COMMENT: LAWYER LIABILITY FOR AIDING AND ABETTING SQUEEZE-OUTS

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I. INTRODUCTION

Once upon a time there was a family-run business, which sold appliances.[1] One of the family members, a minority owner in the business, managed the company. He was at times quite belligerent. Over time, his idea of where the family business was heading increasingly conflicted with the ideas of the other owners. The minority owner became an ineffective manager and started causing the family business to lose money. Eventually the family voted to remove him from his position as manager. Feeling slighted, he filed suit against the family members for oppression.

Because the minority owner was a lawyer, he was able to file multiple suits to "expedite justice." Among these suits were claims against the lawyers representing the family members/co-owners who had voted the minority owner out of the business. During one proceeding, the minority owner prevailed against the lawyers when the court found adequate evidence to allege an *aiding and abetting breach of fiduciary duty claim* against the lawyers. But the minority owner lost on remand. The lawsuits against the lawyers and the family members kept coming.

In the ten years following the initial lawsuit, the minority owner sued most of the lawyers and the judges who had any affiliation with his cases. He claimed that everyone, including the judges who presided over his case (if he lost), was conspiring against him. The state appeals court finally barred the minority owner from asserting more claims against anyone related to the

1. This anecdote is based on the *Kurker v. Hill* series of cases. Kurker v. Hill, 689 N.E.2d 833 (Mass. App. Ct. 1998) (holding that minority owner's allegations against co-owners and lawyers supported claims of oppression and civil conspiracy).

subject matter.[2] Unfortunately, his actions took a toll on a number of different parties, including the lawyers.

This story is an example, albeit extreme, of what may happen if a minority owner in a closely-held business cries foul and alleges oppression. The story serves to illustrate the dangers that confront lawyers who represent majority owners, specifically the danger of a minority owner suing a majority owner's lawyer for aiding and abetting oppression.

This paper addresses a lawyer's liability for aiding and abetting her client's breach of fiduciary duty owed to a co-owner. It first gives a general overview of civil aiding and abetting law and focuses primarily on the Restatement (Second) of Torts section 876(b).[3] The next section of this paper delves further into aiding and abetting in the context of fiduciary duties and distinguishes between the duties owed in various contexts, including the inter-se duties existent in closely-held businesses.[4] That section is also devoted to discussing a lawyer's role in a client's breach of fiduciary duty and presents the difficulty in determining whether a lawyer aided and abetted her client's oppressive conduct in a closely-held business.[5] Finally, it confronts the need to create a rule that imposes liability onto lawyers who knowingly assist oppressive conduct but is not so over-inclusive that it holds lawyers responsible when they are unaware of their clients' oppressive conduct.[6] This paper concludes that there must be some procedural safeguards, such as an expert witness, to prevent innocent lawyers from being held liable for their clients' breaches of fiduciary duty.[7]

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2. Kurker v. Kassler, No. 03-P-15, 2004 WL 556959, at *1 (Mass. App. Ct. Mar. 22, 2004). The judge remarked:

> At some point, Mr. Kurker evidently concluded that his litigation misfortunes were the product of an ever-widening conspiracy between the other parties to the case, their attorneys, and each judge in the Massachusetts trial and appellate courts who had touched the case in any way. . . . Mr. Kurker's allegations cross[ed] the line that separates the merely frivolous from the preposterous.

Id. (citations omitted) (internal quotation marks omitted).

3. *See infra* Part II; RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).
4. *See infra* Part III.A.
5. *See infra* Part III.B.
6. *See infra* Part IV.
7. *See infra* Part V.

II. AIDING AND ABETTING IN GENERAL

The tort of aiding and abetting developed out of the common law doctrine of concerted action.[8] Under this doctrine, a person who acts in concert with others is liable for the unlawful acts of the group, as well as the unlawful acts of the individual members of the group.[9] In the United States, the practice of holding persons acting in concert jointly and severally liable for all wrongs arising out of the group originated in the criminal justice system.[10] Courts gradually began holding persons who acted in concert in the commission of torts jointly and severally liable for damages that the third party incurred.[11] The doctrine of concerted action is now prevalent in civil actions and encompasses both conspiracy and aiding and abetting.[12]

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8. *See* Pittman *ex rel.* Pittman v. Grayson, 149 F.3d 111, 122–23 (2d Cir. 1998) (citing the RESTATEMENT (SECOND) OF TORTS § 876(a), (b) (1979), which states that aiding and abetting liability is a variety of concerted-action liability); *see also* Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 40, 142 N.W. 930, 939 (1913) (applying the "well recognized" rule "that all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done, are jointly and severally liable therefor[e].").

