



**THE “CLOSE CORPORATION” LEGACY OF THE
DEMOULAS/MARKET BASKET SAGA: A CASE AGAINST TYPE?**

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The “Close Corporation” Legacy of the Demoulas/Market Basket Saga: A Case Against Type?

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INTRODUCTION

At first blush, this latest¹ chapter in the Market Basket saga seems contrary to conventional wisdom as to the business and legal structure within which a close corporation operates. A closer examination, however, may yield a different perspective. This article explores whether the Market Basket saga is really a case against type and in doing so analyzes the potential close corporation legacy of this latest installment of the intra-family struggle.

From a business standpoint, Demoulas Super Markets, Inc. (“DSM”) and its Market Basket business challenge convention in a number of ways. As a closely held business, Market Basket has successfully competed in the New England market against chains run by much larger multi-national corporations.² Even more against type was the power exerted by the Market Basket employees and customers during the summer 2014 boycott.

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¹ As judges have done before us, we use the term “latest” rather than “last” advisedly. *See, e.g., Demoulas v. Demoulas*, No. 2013–3171A, 2013 WL 5754104, at *1 (Mass. Super. Ct. Sept. 25, 2013) (“th[is] is the *latest* battle in the long-running war among members of the Demoulas family . . .”) (emphasis added). But this chapter does end with the sale of the George Demoulas side of the family and might at least be the last of the litigation between the two sides of the Demoulas family.

² *See* Jay Fitzgerald, *Mass Grocers Scramble to Keep up with Consumers*, THE BOSTON GLOBE, Nov. 13, 2012, <https://www.bostonglobe.com/business/2012/11/13/supermarkets-scramble-keep-with-consumers-changing-preferences-more-competition/WmnrwvD8luIU1gUA6OyI/story.html>.

The employees, who were not unionized, and customer response effectively brought the Market Basket chain to an absolute halt for six weeks during the summer of 2014.³ What was even more remarkable was that the employees, in support of the company's terminated chief executive officer and other terminated managers, walked off their jobs. And, to top it off, Market Basket customers overwhelmingly supported a boycott of the stores honoring the employee walkout.⁴ The boycott eventually resulted in some level of resolution in the long-running feud between the two sides of the Demoulas family. These business issues will undoubtedly be studied in business schools and boardrooms.⁵ Our focus here, however, is on the resulting legal issues, with passing reference to these business issues to the extent that they inform our legal analysis.

From a legal view, the events of 2014 raised at least as many issues challenging convention as did the business issues. First and foremost, the DSM Board of Directors, which directly or indirectly represented the majority shareholder interest in 2014, was effectively stymied by the Market Basket employees and customers standing in solidarity with the fired chief executive officer and the walkout of his supporting subordinate employees. Legal corporate orthodoxy generally provides that the board of directors is all-powerful yet, in the Market Basket situation, non-directors were influencing, if not determining, corporate policy.

The second corporate issue that appears against type arose from the George Demoulas side of the family having a controlling stock interest in DSM.⁶ Conventional wisdom in closely held corporations is that majority shareholders will join together to exert control over the corporation, especially by gaining control of the persons serving as directors and thereby manage, oftentimes to the disadvantage of the minority interests. Despite owning a majority of the shares as of 1998, the family of George

³ See Adam Vaccaro, *Market Basket Deal: Arthur T. Demoulas to Buy Out Grocery Chain*, BOSTON.COM (Aug. 27, 2014), <http://www.boston.com/news/business/2014/08/27/market-basket-deal-arthur-t-demoulas-to-buy-out-grocery-chain>.

⁴ See Callum Borchers, *Uprising's Success will be Hard to Replicate*, THE BOSTON GLOBE, Aug. 8, 2014 <https://www.bostonglobe.com/business/2014/08/28/market-basket-uprising-success-will-hard-replicate/OAyHQLNrjaI67oySVTZ01J/story.html>.

