Circuit Court for Howard County
Case No.: C-13-CV-21-000666
Argued: June 2, 2023

IN THE SUPREME COURT

OF MARYLAND*

No. 37

September Term, 2022

EASTLAND FOOD CORPORATION, et al.

v.

EDWARD MEKHAYA

Fader, C.J.,
Watts,
Hotten,
Booth,
Biran,
Gould,
Eaves,

JJ.

Concurring Opinion by Booth, J., which Fader, C.J., joins.

Filed: August 31, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

Respectfully, I concur with the Majority's analysis and conclusion that the Amended Complaint did not allege sufficient facts to support Count III, a claim for unjust enrichment. Pertaining to Counts I and II, I analyze these statutory claims differently than the Majority, and, therefore, do not join those portions of the opinion that discuss Counts I and II. I write separately to explain my analysis.

In this case, we must determine whether Edward has alleged sufficient facts necessary to overcome the Defendants' motion to dismiss. Specifically, we must determine whether Edward's Amended Complaint adequately sets forth a cause of action against the Defendants under the Maryland General Corporation Law (sometimes referred to as the "MGCL").[1] The Defendants are: Eastland Food Corporation ("Eastland"), a Maryland corporation formed under the MGCL; Oscar Mekhaya ("Oscar") and Vipa Mekhaya ("Vipa"), as officers and directors of Eastland; and Tisnai Thaitam, ("Tisnai") as a director of Eastland. Edward, Vipa, and Oscar are stockholders. Tisnai is not a stockholder.

We conduct a *de novo* review of matters of statutory interpretation, as well as whether a trial court's decision to grant a motion to dismiss was legally correct. *Wheeling v. Selene Finance, LP*, 473 Md. 356, 373–74 (2021). Under Maryland Rule 2-322(b)(2), the court may dismiss a complaint if it fails "to state a claim upon which relief can be granted." This Court has explained that "[a] motion to dismiss is properly granted if the factual allegations in a complaint, if proven, would not provide a legally sufficient basis

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[1] The Maryland General Corporation Law, or "MGCL", is comprised of Titles 1 through 3 of the of the Corporations and Associations Article of the Maryland Code (2014 Repl. Vol, 2022 Supp.) ("CA").

for the cause of action asserted in the complaint." *Wheeling*, 473 Md. at 374. We "assume the truth of all relevant and material facts that are well pleaded and all inferences which can reasonably be drawn from those pleadings." *Id.* (quotations omitted). "A motion to dismiss on this ground may only be granted where the allegations presented do not state a cause of action." *Id.* In *Wheeling*, we reiterated that, "[i]n determining whether a plaintiff has alleged claims upon which relief can be granted, there is a big difference between that which is necessary to prove the elements, and that which is necessary to merely allege them." *Id.* (citations omitted). "Indeed, our decision does not 'pass on the merits of the claim,' but instead, we merely 'determine[] whether the plaintiff's right to bring the action.'" *Id.* (quoting *Lloyd v. General Motors Corp.*, 397 Md. 108, 122 (2007)) (alteration in original).

The general rule governing sufficiency of pleadings is set forth in Maryland Rule 2-303(b), which states that:

> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

Under Maryland's liberal pleading standard, "a plaintiff need only state such facts in his or her complaint as are necessary to show an entitlement to relief." *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 698 (1997). As I will discuss in more detail, this case involves the application of the business judgment rule that has been codified by the General Assembly in Section 2-405.1 of the Corporations and Associations Article of the Maryland

Code ("CA") (2014 Repl. Vol, 2022 Supp.). When a complaint involves the application of the business judgment rule that applies to corporate acts undertaken by its directors, the plaintiff must plead sufficient facts to overcome the presumption of the rule in the complaint. *See, e.g., Oliveira v. Sugarman*, 451 Md. 208, 246 (2017) (stating that the petitioners' "claims were properly dismissed by the Circuit Court for failure to overcome the business judgment rule presumption"). The presumption does not end the inquiry, but merely places the burden upon the person attacking the directors' decision to prove a lack of good faith or absence of an informed basis for the challenged decision.

Starting with the four corners of the Amended Complaint, Edward alleges facts that are common to all counts, and sets forth three specific claims—two of which are statutory claims arising under the MGCL and one claim arising under common law.

I

A. The Amended Complaint – Facts Common to All Counts

In 1999, Edward's father, Pricha Mekhayarajjananonth ("Pricha"), asked Edward to work for Eastland. If Edward agreed to come work for Eastland, Pricha explained that Edward would become an owner of Eastland, and once he was an owner, he would be paid as such. Pricha explained to Edward that

> the compensation structure for the owners of [] Eastland includes the sharing of the profits of [] Eastland with each owner receiving a percentage of profits paid as a bonus after the end of each fiscal year instead of declared dividends. While employees may also receive discretionary bonuses, the sharing of profits paid as a bonus instead of declared dividends was limited to the owners of [] Eastland.

Edward alleges that when he accepted employment with Eastland in 1999, the expectation of continuous employment, participation in Eastland's management, and receipt of Eastland's profits as an eventual owner were central to his decision to join Eastland. Edward contends that these expectations were reasonable under the circumstances because, among other reasons: (1) Eastland existed as a family-run business with only members of Edward's family involved in its management and operation; (2) Edward's parents, Pricha and Vipa, were Eastland's only owners; and (3) Pricha and Vipa knew Edward would be foregoing the opportunity to continue his promising engineering career to join Eastland.

Edward describes the many contributions that he made to Eastland as an employee. From April 1996 until December 2008, Pricha and Vipa were Eastland's sole stockholders, each owning a 50% interest in the company. On December 31, 2008, Pricha and Vipa caused Eastland to issue shares of stock to Edward and his brother, Oscar. As a result of the stock transactions, as of December 31, 2008, Edward and his brother, Oscar, each owned 15% of Eastland's outstanding stock, and Vipa and Pricha each owned 35%. In November 2015, Pricha ceased being a stockholder and agreed that Eastland would redistribute his stock interest in Eastland. As a result of the 2015 stock transactions, Eastland's outstanding stock is owned as follows: Edward and Oscar each own 28%; Vipa owns 35%; and a trust established for Oscar's three children owns 9%.

In the Amended Complaint, Edward sets forth his annual compensation from Eastland between 2006 and 2018, which reflects a considerable salary increase in 2008

when he received his initial stock in Eastland and another considerable increase in 2015 when he received additional stock in the corporation. He includes the following table:

Edward's Annual Compensation from Eastland (2006–2018)

Year	Annual Compensation
2006	$310,132
2007	$291,880
2008*	$457,376
2009	$491,655
2010	$454,835
2011	$468,537
2012	$492,382
2013	$460,855
2014	$484,648
2015**	$603,117
2016	$609,594
2017	$592,098
2018***	$392,813

* Edward became a stockholder.
** Edward's stock ownership increased.
*** Edward's employment with Eastland was terminated in October, 2018.

Edward alleged that, consistent with Pricha's 1999 explanation of the stockholders' compensation structure, which was practiced by Eastland when Edward received his 2008 stock ownership, and his additional 13% stock ownership in 2015, his total compensation set forth in the chart above includes the following profits of Eastland that were paid to Edward in the form of a bonus instead of as a declared dividend:

Bonuses Paid to Edward from Eastland

Date Received	**Profit Paid as a Bonus Instead of as a Declared Dividend**
3/25/2010	$28,783
3/24/2011	$137,500
3/29/2012	$153,149
4/11/2013	$131,537
3/27/2014	$129,991
3/26/2015	$192,734
3/31/2016	$191,055
4/21/2017	$195,933
4/06/2018	$49,678

Edward alleges that he expected that his: (1) employment with Eastland; (2) participation in the management of Eastland; and (3) receipt of Eastland's profits would continue for the duration of the corporation's existence.

Until August 2017, Pricha led and managed Eastland as its President and as a director. Pricha also determined the amount of Eastland's profit that each stockholder would receive as a bonus instead of a declared dividend. In August 2017, Eastland's "stockholders and directors" removed Pricha as a director and officer "for various reasons documented in the corporate minutes[.]" Among other things, Pricha had moved to Thailand and was not likely to return to the United States. In September 2017, Oscar was elected as Eastland's President, over Edward's objection.[2] In August 2018, Edward signed a directors' consent approving a credit line increase for Eastland "under express written

[2] Edward alleges that he objected to his brother being President because, among other things, Oscar: (1) lacked management experience; and (2) was not good with employees, and would become upset and emotional when employees would tell him what he did not want to hear, resulting in a high employee turnover rate.

protest." Edward argued that the corporation's "management" was growing inventory "at an alarming rate."

On or about October 2, 2018—prior to an October 12, 2018, stockholder meeting—Raymond Sherbill, an attorney who represented Eastland, sent an email to Edward's attorney at that time, bearing the subject "Annual Meeting" and attaching a "Notice of Annual Shareholder and Regular Director Meeting." In the body of the email, Mr. Sherbill wrote, in part:

> Per our call just now, attached is a draft notice of meeting of the board and stockholders for next week. . . . The anticipated draft agenda is: financial report, sales, Sapphire/IT developments, competitive environment, purchasing controls, and *hopefully introduction of a dividend study (advantages to moving to shareholders getting dividends with respect to their ownership in lieu of salaries being paid as if they were dividends.)* I anticipate that RSM McGladrey, EFC's auditors and accountants, will be there . . .

