in Balsamidies did have an extraordinary circumstance:

> In Balsamides, the extraordinary circumstance that warranted use of a marketability discount was that it was the oppressing 50% shareholder who was to acquire the shares of the oppressed 50% shareholder, and equity demanded that the oppressor not be rewarded for his conduct by allowing a buy-out at a discounted price. In Lawson, the Supreme Court found no comparably extraordinary circumstance and rejected use of the discounts where discounting would have allowed the oppressive majority shareholder to buy out minority owners at less than full value.
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> [Brown v. Brown, 348 N.J. Super. 466, 484 (App. Div. 2002)]

As a result, "valuing shares in a court-ordered buy-out resulting from an oppressed shareholder situation, N.J.S.A. 14A:12-7(1)(c) (as in Balsamides), neither a marketability nor a minority discount should be applied absent extraordinary circumstances." Id. at 483.

Date of Valuation

PIP and DreamWorks began discussion in the spring of 2013. On the same date the complaint was signed a written agreement entitled "Letter of Agreement" between DreamWorks Licensing and Richard Parker was signed. (Ex. D-65). Plaintiff believes the valuation date should be October 21, 2013, the date of the filing. Defendant believes the valuation date should include a time period when all contracts are included. The document entitled "Letter of Agreement" provided that Parker 3D and DreamWorks would develop the "next generation" of retail shopping experiences by creating one or more "concepts," to create interactive center courts as may be approved by DreamWorks. DreamWorks was to contribute its licensed characters and creations and Parker 3D was to contribute, license, produce and deliver its designs, structures, functionality and technology creations based upon DreamWorks intellectual property. The agreement was to be exclusive and for 5 years, Parker 3D was to be the exclusive manufacturer. The parties were to negotiate in good faith and to obtain patents for the intellectual property utilized. It was contemplated that a separate venture could be performed to own the patentable co-ownable portions of the creative property which would be part of a separate agreement. Parker 3D was to market the concepts and if unsuccessful, DreamWorks could attempt to sell the concepts while Parker 3D could continue all its prior projects. The project was to be for the US, Canada, Mexico and the Caribbean. It was contemplated that DreamWorks could charge an annual license fee. Parker was to suggest a fee structure to DreamWorks in advance of negotiations. All fabrication, installation, shipping and storage would be the responsibility of Parker 3D. Each side were to obtain bids; the production was to be approved by DreamWorks. DreamWorks was to pay Parker 3D a "creative fee" of $25,000 for the first 3 months of the term. The fee was not to exceed $50,000 without a separate written agreement. If after the first 6 months, the parties agreed to employ Parker 3D for additional creative design if $3,000,000 of sales were booked in 24 months. This agreement did not provide for the order of any DreamPlace houses.

On October 2, 2013 a purchase order for a prototype DreamPlace house was received to be built at cost of $1,277,000. (Ex. P-329).

In June 2014, eight months after the prototype, PIP entered into an agreement with Forest City Commercial Group to build two houses for approximately $3,370,000 with an option to purchase two more in 2015 for a total of $4,320,000. Installation fees were also provided. (Ex. P-341).

Also in June 2014 PIP entered into an agreement with General Growth Services to build DreamPlace houses for $8,311,750. (Ex. P-343).

In August 2014 a contract was entered with PRIET to build one dream house for $1,727,270 and in February 2015 PIP entered into an agreement with DreamWorks to purchase 12 houses in 2015 and 12 in 2016 for $36,00,000. This February 2015 agreement states that it "does not amend, modify, or alter or diminish the 2013 agreement." (Ex. D-82).

N.J.S.A. §14A:12-7(8)(a) provides:

> The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12-7(1)(c).