⁵ The events have been published as a Massachusetts Institute of Technology (MIT) Sloan Business School case study. See, e.g., Zeynep Ton, Thomas A. Kochman & Cale Reavis, *We Are Market Basket*, #14-160 MIT SLOAN MGMT. 1, 1 (Mar. 23, 2015), available at <https://mitsloan.mit.edu/LearningEdge/CaseDocs/14.160.Market%20Basket.Ton.Kochan.FINA.L.pdf> [hereinafter *MIT Market Basket Study*].

⁶ The George Demoulas side of the family was effectively awarded 50.5% interest under Judge Lopez's ruling. The ruling requires Telemachus' side to transfer back stock as well as requiring DSM to issue treasury stock. See *infra* note 19 and accompanying text.

Demoulas did not achieve control of the Board of directors until 2013.⁷

The final area in which this part of the Demoulas saga appears to depart from the convention was the Board's termination of a minority shareholder/employee, such as Arthur T. Demoulas ("Artie T"). This termination did not result in litigation but instead was resolved through negotiation, which was particularly surprising given the prior history of extensive litigation between the two sides of the family.⁸ Such an outcome is remarkable given the line of Massachusetts close corporation cases establishing a fiduciary duty owed among closely held corporation shareholders and heightened judicial scrutiny where a minority shareholder's employment is terminated.⁹

This article will examine the above legal issues and consider the close corporation legacy of the latest (and perhaps last) chapter in the Demoulas and Market Basket saga.

ANALYSIS

As a preliminary matter, we note that DSM is a closely held¹⁰ corporation, the stock in which is not publicly traded. As such, the information regarding its governance and operations is not available through public disclosure documents such as disclosure forms available for publicly held companies like so-called 10-Qs and 10-Ks. Without publicly available information, it is generally difficult to learn about the inner-workings of private, closely held corporations, such as DSM, beyond the bare-bones filing information available with the Secretary of the Commonwealth¹¹ or news articles, if any. DSM does represent an exception to the general lack of available information for non-publicly traded corporations. Rather, the relative treasure trove of information about DSM

⁷ See Grant Welker, *A Switch in Allegiance, and Market Basket Dominoes Begin to Fall*, LOWELL SUN, July 27, 2014, http://www.lowellsun.com/todayshdlines/ci_26225337/switch-allegiance-and-market-basket-dominoes-began-fall.

⁸ See generally Meghan S. Laskal & Wendy L. Pfaffenbach, *Demoulas: An Inside Look at the Twists and Turns of a Legal Blood Feud*, MASS. LAWS. WKLY., Apr. 21, 2000, <http://masslawyersweekly.com/reprints/davismalm2/>.

⁹ See *infra* note 56–57 and accompanying text.

¹⁰ In Massachusetts, a close corporation has a "(1) small number of shareholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management direction and operation of the corporation." *Donahaue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 511 (Mass. 1975).

¹¹ Massachusetts' corporations must file an initial Articles of Organization and then Annual Reports with the Secretary of the Commonwealth. *Domestic Profit Forms*, SEC'Y OF THE COMMONWEALTH OF MASS., <http://www.sec.state.ma.us/cor/corpweb/cordom/dominf.htm> (last visited Apr. 14, 2016).

comes from a variety of sources, including: numerous legal pleadings and judicial pleadings, scores of newspaper and magazine articles, an MIT business school case study,¹² a pro-Artie T website,¹³ and a recently published book.¹⁴ At this writing, two movies on the Market Basket story were just being released.¹⁵ Quite clearly the underlying long-standing, bitter, and very public fight between the two sides of the Demoulas family accounts for this atypical amount of available information for a closely held corporation.

While the period of time leading up to, and including, the various litigation matters of the 1990s are a very important part of the Market Basket saga, our focus begins with the end of that period, marked by Massachusetts' Superior Court Judge Lopez's Findings of Fact and Rulings of Law on Order for Equitable Relief and for Entry of Separate and Final Judgment.¹⁶ The order followed a jury's finding that Telemachus Demoulas had breached his fiduciary duty to the plaintiffs who were the estate of Telemachus' brother, George Demoulas; George's widow, Evanthea; and George and Evanthea's four children: Evan Demoulas,¹⁷ Diana Merriam, Fotene Demoulas, and Arthur S. Demoulas ("Arthur S"). The jury found breaches of fiduciary duties by Telemachus in transfers involving a real estate trust and transfers of DSM stock. With respect to transfers of DSM stock, among other things, Judge Lopez's order rescinded the DSM stock transactions resulting in the plaintiffs, George Demoulas' side of the family, owning 50.5% of the stock of DSM, and Telemachus' side owning the remaining 49.5%.¹⁸

¹² See *MIT Market Basket Case Study*, *supra* note 5 and accompanying text.

