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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

GRAYDOG INTERNET, INC., an Oregon Corporation,
Plaintiff-Appellant,
Respondent on Review

v.

DAVID GILLER
Defendant-Respondent
Petitioner on Review

DAVID GILLER
Third-Party Plaintiff-Respondent
Petitioner on Review

v.

DOUGLAS WESTERVELT
Third-Party Defendant-Appellant
Respondent on Review

Multnomah County Circuit Court
130506470

Court of Appeals
A156539

S064346

PETITIONER ON REVIEW'S CORRECTED BRIEF ON THE MERITS

On review of the decision of the Court of Appeals
on appeal from the Judgment entered on March 18, 2014
Multnomah County Circuit Court,
Honorable Henry C. Breithaupt

Opinion filed July 27, 2016
Reversing the trial court and remanding

Before Duncan, Presiding Judge, Lagesen, Judge, Flynn, Judge
Author of opinion: Flynn, Judge

Filed: January 2017

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Statement of the Legal Questions on Review and Proposed Rules of Law

First Question Presented:

Whether the term "filing of a proceeding," as used in ORS 60.952(6) constitutes a legal action as a whole, or whether it constitutes parts of a legal action.

First Proposed Rule of Law:

The term "filing of a proceeding," as used in ORS 60.952(6) means either a civil action, a criminal action, an administrative action, or an investigatory action – not actions.

Second Proposed Rule of Law:

The term "filing of a proceeding," as used in ORS 60.952(6) means a single action commenced. It does not include parts of an action, nor does it include the filing of pleadings that join further parties to an original action. "Proceeding" in this context means a lawsuit, not the filing of a pleading by one already embroiled in litigation.

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Second Question Presented:

Whether the filing of a third-party complaint, joining another party to a pre-existing lawsuit, constitutes the "filing of a proceeding under subsection (1)" of ORS 60.952(6).

Third Proposed Rule of Law:

Filing a third-party complaint joins a party to a pre-existing civil action; it does not constitute the filing of an additional civil action for the purposes of ORS 60.952(6).

Third Question Presented:

Whether filing a third-party complaint alleging solely contractual claims that seek redress for one's reasonable contractual expectations can be construed as the "filing of a proceeding under subsection (1)" of ORS 60.952(6), thereby alleging that it has been "established" that those in control of a closely-held corporation have engaged or will engage in "illegal, oppressive or fraudulent" conduct.

Fourth Proposed Rule of Law:

If a litigant files a third-party complaint for relief alleging breach of contract and breach of the contractual duty of good faith and fair dealing, seeking redress for one's reasonable contractual expectations, such does not

automatically transform into a claim for relief from "illegal, oppressive, or fraudulent conduct" under ORS 60.952(1).

Statement of the Nature of the Proceeding, the Relief Sought in the Trial Court, and the Nature of the Judgment Rendered by the Trial Court

This case arises out of a proceeding filed by Graydog in May 2013, wherein Graydog (really Mr. Westervelt, Graydog's President) filed suit asking for the trial court's blessing to be able to terminate Mr. Giller, the only minority shareholder in Graydog, as an "at-will" employee. This is not an employment or wrongful termination case. Graydog filed the action seeking a declaratory judgment so it could terminate Mr. Giller with impunity and allow Mr. Westervelt to force Mr. Giller to sell his stock to Mr. Westervelt or to Graydog. ER-1. Mr. Giller responded with counterclaims and filed a third-party complaint against Mr. Westervelt, as Mr. Westervelt is the *true* plaintiff, or party in interest, hiding behind the corporate veil of Graydog. Mr. Giller took great care to not implicate ORS 60.952(1) by alleging only contractual claims and by specifically not asking for the numerous equitable remedies available in ORS 60.952(2), other than damages, which are available for most causes of action.

Graydog responded by seeking to have the trial court force a sale of Mr. Giller's shares to Graydog pursuant to ORS 60.952(6). Both parties sought summary judgment on the applicability of ORS 60.952(6).

On September 23, 2013, Judge Henry C. Breithaupt (pro tem) sent counsel for Graydog and for Mr. Giller an opinion letter stating that the Court did not believe the legislature intended for ORS 60.952 to apply to a proceeding begun by a corporation, even where there was a counterclaim because the counterclaims made by Mr. Giller are not of the type described in ORS 60.952. The Court then denied the Plaintiff's Motion for Summary Judgment and granted the Defendant's Motion for Summary Judgment. (Signed opinion letter) SER-3.

Judge Breithaupt thereafter on October 29, 2013 signed an order granting Defendant Giller's motion for summary judgment finding that ORS 60.952(6) does not apply to a proceeding begun by a corporation Graydog) even where there was a counterclaim; nor are the counterclaims (Giller's) of the type described in ORS 60.952. The court then based on its determination did not reach Defendant/Third-Party's alternative claim concerning the constitutionality of ORS 60.952(6) or make any comments thereon.

In the order Judge Breithaupt denied Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Application for a Stay pursuant to ORS 60.952(6)(f). (Order Granting/Denying Summary Judgment) SER-4.

On February 28, 2014 the Supreme Court denied Graydog's petition for writ of mandamus and Graydog's motion for stay. (Order Denying Petition for Writ of Mandamus). SER-7.

Thereafter, on March 28, 2014, Graydog filed a notice of appeal. (Notice of Appeal). SER-9. For the sake of procedural classification, the order signed by Judge Breithaupt on October 29, 2013 granting Giller's motion for partial summary judgment and denying Graydog's motion for partial summary judgment was not entered in the Multnomah County Circuit Court register until November 14, 2013. *Id*. at SER-4.

In July 2016, the Court of Appeals reversed the trial court's decision. Mr. Giller then petitioned this Court for review. This Court granted the Petition on December 15, 2016.

FACTS

Mr. Giller and Mr. Westervelt met while students at the University of Oregon in the mid 1990s. (Third Party Complaint, on file). Mr. Giller's specialization was software engineering. *See id.* at ER-16. Mr. Westervelt was already a Certified Public Accountant going back to school to change careers. *Id.* at ER-18. Mr. Giller and Mr. Westervelt, along with another friend, entered into a business relationship that later became Graydog. *Id.* at ER-18. Mr. Westervelt's primary role was marketing, making business contacts, and handling logistical aspects, while Mr. Giller's primary role was designing the products that Graydog would market. *Id*. at ER-18.

Graydog incorporated on June 6, 1997 with Mr. Westervelt as President and Mr. Giller as Secretary. *Id.* at ER-20. At that time, no stock certificates

were issued to either Mr. Giller or Mr. Westervelt by Graydog. Other corporate formalities, such as the promulgation of bylaws, were also ignored. (Answer, Affirmative Defenses, and Counterclaims by David Giller). *Id.* at ER-10. The company was a closely-held corporation with only two shareholders. Mr. Westervelt was, and remains, the majority shareholder with four shares (57%), and Mr. Giller was, and remains, the minority shareholder with three shares (43%). *Id.* at ER-31.

Mr. Giller generally designed the products and solutions that were proposed to customers while Mr. Westervelt managed the sales, the daily paperwork, and company books. *Id.* at ER-21. Mr. Westervelt was also the personnel manager while Mr. Giller was the technical lead responsible to oversee the technical employees' work. *Id.* at ER-21.

In approximately September 2001, Graydog bought a competitor, DSL Only. *Id.* at 22. The purchase price was $330,000.00. Mr. Giller personally supplied $100,000.00 of the purchase price. Mr. Giller's family through the use of an unsecured promissory note financed $225,000.00 of the purchase price. *Id.* at 22. The loans from Mr. Giller and his family for the purchase of DSL Only were paid back by Graydog in approximately five years. *Id.* at 23. Mr. Giller and his family have loaned Graydog at least $455,000.00 to ensure the success of Graydog. (Answer, Affirmative Defenses, and Counterclaims, at

13, on file). Mr. Giller spent over sixteen years working and investing himself and his life alongside Mr. Westervelt in developing Graydog. *Id.* at ER-42.