Edward asserts that, as of the October 2, 2018, email, Edward, Oscar, and Vipa, as stockholders and directors of Eastland, together with Eastland's attorneys and accountants, had direct knowledge of Eastland's long-standing practice of paying its profits in the form of bonuses to its stockholders instead of as a declared dividend.

On October 10, 2018, Edward sent an email to Uma Tuchinda, Eastland's Human Resources Manager, requesting the past 3 years of payroll data for all employees, including Oscar and Vipa, along with any "bonuses, special pay and monies transferred to employees" including Oscar and Vipa. On the same day, Ms. Tuchinda replied, stating that she had checked with Oscar and that Oscar would not allow Ms. Tuchinda to provide the requested payroll information to Edward.

Edward attended the Eastland stockholders' meeting on October 12, 2018, accompanied by his attorney. The meeting included a discussion concerning changes to the bylaws, the status of operations, election of directors, and the dividend study. By the close of the meeting, Edward was not re-elected to the board of directors, "without cause or reason." On October 15, 2018, "Eastland and the other stockholders" terminated Edward's employment with Eastland, "without cause and without reason."

After Edward's employment was terminated and he was removed from the board of directors, Eastland did not consider the dividend study, and Eastland has failed to pay Edward a portion of the company's profits as a bonus instead of as a declared dividend despite Edward's continued status as a stockholder.

As of October 2018, Eastland had three directors: Oscar, Vipa, and Tisnai. The Amended Complaint does not state when Tisnai became a director. However, as a director of Eastland, he is individually named as a defendant in this case.

B. Specific Counts in the Amended Complaint

Count I – Oppression of Minority Shareholder

Count I is a statutory claim filed under CA § 3-413(a) against the "Defendants[,]" which seeks monetary damages and equitable relief (as specifically set forth in the prayers for relief pertaining to Count I, which I describe below), alleging that the "acts of Defendant Eastland's directors and other stockholders are illegal, fraudulent[,] and oppressive conduct as proscribed by" CA § 3-413. Edward asserts that the "illegal, fraudulent[,] and oppressive conduct substantially defeats" his "reasonable expectations as a minority stockholder," and constitute acts to "squeeze [him] out."

To support this statutory claim, Edward asserts the following:

- That his expectations of continued employment, participation in management, and the payout of Eastland's profits "were central to" his decision to join Eastland, and were reasonable under the circumstances.

- That he had a reasonable expectation that, after becoming a stockholder, he would not be summarily removed from Eastland's employment and management.

- Edward had, and continues to have, a reasonable expectation that, after becoming a stockholder, he would receive a share of Eastland's profits, regardless of his employment or management status with Eastland.

- The Defendants pay Oscar and Vipa excessively high salaries and other compensation, and allow them to use Eastland's funds for their personal use and gain as a scheme to divert Eastland's profits from Edward to Oscar and Vipa.

- Since terminating Edward's employment with Eastland and his removal from the board of directors, the Defendants have not and will not: (1) declare and pay a dividend to Edward; or (2) pay a portion of Eastland's profits to Edward as a "bonus instead of as a declared dividend contrary to the compensation structure" for Eastland's owners as explained to Edward by Pricha before Edward originally became a stockholder and "as practiced by" Eastland when Edward received an additional stock interest in Eastland in November 2015.

In summary, Count I alleges that the individually named Defendants engaged in conduct in violation of CA § 3-413(b)(2), asserting that these Defendants have frustrated Edward's reasonable expectations as a stockholder by engaging in oppressive conduct consisting of: (1) terminating his employment; (2) removing him from the board of directors; (3) diverting Eastland's profits from Edward to Oscar and Vipa; (4) refusing to declare and pay Edward dividends; and (5) refusing to pay Eastland's profits to Edward as a bonus instead of a declared dividend, thereby causing him damages.

In addition to seeking compensatory money damages, Edward is seeking a panoply of equitable remedies that this Court has determined may be available to a minority stockholder who establishes a violation of CA § 3-413(b)(2), as an alternative to involuntary dissolution—which is the only remedy set forth by the General Assembly for a violation of that section. *See Bontempo v. Lare*, 444 Md. 344 (2015); *see also Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005). Specifically, Edward seeks an order providing one or more of the following remedies: (1) the appointment of a receiver, not for purposes of dissolution, but to continue the operation of Eastland for the benefit of all stockholders until the "oppressive" conduct ceases, with the court assuming continuing jurisdiction; (2) the issuance of an injunction to prohibit continuing acts of "oppressive" conduct, including, without limitations, Eastland from paying excessive salaries and other compensation to Oscar and Vipa as a scheme to divert Eastland's profits from Edward; (3) an injunction directing Defendants to declare and pay dividends for the calendar years 2018, 2019, and 2020; (4) the issuance of an injunction directing Defendants to pay Eastland's profits to Edward in the same form as those profits that are distributed to other stockholders; (5) an accounting to Edward of all income, expenses, profits, liabilities, assets, and transactions of Eastland; and (6) other equitable relief as a result of the illegal, fraudulent, and oppressive conduct proscribed by CA § 3-413.

Count II – Breach of Fiduciary Duty

Count II alleges "breach of fiduciary duties" against Oscar, Vipa, and Tisnai as the directors of Eastland. Although this Count has been characterized by the parties, the lower court, and the Majority as a "breach of fiduciary duty" count, for reasons I explain below,

and to avoid inserting confusing concepts of "fiduciary" duties into this discussion, I will refer to Count II as Edward's statutory claim against the directors—Oscar, Vipa, and Tisnai—for a violation of the directors' statutory standard of conduct arising under CA § 2-405.1(c). Although it is titled a "breach of fiduciary duty" claim, in substance, Edward is alleging that Eastland's directors violated their statutory standard of conduct that a director owes to a corporation and its stockholders. That standard, commonly referred to as the "business judgment rule," requires that a director act: (i) in good faith, (ii) in a manner each reasonably believes to be in the best interests of the corporation, and (iii) with the care that an ordinarily prudent person in a like position would use under similar circumstances. CA § 2-405.1(c). In Count II, Edward alleges that Oscar, Vipa, and Tisnai violated this standard, and further asserts that the standard requires that the directors act in a manner that benefits "all stockholders equally and not in furtherance of their personal interest or benefit." Edward also alleges that Oscar and Vipa, "as the majority stockholders" of Eastland, both owe "fiduciary duties" to Edward as a minority stockholder, not to exercise their control over Eastland to Edward's disadvantage. Edward generally alleges that the "Defendants have breached their fiduciary duties" to him.

Edward alleges breaches by Oscar, Vipa, and Tisnai *as directors of Eastland*, and against Oscar and Vipa *as majority stockholders*. Pertaining to the directors, Edward alleges that that the directors: (1) authorized Eastland to pay excessively high salaries and other compensation to Oscar and Vipa to divert profits of Eastland from Edward; (2) authorized profits of Eastland to be paid to Oscar and Vipa without payment of profits to Edward; and (3) otherwise breached their fiduciary duties as Eastland's directors. Edward

alleges the same breaches by Oscar and Vipa "as majority [stockholders]" for the same conduct that he alleges they undertook in their capacities as directors. Edward alleges that the actions taken by Oscar, Vipa, and Tisnai were not undertaken in good faith, nor in a manner reasonably believed to be in the best interests of Eastland, nor with the care that an ordinarily prudent person in a like position would use under similar circumstances. As for Count II, Edward seeks compensatory damages in an amount exceeding $75,000, to be determined at trial.

Count III—Unjust Enrichment

Count III alleges unjust enrichment against Oscar and Vipa. To support this count, Edward asserts that Oscar and Vipa were "unjustly enriched at the expense of" Edward and to Edward's detriment. Edward asserts that the unjust enrichment arose from the receipt of profits, by way of excessive salaries, that Oscar and Vipa accepted and retained these benefits, and that it is inequitable for them to retain the benefit without paying the value. Edward seeks compensatory damages in an amount exceeding $75,000, to be determined at trial.

To understand how I parse out the specific allegations in the complaint that overcome the motion to dismiss, it is useful to set forth the statutory framework that applies here.

II

A. Applicable Statutory Framework Under the Maryland General Corporation Law

Under Maryland law, a corporation, large or small, is a creature of statute. A corporation's articles of incorporation or charter, issued by the State, is both a "contract between stockholders" and "between the corporation and the State." *Warren v. Fitzgerald*, 189 Md. 476, 485 (1948). The charter "is the foundational document of the company." *Impac Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 503 (2021) (citing CA §§ 2-102, 2-104). The charter specifies the types and quantity of stock the corporation may issue and defines the rights and priorities of the stockholders of the various types of stock. *Id.* at 503–04 (citing CA §§ 2-104, 2-105). It must include "a description of each class [of stock] including any preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications, and terms and conditions of redemption." *Id.* at 504 (citing CA § 2-104).