¹³ See generally WE ARE MARKET BASKET, <http://wearemarketbasket.com/> (last visited May 10, 2016).

¹⁴ See generally DANIEL KORSCHUN & GRANT WELKER, WE ARE MARKET BASKET: THE STORY OF THE UNLIKELY GRASSROOTS MOVEMENT THAT SAVED A BELOVED BUSINESS (2015).

¹⁵ See generally *About this Film*, FOOD FIGHT: INSIDE THE BATTLE OF MARKET BASKET, <http://www.foodfightfilm.com/> (last visited May 10, 2016); *The Film*, WE THE PEOPLE: THE MARKET BASKET EFFECT, <http://www.themarketbasketeffect.com/#home> (last visited May 10, 2016).

¹⁶ See generally *Demoulas v. Demoulas*, No. 90-2344, 1996 WL 511, 519 (Mass. Super. Ct. Aug. 20, 1996), *aff'd in part, vacated in part, and remanded*, *Demoulas v. Demoulas*, 703 N.E.2d 1149, 1175 (Mass. 1998).

¹⁷ Evan Demoulas subsequently died and his shares were held by his widow, Rafaela Evans. See *supra* note 8 and accompanying text.

¹⁸ Judge Lopez ordered extensive reshuffling of stock holding from the Telemachus side to the George side with the ultimate result that George Demoulas' side of the family held 50.5% and Telemachus' side had 49.5%. See *Demoulas*, 1996 WL 511519, at *9-10; Casey Ross & Beth Healy, *Market Basket Deal Closes Book on Family Feud*, THE BOSTON GLOBE, Dec. 12, 2014,

In addition to rescinding the stock ownership in DSM, Judge Lopez used her equitable power to order a number of changes affecting the governance structure of DSM.¹⁹ The first of these changes removed Telemachus and two others as officers and directors of DSM.²⁰ Judge Lopez also ordered that the shareholders elect a new seven-member Board of directors. The Board was to consist of two members from George's family (and to include Arthur S) and two members of Telemachus' family.²¹ The remaining three members were to be elected by the shareholders and were required to be "disinterested, independent directors who meet the standards for independence as published by the New [York Stock] [sic] Exchange."²² Judge Lopez also ordered the Board of directors to elect "qualified officers from a list of candidates generated by an independent search firm of Plaintiff's selection."²³

Pursuant to Judge Lopez's order, DSM's Articles of Organization and Bylaws were amended to provide for two classes of stock, A and B.²⁴ The Class A shares represented 50.5% of the stock and were held by the George Demoulas family. The Class B shares represented 49.5% of the stock and were held by the Telemachus family. The Class A and B shareholders were to elect two directors for each class, the A and B directors, respectively.²⁵ The remaining three directors were the A/B directors who were required to be disinterested and independent pursuant to the rules of the New York Stock Exchange.²⁶ These A/B directors were to be elected by all shareholders.²⁷

Notwithstanding Judge Lopez's order that allocated a 50.5% interest in DSM to George Demoulas' side of the family, Telemachus' side continued to control the corporation. This resulted because Evan's widow, Rafaela Evans, voted with Telemachus' side of the family and continued to do so

<https://www.bostonglobe.com/business/2014/12/12/demoulas-closes-deal-buy-market-basket/AXcJOLvTuttlxqo2qb2e6O/story.html>.

¹⁹ See *Demoulas*, 1995 WL 476772, at *8.

²⁰ *Id.*

²¹ *Id.* at *10.