9. *See* Herman v. Wesgate, 464 N.Y.S.2d 315, 316 (N.Y. App. Div. 1983) (holding that passengers attending stag party were jointly and severally liable for injuries the plaintiff sustained from being thrown off boat, even though not all passengers directly assisted).

10. *See* Nye & Nissen v. United States, 336 U.S. 613, 618–19 (1949) (acknowledging that where "[o]ne who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly" is a theory firmly "engrained in the law."); *see also* Pinkerton v. United States, 328 U.S. 640, 646–47 (1946) (stating that "an overt act of one partner may be the act of all.").

11. *See, e.g.*, Curtin v. Lataille, 527 A.2d 1130, 1132 (R.I. 1987). The plaintiff urged the court to adopt the RESTATEMENT (SECOND) OF TORTS § 876(b) definition of concerted action, as opposed to the criminal law definition, which requires 1) aider and abettor to share the intent of the principal and 2) the existence of community of unlawful purpose. *Id.*

12. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 190–93 (1976) (noting the widespread recognition of aiding and abetting in securities law violations but instead establishing defendant's liability on direct violation of 10-b instead of assisting another's violation of 10-b); Failla v. City of Passaic, 146 F.3d 149, 158 (3d Cir. 1998) (stating that rule derived from the RESTATEMENT (SECOND) OF TORTS § 876(b) and used in *Judson v. Peoples Bank & Trust Co.*, 134 A.2d 761, 767 (1957), which established "a defendant's liability for furnishing funds to a corporation when it knew the corporate assets were being used for the personal advantage of the president and director" has been adopted in New Jersey as the standard for liability); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793 (3d Cir. 1978)

Courts reviewing claims of aiding and abetting in civil actions turn to the Restatement (Second) of Torts section 876, which sets forth the elements of three distinct forms of concerted action.[13] Subdivision (b) provides that "for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[14] Although the three forms of concerted action are differentiated according to the type of participation the person who is accused of acting in concert has with the primary tortfeasor, liability in substance is the same for all.[15]

Liability imposed on a secondary actor who provides substantial assistance to or encourages a primary actor in committing a tort furthers two purposes of tort law: first, to compensate the victim; and second, to hold responsible those who give moral support to the primary tortfeasor.[16] "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance."[17]

Although the Restatement doesn't specifically refer to *aiding and abetting*, section 876(b) sets forth the factors to which courts turn for guidance in determining whether a secondary actor is

(reviewing aiding and abetting claim against bank for knowingly assisting 10-b violation).

13. RESTATEMENT (SECOND) OF TORTS § 876 (1979). Although subdivision (b) does not specifically refer to "aiding and abetting", it guides courts in aiding and abetting analyses. Subdivisions (a) and (c) do not come within the ambit of aiding and abetting. One is subject to liability under subdivision (a) if she "does a tortious act in concert with the other or pursuant to a common design with him." Under subdivision (c), one is subject to liability if she "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

14. *See id.* § 876(b); Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 251–54, 255 (2005).

15. *See Herman*, 464 N.Y.S.2d at 938 (stating that all who act in pursuance of common plan to commit a tortious act, including actively taking part in it, furthering it by cooperating or by lending or aiding encouragement to wrongdoer, are equally liable to the plaintiff).

16. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

17. *Id.* § 876 cmt. d (stating that liability imposed on one who gives encouragement to another in commission of tortious act is the same as that which is imposed upon tortfeasor). *See also* Halberstam v. Welch, 705 F.2d 472, 477–78 (D.C. Cir. 1983). *Halberstam* is a seminal case addressing multiple aspects of aiding and abetting liability. *Id.*

liable for the tort of aiding and abetting.[18] In generating a test for aiding and abetting actions, courts pull three common elements out of subdivision (b), including: (1) a tortious act of a primary actor; (2) the secondary actor's knowledge of the primary actor's tortious act; and (3) the secondary actor's substantial assistance or encouragement in the primary actor's commission of the tortious act.[19] As straightforward as this test appears, courts' applications of the test vary immensely. Courts generally do not have a problem applying the first element as establishing a tortious act is required to find the primary actor liable for the tort.[20] The differences arise primarily in each jurisdiction's interpretation of what constitutes *knowledge* and *substantial assistance or encouragement*.[21]

A. *The Knowledge Element Generally*

For a secondary actor to be liable for aiding and abetting, the secondary actor must have knowledge of the primary actor's unlawful conduct.[22] The language of the Restatement suggests that the secondary actor must know that the primary actor's conduct results in breaching a duty owed to a third party.[23] The secondary actor's mistaken belief that the primary actor's conduct is benign, therefore, will not amount to aiding and abetting liability.[24]

The requisite finding of knowledge depends on how a court defines "knowledge." The Restatement offers no assistance to courts as it fails to define the term, and courts have difficulty

18. *See* RESTATEMENT (SECOND) OF TORTS § 876(b).

19. *See generally* Combs, *supra* note 14, at 257–62 (comparing the differences among courts in interpreting RESTATEMENT (SECOND) OF TORTS § 876(b) and distinguishing between conspiracy and aiding and abetting).

20. *Id.* at 279–80 (stating that "[i]n most cases, duty turns upon traditional principles, and the existence of a duty poses no substantial inquiry. If the primary actor owes no duty to the plaintiff, then the plaintiff cannot establish an aiding and abetting claim against the defendant.").

21. *See* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 186–87 (Minn. 1999) (acknowledging the differences among jurisdictions in interpreting knowledge and substantial assistance).

22. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

23. *Id.* "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty." *Id.*

24. *See* Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006 (S.D.N.Y. 1984) (holding that secondary actor's belief that the primary actor's conduct was reasonable thwarts knowledge finding for aiding and abetting liability).

elucidating knowledge in the context of aiding and abetting.[25] The standards that courts use vary from constructive knowledge to actual knowledge.[26] Whether a court applies a "looser" standard of knowledge, either expressly or indirectly by failing to strictly construe the higher standard of knowledge, may reflect the underlying policy that the court is attempting to further.[27] For example, in reviewing a claim under the Employee Retirement Income Security Act (ERISA), the court applied a constructive knowledge standard to impose liability on a project manager for "knowingly participating" in a breach of fiduciary duty.[28] The liberal standard derived from the common law of trusts, where the

25. *See, e.g.*, FDIC v. First Interstate Bank, 885 F.2d 423, 429 (8th Cir. 1989) (recognizing that "the content of the test is still being delineated by the courts, with its significance not yet fully elaborated, by its nature the test is closely focused on the facts of each case . . . ."); Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985) (stating that "[b]ecause the theory of aiding-and-abetting liability is a matter of common law, the courts have not yet elaborated the full meaning of [§ 876] factors."). *See generally* Combs, *supra* note 14, at 264–67 (noting that the "judicial test" derived from pre-Central Bank securities law, changes the knowledge inquiry from the secondary actor "[knowing] that the other's conduct constitutes a breach of duty" to the secondary actor having a general awareness of "his role in another's wrong" and of "the way in which his conduct is contributing to the wrong.").

26. *See* BLACK'S LAW DICTIONARY 888 (8th ed. 2004) (defining knowledge as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact"; reckless knowledge as "[a] person's awareness that a prohibited circumstance may exist, regardless of which the person accepts the risk and goes on to act"; constructive knowledge is described as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person," i.e. "the court held that the partners had constructive knowledge of the partnership agreement even though none of them had read it.").