Under the MGCL, a corporation is managed by its directors.[3] Section 2-401(a) provides that "[a]ll business and affairs of a corporation, whether or not in the ordinary

[3] Under Title 4 of the Corporations and Associations Article of the Maryland Code, a corporation can elect to become a "close corporation" as defined by the provisions in that Title. To make such an election, the corporate charter must state that it is a close corporation. CA § 4-201. A "[c]lear reference to the fact that the corporation is a close corporation shall appear prominently: (1) At the head of the charter document in which the election to be a close corporation is made; (2) In each subsequent charter document of the corporation; and (3) On each certificate representing outstanding stock of the corporation." CA § 4-202. A close corporation is initially required to have "at least one director until an election by the corporation in its charter to have no board of directors becomes effective." CA § 4-301. Stockholders of a close corporation may elect to have no directors. If that occurs, the "stockholders may exercise all powers of directors, and the business and affairs

course, shall be managed by or under the direction of a board of directors." Section 2-401(b) states that "[a]ll powers of the corporation may be exercised by or under authority of the board of directors except as conferred on or reserved to the stockholders by law or by the charter or bylaws of the corporation." In the exercise of their duties, the MGCL establishes a statutory standard of conduct, which is set forth in CA § 2-405.1. Given some legislative amendments to the standard of conduct—which this Court has yet to consider, and which affect how I would analyze Counts I and II—I find it instructive to explain some statutory and legislative history that led to its current iteration.

1. The Directors' Statutory Standard of Conduct, or "the Business Judgment Rule"

In 1976, the General Assembly enacted a statutory provision establishing a director's standard of conduct for corporate acts. CA § 2-405.1. 1976 Md. Laws Ch. 567. The standard of conduct, which remains the same today, states that:

> A director of a corporation shall act:
>
> (1) In good faith;
>
> (2) In a manner the director reasonably believes to be in the best interests of the corporation; and
>
> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.

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of the corporation shall be managed under their direction[.]" CA § 4-303(1). "Under a unanimous stockholders' agreement, the stockholders of a close corporation may regulate any aspect of the affairs of the corporation or the relations of the stockholders, including: . . . (7) The payment of dividends or the division of profits." CA § 4-401. Notably, Eastland is not a close corporation, but a corporation organized under the MGCL.

CA § 2-405.1(c). Importantly, "[*a*] *director who acts in accordance with the standard of conduct* provided in this section *shall have the immunity from liability* described under § 5-417 of the Courts and Judicial Proceedings Article," CA § 2-405.1(e) (emphasis added), and this section creates a statutory presumption that "[a]n act of a director of a corporation is presumed to satisfy the standards set forth in subjection (c)[.]" CA § 2-405.1(g). This standard of conduct, commonly referred to as the "business judgment rule," mirrored the director standard of conduct that was adopted by the American Bar Association's Model Business Corporation Act 8.30(a) in effect at that time. James J. Hanks, Jr., *Maryland Corporation Law* (2d Ed. 2020, 2022 Supp.) ("Hanks") § 6.06B, 6-24. In codifying the standard for director conduct, the General Assembly replaced the common law duties that had historically governed Maryland corporations.[4]

In 1999, the General Assembly adopted a statutory amendment adding new subsections with the intent of protecting Maryland corporations from unwanted takeovers. Bernard S. Sharfman, *Understanding Maryland's Business Judgment Rule*, 8 Duquesne Bus. L.J. 1, 26–27 (2006); Senate Jud. Proc. Comm. Floor Report for Senate Bill 169, at 1 (1999) ("Senate Bill 169 makes a number of changes to strengthen Maryland's laws relating to unsolicited takeovers of corporations and real estate investment trusts."). Relevant here is the amendment limiting enforcement of the statutorily prescribed

[4] Notably, Hanks observes, § 2-405.1—and former § 8.30 of the Model Business Corporations Act upon which it is based—omitted any reference to "fiduciary" duties "because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation." Hanks, § 6.06B, 6-26; *see also* Model Bus. Corp. Act, Section 8.30 (1996).

standards to the corporation or to stockholders suing on behalf of the corporation via a derivative suit. 1999 Md. Laws Ch. 300 (S.B. 169). Specifically, the 1999 amendments added subsection (g) to Section 2-405.1, which barred direct claims against directors for violating the standard of conduct, stating:

> Nothing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation.

CA § 2-405.1(g) (1999). As I explain below, this subsection, which barred stockholders from filing direct claims against directors for violating their standard of conduct, was in effect until the General Assembly revised the statute and deleted subsection (g) in 2016.

a. *Shenker v. Laureate Education, Inc.*

In *Shenker v. Laureate Education, Inc.*, 411 Md. 317 (2009), this Court was asked to consider whether stockholders of a corporation that was purchased in a cash-out merger could bring a breach of fiduciary duty action against directors and investors. This case arose while the above-described legislative amendments were in effect, barring direct actions against directors. *Id.* at 326, 332; CA § 2-405.1(g) (1999). In other words, because claims against directors for violating the directors' standard of conduct were limited to derivative claims, the cashed-out stockholders no longer had a right of action under the statute as they were no longer stockholders with rights to bring derivative suits on behalf of the corporation. Accordingly, the circuit court granted the defendants' motion to dismiss the action, and the Appellate Court of Maryland affirmed. *Shenker*, 411 Md. at 332–33.

This Court granted *certiorari* to determine, in relevant part, whether Section § 2-405.1 barred direct claims against directors for breach of fiduciary duty. *Id.* at

333. This Court held that "in the context of a cash-out merger transaction, where the decision to sell the corporation already has been made, corporate directors *owe their shareholders common law duties* of candor and good faith efforts to maximize shareholder value, and that allegations of breach of those duties may be pursued through a direct suit by shareholders." *Id.* at 335–36 (emphasis added). Although the holding in *Shenker* was intended to apply narrowly by limiting it to "the context of a cash-out merger transaction, where the decision to sell the corporation already has been made[,]" questions arose in the legal community "as to what *other* common law fiduciary duties might exist[.]" Bill Carson & Scott Wilson, *The Director Duties Bill: Amendments to Section 2-405.1 of the Maryland General Corporation Law*, 49-OCT Md. B.J. 40, 41 (2016).[5] Members of Maryland's business law community expressed concern that "*Shenker* and its progeny introduced deep uncertainty into the business world in which Maryland corporations and their boards of directors reside." *Id.* at 41.

b. Post-*Shenker* Legislative Amendments Clarifying that Section 2-405.1 is the Sole Source of Duties Owed by a Director to a Corporation or its Stockholders

In 2015, the General Assembly introduced a bill to clarify the liability and duties of directors post-*Shenker*. 2015 S.B. 459. Bill sponsor Senator Brian Feldman, accompanied by members of the Maryland Bar Association Business Law Section, testified before the

[5] As an example of this confusion, Messrs. Carson and Wilson point to *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46 (2015), in which the Appellate Court, "in the absence of any standard [] purported to adopt Delaware corporate law." Bill Carson & Scott Wilson, *The Director Duties Bill: Amendments to Section 2-405.1 of the Maryland General Corporation Law*, 49-OCT Md. B.J. 40, 41 (2016).

Senate Judicial Proceedings Committee to explain the bill. Jud. Proc. Comm. Hearing (Mar. 18, 2015). Senator Feldman explained that the *Shenker* decision prompted the need to clarify that CA § 2-405.1 is intended to be the *sole source* of the directors' duties. Jud. Proc. Comm. Hearing (Mar. 18, 2015). The bill, which was introduced late in the legislative session, ultimately passed unanimously in the House but was not voted on in the Senate.

In the 2016 legislative session, an identical bill was introduced. 2016 S.B. 148. At the committee hearing, bill sponsor Senator Feldman and representatives from the Maryland Bar Association Business Law Section reiterated the history behind the bill and the need for the General Assembly to clarify the scope of the statutory standard in CA § 2-405.1 and to disavow the "problematic dicta" in *Shenker*. Jud. Proc. Comm. Hearing (Jan. 27, 2016). The bill passed unanimously and was approved by the Governor on April 26, 2016. It went into effect on October 1, 2016.

I highlight two significant changes that were made to Section 2-405.1 during the 2016 Legislative Session. First, the General Assembly added subsection (i), which states that Section 2-405.1:

> 1. *Is the sole source of duties of a director to the corporation or the stockholders of the corporation*, whether or not a decision has been made to enter into an acquisition or potential acquisition of control of the corporation or enter into any other transaction involving the corporation; and
>
> 2. *Applies to any act of a director,* including an act as a member of a committee of the board of directors.

(Emphasis added). The plain and unambiguous language added to Section 2-405.1(i) makes it clear that the statutory standard of conduct is the "sole source" of director duties.

To put it differently, there are no fiduciary duties owed by a director of a Maryland corporation to the corporation or its stockholders other than the duties arising under the standard of conduct set forth in Section 2-405.1. Second, the General Assembly deleted former subsection (g)—the subsection added in 1999 to eliminate direct claims by stockholders against directors.