²² *Id.*

²³ *Id.*

²⁴ DEMOULAS SUPER MARKETS, INC. ARTICLES OF AMENDMENT, SEC'Y OF THE COMMONWEALTH OF MASS., (adopted June 24, 1999 and filed with Secretary of Commonwealth June 24, 1999), <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx>

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

until 2013, when she finally voted with George's side of the family.²⁸ By that time, the intra-family hostility moved down a generation as Telemachus' son, Artie T, eventually became chief executive officer of DSM.²⁹

A. Challenging the Dominant Power of the Board of DSM

As a general proposition, the board of directors is the body vested with the power to govern and manage the corporation.³⁰ This power is even more pronounced in a closely held corporation. Unlike boards of publicly held corporations whose directors often do not directly represent a majority of the shareholding interests, the board of a closely held corporation generally does. In reality, the board's power has natural limits. For example, the board's power is limited to the legal construct of the corporation and its internal business operations. Corporations large and small have long been subject to pressure from employees, customers and other stakeholders. A board's response to these pressures varies. Absent special circumstances, however, in closely held corporations, neither customers nor employees are deciding factors in board hiring and firing of management.

No one should have been surprised by the boycott and showdown of 2014 as it was clearly foreshadowed by events a year earlier—and most certainly not the Board of DSM. In 2013, after Rafaela Evans changed her support from Artie T to her brother-in-law Arthur S, the Board composition changed as well, and the new Board made very clear that it was considering terminating Artie T as chief executive of DSM.³¹ After a strong outpouring of support by employees and customers, the Board did not follow through with firing Artie T at that time,³² however the events of 2013 clearly presaged those of 2014.

²⁸ See *supra* Laskal & Pfaffenbach, note 8.

²⁹ The office of president of DSM was vacant until Artie T was named in 2007. DEMOULAS SUPER MARKETS, INC., 2007 ANNUAL REPORT (filed with Secretary of the Commonwealth Apr. 9, 2008), available at <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx>.

³⁰ MASS. GEN. LAWS. ch. 156D, § 8.01 (2012).

³¹ Casey Ross, *Market Basket CEO Faces Vote on Ouster: Market Basket Chief is Target in Family Feud*, THE BOSTON GLOBE, July 11, 2013, <https://www.bostonglobe.com/business/2013/07/10/grocer-mulls-firing-ceo/obnETS6wxdiL8t3IUMQGul/story.html>; *c.f.* Casey Ross, *Market Basket CEO Gets Reprieve*, THE BOSTON GLOBE, July 18, 2013, <https://www.bostonglobe.com/2013/07/18/marketbasket/qKpk8JGaLsmUmLwJ0oIHL/story.html> [Hereinafter Ross, July 18, 2013].

³² See Ross, July 18, 2013 *supra* note 31.

The power of the stakeholders—and the unusual alliance of employees, customers, and chief executives—will undoubtedly be a fertile area of study in the field of business. The Board’s failure to gauge the reaction by employees, customers, vendors, and others certainly might not be considered best practice in corporate governance. Nevertheless, under traditional corporate law, the board was not required to specifically consider the stakeholder interests.

One interesting view of the corporate board’s structure and power was recently raised in an article by Professor Margaret Blair, which focused on the 2014 Market Basket feud.³³ Professor Blair examines the corporate board’s dispute resolution function.³⁴ Her article expands the Blair/Stout team production model that challenges the traditional view of boards acting as fiduciaries of shareholders and monitoring management. The team production model focuses on the unique character of the board (as not owning assets used within the corporation) as being an appropriate mechanism for resolving potential disputes among the various participants in the corporation.³⁵ Professor Blair cites several examples of statutorily designated final decision-making roles for the board of directors that are likely to be “conflictual.”³⁶ The first function cited was that of hiring and firing a CEO.³⁷ Critical to Professor Blair’s argument is that the board not be under control of any team member such that the board’s decisions would not be trusted:

[F]or this mechanism to work well, the board should not be so controlled by any of the team members that the other important team members cannot trust that the decisions made by the board will be in the best interest of the corporation as a whole.³⁸

Professor Blair frames the Market Basket fight as being a team production problem and thus appropriate for the dispute resolution function of the mediating board.³⁹ Yet the Board only resolved the conflict

³³ See generally Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U.L. REV. 297, 297–98 (2015).