27. *See, e.g.*, Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992) (using constructive knowledge standard to find defendant liable for knowingly participating in breach of trust; the objective of ERISA's fiduciary provisions was to make applicable the law of trusts and establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets and to provide effective remedies for breaches of trust), *overruled on other grounds* by Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 327 (2d Cir. 2003) (stating that ERISA does not explicitly provide equitable relief against acts by non-fiduciaries, preempting state common law claims against non-fiduciaries for ERISA violations). Although *Diduck* may no longer be relied on as precedent, it exemplifies how standards of knowledge may be used to affect certain results. *See generally* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (2006) (discussing standards of knowledge and substantial assistance in aiding and abetting analyses of securities, Greenmail, attorneys, banking transactions, RICO, trusts, and corporations).

28. *Diduck*, 974 F.2d at 283.

policy of protecting a dependent and vulnerable beneficiary from fiduciary misdeeds warrants the use of a lower standard.[29]

Despite the of the intangible nature of some actions like fraud and breach of fiduciary duty and the difficulty in showing actual knowledge of the unlawful conduct,[30] actual knowledge is the prevailing standard set forth by most courts in analyzing aiding and abetting claims. Actual knowledge generally requires the secondary actor to be "pretty sure" that the primary actor's conduct is unlawful and that the secondary actor's own conduct assists or encourages the primary actor.[31] This standard is typically very difficult to prove. Courts that apply the actual knowledge standard will do so when determining whether a professional providing service in her field of specialty is liable for aiding and abetting.[32]

In addition to determining what standard of knowledge applies to aiding and abetting, courts must decide the extent to which the secondary actor is liable for third party injuries. The secondary actor's knowledge may extend to the primary actor's tortious acts, which were not necessarily known but were foreseeable in light of the circumstances. For example, in *Halberstam v. Welch*, the District of Columbia Court of Appeals held that a live-in companion of the primary actor was liable for a death that resulted from the primary actor's burglary of a home.[33] In establishing the secondary actor's knowledge of the primary actor's burglarizing activities, the court stated that:

> [The primary actor's] pattern of unaccompanied evening jaunts over five years, his boxes of booty, the smelting of

29. *Id.* at 282–83 (citing the RESTATEMENT (FIRST) OF TRUSTS § 297 cmt. a (1935), which states that a person has notice of a breach when "he knows or should know of the breach . . . .").

30. *See* Stanley Pietrusiak, Jr., *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 236–37 (1996) (discussing the elusive nature of actual knowledge and the difficulty of establishing actual knowledge in aiding and abetting situations).

31. *See* Hashimoto v. Clark, 264 B.R. 585, 599 (D. Ariz. 2001) (stating that evidence which, in retrospect, would raise red flags as to primary actor's unlawful conduct, is inconclusive as to the degree of knowledge that the secondary actor had at the time of the breach).

32. *See* Witzman v. Lehrmen, Lehrmen & Flom, 601 N.W.2d 179, 186–87 (Minn. 1999) (stating that courts that recognize aiding and abetting in professional contexts rely on strict interpretation of the elements to preclude meritless claims).

33. Halberstam v. Welch, 705 F.2d 472, 474 (D.C. Cir. 1983) (holding that secondary actor was liable in wrongful death action under the theories of aiding and abetting and conspiracy).

> gold and silver, the sudden influx of great wealth, the filtering of all transactions through [the secondary actor] *except* payouts for goods, [the secondary actor's] collusive and unsubstantiated treatment of income and deductions on her tax forms, even her protestations at trial that she knew absolutely *nothing* about [the primary actor's] wrongdoing—combine to make the district court's inference that she knew he was engaged in illegal activities acceptable, to say the least.[34]

Instead of limiting the secondary actor's knowledge to knowledge of the act of burglarizing, the court broadened the conduct of which the secondary actor had knowledge by defining the primary actor's act as a "criminal enterprise."[35] Therefore, the secondary actor was liable for all foreseeable incidents arising from the criminal enterprise.[36]

B. Substantial Assistance Generally

After the court finds that a secondary actor had knowledge of the primary actor's breach of duty, the court must determine if the secondary actor substantially assisted *or* encouraged the primary actor in breaching the duty.[37] Whether the secondary actor's conduct amounts to substantial assistance is dependent on the jurisdictions' various applications of the element. Even the terms that courts use when referring to this third element are not uniform.[38]

In torts that involve physical injury or property damage, the existence of the third element is often apparent. The secondary actor's conduct consists of either direct words or acts that are in proximity both in place and in time to the primary actor's wrongful conduct.[39]