My plain language interpretation is a view shared by others. *See* Carson & Wilson, *supra* at 42 (stating "[w]e believe that elimination of former subsection (g) makes clear that it is the legislative intent that the standard of conduct run directly to the stockholders of a Maryland corporation under limited circumstances and that the stockholders have a direct remedy for any breach of the standard of conduct in such circumstances[]"); Hanks, § 6.06B, 6-46 (stating that the result of the 2016 legislative amendment deleting Section 2-405.1(g) "is that a stockholder's right to sue a director directly or derivatively for failure to comply with the statutory standard of conduct will be determined under applicable case law, which distinguishes between injury to the corporation (derivative claim available) and injury to the stockholder (derivative claim not available) as was the case prior to the addition of Section 2-405.1(g) in 1999").

The plain text and statutory history of the 2016 amendments to Section 2-405.1 clearly reflect that the business judgment rule applies to direct stockholder claims. Because this Court has not had an opportunity to consider these legislative changes to Section 2-405.1,[6] this case is an opportunity for this Court to confirm the proper

[6] In *Oliveira v. Sugarman*, 451 Md. 208, 220 (2017)—filed three months after the amendments went into effect—this Court reviewed the question of whether the

interpretation of the current version of this statute. In Part III, I explain how I apply these legislative amendments to Edward's claims in this case.

Having addressed my view of the proper scope and application of the directors' standard of conduct, I turn next to some of the statutory rights and duties conferred upon directors, which—as the statute prescribes—must be viewed through the lens of the application of the business judgment rule.

2. Directors' Authority to Declare Distributions

Notably, the directors have the right, not the duty, to declare a distribution, CA §§ 2-301(a), 2-309(b), including a "declaration or payment of a dividend[] . . . [,]" CA § 2-301(b)(1).[7] Under the MGCL, and subject to the terms of the corporate charter,

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petitioner/stockholders' claims were direct stockholder claims "not subject to the business judgment rule." In that case, this Court did not reach the question of whether the business judgment rule applied to direct actions because the Court concluded that the claims were improperly brought as direct actions rather than derivative actions. *Id.* at 246. However, this Court appeared to assume that the business judgment rule did not apply to direct claims. *See id.* at 222-23 ("To seek judicial review of a board's business decision under the business judgment rule, shareholders must file a derivative suit on behalf of the corporation.").

In my view, in its opinion below, the Appellate Court made a similar misstatement concerning the application of the directors' standard of conduct when the court stated that the business judgment rule does not apply in direct actions. *Mekhaya v. Eastland Food Corp.*, 256 Md. App. 497, 529 (2022) (quoting *Shenker*, 411 Md. at 345, for the proposition that, where a stockholder can establish a right to bring a direct action by demonstrating the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation, "the business judgment rule does not apply[]"); *also citing* to *Oliveira*, 451 Md. at 230–31.

[7] The MGCL does not define the word "dividend." It does, however, define "distribution." CA § 2-301 states:

(a)(1) In this subtitle, "distribution" means:

directors may authorize a distribution if, after the distribution, the corporation would not be insolvent, either by being unable to pay debts as they come due in the usual course of business, or by its assets being less than the sum of its liabilities plus senior liquidation preferences. CA §§ 2-309, 2-311. A Maryland corporation may make a distribution from its net earnings in the current or preceding fiscal year, or from the sum of net earnings from the preceding eight fiscal quarters. *Id.* at § 2-311(a)(2). Regardless of the basis for the distribution, the decision is entrusted solely to the *directors of the corporation*. The Maryland corporation statute specifically states that "[i]f authorized by its board of directors, a corporation may make distributions to its stockholders, subject to any restriction in its charter and the limitations in § 2-311 of this subtitle." CA § 2-309(b). Similarly, a corporation may distribute its capital surplus only "[b]y resolution of its board of directors[.]" *Id.* at § 2-304(a). Ultimate authority, at all times, rests with the directors, although the board may delegate to an executive committee and other committees its powers related to distributions, *id.* at § 2-411(a), and may delegate to a corporate officer

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(i) A direct or indirect transfer of money or other property of the corporation in respect of any of its shares; or

(ii) An incurrence or forgiveness of indebtedness by a corporation to or for the benefit of the corporation's stockholders in respect of any of its shares.

(2) "Distribution" does not include a stock dividend or stock split authorized in accordance with § 2-309(c) of this subtitle.

(b) A distribution may be in the form of:

(1) A declaration or payment of a dividend;

(2) A purchase, redemption, whether or not at the option of the corporation or the stockholders, or other acquisition of shares; or

(3) An issuance of evidence of indebtedness.

the power to fix the amount and other terms of the distribution, *id.* § 2-309(d). The MGCL, which confers statutory authority on the *directors* to make distributions[8] in the absence of an agreement to the contrary, is consistent with general corporate principles. *See* 11 Fletcher Cyclopedia of the Law of Corporations. § 5349 (September 2022 update) ("Unless otherwise provided by agreement, the authority to declare dividends . . . is solely vested in the board of directors . . . ." (footnote omitted)).

Not only is the board of directors *authorized* to make distributions under CA § 2-309, but directors have a concomitant *personal liability* where a director votes for, or assents to, a distribution that violates CA § 2-311. Such actions are not shielded by the business judgment rule. *See* CA § 2-312(a) (stating that "[i]f it is established that the director's duties were not performed in compliance with § 2-405.1 of this title, a director who votes for or assents to a distribution made in violation of the charter or § 2-311 of this subtitle is personally liable to the corporation for the amount of the distribution that exceeds what could have been made without violating the charter or §2-311[.]").

3. Stockholders' Authority

The stockholders "of a corporation are its owners, but not its managers." *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672 (2007) (citing *Werbowsky v. Collomb*, 362 Md. 581, 599 (2001) ("Except to the extent that a transaction or decision must, by law or by virtue of the corporate charter, be approved by the [stockholders], the directors, either

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[8] By contrast, as discussed *supra*, n.3, where a corporation has elected to become a close corporation, the stockholders may regulate any aspect of the affairs of the corporation, including "[t]he payment of dividends or the division of profits." CA § 4-401(a)(7).

directly or through the officers they appoint, exercise the powers of the corporation."); *also citing* CA § 2-401). As far as management responsibilities, unless modified by agreement, the MGCL limits the stockholders' management role in the corporation to the election of the directors. CA § 2-404(b). With certain exceptions, "[t]he stockholders of a corporation may remove any director, with or without cause, by the affirmative vote of a majority of all of the votes entitled to be cast generally for the election of directors[.]" *Id.* at § 2-406(a). One such limitation on the stockholders' ability to remove a director for cause is if the charter provides otherwise. *Id.* at § 2-406(a)(2). The officers of the corporation, in turn, are elected by the directors. CA § 2-413.

4. A Summary of Some Key Provisions of the MGCL Related to Corporate Management

I summarize some of the key provisions of the MGCL pertaining to corporate management that govern my review of the four corners of the Amended Complaint. First, the MGCL applies to corporations formed under its provisions, whether small or large. Under the MGCL, the "business and affairs of the corporation . . . *shall* be managed under the direction of a board of directors." CA § 2-401(a) (emphasis added). Additionally, "[a]ll powers of the corporation may be exercised by or under authority of the board of directors except as conferred on or reserved to the stockholders by law or by charter or bylaws of the corporation." *Id.* at § 2-401(b). Such management decisions include: (1) the decision to authorize distributions, *see* CA § 2-309(b); (2) the right to appoint and remove officers, *see* CA § 2-413, (3) the right to appoint an executive committee composed of one

or more directors, and to delegate to those committees any powers of the board, subject to statutory limitations, *see* CA § 2-411(a).

Maryland's business judgment rule has been codified in CA § 2-405.1(c), which provides that a director shall act: (1) in good faith; (2) in a manner the director reasonably believes to be in the best interests of the corporation; and (3) with the care that an ordinarily prudent person in a like position would use under similar circumstances. Section 2-405.1(g) states that "[a]n act of a director of a corporation is presumed to be in accordance with subsection (c)." Once a challenger "presents evidence adequate to rebut the presumption, the burden of production shifts back to the corporation or the directors, as the case may be, to present evidence that the directors acted in accordance with Section 2-405.1." Hanks, § 6.09, 6-75.

5. Stockholder's Remedies Under CA § 3-413

Another provision of the MGCL permits a minority stockholder to seek equitable relief in the form of involuntary dissolution where a stockholder can establish that "[t]he acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent." Specifically, and subject to an exception not relevant here, CA § 3-413(b) provides as follows:

> [A]ny stockholder entitled to vote in the election of directors of a corporation may petition a court of equity to dissolve the corporation on grounds that:
>
> (1) The stockholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successor to directors whose terms would have expired on the election and qualification of their successors; or

(2) The acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent.