³⁴ *Id.*

³⁵ *Id.* at 299.

³⁶ *Id.* at 311.

³⁷ *Id.* at 311 & n.63 (citing MODEL BUS. CORP. ACT § 8.40(b) (2002)).

³⁸ *Id.* at 315.

³⁹ See Blair, *supra* note 33, at 302–03. Professor Blair views the tension between the two sides of the family as likely arising from different views as to how the value of the Market Basket business ought to be divided. George Demoulas’ side believes that they are entitled to half the value since George and Telemachus were equal partners, which Professor Stout describes as an *ex ante* position. Telemachus’ side of the family likely believes that they have contributed substantial human and financial capital to the business while the other side has not. *Id.* at 303.

after the governors of Massachusetts and New Hampshire intervened. This outcome was actually consistent with her theory, as Professor Blair suggests that the governors were truly unaligned and likely much more so than the Board. The governors were worried about the economic effect on their respective state economies,⁴⁰ while the Board's three disinterested, independent A/B directors might not have been "truly unaligned," as they were voted for by the majority of shareholders.⁴¹

B. Challenging the Convention that Majority Interest Will Control

Close corporations often have a single shareholder or a group of shareholders that own a majority interest.⁴² Unless the articles of incorporation or bylaws provide otherwise, the directors will be elected by the majority.⁴³ Thus, the convention in closely held corporations is that if there is a group with a majority of voting interest, that group generally controls the board of directors.

In her order rescinding the various DSM stock transactions, Judge Lopez established a 50.5% majority stock interest with the members of the George Demoulas side of the family.⁴⁴ In addition, Judge Lopez established a Board structure that should have established a majority of Board members supported by the 50.5% ownership held by the George Demoulas side of the family if they voted as a block. That is, they would have their two designated members of the Board and could then vote as a majority block for the three "independent" directors.

In considering the effect of Judge Lopez's order, the George Demoulas family would only have control if all of the family members voted together. Indeed, this did not happen until 2013. For reasons that seem never to have been fully disclosed, Evan Demoulas' widow, Rafaela Evans, voted with the Telemachus side of the family, ultimately supporting Artie T as chief executive officer. In 2013, Ms. Evans switched her vote and joined with the George Demoulas family, which shifted control of DSM to Arthur S.

Is it against type for one side of a family with a combined ownership of a majority of the shares of stock not to actually exert control? Not necessarily, as something additional is required to keep the majority together. Perhaps family loyalty is enough to bind the family vote, but a

⁴⁰ *See id.* at 336.

⁴¹ *See id.* at 335.

⁴² *See generally* Donahue v. Rodd Electrotype Co. of New England, 328 N.E.2d 505, 512 (Mass. 1975).

⁴³ MASS. GEN. LAWS ch. 156D, §7.28(a) (2012).

⁴⁴ *Supra* note 18 and accompanying text.

family not getting along is part of the human condition. A classic example of the need to do something more is the Business Organizations chestnut case, *Ringling v. Ringling Bros.—Barnum & Bailey Combined Shows*.⁴⁵ In *Ringling*, the ownership of the corporation was in three shareholders. Two of the shareholders entered into a voting agreement in which they agreed to vote together, and if they could not agree, they would vote as directed by an arbitrator. The shareholders could not agree, and one of the shareholders refused to vote as directed. The Delaware Court of Chancery upheld the agreement but did not order the shares to be voted as directed. The court based its ruling on the fact that the arbitrator's power to direct had to be coupled with an interest in the stock, which it was not.

While the vote-pooling agreement in *Ringling* proved to be ineffective, it still stands for the need to use an effective mechanism to assure control within family blocks.⁴⁶ But it is only effective if there is a way to enforce the agreement. A voting trust is another device used to assure that a block will vote together.⁴⁷

That the George Demoulas side of the family, or any side of the family, did not vote together to assert control is not surprising and certainly not against type. Instead, it is more a cautionary tale and a modern reminder of the legal lesson from the old *Ringling* case, which is to anticipate the need for the mechanism to keep the votes together.