In 2002, Graydog began to develop e-mail filters to filter out "spam" (unsolicited commercial e-mail) that came into Graydog's e-mail servers for its customers. *Id.* at ER-23. Mr. Giller took the lead and developed a system and also developed what Graydog referred to as "mail gateways," which perform tests and analysis on e-mails passing through them in an attempt to reduce "spam." *Id.* at ER-23. The "mail gateways" developed by Mr. Giller had a 95% or higher success rate. Since the development of the "mail gateways," a number of companies have developed similar systems and solutions modeled like the system created by Mr. Giller. *Id.* at ER-23, ER-24. Graydog's own "mail gateways" system is still used by Graydog today. *Id.* at ER-24.

In October 2007, Graydog purchased, for approximately $810,000.00, a building to move Graydog's business operations into. *Id.* at ER-25. Mr. Giller personally prepared the building by tearing down interior walls and removing retail window displays. He also supervised the interior carpet and paint installation in preparation for Graydog's move-in. *Id.* at ER-25.

Mr. Giller and Mr. Westervelt both were required to personally guarantee the loan for the purchase of the building. Graydog did not have sufficient funds for the down payment. Mr. Giller thus obtained an unsecured

loan from his family in the amount of approximately $120,000.00 for the down payment to purchase the building. *Id.* at ER-25.

At the time Graydog incorporated in 1997, it failed to create any bylaws. *Id.* at 5, *citing* ER-10. In 2002, Mr. Westervelt told Mr. Giller of the need to arrange to have bylaws and other formalities in place. Accordingly, Graydog enacted bylaws in 2004. *Id.* at ER-10. A Shareholder's Agreement was also drawn up. The bylaws and the Shareholder's Agreement were both signed in 2004, *as mere formalities*, despite being back-dated to June 6, 1997. *Id.*

Relying on Mr. Westervelt's assurances that the Shareholder Agreement and bylaws were mere formalities that needed to be put into place, Mr. Giller signed the documents unaware that the Shareholder Agreement allegedly allowed Mr. Westervelt the ability to force Mr. Giller out of the company by forcing a sale of Mr. Giller's shares if Mr. Giller's employment with the company ended for any reason. *Id*. at ER-6, ER-11.

Paragraph 8.1 of the Shareholder Agreement specifically sets out that if either shareholder's employment with Graydog ends then that shareholder will have been deemed to have offered to sell his shares of Graydog stock to Graydog and to the other shareholders. *Id*. at ER-9. Paragraph 8.1 was prepared by Graydog's attorney at the direction of Mr. Westervelt for the purpose of ensuring that Mr. Westervelt would have the option, if he fired Mr.

Giller, to force a sale of Mr. Giller's shares to Mr. Westervelt if he decided it was in his interest to do so. *Id*. at ER-37.

In the early summer of 2012, Mr. Westervelt expressed a desire to Mr. Giller to purchase his three shares of Graydog. *Id*. at ER-7. Mr. Giller informed Mr. Westervelt he was not interested in selling his shares because Graydog had only recently begun to yield the kind of return that Mr. Giller and Mr. Westervelt had anticipated for the last sixteen years. *Id*. at ER-8.

When Mr. Giller advised Mr. Westervelt that he was not interested in selling his shares, Mr. Westervelt advised Mr. Giller that he had set up the corporate Shareholder Agreement in a way that would give him the ability to take control of Graydog by forcing Mr. Giller out without Mr. Giller's consent when he deemed it necessary. *Id*. at ER-8. When Mr. Giller refused to sell his stock to Mr. Westervelt, Mr. Westervelt asked Mr. Giller if he had read the Shareholder Agreement; because, if he did read the agreement, he would determine that Mr. Westervelt had the power to dictate a forced-sale of Mr. Giller's shares of stock in Graydog. *Id*. at ER-9.

Thereafter, Mr. Westervelt initiated another conversation with Mr. Giller concerning the proposed sale of Mr. Giller's shares, wherein Mr. Westervelt told Mr. Giller that his attorneys told him that he had a "slam dunk" case and to do whatever he wanted to do if Mr. Giller did not go along with Mr. Westervelt's offer to purchase Mr. Giller's shares in Graydog. *Id*. at ER-11.

Mr. Westervelt told Mr. Giller that he would use his leverage to force Mr. Giller out of the company if Mr. Giller did not agree to sell his three shares to Mr. Westervelt. *Id*. at ER-11. Mr. Westervelt thus made it clear that while he hoped it would not be necessary, he had the absolute ability to force Mr. Giller to accept a buyout offer if Mr. Giller refused to accept his offer willingly. *Id*. at ER-36-37.

On May 9, 2013, Mr. Westervelt took action. He called a special meeting of the two shareholders for the purpose of electing his wife to the Graydog Board of Directors to begin at 1:30 p.m. *Id*. at ER-12, ER-31. He then called a special meeting of the Board of Directors (which now consisted of Mr. and Mrs. Westervelt and Mr. Giller) to immediately follow. *Id*. at ER-40. At that meeting, Mr. and Mrs. Westervelt voted to sue Mr. Giller by initiating a proceeding in circuit court seeking a declaratory judgment that Graydog could fire Mr. Giller, so that Mr. Westervelt could absorb Mr. Giller's shares upon a favorable ruling, by virtue of paragraph 8.1 of the Shareholder's Agreement. *See Id. at* ER-40.

Unbeknownst to Mr. Giller, Graydog's attorney at the direction of Mr. Westervelt had already prepared a Complaint that would initiate Graydog's lawsuit against Mr. Giller. As can be seen on the Complaint, it was filed at 1:34 p.m., which was four minutes after the shareholder meeting was to begin. The meeting actually did not start on time. *Id.* at ER-32. Thus, Mr. Westervelt

(acting through Graydog) filed the lawsuit seeking court approval to terminate Mr. Giller before the Board of Directors voted to sue Mr. Giller (with Mr. Westervelt's wife now acting as his puppet to ensure he could pass whatever business he desired *Id*. at ER-32.

Soon after the May 9, 2013 Board of Directors and Shareholders Meeting, Mr. Westervelt called a meeting of the employees of Graydog at a time he knew that Mr. Giller was absent, and circulated a copy of the Complaint filed against Mr. Giller to all of the employees, informing them of his intent to fire Mr. Giller. While Mr. Westervelt indicated to the employees that he would inform Mr. Giller of the meeting, he never did. *Id*. at ER-33.

Before the meeting where he was told that he was being sued, Mr. Giller had conferred with his attorneys about his options in response to Mr. Westervelt seeking to force him out of the company. Research conducted by Mr. Giller's counsel showed that Oregon has a statute directly on point concerning minority shareholder rights – ORS 60.952.

While the statute codifies the equitable remedies courts developed over the years to protect minority shareholders, it also contains a provision that can be deadly to a minority shareholder seeking to protect her investment from a takeover by a majority shareholder by initiating a lawsuit. Mr. Giller thus chose to not begin any legal proceeding so as not to trigger the statute's application. *Graydog* thus decided to sue and began this proceeding on May 9,

2013.

In sum, ORS 60.952 basically states that when a lawsuit occurs involving a closely-held corporation, and when it is established that one or more of the directors, or those in control of the company, are acting or will act in an illegal, oppressive or fraudulent manner, then the trial court may order any number of remedies or even fashion its own equitable remedy to protect the minority shareholder. However, the party that did not bring the proceeding (the defendant) has the ability to elect to purchase the shares of the plaintiff for their fair value, as stated in subsection (6) of the statute. This is the statute that has come into play in the present case.

In response to the lawsuit filed by Graydog seeking to fire him, Mr. Giller filed an Answer, Affirmative Defenses and Counterclaims on June 10, 2013, alleging counterclaims. *Id*. at ER-15. On June 11, 2013, Mr. Giller also filed a Third-Party Complaint against Mr. Westervelt alleging claims for a Declaratory Judgment, Breach of Contract, and Breach of the Contractual Duty of Good Faith and Fair Dealing (on file). On July 2, 2013, Graydog sent a document to Mr. Giller's attorneys entitled "Graydog Internet, Inc.'s Election to Purchase All of David Giller's Shares Pursuant to ORS 60.952(6)." *Id*. at ER-45. On July 3, 2013, Mr. Giller filed a First Amended Answer, Affirmative Defenses, and Counterclaims asking for a declaratory judgment that ORS 60.952(6) was inapplicable or unconstitutional in the alternative (on file).