The DreamWorks business was virtually inchoate on October 2013. The date of the commencement of the action is considered the presumptive valuation date. Musto v. Vidas, supra, 333 N.J. Super. at 59. However, based upon the language in N.J.S.A. §14A:12-7(8)(a) the Court may set the valuation date at any time the Court deems equitable. Torres, supra, 342 N.J. Super. at 437. In Musto v. Vidas, the Appellate division affirmed the trial court's finding that there was no equitable reason to deviate from the use of the commencement date of action as the presumptive date for valuation purposes where the defendant had made arguments regarding post valuation profits. supra, 333 N.J. Super. at 60. The Court found that it was equitably not sufficient to overcome the assumption of the commencement date. Ibid.

There have been several instances where courts have adjusted the date of valuation in the interest of fairness. In Torres v. Schripps, the Appellate Division approved the trial judge's shifting the valuation date because the "business had changed following the plaintiff's departure" and the defendant testified he "did not know how to run the day-to-day operations of business." supra, 342 N.J. Super. at 437. The court determined that the plaintiff was blameless for losses suffered following his departure and it was unfair to ascribe losses to the plaintiff as a result of the defendant's lack of experience in management of the company. Conversely in Hughes v. Sego International, Ltd., the Appellate Division upheld the trial court adopting an earlier date of valuation because a "subsequent increase in value of [the stock] could not be attributed to Plaintiff's efforts." 192 N.J. Super. 60, 66 (App. Div. 1983) (see also Grato v. Grato, 272 N.J. Super. 140, 145 (App. Div. 1994) certif. denied, 138 N.J. 264 (1994)(Held that value of assets prior to the sale of a dissolved corporation was proper for valuation).

The primary focus of N.J.S.A. §14A:12-7(8)(a) is to grant courts the latitude to select a date of valuation which would grant the most equitable result, and to determine fair value. As of October 23, 2013 there were no signed contracts with DreamWorks to produce anything but the money losing prototype. The first contracts were not signed for eight months in June 2014. This court is convinced the equitable date for valuation is two days after the complaint was filed October 23, 2013, the date the prototype order was received, not a later date. There was no assurance any other contracts would be entered into as of October 23, 2013. The court finds that Defendant has not made a sufficient showing to warrant a shift from the standard valuation date, the date of commencement of the instant action plus two days.

The Value of Parker Interior Plantscape

The court is called upon to establish the value of Defendant's one half interest in PIP. Defendant wishes to use the value expressed in the stockholder's agreements. The agreements have expired by their own terms. Further, courts have found valuations set in such agreements are inappropriate for use valuating a company in a shareholder buy-out situation. Bostock v. High Tech Elevator Industries, Inc., 260 N.J. Super. 432, 446 (App. Div. 1992).

The values set by the experts in their original reports for the business as of December 31, 2013 were wildly divergent. Plaintiff's expert found the company to be worth $1,356,000. (Ex. P-570). After applying a minority discount rate of 15% and marketability discount of 25%, Steven Parker's interest in PIP would be worth $432,625. Plaintiff also believes the $167,000 distributed to each shareholder in 2013 should be deducted from this share. Which would set the value of Defendant's 50% of the shares at $265,655. Defendant's expert's original report detailed the value was $3,150,000 under the net asset method and $4,887,000 under the discounted future cash flow method. (Ex. D-321).

During trial Defendant's expert issued a new report and concluded the value was $1,789,000 under the cash flow method and remained $3,150,000 under the net asset method. (Ex. D-325). Both experts relied upon the applicable elements of appraisal as set forth in Internal Revenue Ruling 59-60.

Plaintiff's expert, Stephan C. Chait CPA/ABV/CFF of Chait and Associates was engaged to determine the fair market value of PIP. The fair market value is defined by him as the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

Mr. Chait describes number of methods of evaluation. He testified there are three main approaches: (1) the Income Approach, (2) the Market Approach and (3) the Cost Approach. Within these main approaches there are subcategories.

Under the Income Approach is the seller's discretionary cash flow method, the capitalization of net income approach and the discounted cash flow model. Each require the use of a capitalization rate, which is also known as a multiplier. Mr. Chait did not feel the seller's discretionary cash flow method to be appropriate, nor the capitalization of net income. The former is a combination approach using company data to develop an available income stream which is then multiplied by a market multiple to arrive at a value.