⁴⁵ See generally *Ringling v. Ringling Bros.—Barnum & Bailey Combined Shows*, 29 Del. Ch. 318 (Ch. Ct. 1946). Professor J. Mark Ramseyer provides a very detailed and insightful portrait of the *Ringling* case. See J. Mark Ramseyer, *The Story of Ringling Bros v. Ringling: Nepotism and Cycling at the Circus*, in CORPORATE LAW STORIES 136–61 (2009). Although the reasons for Rafaela Evans' original switch and subsequent switch back have not been made fully public, the story in the *Ringling* case provides a rich example of how intra-family conflict affects shareholding voting. In *Ringling*, there were three shareholders: Edit Ringling, Aubrey Haley and John Ringling North. Ringling and Haley had a voting agreement, which resulted in their controlling five of the seven board seats. *Id.* at 145. Edith's son, Robert, and Aubrey's husband, James, were both in the management of the circus when then the circus' tent went up in flames in Hartford, Connecticut in 1944. *Id.* at 145–48. The fire claimed at least 168 lives, and James Haley was prosecuted for involuntary manslaughter. Haley pleaded *nolo contendere* and was sentenced to a year and a day. *Id.* at 149. James believed that he took the blame for Robert's actions. Robert and Edith did not visit James in prison while John ultimately did. *Id.* After James was released from prison, he attended the shareholder meeting on behalf of Aubrey and refused to vote with Edith and refused to follow the arbitrator's direction. *Id.* at 150.

⁴⁶ See MASS. GEN. LAWS ch. 156D, § 7.31 (2012).

⁴⁷ See *id.* at § 7.30.

C. Challenging Convention that Close Corporation Disputes End Up in Litigation

The last aspect of whether this chapter of the Demoulas saga challenges convention considers the nature of disputes between majority and minority shareholder groups in close corporations. We preliminarily note two points. First, although the Board's firing of Artie T and the ensuing employee walkout and customer boycott did not end up in litigation, there were a number of lawsuits filed after control of DSM shifted in 2013 as a result of Rafaela Evans' change in voting position. In *Demoulas v. Demoulas*,⁴⁸ Artie T and the other Class B shareholders challenged certain actions of the new Board. Specifically, the plaintiffs sought a preliminary injunction to prevent the Board's granting of a \$300 million distribution to shareholders.⁴⁹ The Class B shareholders based their claim on whether one of the new A/B directors, Keith Cowan, was disinterested and independent, because he was formerly an A director elected by the George Demoulas side of the family. The trial court denied the motion and rejected the plaintiff's argument that the A/B directors had to be independent under the stricter standard of the American Law Institute's ("ALI") Principles of Corporate Governance.⁵⁰

In addition, after the Board was realigned, two former A/B directors became directors representing the B shareholders. These directors filed a suit claiming that they had been marginalized by the rest of the Board.⁵¹ The complaint alleged that after the Board's realignment the plaintiffs were prevented from attending committee meetings, denied access to corporate documents, and generally hindered from performing their duties.⁵² That suit was voluntarily dismissed in September 2014.⁵³

Finally the George Demoulas side of the family sued these same two B directors (William Shea and J. Terrance Carleton) who stated that they

⁴⁸ No. 2013-3171A, 2013 WL 5754104, at *1 (Mass. Super. Ct. Sept. 25, 2013).

⁴⁹ *Id.*

⁵⁰ The trial judge held that there was no evidence that Judge Lopez intended to use the ALI standard. Moreover, there was no evidence offered by plaintiffs that the ALI standard had been used as a general qualification standard versus a standard applied to specific transactions. *Id.* at *4.

⁵¹ Complaint at 1, *Shea v. Demoulas Super Markets, Inc.*, No. 14-3140 2014 WL 1397748 (Mass. Super. Ct. Apr. 3, 2014).