Mr. Giller then filed a motion for partial summary judgment on the issue of the applicability and/or constitutionality of ORS 60.952(6). (*See* Def.'s Mot. Partial Summ. J. (7/26/2013)). Graydog responded and also filed a cross-motion for summary judgment, or in the alternative, a motion for a stay pursuant to ORS 60.952(6)(f) (on file). The parties briefed the motions thoroughly and argued them before Oregon Tax Court Judge Henry C. Breithaupt (sitting as a pro tem judge), on September 19, 2013. On September 23, 2013, Judge Breithaupt sent out a decision letter finding for Mr. Giller. *Id*. at SER-3.

Thereafter, counsel for Graydog informed counsel for Mr. Giller that he intended to file a Petition for a Writ of Mandamus to force the trial court to issue a stay and sell Mr. Giller's shares to Graydog. On September 29, 2013 the trial court signed an order that was entered on November 14, 2013 granting Mr. Giller's motion for partial summary judgment and denying Graydog's motions and/or application for a stay pursuant to ORS 60.952(6)(f). *Id*. at SER-4. Because the court found for Mr. Giller on the issue of the applicability of ORS 60.952(6), it did not reach nor rule upon the issue of the constitutionality of the statute as raised by Giller. *Id*. at SER-4. Accordingly, the constitutionality issue is not raised here. If this Court rules in favor of Mr. Westervelt and Graydog, Mr. Giller intends to again assert and argue that ORS

60.952(6) is unconstitutional under these circumstances, as the trial court did not adjudicate that issue.

On November 20, 2013, Graydog filed a Petition for a Peremptory or Alternative Writ of Mandamus in this Court, which the Court denied the Petition on February 28, 2014. *Id*. at SER-7. On March 18, 2014, the trial court entered a Limited Judgment wherein the trial court ruled that ORS 60.952(6) does not apply to this case because (1) Graydog began the suit, not Mr. Giller and (2) because Mr. Giller did not trigger the statute with his counterclaims or third-party complaint. *Id*. at ER-47-48. The judgment is silent as to Graydog's cross-motion and/or application for a stay. Graydog then filed a Notice of Appeal appealing the judgment.

The parties briefed and argued the case before the Court of Appeals on March 5, 2015. The Court of Appeals issued its decision on July 27, 2016. Thereafter, Mr. Giller petitioned this Court for review, which was granted in December, 2016. This brief follows.

SUMMARY OF ARGUMENT

To allow the Court of Appeals' decision to stand is to inaugurate Oregon as the first and only state in the union to effectively abolish minority shareholder rights by allowing a majority shareholder to both *start a lawsuit* and then *force a sale* of the minority's shares if she dares to defend herself

after being involuntarily dragged into court. To think that this was the intent of the legislature when it enacted ORS 60.952 is beyond credibility.

ORS 60.952(6) gives a buy-out option to a non-litigious shareholder when another shareholder decides to initiate a lawsuit, thereby embroiling the company in litigation. Here – *Graydog filed this lawsuit, not Mr. Giller.* By choosing to initiate a lawsuit, Graydog dragged parties into litigation and thus forfeited the buy-out option. This situation is thus the opposite of the typical situation where a minority shareholder brings a lawsuit for oppression seeking equitable remedies, including dissolution. In such cases the minority is usually looking for dissolution or a buy-out, because her shares are worthless on an open market (which usually does not even exist for closely-held corporation shares).

But to flip such a situation up-side-down, as Graydog is seeking to do, is to make ORS 60.952(6) into a club for majority shareholders that can functionally snuff-out all minority shareholder rights, other than the right to be cashed out involuntarily at any time deemed advantageous by a self-interested majority shareholder. A majority shareholder who wishes to own the company outright has only to *sue* the minority shareholder, and if any resistance is encountered, the response is a labeled as a claim for "oppression" and the majority shareholder can exercise the right to a forced sale of minority's shares – which, of course, was the goal all along.

The Oregon legislature did not intend to enact such a legal and moral Catch-22 when it adopted ORS 60.952; it did not intend for the statute to be a club for majority shareholders to use against minority shareholders. Instead, it sought to codify remedies for the minority shareholder. The Court of Appeals' decision in this case, with all due respect, has turned what the legislature intended as a remedy into a weapon for majority shareholders. It has judicially interpreted ORS 60.952(6) into a statutory tool for "squeeze-outs." The end result is the functional abolition of minority shareholder rights in Oregon – other than the right to be bought out at a time of the majority shareholder's choosing. Such a doctrine is a frightening expansion of majority power in corporate law.

The reason the Court of Appeals' decision is so alarming is because there comes a point in a successful close corporation's life when the hard work and sacrifice begins to pay off. It is often said that what an entrepreneur does is translate an ability or willingness to defer compensation to a much later date, in exchange for a higher payoff later (and in the process, the economy is expanded to society's benefit). By allowing the majority to dictate when a minority must sell, the majority is able to deprive the minority of that deferred compensation and keep it for itself. This is the "future" in which the minority has invested, and it is not necessarily reflected in the stock price or "fair value", even when minority and marketability discounts are disallowed,

because "fair value" considers the business as a going concern from the outside, without the inside understanding the founders have of its future potential. To be an entrepreneur is to bet on a future. Allowing the majority to cash out a minority shareholder at will allows the majority to steal that future when it becomes clear it will pay off, but before it actually does.

This scenario can be avoided by applying the common sense, plain meaning of the words used in the statute. When ORS 60.952(6) speaks of a "proceeding," it is clear that the legislature understood that term to be a lawsuit as a whole, not bits and pieces of a lawsuit, and not pleadings filed by a party who has been unwillingly dragged into litigation, joining the real party in interest to that litigation. This understanding is all the more important when it is remembered that the legislature designed ORS 60.952(6) for situations where a *minority* shareholder begins litigation, not for situations where a *majority* shareholder initiates litigation as a plaintiff, then seeks to use a responsive pleading of the minority shareholder defendant to force a buy-out of the minority shareholder's shares. ORS 60.952 was not designed as a way for majority shareholders to perform private condemnation and liquidation of a minority's shares. In other words, it is not a codification of, nor a legislative blessing of, "squeeze-outs."

Moreover, when Mr. Giller responded to Graydog's lawsuit, he specifically chose to bring claims that only sound in contract law and to only

seek very limited remedies rather than the many remedies available in ORS 60.952(2). The true gravamen of his claims is him seeking to redress his reasonable expectations, not to seek a redress for a breach of fiduciary duty. Graydog is all but screaming at this court that Mr. Westervelt's actions are a breach of fiduciary duty, and that if Mr. Giller makes one peep about his "reasonable expectations," then he is really complaining about "oppression."

The problem for this analysis is that it ignores the distinction Oregon courts have long recognized between "oppression" – which is equated with a breach of fiduciary duty, and "reasonable expectations" – which Oregon has long kept distinct from "oppression." Mr. Westervelt has thus sought from the beginning to hi-jack Mr. Giller's claims and turn them to his own use.

In sum, the buy-out option listed in ORS 60.952(6) is available only to the shareholder who does not begin the litigation. It exists as an escape valve to protect the company from dissolution suits and expensive litigation. *It therefore is not available to the shareholder who starts a lawsuit*. Here, Graydog chose to begin this lawsuit, not Mr. Giller – Graydog embroiled the company in litigation, not Mr. Giller. Finally, when Mr. Giller responded to being sued, he brought counterclaims and joined the real party in interest, but he also severely limited his response to seeking only his reasonable contractual expectations – precisely because Oregon law has long disassociated such claims from claims of oppression. Consequently, this Court should reverse the

Court of Appeals' decision so that ORS 60.952 does not judicially grow teeth that the legislature never intended it to have.

ARGUMENT

As stated in ORAP 9.20(4), the *main* briefs in this case are those already prepared and filed in the Court of Appeals. Mr. Giller invites the Court to carefully consider his brief in the Court of Appeals, as it explains the crux of the legal arguments at issue. Because this brief is designated by rule as a supplemental brief, it shall focus on some of the more critical aspects of this litigation and the ramifications of what the Court of Appeals' decision in this case could mean in the future.