The capitalization of net income method is based upon the belief that the fair market value of a business is equal to the present value of the future net income to be generated.

The expert believed the discounted cash flow method where the present value of a future expected economic benefit is calculated using a discounted rate was most appropriate for the time frame of the valuation and for the risk inherent in the investment considering the specific company and the marketplace overall.

A capitalization rate converts an income stream to a present value. Capitalization rates are discussed in Internal Revenue Ruling 59-60:

> In the application of certain fundamental valuation factors, such as earnings and dividends, it is necessary to capitalize the average or current results at some appropriate rate. A determination of the proper capitalization rate presents one of the most difficult problems in valuation. That there is no ready or simple solution will become apparent by a cursory check of the rates of return and dividend yields in terms of the selling prices of corporate shares listed on the major exchanges of the country. Wide variations will be found even for companies in the same industry. Moreover, the ratio will fluctuate from year to year depending upon economic conditions. Thus, no standard tables of capitalization rates applicable to closely held corporations can be formulated. Among the more important factors to be taken into consideration in deciding upon a capitalization rate in a particular case are: (1) the nature of the business; (2) the risk involved; and (3) the stability or irregularity of earnings.
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> [Rev. Rul. 59-60, 1959-1 C.B. (I.R.S. 1959).]

There are two components used when determining a capitalization rate, a discount rate and a growth rate. The capitalization rate used was 20.80% which was calculated as follows:

Capitalization rate – 12-31-2013

Risk Free Rate (Rf)	3.367%
Equity Risk Premium (supply side)	6.18%
Size Risk Premium	5.99%
Industry Risk Premium	0.00%
Company Risk Premium	6.00%
Cash Flow to Earnings Conversation	0.50%
Total Equity Risk Premium	22.34%
Total Equity Risk Premium (ROUNDED)	22.30%
Less: Long Term Growth	1.50%
Cap Rate to Next Year Income Stream	20.80%

Mr. Chait then applied the capitalization rate to the historical reported corporate net income, amortized same, determined reasonable compensation to be $300,000, adjusted for auto expenses, life insurance, contributions, 20% of meals and entertainment. He also added interest income, deducted for tax amortization, depreciation. and obtained a figure for pretax excess earnings. He did the calculation for the years 2009-2013 and equally weighted the years and found the average income to be $414,778. He subtracted 1/3 for taxes, added 1.5% for a long term growth rate and applied capitalization rate of 20.80% as explained above. From this figure he subtracted a minority discount of 15% and a marketability discount of 25% to achieve a fair market value for a one half interest of $432,225. (Ex. P-20). From this he believed that there should a deduction of $167,000 representing one half of the 2014 distribution.

Mr. Henry Fuentes of Sax BST LLP is a CPA/ABV, MBA and CFE testified for Defendant. Mr. Fuentes is an experienced accountant and professor whose career spans over four decades with substantial experience and accreditation in business valuation. Mr. Fuentes, commenced his original report by finding a limiting condition in that he did not feel as if he had all information as to DreamWorks but used 2014 information available to him. He was tasked with authoring a report for fair market value for the corporations. He noted that this standard of value was often employed in New Jersey and elsewhere does not include marketability and minority discounts. His opinion on the law is not binding on the court.

He too relied on Internal Revenue ruling 59-60. He also did not believe the asset or market approach were the best indicators of the value of PIP and used the discounted future cash flow methodology. He recognized that this required a forecast of the future income stream and a discount rate to be applied. Net cash flow was utilized which he defined as the "free cash" a business does not have to retain and reinvest to sustain projected levels of cash in the future. He noted that in the absence of a well-developed and supportable forecasts of future income valuators often use historical data but he did not do so. He noted the DreamWorks contracts were not signed until 2014 but relied upon the fact that the August 2013 letter agreement was known and felt future contracts were foreseeable. He projected income from 2014 to 2018.