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34. *Id.* at 486.
35. *Id.* at 488.
36. *Id.* at 487–89.
37. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).
38. *See* Holmes v. Young, 885 P.2d 305, 309 (Colo. Ct. App. 1994) (knowing participation); *see also* S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 849 (2d Cir. 1987) (knowing assistance). *See generally* Bryan C. Barksdale, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duties in Squeeze-outs*, 58 WASH. & LEE L. REV. 551, 559–60 (2001) (evaluating elements of knowledge and substantial assistance in the squeeze-out contexts in Oregon and California).
39. *See, e.g.*, Rael v. Cadena, 604 P.2d 822 (N.M. Ct. App. 1979) (aiding and abetting a battery where secondary actor's words encouraged primary actor's

Substantial assistance does not require physical acts; advice or encouragement may be sufficient to find a secondary actor liable for aiding and abetting.[40] For example, in *Rael v. Cadena*,[41] a secondary actor was liable for aiding and abetting a battery when he encouraged the primary actor by yelling "[k]ill him" and "[h]it him more!"[42] Unfortunately, in more complex situations, substantial assistance or encouragement is rarely as blatant as in *Rael*. Substantial assistance or encouragement is often indirect both in time and place, and courts often struggle with the analysis.[43]

The determination of whether a secondary actor provided substantial assistance or encouragement to a primary actor in breaching a duty is highly contextual.[44] The contextual nature results from the fact that the relationships between primary actors and third parties, and the duties owed therein, are unique. Comment (d) of the Restatement (Second) of Torts section 876, provides a framework to aid a court in evaluating whether secondary actor's assistance is substantial.[45] The Restatement's factors include: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) her presence or absence at the time of the tort; (4) her relationship to the fiduciary; and (5) the defendant's state of mind.[46] In addition to these

conduct); Cobb v. Indian Springs, Inc., 522 S.W.2d 383 (Ark. 1975) (aiding and abetting youth's reckless conduct found where security guard encouraged youth to test out a new car by driving it at high speeds); Keel v. Hainline, 331 P.2d 397 (Okla. 1958) (aiding and abetting battery found where child picked up erasers from floor and gave erasers to other children for the purpose of throwing at others in class, causing nonparticipating student to sustain eye injury).

40. Halberstam v. Welch, 705 F.2d 472, 481 (D.C. Cir. 1983) (citing *Rael*, 604 P.2d at 823).

41. 604 P.2d 822 (N.M. Ct. App. 1979).

42. *Id.* at 822.

43. *See generally* Pietrusiak, *supra* note 30, at 246–54 (1996) (discussing that application of aiding and abetting to the S&L situation, which created further confusion in determining knowledge).

44. *Id.* at 235–36 (noting that in addition to the courts' continuing struggle to apply the knowledge requirement, substantial assistance is difficult to ascertain because certain actors in certain situations may meet the elements, while other actors may not).

45. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

46. *Id.* The factors, which many courts use to determine substantial assistance, are derived from Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97–100 (5th Cir. 1975) (addressing these factors that may be used in determining substantial assistance and concluding that Metro Bank was not liable for aiding and abetting an entrepreneur's violation of 10b-5 of the Securities Exchange Act of 1934).

factors, the length of the relationship between the primary actor and the secondary actor, as well as the duration of the secondary actor's activity, may establish substantial assistance by implying an agreement between the two actors.[47]

Substantial assistance or encouragement typically takes the form of affirmative acts, but some courts have found that silence or inaction constitutes substantial assistance.[48] Nonfeasance may result in substantial assistance where the secondary actor consciously intended his silence to assist the primary actor in a wrongful act.[49] Yet, silence or inaction does not give rise to liability for aiding and abetting in situations where there is no affirmative duty of a secondary actor to help, notify, or aid a third party.[50] The narrow scope of cases in which silence or inaction constitutes substantial assistance comports with common law treatment of the duty to assist others. A person's duty to prevent injuries to third parties is limited to situations where there is a "special relationship" between that person and the injured third party.[51] The application

47. *See* Halberstram v. Welch, 705 F.2d 472, 481 (D.C. Cir. 1983) ("Additionally, the *length of time* two parties work closely together may also strengthen the likelihood that they are engaged in a common pursuit. Mutually supportive activity by parties in contact with one another over a long period suggests a common plan.").