As I will discuss more fully below, in *Bontempo v. Lare*, 444 Md. 344 (2015), this Court adopted the holding of *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005), that, when a minority stockholder has established that "directors or those in control" have engaged in oppressive conduct, a court may grant equitable relief short of dissolution. Given that Edward, in his Amended Complaint, seeks equitable relief as described in those cases, it is instructive to discuss them in some detail.

a. *<u>Edenbaum v. Schwarcz-Osztreicherne</u>*

Edenbaum involved a closely-held corporation that operated an adult care facility. 165 Md. App. at 233. The corporation was owned by two stockholders—the majority stockholder owning a 51% interest and the minority stockholder owning a 49% interest. *Id.* at 239. The parties entered into a written stockholders' agreement, which stated that "the corporate charter and by-laws shall be amended, and are hereby deemed to be amended, to reflect the provisions of the Shareholder's Agreement." *Id.* The majority stockholder, an experienced manager of assisted living facilities, was the person in charge of admissions, hiring, billing, and administration of the facility. *Id.* at 239–40. The minority stockholder was a geriatric nurse who provided patient care and house maintenance at the facility. *Id.* at 238, 240. The parties did not execute a separate employment agreement, but the stockholders' agreement contained specific details about their respective job titles, responsibilities, and salaries. *Id.* at 238–40. Specifically, under the agreement, the majority stockholder had the authority to make all business decisions

for the corporation. *Id.* at 239–40. After he became dissatisfied with the minority stockholder's operation of the facility, he terminated her employment. *Id.* at 241. The minority stockholder then sued the majority stockholder and the corporation for breach of contract, and also sought dissolution of the corporation under CA § 3-413, on the basis of "illegal, oppressive and/or fraudulent" conduct by the majority stockholder. *Id.*

The corporation and majority stockholder contended that, insofar as the stockholders' agreement spelled out the job descriptions, salaries, and work duties of the stockholders as employees of the facility, it functioned as an employment agreement—an argument that the Appellate Court accepted while also noting that the agreement was "more modest in scope" as to their rights as stockholders. *Id.* at 248. The trial court found that the minority stockholder was properly discharged under that agreement. *Id.* at 250. Because the minority stockholder had not appealed that ruling, the Appellate Court had no occasion to discuss whether she was an at-will employee. *Id.* at 250–51. But the Appellate Court reversed the circuit court's decision that the minority stockholder was entitled to employment-related relief—*i.e.,* salary—as opposed to profits owing to the owners of the corporation. *Id.* at 250–51.

In her cross-appeal, the minority stockholder contended that the circuit court abused its discretion in dismissing her request for involuntary dissolution of the corporation. *Id.* at 254. She argued that the court should have granted that request on the ground that the majority stockholder "engaged in oppressive conduct because his conduct substantially defeated her reasonable expectations as" a stockholder. *Id.* (internal quotations omitted).

The Appellate Court reviewed the provisions of CA § 3-413(b)(2), which permits a court to dissolve a corporation on the ground that the "acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent." *Id.* at 254–55. Observing that "oppressive" conduct is not defined by the statute, the court "surmise[d] that it does not necessarily involve 'fraudulent' or 'illegal' conduct." *Id.* at 255. The Appellate Court looked to other states, as well as commentators, for an apt definition of "oppressive conduct" in this context. *Id.* at 255–56. The court noted that Hanks defined the term as "conduct that substantially defeats the reasonable expectations of a stockholder." *Id.* at 256 (citing Hanks § 11.7(b)). "Or, in the more precise terminology of one of our sister states, 'conduct that substantially defeats the 'reasonable expectations' held by minority [stockholders] in committing their capital to the particular enterprise.'" *Id.* at 256 (citing *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1179 (1984)).

The court observed that the "so-called 'reasonable expectations' view has been adopted, either as the sole test of oppressive conduct or as one such test, by a number of other state courts." *Id.* (citations omitted). The Appellate Court noted that "the typical characteristics of a closely held corporation are: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Id.* at 257 (citations omitted).

The Appellate Court stated that

> the very nature of a closely held corporation makes it possible for a majority [stockholder] to 'freeze out' a minority [stockholder], that is, deprive a minority [stockholder] of her interest in the business or a fair return on her

> investment. The limited market for stock in a closely held corporation and the natural reluctance of potential investors to purchase a noncontrolling interest in a closely held corporation that has been marked by dissension can result in a minority [stockholder's] interest being held 'hostage' by the controlling interest, and can lead to situations where the majority 'freeze out' minority [stockholders] by the use of oppressive tactics.

Id. at 257–58 (citations omitted) (cleaned up). The Appellate Court explained that, because of the "predicament" in which a minority stockholder is left when a "freeze out occurs," courts in other jurisdictions have looked at the majority stockholder's "alleged 'oppressive' conduct, in terms of the 'reasonable expectations' held by minority [stockholders] in committing their capital to the particular enterprise." *Id.* at 258. (citing *Kemp & Beatley*, 473 N.E.2d at 1179–80). The Appellate Court summarized the "reasonable expectations" view of oppressive conduct from other states that have adopted the doctrine as recognizing

> that a minority [stockholder] who reasonably expects that ownership in the corporation would entitle him to a job, a share of the corporate earnings, and a place in corporate management would be oppressed in a very real sense when the majority seeks to defeat those expectations and there exists no effective means of salvaging the investment. But, we caution, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. It should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. That is to say, disappointment alone should not necessarily be equated with oppression.

Id. at 258 (cleaned up).

Although the Appellate Court held that the minority stockholder was not entitled to employment-related relief as a stockholder, the court held that she had been oppressed by the majority stockholder when her termination "defeated her reasonable expectations that she would be employed by the corporation, receive a salary, and take part in its

management." *Id.* at 259. The court remanded the case to the circuit court to consider other possible equitable remedies. *Id.* at 261. Thus, the court looked to her expectation of employment with the company (together with her expected role in management) as a gauge for measuring oppression, even though it held that she was not entitled to employment-related relief in the form of post-termination salary.

The Appellate Court noted that, although CA § 3-413 only mentions "dissolution as a remedy for oppressive conduct," the court stated that it was joining other courts "which have interpreted their similar statutory counterparts to allow alternative equitable remedies not specifically stated in the statute." *Id.* at 260 (quotations omitted). The Appellate Court listed a non-exhaustive set of alternatives to dissolution that might be appropriate in a particular case:

> (a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;
>
> (b) The appointment of a receiver, not for the purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until differences are resolved or "oppressive" conduct ceases;
>
> (c) The appointment of a "special fiscal agent" to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;
>
> (d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or "special fiscal agent";
>
> (e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;

(f) The issuance of an injunction to prohibit continuing acts of "oppressive" conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive;

(g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital;

(h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price;

(i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court;

(j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of "oppressive" conduct by the majority in control of the corporation.

Id. at 260–61 (quoting *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395–96 (Or. 1973)). The Appellate Court remanded the case to the circuit court to consider other possible remedies. *Id.* at 261.

b. Bontempo v. Lare

In *Bontempo*, this Court considered, among other things, the limit of equitable tools available to minority stockholders to remedy stockholder oppression. 444 Md. at 344. The case involved a minority stockholder and employee of a corporation and a husband and wife who, together, were majority stockholders of the corporation. *Id.* at 349. The minority stockholder assented to the terms of a stockholder agreement and an amended and restated stockholder agreement that acknowledged his 45% ownership in the company and designated triggering events that would require a stockholder to sell the stockholder's

interest, including termination of the stockholder's employment with the corporation "for good cause." *Id.* at 350–51.

The minority stockholder worked with the husband to grow the business, but, over time, their relationship deteriorated. *Id.* at 352–54. The minority stockholder and the husband disagreed about business strategy, salaries, stockholder distributions, and the minority stockholder's job performance. *Id.* at 353–54. After they failed to reach an agreement to split the corporation, the husband proposed a separation agreement, which the minority stockholder declined to consider and refused to sell his shares. *Id.* at 354. In response, the husband fired him. *Id.* The minority stockholder was no longer an employee of the corporation, but he remained an officer, director, and stockholder of the corporation. *Id.* at 355. Eventually, the minority stockholder resigned from his director position but retained his 45% ownership of stock. *Id.*

The minority stockholder filed an action in the circuit court including five counts. *Id.* Relevant here is the minority stockholder's direct claim against the majority stockholders under CA § 3-413 "seeking a panoply of equitable relief for [the minority stockholder] under that statute based on his status as a [stockholder] of [the corporation] and the alleged 'illegal, fraudulent, and oppressive' conduct of the [majority stockholders] with respect to him." *Id.* at 356. As part of these remedies, the minority stockholder sought reinstatement of his status as an employee, "or to award other employment related relief." *Id.* at 349. The circuit court reviewed the minority stockholder's direct claim under CA § 3-413 and applied the "reasonable expectations" test as articulated in *Edenbaum*. *Id.* at 357. The circuit court found that the minority stockholder's reasonable expectations had

been defeated, and, in fashioning relief, determined an equitable remedy short of dissolution under § 3-413. *Id.* at 357–58. The circuit court found that the stockholder was an at-will employee, and in fashioning a lesser remedy, "decided not to require employment-related relief without an oral or written agreement to support that relief[.]" *Id.* at 374.