He found that gross profit from 2009-2013 was 47.1% of sales and normalized gross profit was 48.5% of sales. He excluded 2012 which he found to be an unusually high year and utilized an average gross profit of for 2010, 2012 and 2013 of 46.3%. The historical expense to sales ratio was 42.9% from 2009-2013.

The adjustment for normalized operating expense was $253,285 for legal expense, $315,000 for Richard Parker's salary and $157,000 based on Steven Parker's assessment of time spent working for PIP. In his opinion operating expenses were to increase 2% a year.

He then reviewed the contracts entered into with DreamWorks in 2014 as detailed above on page 29. He projected 2014 revenue to be $13,931,500 and 2015 projected revenue to be $26,525,000. Revenue for 2016 was projected to be $28,650,000, revenue for 2017 was to be $30,775,000 and revenue for 2018 was to be $32,900.00. Richard Parker and others had testified as to proposed profits of 10-18% pretax. Mr. Chait used a conservative figure of 10%. The only deviation was as to the prototype which incurred a $1,225,000 loss.

In the original report Mr. Fuentes determined the discounted future cash flow value to be $4,887,000 for 2014-2018. As a check he then calculated the net asset value of PIP. He determined that to be $3,150,000.

As he was calculating fair value, no discount for minority or marketability was used. One half the value of the corporation was thus $1,575,000 under the net assets method and $2,443,50 under the discounted cash flow method.

In reaching his valuation Mr. Fuentas established the following Capital Rate:

Risk Free Rate – 20 Year Treasury Bonds	3.72%
Equity Risk Premium	6.96%
Size Risk Premium	5.99%
Specific Company Risk Premium	7.50%
Discount Rate	24.17%
Less: Long-Term Growth Rate	2.00%
Capitalization Rate	22.17%

Mr. Fuentes capitalization figure of 20.80% did not differ markedly from Plaintiff's expert who used 22.17%. Each used 3.72% for the risk free treasury rate. Plaintiff believed the long term growth rate to be 1.5% vs. 2% for Defendant. This resulted in Defendant using a capitalization rate of 22.17% vs. 20.80% for Plaintiff. The greatest difference between the expert figures was based upon the choice of years they used in arriving at their calculations, 2013-2019 or 2009 to 2013.

Mr. Fuentes authored a supplemental report dated March 25, 2016 and April 27, 2016. (Ex. D-325). The April 27, 2016 report incorporated the March 25, 2016 report and consequently the March 25, 2016 will not be addressed. The new reports changed the value of the company. He relied upon the methodology in his December 31, 2013 report.

Under the revised report the net asset value remained the same at $3,150,000. The cash flow calculation was revised to establish a total value for PIP of $1,789,000. Again Mr. Fuentes projected income, using 2014 actual figures and establishing a terminal value after December 31, 2018.

At trial Mr. Fuentes concluded that PIP and DreamWorks had entered into a 5-year letter agreement in 2013 along with additional agreements through December 31, 2018 in the amount of $32,900,000 as detailed above. He acknowledged that 24 houses were to be built, 12 each year, but that in fact only 12 had been built and paid for in 2015 and only four were paid for and installed. The remaining units were actually completed and in storage or mostly completed. He acknowledged that as of the date of the April 2015 report there were discussions as to a "stand still" and "wind down" agreements to settle all matters. As of the time of the report there was an offer of $5,500,000 from DreamWorks to settle all issues. In addition, there was claim for $1,219,948 resulting in a potential disputed amount of $8,435,196. No final agreement had been reached as of the preparation of the last report.

The report did not deal with a potential license fee of 7.5% in the event another company building the houses or the effect of patents. His report did not take into account present and future profits, benefits and claims relating to the DreamWorks project but stated that these items should be shared by Steven Parker. He noted that the defective Centerline work cost PIP $800,000.

Mr. Fuentes relied upon his earlier report as to normalization of expenses. He also recognized that PWF would be closed and Steven Parker would not be employed by either entity. He believed the closing of PWF would result in a savings to PIP, although certain common costs would continue. He did not specify a dollar savings amount.