⁵² *Id.*

⁵³ MASSACHUSETTS TRIAL COURT ELECTRONIC CASE ACCESS, 1481CV03140 SHEA V. DEMOULAS SUPER MARKETS, INC., <http://www.masscourts.org/eservices/?x=CuA7OgDAJULEJyivexhzY6h7ESA5A98kf4CupmlB2Wg6P4PbXlk9bfSCW3aLpR82cPYd9ibiJxA-dqtINvZgPw> (last visited May 11, 2016).

intended to not attend meetings in hopes of forcing a lack of quorum, and stopping the Board from firing Artie T. The court granted the plaintiff's motion for preliminary injunction and required the two directors to attend meetings.⁵⁴

The second preliminary point is that, once Artie T was terminated, events on the ground occurred quickly with the walkout and boycott. The employee walkout and customer boycott reportedly cost Market Basket millions of dollars per day until the employees returned and the customer boycott ended.⁵⁵ By the time the business case was litigated, the business might have failed or been permanently weakened. While Artie T's termination did not end up in litigation, it still merits analysis in considering the close corporation legacy of the Market Basket saga.

The Massachusetts line of cases imposing fiduciary duties on shareholders in closely held corporations that create a cause of action for freeze-out transactions is driven by the lack of market for shares in closely held corporations.⁵⁶ Without the benefit of an active trading market, minority shareholders in particular are vulnerable to being frozen out or oppressed.⁵⁷ The Massachusetts Supreme Judicial Court has developed a line of cases recognizing a fiduciary duty owed by shareholders of closely held corporations.⁵⁸ The duty is one of "utmost good faith and loyalty."⁵⁹ More specifically, the Supreme Judicial Court provides for an equitable remedy where a minority shareholder has been frozen out by the majority shareholders. The Court refined the test for imposing this remedy in *Wilkes v. Springside Nursing*, which sets forth the three-part test:

1. The plaintiff must allege an action in which the majority has breached the fiduciary duty.
2. The defendant may defend by showing a legitimate business purpose for the actions.
3. The plaintiff must then show that there is a less harmful way to effect the legitimate business purpose.⁶⁰

⁵⁴ *Merriam v. Shea*, No. 14-1071 BLS 2, 2014 WL 7933947, at *2-3 (Mass. Super. Ct. Apr. 25, 2014).

⁵⁵ Casey Ross, *Despite More Negotiations, Chain's Fate Remains in Limbo*, THE BOSTON GLOBE, Aug. 26, 2014, <https://www.bostonglobe.com/business/2014/08/25/demoulas/MnijPpNA7hmYt4ije6YmwK/story.html>.

⁵⁶ *See, e.g., Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 514 (Mass. 1974).

⁵⁷ Delaware courts do not follow this line of cases. *See Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1992).

⁵⁸ *See, e.g., Donahue*, 328 N.E.2d at 515.

⁵⁹ *Id.*

⁶⁰ 353 N.E.2d 657, 663 (Mass. 1976).

One commentator describes the legitimate business purpose prong as an affirmative defense, which can be overcome if a plaintiff can establish that the "defendants could have accomplished their business purpose through a reasonably practicable alternative course of action."⁶¹ Massachusetts courts have generally provided that claims focus on actions that deprive the minority shareholder of their reasonable expectation with respect to the shares in the closely held corporation. The *Wilkes* case involved termination from corporate office.⁶² Many of the reported close corporation freeze-out cases involve termination from corporate office or employment. Others involve stock buyback transactions. As Artie T was a member of the founding family of DSM and a long-term employee and officer, his termination by the Board representing the majority shareholding faction clearly meets the first step of the analysis.

It would then be up to the majority to show that there was a legitimate business purpose for the Board's action. A number of cases have considered the business purpose step of the analysis. *Leader v. Hycor*,⁶³ involved a corporation⁶⁴ in which the minority shareholders brought an action against the majority and the corporation challenging the forced redemption of the minority's shares.⁶⁵ The Supreme Judicial Court upheld the trial court's finding that the plaintiffs failed to show that the recapitalization transaction was not designed to achieve a legitimate business purpose.⁶⁶ The Supreme Judicial Court held that the majority shareholders followed applicable Massachusetts law when they put the recapitalization transaction into effect.⁶⁷ The Supreme Judicial Court held that the trial court found sufficient evidence to support the legitimate business purpose. Specifically, the Supreme Judicial Court cited testimony by the corporation's president and the general counsel that the corporation enjoyed none of the benefits of a public company and all of the responsibilities.⁶⁸ As to the final part of the analysis, the Supreme Judicial

⁶¹ RICHARD W. SOUTHGATE & DONALD W. GLAZER, *MASS. CORP. LAW AND PRAC.* §18.4 (2d ed. 2015).