A. The Court of Appeals' Decision in this Case Represents a Radical Shift in Corporate Law that Will Set-up Oregon as the First and Only State to Functionally Eliminate Minority Shareholder Rights in Closely-Held Corporations.

To be a minority shareholder in a closely-held corporation comes with certain disadvantages. First of all, there is no market for one's shares if one wishes to get out of the company. *See* Robert B. Thompson, *Corporate Dissolution and Shareholder's Reasonable Expectations*, 66 Wash U LQ 193, 225 (1988). Second, a minority shareholder has little say in corporate governance because she may be outvoted by the majority. *See* Franklin A. Gevurtz, *Corporation Law*, 450 (2000, Hornbook Series).

Third, the minority is subject to "squeeze-outs," a situation where "the majority owner(s) uses the majority's control over the corporation to deprive

the minority shareholder of any say in management, and, of more practical importance, to deprive the minority shareholder of any distribution of the business' earnings." *Id.*

Courts, in Oregon and elsewhere, have long used their equitable powers to fashion remedies for minority shareholders in closely-held corporations. *See e.g.*, *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 507 P2d 387 (1973). The Court of Appeals is correct that prior to 2001 (when ORS 60.952 was enacted) the only statutory remedy available was dissolution pursuant to ORS 60.661. *See Hickey v. Hickey*, 269 Or App 258, 268-69, 344 P3d 512, *rev den*, 357 Or 415 (2015). The problem is that dissolution kills the company over squabbling between shareholders. Thus, dissolution was described by one of the drafters of ORS 60.952 as "typically the worst remedy available, both for the plaintiff [a minority shareholder who initiated a lawsuit for oppression] and the corporation and for the economy." (Tape Recording, House Committee on Judiciary, Subcommittee on Civil Law, SB 118, May 2, 2001, Tape 89, Side A (statement of Professor Robert C. Art)).

Due to the problem of dissolution suits, the ABA included in the revised Model Business Corporations Act ("MBCA") a provision where a company or its shareholders could elect to purchase the minority's shares to avoid dissolution. *See* Jeff Garrett, *The Reasonable Expectations Doctrine and Senate Bill 546: Toward a Bright-Line Rule for Corporate Oppression in Close*

Corporations, 36 Willamette L Rev 361 (2000). That provision is MBCA § 14.34. ORS 60.952 is modeled on a now-revised Illinois provision that was first modeled on MBCA § 14.34. *See* Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J Corp L 371, 414 (2003).

Most importantly, ORS 60.952 was enacted to codify judicially-created remedies for minority shareholders. This was made clear by one of the primary drafters when Professor Art told the legislature that "the statute will now codify these remedies." (Tape Recording, House Committee on Judiciary, Subcommittee on Civil Law, SB 118, May 2, 2001, Tape 89, Side A (statement of Professor Robert C. Art)). This statement was made in response to a question by Representative Charlie Ringo who asked whether the then current Oregon statutes had the provisions needed to provide minority shareholders sufficient protection. *Id.*

It is undeniable that Oregon courts, and now the Oregon legislature, has long been concerned with protecting minority shareholder rights in the closely-held corporation. Absolutely nothing in the legislative history exists to show that the legislature intended to narrow or do away with minority shareholder rights, or to reduce those rights into nothing but the right to be bought out. This was far from the legislature's mind, but it is precisely what Graydog

wishes ORS 60.952(6) to mean, and it is precisely what the Court of Appeals' decision has done.

The buy-out option must be understood for what it truly is – a safety valve to protect to the company when a shareholder decides to take the company into the thickets of litigation. It is an escape pod – not a weapon. Litigation is expensive, and minority shareholder suits often seek dissolution. Thus, the buy-out option, modeled on MBCA § 14.34 "affords an alternative to involuntary dissolution" by allowing the corporation or others to avoid destruction of the company by exercising "a limited right to purchase at fair value the shares of the shareholder who petitioned to dissolve the corporation." *Model Business Corporation Act with Official Comments and Reported Annotations,* 14-174, Vl. 3 (4th ed, 2011 Revision).

To put it more bluntly, Professors F. Hodge O'Neal and Robert Thompson state that the rationale behind MBCA § 14.34 (giving a defendant in an oppression suit the ability to elect to buy-out the plaintiff) is based upon safeguarding against the "fear of corporate death." *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members: Protecting Minority Rights in Squeeze-Outs and Other Intracorporate Conflicts* § 10:6, 10-21 (2005).

All of this makes sense. There are two sides to every story. When a minority shareholder decides to begin a lawsuit, she decides to seek her own

interests and asks for court intervention. However, she also drags the company into litigation with all of its expenses. The buy-out option thus exists as a compromise – it gives the aggrieved shareholder the fair value of her shares while also protecting the company from the dangers of financial ruin that litigation can bring.

This situation was even commented on by Graydog during oral argument on appeal. Graydog argued (correctly) that the buy-out option gives the corporation a lifeline. It gives the corporation a chance to save the company by exercising a buy-out. When the company becomes embroiled in litigation, it is time to give the corporation a safety belt. *See* Oral Argument from March 5, 2016 before the Court of Appeals, argument of counsel for Graydog.

Graydog continued at oral argument by arguing that there are a lot of innocent parties that are hurt when a corporation is destroyed, that employees can lose their jobs, creditors' rights are jeopardized, and the economy can be hurt. *Id.* Graydog thus concluded that when a shareholder brings litigation, the buy-out option allows that shareholder fair value for her shares but that the buy-out option is the legislature's understanding that the aggrieved shareholder does not have the right to lock the company into protracted litigation and run the risk of destroying it, putting employees out of jobs, and ending the life of the company. *Id.*

This is correct – absolutely correct. That is exactly why the buy-out option in ORS 60.952(6) is a fair and just option. But Graydog has one massive problem staring it in the face – it began the litigation. Graydog is the party that brought this matter into the courts. Graydog – really Mr. Westervelt wearing Graydog's hat – is the party that decided to risk the jobs of its employees, to bring its finances into litigation, and to enter into the battlefield of litigation. Thus, Graydog's own argument about the purpose of the buy-out option illustrates why it has horribly perverted ORS 60.952(6) into a weapon rather than the compromise it was intended to be.

The buy-out option exists to protect the company from protracted litigation. It thus gives the company a lifeline against the litigious party. But here – *Graydog is the litigious party*. Graydog has created the very risks and detriments the buy-out option is designed to cure. It is an old cliché, but it explains the situation quite well – Graydog wishes to "have its cake and eat it too." The buy-out option does not allow this. One can have the buy-out option, so long as one does not begin the lawsuit.

Graydog will likely seek to mollify this fact by pointing out that all it did was bring a small action for a declaratory judgment asking the court if it could terminate Mr. Giller as an "at-will" employee. Indeed, Graydog argued this very point at oral argument before the Court of Appeals. There, Graydog stated that "if Mr. Giller had responded to that Complaint simply by defending

and establishing that in fact he is not "at-will," he has an employment contract or some such, we wouldn't be here today." *See* Oral Argument from March 5, 2015 before the Court of Appeals, argument of counsel for Graydog.

The point, however, is that what appears to be minor shot across the bow to one party can easily spiral out of control into a massive conflagration. History is replete with relatively small events igniting massive wars. After all it was a simple assassination that kicked off World War I all across Europe and into the world's oceans.

The first salvo in this case came when Graydog tried to throw Mr. Giller out of the company by using the courts. To use Judge Breithaupt's words, it began as "a situation where the football [was] kicked off by Westervelt." Tr. at 35-36. Graydog's counsel also admitted that purpose of "start[ing] [this] fight" was to exercise Graydog's rights under the Shareholder Agreement. *Id.* at 33. In short, it was a sham, and Judge Breithaupt understood the situation perfectly. At that point, the die was cast.

Also, let there be no mistake: if Mr. Giller had merely denied in his Answer to Graydog's Complaint that he was an "at-will" employee, or raised any counterclaim or affirmative defense defending himself, then Graydog could have easily responded that by Mr. Giller claiming he has a right to employment, and that Graydog is seeking to trample that right, he is now alleging oppression, which triggers ORS 60.952(6), giving Graydog the option

to buy him out. After all, if filing a third-party complaint is a proceeding in and of itself, there is no reason why filing an Answer or even Counterclaims cannot also be construed as commencing a proceeding after the Court of Appeals' decision.