48. *See* Schiller v. Strangis, 540 F. Supp. 605, 624 (D. Mass. 1982) (imposing liability onto a joint tortfeasor who knowingly joined in committing the tort of false imprisonment because his "silence" encouraged the primary actor to commit subsequent tortious acts).

49. *See generally* Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 27 (1993) (quoting SEC v. Coffey, 493 F.2d 1304, 1317 (6th Cir. 1974) ("Inaction may be a form of assistance in certain cases, but only where it is shown that silence of the accused aider and abetter was consciously intended to aid the securities law violation.")).

50. *See* Pietrusiak, *supra* note 30, at 238–39 ("[T]he issue is not whether the party directly assisted the primary tortfeasor by direct advice or support, but whether the actor was obligated to 'disclose or stop another's wrongdoing discovered in the performance of normal and customary business activities.'").

51. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 190 (1989). The court in *DeShaney* recognized that "certain 'special relationships' created or assumed by the State with respect to particular individuals may give rise to an affirmative duty." *Id.* at 189. That was not the case, however, in the facts of *DeShaney*:

> No such duty existed here, for the harms petitioner suffered occurred not while the State was holding him in its custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them.

of silence or inaction to meet the substantial assistance element is rare in modern-day civil aiding and abetting cases where there are no special relationships.

III. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

A. *Fiduciary Duties*

1. *Plain Vanilla*

The determination of whether a secondary actor aids and abets a primary actor's breach of fiduciary duty is contingent upon the primary actor owing a fiduciary duty to the third party.[52] In typical aiding and abetting analyses, the existence of a fiduciary duty is implicit. Fiduciary duties include the duty of loyalty and the duty of care.[53] The duty of loyalty requires the fiduciary to be honest and refrain from competing with the entrustor (the person to whom the fiduciary owes the fiduciary duty). The duty of care essentially means that the fiduciary must act carefully and responsibly when acting on behalf of the entrustor.[54]

Historically, the presence of fiduciary duties was strongest in

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Id. at 190. *See also* Pietrusiak, *supra* note 30, at 238–39 ("[The] general rule in modern tort law is that one is under no duty to prevent injury to another person, even if one knows the other is in danger of being injured.").

52. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (noting a person is liable if she "knows that the other's conduct constitutes a *breach of duty*") (emphasis added). *See, e.g.*, Alexander v. Anstine, 152 P.3d 497, 503 (Colo. 2007) (reversing the lower court's holding that under Colorado common law, a president of an insolvent corporation owes broad fiduciary duties, beyond "[avoiding] favoring their own interests over creditors' claims," to hypothetical judgment lien creditors). The *Alexander* court further opined:

> [T]o determine whether [hypothetical judgment creditor] has standing to sue the attorneys for aiding and abetting the president's breach of fiduciary duty, we must determine whether judgment lien creditors may sue a corporation's president for a breach of fiduciary duty under Colorado law. To determine what claims are available to creditors, we now turn to an examination of the duties owed by the directors and officers of an insolvent corporation to the corporation's creditors.

Id. at 501.

53. *See, e.g.*, Ostrowski v. Avery, 703 A.2d 117, 121–22 (Conn. 1997) (noting the historical fiduciary duties of directors).

54. *See* United States v. Chestman, 947 F.2d 551, 568 (2d Cir. 1991) (citing United States v. Margiotta, 668 F.2d 108, 125 (2d Cir. 1982) ("'[A]t the heart of the fiduciary relationship' lies 'reliance, and de facto control and dominance.'").

the contexts of trusts where a high degree of confidence in the trustee was necessary for the protection and well-being of the beneficiary.[55] Indeed, the trust and confidence that one party places in another with whom there are disparities in dominance and in position are salient elements of the fiduciary relationship. The potential vulnerability of the beneficiary derives from the trustee's dominant position, combined with the great degree of trust and autonomy the trustee is given to pursue the best interests of the beneficiary.[56] When a trustee has the right to act for the beneficiary and the power to pursue the beneficiary's objectives with discretion, the beneficiary is in a precarious position because the trustee's power may be abused.[57] A fiduciary's breach has the propensity of being devastating to the beneficiary. Determining whether an actor is a fiduciary, along with the concomitant duties, is a question of law.[58] Therefore, the role of the fiduciary is a device courts may use in appropriate circumstances to ensure that the trust and confidence of a vulnerable party is not abused.