On appeal, the Appellate Court affirmed the circuit court with respect to the minority stockholder's CA § 3-413 claim. *Id.* at 361–62. The parties then cross-petitioned this Court for a writ of *certiorari*. *Id.* at 362. This Court granted *certiorari*, and, in affirming the circuit court, adopted the "reasonable expectations" test for measuring minority stockholder oppression, and held that "a court of equity may employ other equitable tools, short of dissolution, to remedy [stockholder] oppression." *Id.* at 348. After extensively describing the Appellate Court's analysis in *Edenbaum*, we cited with approval the "non-exhaustive set of alternatives to dissolution that might be appropriate in a particular case[.]" *Id.* at 368. We explained that:

> A court acting under CA § 3–413 to fashion a remedy less drastic than dissolution is not required to match its remedy to an expectation of the minority shareholder. (Indeed, the default remedy—dissolution—may bear no correlation to any expectation of a shareholder.) In particular, a court should take into account not only the reasonable expectations of the oppressed minority shareholder, but also the expectations and interests of others associated with the company. Inherent in the notion that a court of equity may devise a remedy other than the statutory remedy invoked by the minority shareholder is that there are other interests at stake besides those of the oppressed or disaffected shareholder. The existence and operation of the corporation—an entity that is legally distinct from any of its owners—affects not only the complaining and controlling shareholders, but also many others who may be associated with or depend on the company—other shareholders, its management, employees, and customers. Dissolution—capital punishment for the corporation—affects those parties as well.

Id. at 370. We explained that "'[a] reasonable expectation' for purposes of the corporate dissolution statute is simply a way of detecting oppression, but it does not dictate the relief that an equity court is to grant." *Id.* at 371. We stated that while the minority stockholder "may have had a reasonable expectation of a future relationship" with the corporation "as an employee, officer, director, and shareholder, that is a far cry from an employment agreement that entitles him to specific employment-related relief—*i.e.*, a specific position within the company with specific duties, pay, and conditions of employment." *Id.* For example, we observed, "[o]ne might envision a situation in which a minority shareholder reasonably believed, upon committing capital to an entity, that one day he would advance to an executive position with the enterprise and in which, as a result of oppressive conduct of the majority shareholder, the minority shareholder has never been considered for any management position." *Id.* at 371–72. We stated that "[a] court acting under the authority of the corporate dissolution statute would be venturing far afield to order the company to hire the shareholder into a particular position with particular duties at a specified salary." *Id.* at 372.

Analyzing the facts of this case, we determined that the circuit court did not abuse its discretion in finding that the minority stockholder was not "entitled to employment-related relief—whether reinstatement or the monetary damages he is primarily interested in[,]" as those remedies "would [] convert a discretionary equitable remedy into a substantive legal right." *Id.* at 374.

In summary, we held

> that the measuring stick for 'oppression' of a minority shareholder—the shareholder's 'reasonable expectations' upon becoming an owner of the

> company—does not dictate the nature of equitable relief (short of corporate dissolution) that a trial court must impose. In fashioning relief, the trial court may properly take account of the viability of the corporation, and the impact of the relief on others associated with the corporation, including other shareholders, management, employees, and customers. Employment-related relief, such as pay-related monetary damages or a requirement that the corporation employ the minority shareholder, is unlikely to be appropriate in the absence of a written or oral employment agreement.

Id. at 349. Reviewing the circuit court's ruling in the context of the particular facts of the case, we held that the trial court in this case did not abuse its discretion in deciding on appropriate relief. *Id.* at 378.

B. A Word About Direct Stockholder Claims Versus Stockholder Derivative Claims

When a stockholder brings a claim against a Maryland corporation, it is necessary to determine whether the suit is a derivative suit or a direct action. "A derivative suit is an action by a stockholder that derives from the right to enforce a legal right of the corporation against another person. The suit is brought in the name and right of the corporation." Hanks, § 7.22A, 7-65. This is because the corporation is the real party in interest, and the substantive claims belong to the corporation. *Werbowsky*, 362 Md. at 599 (citations omitted). Maryland courts distinguish between direct and derivative claims brought by stockholders by looking at (1) the nature of the wrong alleged, and (2) the relief that the plaintiff would receive if successful. *Oliveira*, 451 Md. at 230.

A stockholder "may bring a direct action against the corporation, its officers, directors, and other [stockholders] to enforce a right that is personal to him." *Mona*, 176 Md. App. at 697. Direct claims require a plaintiff to have suffered a "distinct injury" separate from any harm suffered by the corporation, not that the stockholder has suffered

an injury distinct from other stockholders. *Oliveira*, at 231, 242. This Court has stated that "[t]he remedy that a [stockholder] seeks must benefit the [stockholder] as an individual, not the corporate entity." *Id.* at 231.

Derivative claims, on the other hand, involve a corporate right brought on behalf of the corporate entity, rather than the stockholder, with any recovery belonging to the corporate entity, not the plaintiff stockholder. *See id.* at 223; *Boland v. Boland*, 423 Md. 296, 328 (2011). Derivative actions have been described as "an extraordinary equitable device to enable shareholders to enforce a corporate right that the corporation failed to assert on its own behalf." *Werbowsky*, 362 Md. at 599. Because derivative claims require that the corporation refused to assert its own right, plaintiffs are required to "seek a corporate decision on whether to maintain a lawsuit, a prerequisite known as the 'demand requirement.'" *Boland*, 423 Md. at 330. That is, a stockholder must "allege and prove that he requested the directors to institute suit in the name of the corporation, and they refused." *Waller v. Waller*, 187 Md. 185, 192 (1946).

Where a harm is suffered by both the stockholders and the corporation alike, a stockholder derivative claim is the appropriate action. *Oliveira*, 451 Md. at 240.

III

Against the framework of the applicable law, I turn to the allegations set forth in the Amended Complaint. First, it is important to note that Edward has not filed this claim as a derivative action, but as a direct one in his capacity as a minority stockholder. The Amended Complaint has not been filed on Eastland's behalf. Indeed, Eastland is a defendant, not a plaintiff. Nor has Edward alleged that he requested the directors to initiate

suit in the name of Eastland, and they refused. Accordingly, we must consider whether the various counts pleaded by Edward state direct claims that he is entitled to make in his capacity as a minority stockholder.

Edward has filed this action in his capacity as a minority stockholder against several defendants—Eastland; Oscar, and Vipa, "as stockholders, directors and officers" of Eastland; and Tisnai, as a director of Eastland. Edward has pleaded certain facts in the Amended Complaint that are common to all counts. Counts I and II are statutory claims and Count III arises under common law. Count I, titled "Oppression of a Minority Stockholder[,]" has been filed against all of the Defendants. Count II, titled "Breach of Fiduciary Duties[,]" has been filed against Oscar, Vipa, and Tisnai "as directors of" Eastland, and also against Oscar and Vipa "as majority stockholders." Count III, titled "Unjust Enrichment" has been filed against Oscar and Vipa.

A. Edward Has Failed to State a Claim for Unjust Enrichment

Taking the counts out of order and starting with Count III, I agree with the Majority that Edward has failed to state a claim for unjust enrichment. Maj. Slip Op. at 34–35. Under Maryland law, a cause of action for unjust enrichment consists of three elements: "(1) [a] benefit conferred upon the defendant by the plaintiff; (2) [a]n appreciation or knowledge by the defendant of the benefit; and (3) [t]he acceptance or retention by the defendant of a benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Berry & Gould, P.A. v. Berry*, 360 Md. 142, 151 (2000) (citations omitted). As the Majority correctly notes, damages in an unjust enrichment action are measured by the *gain* to the defendant and not by the *loss* to

the plaintiff. Maj. Slip Op. at 34. Edward did not confer any benefit upon Vipa and Oscar in the form of excessive salaries or compensation. Any such claim would lie in Eastland, and Edward has not filed a derivative claim on behalf of Eastland.

B. Edward Has Pleaded Sufficient Facts to Support Statutory Claims Arising Under the MGCL

Edward has alleged two statutory counts that arise under the MGCL—Count I, a claim arising under CA § 3-413(b)(2), which permits a stockholder to petition for involuntary dissolution under certain circumstances including where "[t]he acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent[;]" and Count II, a claim against Eastland's directors arising under CA § 2-405.1(c) alleging a violation of the directors' statutory standard of conduct. As I describe below, I believe that Edward's complaint alleges sufficient facts to assert a statutory claim under CA § 3-413(b)(2) and CA § 2-405.1(c), although he has not sought an available form of damages to proceed under the latter. Below, I discuss the facts set forth in the complaint that I find are sufficient to support the statutory claims.

First, as noted above, Edward has not filed a derivative claim. The allegations that relate to the harm allegedly suffered by Eastland—such as the general corporate harm allegedly suffered by the decision to pay "excessively high salary and other compensation to [Oscar and Vipa]"—are claims that may only be brought on behalf of Eastland and, therefore, should not be considered.

In light of the fact that this case is the first instance in which this Court has considered the effect of the 2016 legislative amendments to the directors' statutory

standard of conduct, which now provides a stockholder with a right to bring a direct claim against corporate directors for violating the business judgment rule, I explain how such a claim should be analyzed.