Projected pretax income, adjustments for reasonable compensation for Richard Parker, depreciation, capital expenditures and additional prerequisites would be in accordance with the original report. Five-year cash flow was discounted at a rate of 19.67% and the terminal value was capitalized at a rate of 17.67%. The discount and capitalization rate were reduced from 24.17% to 22.17% respectively. The difference was due to a change in the company specific rate of risk to 3% from 7.5%. Mr. Fuentes reduced the figure because he believed the specific company risk was reduced since the DreamWorks contracts were not part of the calculation.

The cash flow method, using the above assumptions, resulted in a discounted cash value of $1,789,000 for PIP.

Mr. Chiat, Plaintiff's expert, testified that he disagreed with a number of these conclusions. He believed a marketability and minority discount needed to be applied. He testified he believed Richard Parker to be the oppressed shareholder although this court finds such a conclusion goes beyond the expertise of a valuation expert and his opinion as to this fact will not be considered by the court.

He agreed that while the discounted cash flow is a feasible method it is important from which reliable projections can be drawn. He believed, no consideration was given to the effect of declining business for Atlantic City, nor the fact that the Atlantic City portion of the business was the most profitable portion of PIP. He believed a 1.57% future growth was appropriate where the future of the business is in flux.

Mr. Chait noted that the defense report took into account monies received from DreamWorks but it did not take into account costs which would be incurred in the future for warranty claims.

He did not believe a reduction from 7.5% to 3% for company risk factors to be appropriate where there was an uncertainty in the future stream of income from DreamWorks and where John Carter continued to be a key employee. Further, he also believed the shift to on line shopping as well as the general economic decline could effect the industry and suggested a 6% company specific risk premium.

Mr. Chait believed the $143,000 savings projected by Mr. Fuentas due to the closing of PWF was unwarranted and speculative. He did not believe mid-year weighing was appropriate. He disagreed with the unexplained reduction in Richard Parker's salary to from $315,000 to $280,000 and believed the salary for Richard Parker of $280,000 should not be allowed. (Ex. P-570).

Mr. Chait believed the post December 31, 2013 distributions of $681,692.00 for 2013, received in 2014 would reduce the defendant's share of the value of the company. If the value was not reduced the effect would be to "double count a portion of the value." If the distribution was taken from the book value calculation, the value would then be reduced from $3,152,663 to $2,470,971. A one half share would be worth <u>$1,235,485 not $1,575,00</u> as stated by Sax**.** (Ex. P-570).

Finally, Mr. Chait believed the book value, which Saxbst set at $1,790,000 as of December 31, 2013, was not an appropriate valuation to use where partners were buying one another out. He also noted that book value was rarely used and that costs would naturally be incurred if one tried to shut down the company which wouldn't reduce book value.

<u>Parker Interior Plantscape value</u>

The court believes Mr. Chait's discounted cash flow method based on the years 2009 to 2013 to be the most appropriate method to value the business. The court believes Mr. Fuentes calculation using the years 2013-2018 to be inappropriate where there is historical data and where the business is facing potential declines as a result of market uncertainly, in particular the decline of its most profitable business in Atlantic City.

Mr. Chait values the business at $1,356,000. The court agrees. The court believes a marketability discount should be applied. The actions of defendant were the cause of the lawsuit. He cannot be rewarded by not applying this discount. In cases where the oppressing shareholder instigates the problems, as in this case, fairness dictates that the oppressing shareholder should not benefit at the expense of the oppressed. Balsamides v. Protameen Chems., 160 N.J. 352, 382 (N.J. 1999). The potential buyer base for Richard Parker will remain illiquid because it is not publicly traded and public information about it is not widely disseminated moving forward. Id. at 378. In this matter, Steven Parker's wrongful act caused an extraordinary circumstance which requires this court to apply a marketability discount. Steven Parker, the oppressing shareholder, cannot receive a windfall as a result of his actions, the marketability discount will be applied.