All of the above illustrates the point that the buy-out option was designed *only* to apply to the non-litigious shareholder. In that case, it is fair and equitable. But to give the buy-out option to the shareholder who actually brings the litigation is to take a fair and equitable principle and change it into a poisonous weapon that can be used as a tool to achieve the very injustice it was designed to prevent. In chemistry, the addition or subtraction of a single atom, or a single electron for that matter, can change life into death – so too, in this case, by allowing the litigious shareholder the ability to also exercise the buy-out option creates a situation that has the opposite effect than intended.

When the buy-out option is available to the party that starts a lawsuit, it converts this remedy statute into a tool for squeeze-outs. This is what Graydog convinced the Court of Appeals to do. With such an interpretation, all of the remedies listed in ORS 60.952(2) and all of the rights a minority shareholder has cease to exist except for one – the right to be bought out.

Any majority shareholder who wishes to own the company outright has only to consult with a lawyer who will read *Graydog v. Giller*, 279 Or App

722, 381 P3d 903 (2016), and that person will be told she has a slam-dunk case. Here is how you do it. First, you ask your partner to sell her shares to you. If she says "no" you *motivate* her by engaging in all sorts of questionable conduct, such as removing your partner from the Board of Directors, withholding dividends from her while paying inflated ones to yourself, or if necessary you relegate your partner to cleaning the bathroom at minimum wage.

Second, if your partner still holds fast and decides to not sell her interest in the company to you, then you sue her! This way, she will be forced to respond or she will have a default judgment entered against her. Call it what you like – perhaps a declaratory judgment asking for court permission to terminate her as an "at-will" employee. Third, when she responds, claim that she has filed a "proceeding" under ORS 60.952(1), despite the fact that you started the lawsuit, and label whatever response she gives as "oppression." Fourth, file an election to purchase her shares via ORS 60.952(6). Either she will sell you her shares, or you will get a court-ordered buy-out of her shares. You win either way.

Such a scenario should come straight out of Machiavelli's *The Prince*. This is not what the legislature had in mind when it enacted ORS 60.952. Allowing the statute to be perverted this way creates a situation where minority shareholder rights no longer functionally exist in Oregon – other than the single

right to be bought out. As illustrated in Mr. Giller's Response Brief before the Court of Appeals, out of fifty states, Oregon is the only one that allows a forced buy-out of one's shares if one brings litigation, without either a judicial determination of fairness or a suit for dissolution before a forced buy-out will be allowed. *See* Respondent's Brief on Appeal, at 25.

Accordingly, to add a gloss to ORS 60.952 that allows a party to both initiate a lawsuit and to then be able to elect to buy-out the other shareholder's interest is to take an already dangerous statute and make it into a weapon of fierce dimensions. This would represent a truly revolutionary shift in corporate law away from protecting minority shareholder rights towards absolute dominance for majority shareholders. The ramifications for Oregon businesses, the vast majority of which are closely-held entities, could be enormous and unprecedented. Thus, this Court should reverse the Court of Appeals' decision.

B. The Court of Appeals' Decision Does Not Properly Follow Established Norms of Statutory Interpretation, as Set Forth in *PGE v. Bureau of Labor and Indus.*, as Modified by *State v. Gaines.*

The above situation can be cured by applying appropriate and time-tested standards of statutory interpretation. ORS 174.020 sets forth the standard: In interpreting statutes, courts "shall pursue the intention of the legislature if possible." In Oregon, courts generally follow the analysis set forth in *PGE v. Bureau of Labor and Indus*., 317 Or 66, 859 P2d 1143 (1993),

as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The first step is to examine text and context. *Id.,* 346 Or at 171. Second, the Court may consider legislative history and give it such weight as the Court sees fit. *Id.* at 172. Third, if the legislative intent remains unclear, then the Court may "resort to general maxims of statutory construction" to resolve any uncertainty. *Id.*

The Court of Appeals' opinion correctly cites the proper methodology to be employed, but the court takes a detour in applying that methodology. Its analysis begins and ends with legislative history combined with its own case law without carefully examining the text and context. The words in ORS 60.952 do not exist in a vacuum. The phrase "proceeding" appears in several areas in the statute's text, all of which point towards understanding the term as a single lawsuit, not bits and pieces of a suit, and especially not pleadings joining the real party in interest.

This analysis must be given its proper weight. ORS 60.952(6) states in relevant part that within 90 days "after the filing of a proceeding under subsection (1) of this section" the company or other shareholders may elect to purchase the shares "owned by the shareholder who filed *the proceeding*." (emphasis added). Thus, the primary question becomes what "the proceeding" is. In *Gaines*, this Court reiterated that "there is no more persuasive evidence of the intent of the legislature than 'the words by which the legislature

undertook to give expression to its wishes.'" 346 Or at 171, *quoting State ex rel Cox v. Wilson*, 277 Or 747, 750 (1977).

Concerning the *text* of the statute, at the time this election was made ORS 60.001(24) defined "proceeding" for the purposes of ORS chapter 60 to mean "a civil, criminal, administrative and investigatory action." A lawsuit is an "action." ORCP 2 states that "[t]here shall be one form of action known as a civil action." ORCP 3 states in relevant part that "an action shall be commenced by filing a complaint." Thus, when ORS 60.001(24) defines proceeding to mean an "action," such is referring to lawsuits or similar contested cases.

The plain text of ORS 60.952(6) also uses the term "proceeding" in a singular fashion. This shows that the legislature is referring to a single action or suit, not parts of the same action or suit. It does not speak of proceedings in the plural – instead, it is singular. The *text* thus supports the conclusion that the legislature meant "proceeding" to be an actual lawsuit, not parts thereof. If "the proceeding" can refer to parts of a lawsuit, it opens the door to massive ambiguity; because, courts will be left to decide exactly which proceedings allege oppression and which do not, a situation Graydog has already asserted. Thus when a party joins the "proceeding," as required by ORS 60.952(6)(b), it becomes unclear which "proceeding" is "the proceeding," as they both are according to the Court of Appeals.

Moreover, the *context* in which the phrase "the proceeding" appears is actually dispositive when one considers its uses elsewhere in ORS 60.952. First, as noted above, ORS 60.952(6)(b) states that if more than one shareholder elects to participate in the forced sale, then they "become parties to the proceeding under subsection (1) of this section." Those shareholders do not become parties to a complaint, an answer, or a third-party complaint alone. The idea is nonsensical. Instead, the shareholders will be parties to the lawsuit *as a whole*. Proceeding in this context means a lawsuit.

Second, ORS 60.952(1) begins by stating: "In a proceeding." The prepositional phrase "[i]n a proceeding" denotes "proceeding" to be a lawsuit, not a pleading; because, subsection (1) also points out that "the circuit court may order" a remedy in that proceeding. It is again nonsensical to think of a circuit court ordering a remedy within a complaint, answer, or third-party complaint alone. The only rational reading is that when a circuit court is authorized to order a remedy "[i]n a proceeding," that proceeding is obviously the lawsuit at issue.

Third, the word "proceeding" also appears in ORS 60.952(2)(L) where it speaks of courts retaining "the case" for protecting the "shareholder who filed the proceeding." Here, "the case" is equated with "the proceeding." The usage is entirely singular and contemplates a situation where a plaintiff-shareholder brings a lawsuit.

The Oregon Rules of Civil Procedure concerning joinder of parties mirrors this approach by allowing third-party defendants and others to become parties to the original proceeding. *See* ORCP 22 C(1) (noting that such persons are not originally a "party to the action."); ORCP 22 D(1) (speaking of parties who may be "made parties to the original action."). As a third-party defendant, Mr. Westervelt "joins" the proceeding. If he joins the proceeding and becomes a party to "the proceeding," then "the proceeding" must necessarily pre-date his joining the suit. Consequently, a third-party complaint cannot be "the proceeding" pursuant to the text of ORS 60.952 because the "proceeding" must pre-exist his joining it. It is also nonsensical to say that Mr. Westervelt "joins" the third-party complaint against him, yet that is how the Court of Appeals has interpreted ORS 60.952.