1. Count II—Statutory Claim for a Violation of the Directors' Standard of Conduct

In *Plank v. Cherneski*, 469 Md. 548 (2020), this Court held that a breach of fiduciary duty may be actionable as an independent cause of action. To establish a breach of fiduciary duty, a plaintiff "must demonstrate: (1) the existence of a fiduciary relationship; (2) breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary." *Id.* at 625. "The remedy for the breach is dependent upon the type of fiduciary relationship, and the historical remedies provided by law for the specific type of fiduciary relationship and specific breach in question, and may arise under a statute, common law, or contract." *Id.* We stated in *Plank* that a "court should consider the nature of the fiduciary relationship and possible remedies afforded for a breach, on a case-by-case basis." *Id.* In so doing, if

> the plaintiff describes a fiduciary relationship, identifies a breach, and requests a remedy historically recognized by statute, contract or common law applicable to the specific type of fiduciary relationship and the specific breach alleged, the court should permit the count to proceed. The cause of action may be pleaded without limitation as to whether there is another viable cause of action to address the same conduct.

Id. at 625–26.

Applying this framework here, Edward has identified a statutory duty that Eastland's directors owe to him under CA § 2-405.1.[9] Specifically, the directors owe Edward a duty to act: (1) in good faith; (2) in a manner the director reasonably believes to be in the best interests of the corporation;[10] and (3) with the care that an ordinarily prudent person in a like position would use under the circumstances.

Edward has overcome the presumption of the business judgment rule by setting forth sufficient facts, which, if proven, would demonstrate Eastland's historical practice of paying corporate profits to stockholder/employees in the form of bonuses as opposed to dividends. The Amended Complaint sets forth Edward's annual compensation for the years 2006 through 2018, which reflects considerable increases in 2008 and 2015—the years that corresponded with Edward becoming a stockholder, as well as his increase in stock ownership. Edward alleges, in specific amounts, sums that he contends were paid as

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[9] Although Edward alleges in Count II that Oscar and Vipa, in their capacity as majority stockholders, owe him "fiduciary duties," which he contends they breached, he has not identified any specific fiduciary duties that arise by virtue of their status as stockholders. The duties identified by Edward in Count II all relate to directors' duties that the MGCL vests within Eastland's board of directors. Accordingly, for purpose of my analysis, I consider only those statutory claims arising under CA § 2-405.1.

[10] I realize that the standard of conduct requires that Edward prove that the directors' actions were not in the best interest of the *corporation*. CA § 2-405.1. I observe, however, that the 2016 amendments provided stockholders with a right to file a direct claim against directors for a failure to comply with the statutory standard of conduct where the stockholder can establish an injury that is personal to the stockholder (as opposed to an injury suffered by the corporation in the form of a derivative claim). In light of this amendment, I conclude that, one way a stockholder would be able to prove that the directors were not acting in the best interest of the corporation would be to establish that the directors were acting in a manner that does not benefit all stockholders equally, and, instead, were acting in a manner that furthered their personal interest or benefit, which in turn caused the stockholder to suffer a distinct injury.

annual bonus payments in lieu of distributions of profits that would have been commensurate with his stock ownership interest. He alleges that up until August 2017, Pricha, as Eastland's President and director, determined the amount that each stockholder would receive as a bonus instead of a declared dividend or distribution.

Edward alleges that Eastland's directors and stockholders, as well as its accountants and attorneys, all had direct knowledge of Eastland's longstanding practice of Eastland paying its profits in the form of bonuses to its stockholders, instead of paying dividends. To support this allegation, he quotes from an email that Eastland's attorney sent to Eastland's stockholders ten days prior to the October 2018 annual stockholders' and regular directors' meeting, which reflects that the agenda included discussion pertaining to "*introduction of a dividend study* (*advantages to moving to shareholders getting dividends with respect to their ownership in lieu of salaries being paid as if they were dividends)*[,]" and also reflects that the corporate accountants would be present. Edward further alleges that he attended the stockholders' meeting accompanied by his counsel, and that there was a discussion of the dividend study. During the time period in which he was still a director, Edward alleges that he requested payroll data for all employees, including Oscar and Vipa, along with any bonuses, special pay, and money transferred to either of them, and he was advised that Oscar would not allow that information to be provided to him.

Edward alleges that, after he was removed from the Board and his employment was terminated, Eastland did not consider the dividend study further and has since failed to pay Edward a portion of Eastland's profits despite his continued status as a stockholder. In my view, Edward alleges with specificity a historical practice of paying Eastland's profits to

its stockholder/employee as bonus payments instead of stockholder distributions—a practice that Edward alleges the directors have continued with respect Oscar and Vipa, but not to him. In other words, Edward has alleged facts that, if proven, would demonstrate that Oscar, Vipa, and Tisnai were not acting in good faith, were not acting in the best interest of all of the stockholders, and stood to receive some personal benefit when they continued to pay corporate profits only to stockholder/employees in the form of bonus compensation instead of paying the corporate profits to the stockholders commensurate with their percentage ownership interest.

I would conclude that Edwards's allegations, if true, are sufficient to establish that the directors are paying Eastland's profits in a manner that does not treat all stockholders equally and in furtherance of two director/stockholders' personal interest or benefit. That is, these acts are not being undertaken with the care that an ordinarily prudent person in a like position would use under similar circumstances.

I further determine that Edward has alleged that he has suffered a distinct injury separate and apart from any injury suffered by Eastland. In other words, the directors' decision to pay Eastland's profits to its stockholders (other than to Edward) as bonus payments instead of in the form of distributions, is causing a separate and distinct injury to Edward. That is, unlike the other Eastland stockholders, Edward is not receiving Eastland's profits, and is therefore not being treated equally as far as the receipt of corporation profits.

Turning to Edward's remedy, as *Plank* instructs, "[t]he remedy for the breach is dependent upon the type of fiduciary relationship, and the historical remedies provided by

law for the specific type of fiduciary relationship and specific breach in question, and may arise under a statute, common law, or contract." *Id.* A "court should consider the nature of the fiduciary relationship and possible remedies afforded for a breach, on a case-by-case basis." *Id.* In his specific prayers for relief related to Count II, Edward asserts that he is seeking compensatory damages. In other general paragraphs of the complaint common to all counts, as well as the remedies he specifically seeks for a violation of Count I that I describe below, he seeks equitable remedies in the nature of the continued payment of corporate profits that he alleges he historically received while a stockholder/employee, which are personal to him as a stockholder, and not Eastland, as a corporation.

Based upon the statutory duty that now flows to the stockholders under CA § 2-405.1 where the stockholder can establish a direct claim through a distinct personal harm, under the *Plank* framework, I would look to traditional remedies historically provided for this type of injury, which a trial court could then apply on a case-by-case basis. Here, I observe that the Appellate Court in *Edenbaum* identified the non-exhaustive list of equitable remedies, which this Court adopted in *Bontempo*. These types of equitable remedies have been recognized for similar injuries where oppressive conduct interferes with the minority stockholder's reasonable expectations. Given this Court's adoption of these non-exhaustive equitable remedies that apply when a stockholder establishes oppressive conduct, I would hold that these remedies may similarly apply to a violation of a statutory standard of conduct arising under CA § 2-405.1 where a violation results in the same injury. Those types of equitable remedies, as well as others, may be considered based upon the injury alleged and proven. For example, to the extent Edward claims that that the

directors diverted to themselves profits to which he was entitled, he may be able to establish that he is entitled to the equitable remedy of disgorgement. Again, these equitable remedies are dependent upon the particular facts alleged and proven.

As noted above, in my view, the Amended Complaint alleges sufficient facts necessary to overcome the presumption of the business judgment rule that applies to the board of directors' standard of conduct. Nonetheless, the only relief sought in Count II are compensatory damages, which are not available for breaches of the duties identified in that claim. For that reason, I agree that Count II was properly dismissed and would reverse the judgment of the Appellate Court. Given that this case is the Court's first opportunity to consider a stockholder's direct claim for a violation of the directors' statutory standard of conduct, and my discussion of the types of equitable remedies that are available for such a claim, on remand, if the Plaintiff, Edward Mekhaya, seeks leave to amend his prayers for relief on Count II, the court may consider such a request in its discretion.

2. Count I—Statutory Claim for Stockholder Oppression

For the same reasons that I have determined that Edward states a statutory claim under Count II for a violation of the directors' standard of conduct under CA § 2-405.1, I similarly determine that Edward has stated a claim under CA § 3-413(b)(2) that would permit a court to consider equitable remedies short of involuntary dissolution to which a minority stockholder may be entitled upon proof that the "acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent"—remedies that this Court has sanctioned in *Bontempo.* 444 Md. at 365. However, my basis for this conclusion is grounded in my view that Edward's Amended Complaint sets forth sufficiently particular

facts to establish minority shareholder oppression and to overcome the business judgment presumption that applies to all directors' actions. That is, he has pleaded sufficient facts to demonstrate: (1) the directors' historical practice was to pay Eastland's profits to its stockholder/employees as bonus compensation instead of dividend payments; (2) that the directors' decision to continue to pay corporate profits to its existing stockholder/employees to the exclusion of Edward—who is a stockholder but no longer an employee—is not action undertaken in good faith under the circumstances; (3) the allegations, if true, would establish that the directors are paying Eastland's profits in a manner that does not treat all stockholders equally and in furtherance of their personal interest or benefit; and (4) these acts are not being undertaken with the care that an ordinarily prudent person in a like position would use under similar circumstances, which is causing direct harm to Edward. I would determine therefore, that Edward has sufficiently pleaded facts that would constitute "oppressive conduct" that, if proven, would entitle a court to award equitable relief under CA § 3-413 short of involuntary dissolution. In other words, the above-described conduct interferes with Edward's reasonable expectation that, as a stockholder, he will continue to receive a share of Eastland's profits regardless of his employment or management status with Eastland.