A one half of the value is $778,000. This figure must be reduced by 25% representing the marketability discount. Defendant shall sell his shares to Plaintiff for the sum of $583,500. Payments shall be made in 30 days in accordance with statute.

The court does not believe a minority discount should be applied. A minority discount adjusts for lack of control over the business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions. Lawson Mardon Wheaton v. Smith, supra, 160 N.J. at 398. Similar to marketability discounts, while there is no uniform rule the majority position in New Jersey is the American Legal Institutes no-discount-absent-exceptional-circumstances rule. Brown v. Brown, supra, 348 N.J. Super. at 484. A minority discount is not appropriate here. While the court did find an exceptional circumstance to warrant a marketability discount that does not entitle Plaintiff to a minority discount automatically. The court must only apply a minority discount to adjust for a lack of control here where neither party has a controlling interest in either corporation such a discount would be inappropriate.

The court declines to adjust the value by the distribution shown on the 2013 books but paid in 2014. Plaintiff alleges this is double counting the money. It is not. Valuation captures a "snapshot" as of December 31, 2013. The payment of the money in 2014 does not effect the value of corporation as of December 31, 2013.

Payment of the insurance claim was received in 2014. This is not additional income to the parties but a payment to restore the value of what they had. It affects 2014 cash flow and hence is irrelevant to December 31, 2013 value. No adjustments are necessary.

Parker Wholesale Florist Value

Using the net asset value Mr. Fuentes valued PWF at $310,380 as of December 31, 2013. The fair value of a 50% equity interest was $155,190. While Mr. Chiat believed the company had no value. The court agrees. The company has been closed and whatever revenue was received in the liquidation process shall be accounted for by Defendant.

Disgorge Profits

Plaintiff argues in his brief that Steven Parker's profits should be disgorged because of usurpation of corporate opportunity. This is not plead in the complaint. Plaintiff argues that Defendant employed his daughter to work in "marketing" for PWF while living in California for the past decade. Plaintiff also claims that Defendant advertised his son's landscaping business and referred landscaping jobs to him. Additionally, Plaintiff argues that Defendant has taken excessive compensation and took the entire $325,000 settlement of Hurricane Sandy claims and apportioned the money to PWF rather than splitting in between PWF and PIP.

Defendant relies heavily on the recent case of Kaye v. Rosefielde. 223 N.J. 218 (2015). The Court held that:

> In accordance with the broad discretion afforded to courts fashioning equitable remedies that are fair and practical, a trial court may order disgorgement of an employee's compensation as a remedy for a breach of loyalty in an appropriate case. If a court determines that disgorgement is an appropriate equitable remedy, it should apportion that compensation and compel disgorgement of only the compensation that the employee received during pay periods in which he or she acted in violation of the duty of loyalty.
> [Id. at 222.]

Claims in regard to the duty of loyalty are discussed in the fiduciary duty analysis in this opinion and there is no need for repetition. The court does not find that any of Steven Parker's actions amount to a violation of the duty of loyalty. For context, in Kaye, where the court held disgorging profits was appropriate. Ibid. The court found that the defendant was Chief Operating Officer and General Counsel of a corporation and had committed various forms of legal malpractice and violation of fiduciary duties such as drafting agreements to increase his own personal interest, forming shell entities to collect management fees through false pretenses, forging signatures, committing health insurance fraud, spending corporate assets on vacation to Las Vegas and making inappropriate advances towards women in the corporation. Id. at 225. The facts in Kaye are much more egregious that the present matter, and court are required to look into the "egregiousness" of the misconduct when fashioning a remedy. Id. at 230. (citing Cameco, Inc. v. Gedicke, supra, 157 N.J. at 517).