Fourth, ORS 60.952(6)(f) states that if the parties cannot agree on a sale price, the court is to "stay the proceeding." Courts do not stay pleadings – courts stay cases. It would be an odd case indeed for the court to stay Mr. Giller's third-party complaint, but not his counterclaims, answers, affirmative defenses, or Graydog's suit. Here, "the proceeding" necessarily means the lawsuit as a whole. Because Graydog filed "the case," the lawsuit, or "the proceeding," it cannot make the election under ORS 60.952(6).

Fifth, the use of the term "proceeding" elsewhere in ORS chapter 60 gives further insight into the legislature's intent. For example, ORS 60.261(2)

states: "A complaint in a proceeding brought in the right of a corporation * * *." This phrase is used to describe proper procedure in derivative suits. It is common sense that the legislature considered a "complaint" to be a *part* of a "proceeding" because it is "in" the proceeding itself.

These examples show that in using the first part of the *PGE* analysis (reviewing the statutory text and context), there is only one sensible conclusion – "the proceeding under subsection (1)" is the lawsuit itself, not a pleading such as an answer or a third-party complaint. Also, as clearly set forth in Mr. Giller's Response Brief in the Court of Appeals, the legislative history also shows that the legislature intended the term "proceeding" to be a lawsuit, not bits and pieces thereof.

In addition, the Court may "look also to general rules of statutory construction as helpful." *Alfieri v. Solomon*, 358 Or 383, 392, 365 P3d 99 (2015). One such maxim is that courts should construe words in a statute in accordance with the statute's purpose. *See Bartz v. State of Oregon*, 314 Or 353, 358, 839 P2d 217 (1992). Here, the stated purpose (as noted above) of ORS 60.952 is to codify remedies that were judicially-created to protect the minority shareholder.

Another maxim is that statutes should be interpreted to "avoid inconsistent and unconscionable results." *Didier v. State Indus. Acc. Commission*, 243 Or 460, 465, 414 P2d 325 (1966). In *Didier*, this Court held

that when a statutory provision is unclear, courts should "give the section a meaning that comports with common sense and with the statutory scheme as a whole." Once again, it is common sense that the term "proceeding" in ORS 60.952 means a lawsuit. To expand that meaning to include third-party complaints as separate proceedings that would also be included in ORS 60.952 requires extrapolation – an extrapolation that gives the statute a meaning that is inconsistent with its purpose as a codification of minority shareholder remedies.

It would indeed be an "unconscionable result" to interpret a codification of remedies for minority shareholders as a club for majority shareholders. As noted above, the buy-out option exists as a lifeline for the company to protect it against the economic harm imported to the company by the party that drags the company into litigation. It permits a minority who is being squeezed out to prod the majority into action and force a sale under court-supervised terms in a way that potentially avoids the full costs of litigation. It is a mutually beneficial shortcut and compromise when the minority simply wants to cash out but the majority wants to prevent the minority from recovering the full value of its investment. In this case, it was Mr. Westervelt, hiding behind the corporate veil of Graydog, that dragged the company into litigation, not Mr. Giller. Mr. Westervelt drew first blood, not Mr. Giller.

As early as 1915, this Court held that "[i]t is a well-settled principle that a remedial statute (which ORS 60.952 is) should be so construed as to give it practical effect according to the intention of the lawmakers." *Landers v. Van Aukin*, 77 Or 479, 489, 151 P 712 (1915). ORS 60.952 codifies remedies – this Court should not allow Graydog to turn it into a club against minority shareholders.

One final maxim takes us back to the text and context of the word "proceeding" as used in ORS 60.952. *Noscitur a sociis* (literally "it is known by its associates" *Black's Law Dictionary*, 1160-61 (Ninth ed.) holds that words should be interpreted according to the words around it. In *Goodwin v. Kingsmen Plastering, Inc.*, this Court once again referred to this concept when it said "[t]he meaning of words in a statute may be clarified or confirmed by reference to other words in the same sentence or provision." 359 Or 694, 702, 375 P3d 463 (2016), *citing Johnson v. Gibson*, 358 Or 624, 629-30, 369 P3d 1151 (2016) (explaining *noscitur a sociis* textual canon).

Using the words around the critical word "proceeding" in ORS 60.952 gives an undeniable conclusion that the legislature meant the word "proceeding" to be a lawsuit. As stated above, the word almost always appears after the word "the" showing it to be understood as a single thing – not one of multiple things. The word also appears after the preposition "in" showing that remedies are to be given inside the confinement of a "proceeding." Remedies

are not offered inside pleadings or portions of a lawsuit; remedies are given "in" a lawsuit as a whole. Most revealing is that ORS 60.952(2)(L) speaks of "the case" and "the proceeding" interchangeably. If the court should retain "the case" so as to protect the party who "filed the proceeding" it becomes clear that these phrases mean the same thing.

Finally, the words surrounding "proceeding" in ORS 60.952(6)(b) show that shareholders wishing to participate in a buy-out "become parties to the proceeding." To become a party to a proceeding, the "proceeding" must both be an intangible matter such as a lawsuit (not a pleading) and it must necessarily pre-exist one joining it. A third-party complaint *joins* a party to a pre-existing lawsuit. It requires stretching and twisting of plain language and common sense to have the filing of a third-party complaint, joining the real party in interest, to constitute a brand new proceeding on its own, separate from "the proceeding" already in existence, and then to have other shareholders join the third-party complaint proceeding, but not the *other* proceeding. To compound this problem, the statute refers to "proceeding" in the singular but the Court of Appeals' decision would result in multiple proceedings – one that triggers the statute and another that was the "original" lawsuit. This is in direct contravention to the text of the statute, and it is easily solved by reading "proceeding" to mean the original lawsuit only.

To be blunt – it is abundantly clear that the legislature understood the word "proceeding" in ORS 60.952 to mean a lawsuit. To split hairs and begin to stretch that language so as to make it to where a party files a proceeding, and then when the defendant responds – that is also a proceeding – is to enter into an area that is neither supported by the legislative intent nor the plain text and context of this statute. Graydog filed the "proceeding," and Mr. Westervelt was joined to that "proceeding" by Mr. Giller *after* Graydog already filed the proceeding. As such, Graydog forfeited its ability to force a sale of Mr. Giller's shares via ORS 60.952(6).

C. Third-Party Complaints Do Not Constitute Third-Party Actions that are Distinct Actions or "Proceedings," as Used in ORS 60.952.

The Court of Appeals ruled that the filing of a third-party complaint is the filing of a "proceeding" for purposes of ORS 60.952 because this Court has used "third-party complaint" and "third-party action" synonymously, thereby making a third-party complaint a separate civil action. *See Graydog v. Giller*, 279 Or App at 729. In reaching this conclusion, the Court cites to *Wallulis v. Dymowski*, 323 Or 337, 342, 918 P2d 755 (1996) and *O'Connell, Goyak & Ball v. Silbernagel*, 297 Or 207, 210, 681 P2d 1159 (1984).

The Court of Appeals is cherry-picking language out of context to justify a position that the language does not represent. *Wallulis* was a case about

summary judgment in a defamation context. *See generally* 323 Or 337. It does use "third-party action" in *dicta* to describe a joinder, as do other cases. However, this is a semantic usage only, as ORCP 22 clearly denotes that a third-party complaint *joins* a party to an action that is already in existence. Third-party complaints do not initiate new lawsuits – they join parties to already existing lawsuits. The fact that this Court used the term "third-party action" to simply describe a situation where a party was joined to the case does not mean that the concept of joinder disappears. Words have different meanings when used in different contexts – hence the importance of looking at the term "proceeding" everywhere it is used in ORS 60.952, which the Court of Appeals failed to do.

O'Connell was a collection case for unpaid legal fees. *See generally* 297 Or 207. This Court does refer to a third-party claim as a "separate action," but again in *dicta* and in passing. However, the facts in *O'Connell* muddy the water quite a bit. There, a third-party was sued, but by a pleading styled as a counterclaim for malpractice. *Id.* at 209. This Court commented that it was in actuality a "third party complaint, because defendants asserted their malpractice claim *against parties not already in the action*." *Id.* (emphasis added).