Courts recognize fiduciary duties in a number of areas in addition to trusts. Reasoning primarily by analogy, courts apply fiduciary principles developed through trust law to achieve equitable results in the various contexts.[59] For example, courts have compared the loyalty that a trustee owes to a beneficiary to that which an officer of a corporation owes to the corporation.[60] Generally, in both cases, the fiduciary is barred from acting out of self-interest, and the entrustor exercises little control over the fiduciary's daily actions, causing the entrustor to be in a vulnerable position. In addition, fiduciary relationships arise in the contexts

55. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 895–96 (1994) (providing a historical analysis of fiduciary duties).

56. *See id.* at 897 (discussing the vulnerability of beneficiary).

57. *See id.*

58. *See* Gliko v. Permann, 130 P.3d 155, 159–60 (Mont. 2006) (overruling a line of cases in which the existence of a fiduciary duty is a question of fact).

59. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880 (1988) (noting that "[a]s equity evolved, concrete rules in many instances supplanted the chancellors' exercise of discretion based on broad principles.").

60. *See* Harold Marsh Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36–40 (1966) (describing directors' fiduciary duties in the nineteenth and twentieth centuries).

of agency, bailments, guardianships, corporations and legal representation, among others.[61]

The preceding relationships are similar to trusts in that they involve a fiduciary undertaking a duty to act in the best interests of another who has put trust and confidence in that fiduciary.[62] In these contexts, the fiduciary is in a position of inherent power and responsibility where actions motivated by self-interest are proscribed. Because of the potential for the fiduciary to abuse her power, it is necessary for the protection of the entrustor (the principal, the bailor, the ward, the corporation, or the client) that a higher level of duty be imposed upon the one in whom another has trusted and confided.[63]

The fiduciary relationship that exists between two parties varies according to the context in which they arise.[64] One element that varies among fiduciary relationships is the degree of control that the entrustor has over the fidicuary. In the trust context, the beneficiary is relatively powerless to control the acts of the trustee; however, in the agency context, the principal has a great degree of power over the agent's actions.[65] Although the scope of duties between the fiduciary and the entrustor is unique to that relationship, an important characteristic of the aforementioned fiduciary relationships is the one-way fiduciary duty owed by the fiduciary to the entrustor.

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61. *See generally* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983) (examining the differences and similarities among fiduciaries and how history has impacted the various duties in each relationship).

62. Haluka v. Baker, 34 N.E.2d 68 (Ohio Ct. App. 1941) (examining the agent's duty to act in the best interests of the principal).

63. In addition to the duty of loyalty, fiduciaries owe to the entrustor the duty of care. Variables existent in fiduciary duties include the standard of care used by the fiduciary in exercising its role and the degree of control the entrustor has over the fiduciary. For example, where a director of a corporation owes the duty of care to the corporation, the standard of conduct used to impose liability upon the director is gross negligence. *See generally* Brehm v. Eisner, 746 A.2d. 244 (Del. 2000). This is in contrast to a trustee, which must refrain from negligent conduct in performing its role as a fiduciary. The duty of care is relevant in aiding and abetting cases because the secondary actor's negligence alone, without knowledge and substantial assistance, will not give rise to liability. As a result, in a case involving lawyer liability, a plaintiff's claim is foreclosed when the lawyer assistance was the result of mere negligence in advising her client/defendant.

64. *See* DeMott, *supra* note 59, at 880–81 (distinguishing fiduciary duties in corporate law and those in the trust context).

65. Even within the agency context, the power and control that the principal has over the agent varies immensely according to the terms of the agreement.