While there was discussion of Defendant advertising for his son, there was insufficient proof submitted to the court to allow a finding that Defendant diverted corporate assets. Further, the court does not find Plaintiff's claims regarding Defendant's hiring of his daughter to be sufficient to implicate the duty of loyalty. Plaintiff has failed to show a negative effect this choice has had on the companies and lacks the egregiousness required to find a breach of duty of loyalty. Finally, the court does not find the handling of the Hurricane Sandy funds implicating the duty of loyalty. If Defendant had personally taking the funds, then Plaintiff would have an argument, however, Plaintiff's complaint is that he did not apportion the funds correctly between companies. Mr Meacham knew of the settlement and as controller, he had been appraised of the money. Finally, the court does not find that Defendant's insistence on having an equal salary to Plaintiff as implicating his duty of loyalty to the company who both were owners. In short, the conduct alleged by Plaintiff does not implicate the duty of loyalty and cannot be a basis for disgorging profits.

Clawans Charge

Plaintiff has requested that the court draw an adverse inference against the defendant for failure to call Stephanie Mansilla to testify on Defendant's behalf. Plaintiff argues that Ms. Mansilla's was under Defendant's control as one of his top employees and her testimony would have been critical. For an inference to be drawn from the nonproduction of a witness it must appear that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved. State v. Clawans, 38 N.J. 162, 171 (1962). When making a determination about a Clawans charge, a court must demonstrate that it has taken into consideration all relevant circumstances by placing, on the record, findings on each of the following:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue [;] and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.
>
> [State v. Hill, 199 N.J. 545, 531 (2009).]

The court may not give a charge relating to the non-production to a witness unless it is satisfied that a sufficient foundation has been laid and giving such a charge when it is not warranted is prejudicial error. Wild v. Roman, 91 N.J. Super. 410, 415 (App. Div. 1966).

The court does not find that that granting an adverse influence for the non-production of Ms. Mansilla is warranted in the present matter as Plaintiff has failed to raise a proper foundation and the facts do not support granting an adverse inference. The plaintiff has not shown that Ms. Mansilla was in the sole control of Defendant or that there was any reason Plaintiff could not have called Ms. Mansilla to testify. Plaintiff and Ms. Mansilla work in the same location and Ms. Mansilla is also Plaintiff's employee as Plaintiff was 50% shareholder of PWF. It was well within Plaintiff's control and ability to call Ms. Mansilla to testify and if Plaintiff had deemed her testimony important, he would have done so. As a result, the court does not grant an adverse inference against the defendant.

Request for Relief

A. Plaintiff seeks to purchase Defendant's shares at fair value. His request will be granted pursuant to N.J.S.A. §14A:12-7. Plaintiff shall purchase Defendant's share for $538,500. Payment shall be made within 30 days. N.J.S.A. §14A:12-7(8)(e).

B. Plaintiff seeks an accounting, presumably of PWF for the last 25 years. Plaintiff, while clearly annoyed with Defendant, has failed to bring this matter to court during this time period and the court does not believe it is equitable to allow him to do so now. The sole exception is that Plaintiff is entitled to an accounting of all monies received as a result of the shutdown of PWF and as a result of Steven Parker permitting third parties to use the property. Same shall be supplied within 45 days. The accounting shall be as of November 13, 2015, the day that Defendant announced he was going to close PWF.

C. Plaintiff seeks costs, reasonable costs are permitted under N.J.S.A. § 4A:12-2 (10). For the reasons stated below the request is denied.

D. Plaintiff seeks an award of compensatory damages. "Compensatory damages are intended to make a litigant whole for a loss, no more, no less." Tarr v. Ciasulli, 181 N.J. 70, 92 (2004). "Compensatory damages are not intended to punish a litigant for the wrongdoing." Ibid. An award of compensatory damages is permitted if the "Plaintiff has met his burden of proving that he has suffered some loss or injury and if he has given the [finder of fact] some information from which to estimate the amount of damages." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 64 (1984). Damages may be awarded even if the prevailing party is unable to prove the exact measure of damages. Ibid. "A loss or injury does not necessarily entitle a victim to an award of compensatory damages. Ibid. The court finds that the only loss suffered by Plaintiff which warrants a grant of compensatory damages are losses related to the closing of PWF.