Here we have the term "action" describing the whole lawsuit. If, as a matter of law, the third-party complaint initiated a "separate action," then it

could not have joined a party "not already in the action." Also, the third-party complaint was dismissed before trial in *O'Connell*, thereby making this Court's semantic reference to it as a "separate action" more appropriate. *Id.*

When this Court has used the term "separate actions" as a matter of law instead of in passing, it has taken a much different approach. For example, in *Peterson v. Temple*, 323 Or 322, 918 P2d 413 (1996) this Court addressed claim-splitting where parties seek to have "separate actions" arising out of the same situation. *Id.* at 332. The term "separate actions" most definitely applied to separate lawsuits, as used throughout the opinion. *See generally id.*

ORCP 22 states that third-party defendants join an action already in existence. The Court of Appeals is incorrect - there are not civil actions within civil actions in the context of ORS 60.952. ORCP 2 states that "[t]here shall be one form of action known as a civil action." ORCP 3 states in relevant part that "an action shall be commenced by filing a complaint." Thus, when ORS 60.001(24) defines a proceeding as a "civil action," it is referring to a lawsuit. When a third party is brought in, that party joins the original action or lawsuit – it does not create an independent civil action. Otherwise, it would not be a joinder. Again, this is 100% in line with the text of ORS 60.952(6)(b) where it states that parties that join the election "become parties to the proceeding under subsection (1)."

This is the key point – if a third-party complaint initiates a "separate action" and hence a separate proceeding under subsection (1) of ORS 60.952, and if shareholders who make an election to participate in the buy-out become parties to "*the* proceeding under subsection (1)," then it must be asked – which of the separate proceedings under subsection (1) is "the proceeding" the statute refers to? (emphasis added). It is nonsensical to have separate proceedings in such a case. The statute only contemplates a single proceeding – the lawsuit as a whole.

The Court of Appeals is creating a situation referred to by George Orwell as "doublethink," the ability to have completely contradicting notions exist about the same thing at the same time, and to accept both of them as correct. *See* George Orwell, *Nineteen-Eighty Four*, 175 (1949). Another definition that fits the current situation describes "doublethink" as "the tortured abuse of words and phrases so that their meaning and effect become inverted." *Price v. Civil Serv. Comm.*, 161 CalRptr 475, 494, 604 P2d 1365 (1980) *superseded by statute, as stated in Strauss v. Horton*, 93 CalRptr3d 591, 207 P3d 48 (2009), *abrogated by Obergefell v. Hodges*, 576 US ___, 135 SCt 2584 (2015).

This is a perfect description for the interpretation of "the proceeding" as given by the Court of Appeals – an interpretation that will necessitate "the proceeding" to be two separate proceedings, yet "the" proceeding (singular) to

which a party may be joined – all at the same time. Indeed, one must abuse the words "the" and "proceeding" to get them into a position to where their meaning becomes "inverted." In essence, that is what the Court of Appeals has done to ORS 60.952 – it has inverted its meaning from what the legislature intended.

D. The True Gravamen of Mr. Giller's Third-Party Claims are Contractual in Nature, Seeking Redress for his Reasonable Expectations, not for Oppression via a Claim for Breach of Fiduciary Duty.

The Court of Appeals bought Graydog's argument that just because Mr. Westervelt's actions most certainly could be characterized as "oppressive," that means any complaint about them is necessarily a complaint about "oppression." This is an example of what Dean Prosser once called "a failure to think the thing through." Dean Prosser, *The Borderland of Tort and Contract in Selected Topics on the Law of Torts*, 440 (1953).

Such faulty logic categorically ignores the distinction between necessary and sufficient conditions. While the situation Mr. Giller describes may be *sufficient* to bring a claim for breach of fiduciary duty, it does not *necessarily* mean he is bringing such a claim. This point is missed time-after-time in this litigation.

Mr. Giller's third-party complaint against Mr. Westervelt alleges breach of the company's bylaws as a breach of contract. *See McConnell v. Owyhee Ditch Co.*, 132 Or 128, 132, 283 P 755 (1930) (holding that bylaws are

contractual). He also sued for breach of implied contract, as he relied to his detriment upon Mr. Westervelt's representations to him, raising promissory estoppel. Moreover, Mr. Giller asked for declaratory judgments making defenses against the enforceability of a shareholder agreement, and he made a claim for the breach of the contractual duty of good faith and fair dealing.

In evaluating these claims, the Court of Appeals stated that it would "look past the label a party gives to a claim" so as to determine the "gravamen or the predominant characteristics" of a claim, not the label given to it. *Graydog*, 279 Or App at 731, *quoting Lindemeier v. Walker*, 272 Or 682, 685, 538 P2d 1266 (1975). This Court has held similarly, stating that it is "the nature of the matter, not the label that a party has placed on it" that determines the nature of a claim. *Ahern v. Oregon Pub Employees Union*, 329 Or 428, 436, 988 P2d 364 (1999).

The Court of Appeals cited to this Court's decision in *Securities-Intermountain v. Sunset Fuel*, 289 Or 243, 611 P2d 1158 (1980), a statute of limitations case, for a four-part analysis formulated in its own case law in *Htaike v. Sein*, 269 Or App 284, 344 P3d 527, *rev den*, 357 Or 565 (2015). *Graydog*, 279 Or App at 732.

However, this Court's decision in *Securities-Intermountain* contains no such test. Instead, this Court stated that the "scope of the damages demanded may characterize a complaint as founded in tort rather than in contract."

Securities-Intermountain, 289 Or at 260. Accordingly, this Court should consider what the "nature of the matter" alleged by Mr. Giller is in conjunction with the "scope of damages demanded."

An action under ORS 60.952(1) allows the litigant, in equity, to seek the following remedies:

- "The performance, prohibition, alteration or setting aside of any action of the corporation or of its shareholders, directors or officers or any other party to the proceeding." ORS 60.952(2)(a). *Mr. Giller did not ask for this.*
- "The cancellation or alteration of any provision in the corporation's articles of incorporation or bylaws." ORS 60.952(2)(b). *Mr. Giller did not ask for this.*
- "The removal from office of any director or officer." ORS 60.952(2)(c). *Mr. Giller did not ask for this.*
- "The appointment of any individual as a director or officer." ORS 60.952(2)(d). *Mr. Giller did not ask for this.*
- "An accounting with respect to any matter in dispute." ORS 60.952(2)(e). *Mr. Giller did not ask for this.*
- "The appointment of a custodian to manage the business and affairs of the corporation, to serve for the term and under the conditions prescribed by the court." ORS 60.952(2)(f). *Mr. Giller did not ask for this.*

- "The appointment of a provisional director to serve for the term and under the conditions prescribed by the court." ORS 60.952(2)(g). *Mr. Giller did not ask for this.*
- "The submission of the dispute to mediation or another form of nonbinding alternative dispute resolution." ORS 60.952(2)(h). *Mr. Giller did not ask for this.*
- "The issuance of distributions." ORS 60.952(2)(i). *Mr. Giller did not ask for this.*
- "The award of damages to any aggrieved party." ORS 60.952(2)(j). Finally, after bypassing the first nine (9) possible remedies, Mr. Giller has asked for damages, but not under ORS 60.952(2) for illegal, oppressive or fraudulent conduct, but under contract claims. He also did not seek punitive damages.
- "The purchase by the corporation or one or more shareholders of all of the shares of one or more other shareholders for their fair value and on the terms determined under subsection (5) of this section." ORS 60.952(2)(k). *Mr. Giller did not ask for this.*
- "The retention of jurisdiction of the case by the court for the protection of the shareholder who filed the proceeding." ORS 60.952(2)(L). *Mr. Giller did not ask for this.*
- "The dissolution of the corporation if the court determines that no

remedy specified in paragraphs (a) to (L) of this subsection or other alternative remedy is sufficient to resolve the matters in dispute." ORS 60.952(2)(m). *Mr. Giller did not ask for this.*

Out of thirteen (13) enumerated remedies that the court may select to impose for a proceeding under ORS 60.952(1), Mr. Giller has only asked for damages, under contract law, not ORS 60.952(1). He did not seek for these remedies. Instead, he chose to stay away from them. Because the nature of the claim depends upon the relief sought instead of allegations made, as stated by this Court in *Ahern*, the fact that Mr. Giller has not asked for the equitable remedies listed in ORS 60.952(2) should be absolutely indicative that he has not filed an equitable proceeding under ORS 60.952(1), nor that he has alleged oppression.