I make an observation about the Amended Complaint. As I explained above, the MGCL applies to small and large corporations. Corporate management decisions are vested by statute in the *directors* of the corporation, giving the directors statutory rights and duties, and protections where they act in accordance with the business judgment rule. CA § 3-413(b)(2) allows a stockholder to seek equitable relief where "[t]he acts of the

directors or those in control of the corporation are illegal, oppressive or fraudulent." Although the Majority makes a passing reference to the fact that Edward has pleaded sufficient facts to overcome the business judgment presumption, *see* Maj. Slip Op. at 27 n.17, in my view, whether a stockholder has overcome the business judgment rule should be the focus of the analysis when a stockholder is alleging that directors' acts constitute oppressive conduct. Edward should not be permitted to avoid the business judgment presumption at the pleading stage because he has alleged that Vipa and Oscar were acting as *both* directors and majority stockholders, and that if they were performing acts in their role as majority stockholders, they are acting as "others in control" and therefore escape the protections of the business judgment rule. The plain language of CA § 3-413(b)(2), which discusses conduct by directors or "others in control," in my view, simply means that the statutory framework of the MGCL recognizes that in some instances, corporate acts may be legally undertaken by someone other than by the board of directors, and that in those instances, the conduct of "others in control" may form the basis for a claim of oppressive conduct. *See, e.g.*, CA § 2-401(b) (stating that "[a]ll powers of the corporation may be exercised by or under the authority of the board of directors *except as conferred on or reserved to the stockholders by law or by charter or bylaws of the corporation*[]") (emphasis added). The "others in control" language simply recognizes that there are instances in which others may legally have control to undertake the actions that the stockholder contends are oppressive.

When a complaint involves the application of the business judgment rule that applies to corporate acts undertaken by its directors, the plaintiff must plead sufficient facts

to overcome the presumption of the rule in the complaint. *See, e.g., Oliveira*, 451 Md. at 246 (stating that the petitioners' "claims were properly dismissed by the Circuit Court for failure to overcome the business judgment rule presumption").

At the pleading stage, where a minority stockholder is alleging oppressive conduct by the directors for management decisions that are placed within their sole purview under the MGCL, the stockholder should plead sufficient facts to overcome the business judgment rule. For example, Tisnai is a director and is not a stockholder. He is being sued under Count I for acts undertaken in his capacity as a director along with the other directors who happen to be stockholders. He is entitled to the business judgment rule presumption at the pleadings stage. Edward is required to plead sufficient facts to overcome the business judgment presumption for claims against the member of the board of directors to overcome dismissal. Stated another way, directors such as Tisnai should not lose the protection of the business judgment rule presumption at the pleading stage because the pleading alleges that the other directors, who happen to be stockholders, were acting in their capacity as stockholders. Here, I agree with the Majority that Edward has pleaded sufficient facts to overcome the business judgment rule as to the acts of the directors.

Of course, there may be instances where majority stockholders are undertaking acts in which they are legally authorized to take under the MGCL—such as, for example, removing a director—which forms the basis for the minority stockholder's allegation of oppressive conduct. There may also be instances where a minority stockholder contends that the majority stockholders are undertaking fraudulent, illegal or *ultra vires* acts—acts that they have no legal authority to undertake—which may also form the basis for

entitlement to equitable remedies under CA § 3-413(b)(2).[11] In other words, the pleading should set forth sufficient facts to identify the conduct in question, and if it is being undertaken by a director, sufficient facts to overcome the business judgment rule. If a minority stockholder is alleging that the actions are being undertaken by majority stockholders in a fraudulent, illegal, or *ultra vires* manner, the complaint should say that. We cannot excuse the statutory presumption of the business judgment rule at the pleading stage by permitting minority stockholders to make generalized allegations that directors/majority stockholders are acting outside of their capacity as directors—and therefore their actions are not entitled to the business judgment presumption—simply because they are also majority stockholders. Given that this is a legislatively established standard of conduct that applies to directors' management decisions, this Court, or any other court, should take care not to add language to the standard that alters or expands its plain language. *See Boland v. Boland*, 194 Md. App. 477, 502 (2010), *rev'd on other grounds*, 423 Md. 296 (2011) ("Maryland's business judgment rule, being statutory, is the product of legislation and, absent ambiguity or other constitutional infirmity, is not subject to interpretation or revision by judicial gloss.").

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[11] For example, there may be instances where the minority stockholder contends that majority stockholders were taking certain *ultra vires* acts for which they have no legal authority to take and which were causing a direct injury. For example, if Vipa and Oscar were making decisions concerning the distribution of profits in their capacity as stockholders—to the exclusion of other directors, such as Tisnai—which they had no legal authority to take, the stockholder might have a claim under CA § 3-413(b)(2) against those individuals on the basis that such acts were *ultra vires*, illegal, or fraudulent. If that conduct is being alleged, it should be pleaded in the complaint.

Finally, in considering Edward's claims for equitable remedies, a court should be guided by our discussion in *Bontempo.* As we explained in *Bontempo*, the court should first determine whether the rights of minority stockholders have been oppressed. 444 Md. at 348. In giving consideration to a stockholder's expectations as part of that analysis, the court should consider whether the stockholder's expectations were objectively reasonable. *Id.* at 398. While it is certainly reasonable for a stockholder to have a continued expectation that he or she will receive corporate profits to which he or she is entitled in the same manner as other stockholders without regard to employment status, it may not be reasonable for the stockholder to have an expectation of continued employment or management status given the at-will nature of employment under Maryland law in the absence of a contract, and the statutory authority of stockholders to remove a director with or without cause.

If the court determines that the Defendants engaged in oppressive conduct that interfered with, or continues to interfere with the stockholder's reasonable expectations, the court may fashion an equitable remedy. However, the court is "not required to match its remedy to an expectation of the minority [stockholder]." *Id.* at 369. Or stated another way, "'[a] reasonable expectation' for purposes of the corporate dissolution statute is simply a way of detecting oppression, but it does not dictate the relief that an equity court is to grant." *Id.* at 371. "In particular, a court should take into account not only the reasonable expectations of the oppressed minority shareholder, but also the expectations and interests of others associated with the company." *Id.* at 370. Indeed, "[t]he existence and operation of the corporation—an entity that is legally distinct from any of its owners—affects not only the complaining and controlling shareholders, but also many others who

may be associated with or depend on the company—other shareholders, its management, employees, and customers." *Id.*

IV

In conclusion, I agree with the Majority's analysis of Count III. Although I concur with the Majority's ultimate disposition of the statutory claim pleaded under Count II, I conclude that Edward has sufficiently pleaded facts to establish a direct claim against the directors for a violation of the statutory standard of conduct set forth in CA § 2-405.1(c), and that he has set forth sufficient facts to allege that he has suffered a distinct injury separate and apart from any harm suffered by Eastland. In my view, Edward has pleaded sufficient facts to overcome the statutory presumption that Eastland's directors acted: (1) in good faith; (2) in a manner the director reasonably believes to be in the best interest of the corporation, or in this case, in a manner that benefits all stockholders equally; and (3) with the care that an ordinarily prudent person in a like position would use under the circumstances. Edward has alleged sufficient facts to establish that the violation has caused him a distinct injury—the deprivation of Eastland's profits that are being paid to other stockholders. Nonetheless, the only relief sought in Count II was compensatory damages, which are not available for breaches of the duties identified in that claim under the facts alleged. For that reason, I agree that Count II was properly dismissed, and would reverse the judgment of the Appellate Court. Given that this case is the Court's first opportunity to consider a stockholder's direct claim for a violation of the directors' statutory standard of conduct, and my discussion of the types of equitable remedies that are available for such

a claim, on remand, if Edward seeks leave to amend his prayers for relief on Count II, the court may consider such a request in its discretion.

With respect to Count I, for the same reasons that I would conclude that Edward has stated a claim for a violation of the directors' standard of conduct under CA § 2-405.1, I would similarly conclude that Edward has sufficiently pleaded facts that would constitute "oppressive conduct" under CA § 3-413(b)(2). If Edward is able to prevail at trial under either or both of these statutory claims, a court would be permitted to fashion equitable relief in the same manner that this Court and the Appellate Court have upheld in *Bontempo* and *Edenbaum*.[12]

Chief Justice Fader has authorized me to state that he joins this opinion.

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[12] I wish to acknowledge the very helpful amicus submission provided in this case by the Maryland Chamber of Commerce.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/coa/37a22cn.pdf