E. Plaintiff also seeks recovery of consequential damages. Contract principles are generally more appropriate for determining claims for consequential damages. Dean v. Barrett Homes, Inc., 204 N.J. 286, 296 (2010). "Consequential damages are only recoverable where they 'are reasonably foreseeable at the time the contract was entered into.'" George H. Swatek, Inc. v. North Star Graphics, Inc., 246 N.J. Super. 281, 285 (App. Div. 1991)(citing T.M. Long Co., Inc. v. Jarrett, 165 N.J.Super. 117, 119, (Cty.D.Ct.1979). To impose consequential damages, the defendant must have had reason to foresee the injury at the time the contract was made, not at the time of the breach. Coyle v. Englander's, 199 N.J. Super. 212, 220 (App. Div. 1985). Damages consisting of loss of profits come within the category of consequential damages. Seaman v. United States Steel Corp., 166 N.J. Super. 467, 471 (App. Div. 1979). Whether consequential damages are warranted must carefully examine the individual factual situation. Kearney & Trecker Corp. v. Master Engraving Co., 107 N.J. 584, 598 (1987). As previously stated, the court has not found a valid enforceable contract between the parties and cannot determine under what damages could have been foreseeable between the parties that would permit recovery. Plaintiff has not met their burden to establish they have suffered consequential damages.

F. Plaintiff seeks recovery of punitive damages. Punitive damages are awarded as punishment or deterrence for particularly egregious conduct. Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 (1984) (citing Leimgruber v. Claridge Associates, Ltd., 73 N.J. 450, 454 (1977). Punitive damages are exemplary and can be awarded to punish aggravated misconduct by the defendant and to deter him and others from repeating it. Nappe v. Anschelewitz, Barr, Ansell & Bonello, supra, 97 N.J. at 48-49. While the court has found bad faith and shareholder oppression on the part of the defendant, this does not entitle Plaintiff to punitive damages. The court does not find that Defendant's conduct is so egregious as to warrants additional punitive damages. Furthermore, punitive damages will not serve to dissuade Defendant from future conduct since PWF is already closed and Defendant will no longer have an interest in PIP.

G. Plaintiffs have also requested an award of attorney's fees pursuant to N.J.S.A. § 14A:12-7 (10). "Courts in New Jersey have traditionally adhered to the American Rule as the principle that governs attorneys' fees." Walker v. Giuffre, 209 N.J. 124, 127 (2012). "This guiding concept provides that, absent authorization by contract, statute or rule, each party to a litigation is responsible for the fees charged by his or her attorney." Id. Fees charged by one's own attorney, of course, must comply with our Rules of Professional Conduct, and fees awarded by courts, regardless of their basis, are governed by principles of reasonableness. Id. at 127-128. Contrary to the American Rule, N.J.S.A. § 14A:12-7 (10) provides:

> If the court determines that any party to an action brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.

An award under a statute does "not define the method for quantification of fees, but uniformly are in accord with the overarching principles of reasonableness that we have fixed." Walker v. Giuffre, supra, 209 N.J. at 128. Courts have held that even if a party acts unreasonably in an attempt to assume the control of a company without regard to the minority shareholder this does not necessarily form the basis for awarding legal fees. Belfer v. Merling, 322 N.J. Super. 124, 144-45 (App. Div. 1999). The court does not find that Defendant had acted in an arbitrary manner. Further the court believes an attorney's fee award is inappropriate.

Defendant has committed his entire career to the operation of PWF, while his conduct may not have been far from ideal, even sufficient for a finding of bad faith, the court does not find that the factual scenario warrants an additional grant of attorney's fees.

Defendant has also requested various forms or relief in his Counterclaim. For the reasons explained above, Defendant's request for relief is denied with the sole exception of Defendant's alternative relief (E) requesting an Order requiring the payment of fair value to Defendant for his interests in PIP and PWF, in accordance with N.J.S.A. §14A:12-7.

By The Court