In addition, Oregon has long equated "oppression" with breach of fiduciary duty; it has long rejected the notion that a breach of one's reasonable expectations constitutes oppression. To illustrate, in *Baker*, this Court rejected other definitions of oppression and held that oppression "is closely related to what we agree to be the fiduciary duty of good faith and fair dealing owed by [the majority] to its minority stockholders." 264 Or at 629.

Professor Robert C. Art, often quoted in this litigation because he was the chair of the task force that drafted ORS 60.952, notes that "oppression" has generally been delineated in three separate ways around the country. Robert C.

Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. Corp L. 371, 414 (2003). First, "some [state] decisions state the standard in very general, aspirational terms." *Id.* Second, some states relate "oppression to breach by controlling shareholders of their fiduciary duties." *Id.* Finally, the third group of states "deem oppression to be a breach of the reasonable expectations of minority shareholders." *Id.*

Oregon falls into the second category, namely it is a jurisdiction that equates oppression with a breach of fiduciary duty. As Professor Art states, "[a] substantial body of case law, from Oregon and other states, relates 'oppression' to fiduciary duties." *Id.* at 377-78. Professor Art cites to a long line of Oregon cases to support his reasoning. *See id.* at 378, n 39. Professor Art's reasoning is not news to Graydog. In fact, Graydog's trial counsel (Robert J. McGaughey) is the best source for citation. In the October 2001 update of his *Oregon Corporate Law Handbook*, counsel states:

> Efforts by some members of the Task Force to statutorily expand the conduct triggering judicial intervention (to include conduct violating the reasonable expectations of the shareholders) was rejected by the Task Force and not included in the statutory language of SB 118 [which became ORS 60.952].

Id. at 268-69.

The legislative history of ORS 60.952 also shows this understanding. Professor Art, before the Senate Committee on Business, Labor and Economic

Development, stated that one of the greatest points of contention among the OSB task force that drafted ORS 60.952 was a discussion concerning "reasonable expectations." When asked by Senator Deckert what the largest areas of contention were on the task force, Professor Art replied:

> Primary issue was the, ah, standard called reasonable expectations, ah, currently Oregon case law focuses on fiduciary duty, of the majority owing to the minority shareholders, ah, and around the country, that's the typical approach to the problem, to determine whether the majority violated their fiduciary duty. Ah, an alternative, ah, approach is to determine whether the majority violated, ah, the reasonable expectations that the minority had * * * * The task force concluded, ah, that we should stick with our existing fiduciary duty analysis. There's plenty of Oregon case law, plenty of case law around the country, that supports that, ah, and that's, ah, that was the resolution.

See Public Hearing on SB 116, January 15, 2001, Senate Committee on Business, Labor and Economic Development, Tape 2A, 268-270.

Furthermore, in *Uptown Heights Assoc. Ltd. v. Seafirst Corp.*, 320 Or 638, 891 P2d 639 (1995), this Court recognized the distinction between causes of action for breach of the "contractual duty of good faith" and "tortious breach of the duty of good faith." *Id.* at 644-649.

The distinction is as follows: A claim for a breach of the contractual duty of good faith and fair dealing relies on "the reasonable contractual expectations of the parties." *Id.* at 645, *quoting Pac. First Bank v. New Morgan Park Corp.*, 319 Or 342, 353, 876 P2d 761 (1994). In contrast, the tortious breach of the duty of good faith relies on a "special relationship of trust and confidence" and a "*standard of care independent of the terms of the contract*."

Uptown Heights, 320 Or at 648-649.

Consequently, claims for a breach of *fiduciary* duty and tortious breach of the duty of good faith fall on the tort side of the spectrum, whereas a claim for the breach of the *contractual* duty of good faith and fair dealing falls on the contractual side of the spectrum. Mr. Giller's claim is for breach of the contractual duty of good faith and fair dealing, which rests upon "the reasonable expectations of the parties." *Tolbert v. First Nat'l Bank*, 312 Or 485, 494, 823 P2d 965 (1991). In contrast to the fiduciary duty noted above, this duty "is a contractual term that is implied by law into *every* contract." *McKenzie v. Pac. Health & Life Ins. Co.*, 118 Or App 377, 381, 847 P2d 879 (1993). There is no contractual duty to adhere to "*an honor the most sensitive*," as in a fiduciary relationship.

What the above analysis shows is that Mr. Giller made a contractual claim based upon his reasonable expectations, not based on a breach of a fiduciary duty, the conduct most associated with oppression. In so doing, Mr. Giller severely limited his available remedies. He did not seek an accounting, nor punitive damages, nor a receivership, nor to exclude Mr. Westervelt from the company, nor any other of the equitable remedies listed in ORS 60.952(2). He only sought compensatory damages based solely on his reasonable contractual expectations. While Mr. Giller could have used nuclear weapons, he kept his fight in the realm of conventional weapons.

The conclusion is clear – under Oregon law, when a party seeks redress for a breach of fiduciary duty, asking for damages (including perhaps punitive damages) along with the numerous equitable remedies listed in ORS 60.952(2), that party is alleging "oppression," as that term is understood in Oregon. When a party does not seek such remedies, and seeks only her reasonable expectations, thereby limiting herself to compensatory damages alone, that is not an allegation for "oppression."

Finally, the decision whether to assert a counterclaim or third-party claim is a decision reserved to a defendant who may elect to assert the claim or not. ORCP 22 A(1) states that a defendant may assert as many counterclaims "as such defendant may have against a plaintiff." However, there are no compulsory counterclaims in Oregon. *Buck v. Mueller*, 221 Or 271, 277, 351 P2d 61 (1960). Assertion of a claim or the choice not to assert the claim is left to the Defendant – Mr. Giller. *See id.* at 277 (holding that a defendant may assert counterclaims but may elect not to do so; a defendant has "an election."); *see also Jacobs v. Jacobs*, 92 Or 255, 258-59, 180 P 515 (1919) (holding that when a litigant raises allegations on one issue but not another, the litigant elects not to present the other issue).

Mr. Giller did not allege oppression as that term has long been understood in Oregon law. The simple fact that Mr. Westervelt's actions can be deemed to be oppressive (He seems most ready to label them as such.) does

not mean that Mr. Giller is alleging them to be so. The true gravamen of Mr. Giller's claims is that he sought very limited remedies and made very limited allegations. He could have chosen to allege oppression, but he intentionally chose not to. Thus, the buy-out option in ORS 60.952(6) was not triggered, even if Mr. Giller's Third-Party Complaint was a "proceeding" in-and-of-itself.

CONCLUSION

The Court of Appeals' decision in this case has vastly expanded ORS 60.952(6) into a tool for corporate squeeze-outs. It has essentially made Oregon into the first and only state that has a statutory route to functionally eliminate minority shareholder rights. The consequences for minority shareholders throughout Oregon cannot be overstated – the death knell for minority shareholder rights in this state has been sounded. The only right a minority shareholder has anymore is the right to be bought out. If the Court of Appeals decision stands, it will do nothing but *encourage* minority shareholder oppression. This is *not* what the legislature intended when it adopted ORS 60.952(6). The Court of Appeals has turned this statute on its head and given a very dangerous interpretation to this statute.

Fortunately, this Court can avoid the above by giving the words used in ORS 60.952 their common-sense plain meaning. A "proceeding" in this context means a lawsuit, which Mr. Giller did not file. The statute also requires allegations of oppression, but Mr. Giller only asserted his reasonable

contractual expectations. For the sake of all minority shareholders who hold stock in closely-held corporations in Oregon, Mr. Giller specifically asks this Court to reverse the decision of the Court of Appeals, rule that ORS 60.952(6) does not apply in this case, and remand this case to the circuit court with instructions to proceed in accordance with its original ruling and limited judgment from March 18, 2014.

RESPECTFULLY SUBMITTED this 13th day of January, 2017

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CERTIFICATE OF FILING and SERVICE

I certify that on January 13, 2017, I filed the foregoing **PETITIONER ON REVIEW'S CORRECTED BRIEF ON THE MERITS** with the Appellate Court Administrator by using the e-filing system.

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