⁶² *Wilkes*, 353 N.E.2d at 664–65. Other instances are stock buy-backs. See Lou Vlahos, *Shareholder Buy-Outs In A Closely-Held Corp.: Part I*, FARRELL FRITZ (Feb. 9, 2015), <http://www.taxlawforchb.com/2015/02/shareholder-buy-outs-in-a-closely-held-corp-part-i/>.

⁶³ See generally 479 N.E.2d 173, 177–78 (Mass. 1985).

⁶⁴ The parties disputed whether the corporation was closely held. The trial court apparently determined that the corporation was a closely held one but the Supreme Judicial Court did not opine on that issue. *Id.* at 174, 177–78.

⁶⁵ *Id.* at 174.

⁶⁶ *Id.* at 178.

⁶⁷ *Id.* at 177–78.

⁶⁸ *Id.*

Court' upheld the trial court's finding of no less harmful alternative means to accomplish the legitimate business purpose.

A number of reported actions by Artie T suggest that the Board had a legitimate business purpose for its action. The minutes of DSM Board meetings reflect a Chief Executive Officer who did not feel at all accountable to the Board.⁶⁹ Moreover, allegations were made that Artie T steered real estate deals and other business to companies controlled by his family. While these latter allegations were not established through litigation, the aforementioned Board minutes quite clearly established a lack of willingness to be governed by the Board. In *Pointer v. Castellani*, the Supreme Judicial Court upheld the trial court's weighing the less harmful alternative against the asserted business purpose.⁷⁰

CONCLUSION

This latest chapter in the Demoulas family Market Basket saga adds to the factually rich tapestry of the now decades-old intra-family dispute. Although at first glance the events and corporate actions of 2014 appeared to challenge corporate convention, we conclude that they really did not break new ground in terms of a legal doctrine or convention. Many of the legal issues raised involve cautionary tales as to either the limitations of the law's power or the need to provide legal mechanisms or devices to preserve voting control of majority shareholding interests. On the other hand, there is an important factual legacy because the legal observer, whether attorney, teacher or law student, can get a fairly well developed look inside a very successful closely held business. While the dimensions of the Demoulas family Market Basket fight might seem outsized, the basic fact pattern is not unusual in a closely held corporation, particularly a family business.⁷¹ Moreover, when stripped of the vitriol, the battle can also be framed in classic competing corporate themes such as the extent to which the corporation is managed solely for the benefit of its shareholders and short-term versus long-term returns.⁷² And to that extent, the legacy of

⁶⁹ See Casey Ross, *Market Basket Board Meeting the Stage for Family Strife: Close Look at a Decade of Demoulas Fighting Transcripts of Market Basket Meetings Reveal Ill Will, Wide Divisions on Authority, Employee Compensation, and Where Profits Should Go*, THE BOSTON GLOBE, Aug. 15, 2014, <https://www.bostonglobe.com/business/2014/08/14/behind-closed-doors-demoulas-cousins-feud-raged/0dc9gC2d7tN1k9oTH4QIuK/story.html>.

⁷⁰ 918 N.E.2d 805, 816–17 (Mass. 2009).

⁷¹ Another compelling example would be Legal Sea Foods and the Berkowitz family. See generally Jack Thomas, *Boiling Over: Legal Sea Foods' Family Feud Hard-Driving Father, Competitive Brothers Combine in Recipe for Painful Split*, THE BOSTON GLOBE, Mar. 24, 1994, available at 1994 WLNR 2050910.

⁷² See Gary M. Bishop, *A Grocery Chain, Family Strife, and Worker Solidarity: We Are Market*

the Demoulas/Market Basket saga certainly does become part of the development of corporate law.