There are some critical distinctions between the liability imposed on a fiduciary for directly breaching a fiduciary duty and that which is imposed on a secondary actor for merely assisting the breach.[66] A fiduciary who breaches a duty may be liable to the entrustor, regardless of whether the breach was intentional.[67] Accordingly, a fiduciary's negligent breach of fiduciary duty will amount to liability.[68] A fiduciary's liability for unknowingly or intentionally breaching a duty, therefore, is conceptually similar to strict liability because it lacks the requirement of a specific mental state.[69] In contrast, the scope of the secondary actor's liability is comparatively narrower. A secondary actor's negligent conduct, which in some way contributes to a fiduciary's breach, will not give rise to liability.[70]

2. *Inter se Fiduciary Relationships in Closely-Held Businesses*

In the context of closely-held businesses such as partnerships, closely-held corporations, and limited liability companies, inter se duties developed and are most often at issue in situations in which

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66. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 901 (1994) (discussing the differences of primary liability and secondary liability with regard to the liability imposed on one who breaches a fiduciary duty and one who knowingly assists another in breaching a fiduciary duty).

67. *Id.*

68. *See, e.g.*, Neade v. Portes, 739 N.E.2d 496, 502–04 (Ill. 2000). In *Neade*, the court established that a fiduciary relationship existed between the defendant physician and the physician's patient. *Id.* In treating the patient symptoms, the physician failed to order specific tests, which resulted in the patient's death. *Id.* at 498–99. In examining the causes of action brought forth by the decedent's estate—including breach of fiduciary duty and malpractice—the court recognized that although the facts the estate set forth would establish a breach of fiduciary duty, the court would not recognize it as a cause of action because the same facts and elements gave rise to a duplicative and recognized medical malpractice cause of action. *Id. passim.* *But see* JOSEPH WARREN BISHOP II, LAW OF CORPORATE OFFICERS & DIRECTORS: INDEMNIFICATION & INSURANCE § 3:23 (2008) (noting that the concept of gross negligence is the standard for determining whether the business judgment exercised by the board of directors was informed and thus not a breach of the director's duty of care).

69. *See* Tuttle, *supra* note 66, at 901 (examining the broad scope of liability that the fiduciary faces for breaches).

70. *See generally* RESTATEMENT (SECOND) OF TORTS § 876 (1979) (setting forth the elements of aiding and abetting). Restricting the scope of liability to conduct that is "knowing" is in conformity with the policy behind many courts' use of actual knowledge as the requisite standard of knowledge—it is undesirable and unfair to hold people liable for another's tort unless they knew what they were doing. *Id.*

a gross imbalance of power exists.[71] In closely-held businesses with decentralized management, which may include any of the aforementioned entities, management duties (including daily operating procedures and policies and general long-term business plans) are directly controlled by the owners.[72] Co-owners may agree to the allocation of various means of control upon business formation.[73] With this control comes heightened duties owed by those who possess it. To guard against the majority owner exerting his dominance at the expense of the minority owner, co-owners owe each other inter se fiduciary duties.[74] Inter se duties are distinguished from ordinary fiduciary duties owed by managers in that inter se duties are peculiar to the co-owners without regard to management position.[75]

In contracts, parties dealing at arm's length are limited only by the requirement that they must act in good faith; however, there is a distinctive difference between the duties owed by parties dealing at arm's length and the duties owed by parties who are closely involved in a common pursuit.[76] Co-owners are fiduciaries and although the relationship between co-owners substantially differs from the relationship between a trustee and beneficiary, it is still one that involves loyalty and care. It is axiomatic that a higher level of duty should be imposed upon those who invest their labor and capital in a common enterprise.[77] Justice Cardozo's oft repeated maxim "[n]ot honesty alone, but the punctilio of an honor the

71. *See* Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 383–84 (2004).

72. *See* Ann E. Conaway & Robert R. Keatinge, *Fiduciary Duties of Owners and Managers in Closely-Held Businesses and Contractual Relationships or Co-Ownerships*, VML0202 ALI-ABA 119, 121 (2006) (examining the fiduciary duties and contractual duties in small businesses).

73. Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 WM. MITCHELL L. REV. 1143, 1148 (1990) (distinguishing the obligations and rights of owners in closely-held corporations from corporations).

74. *Id.* at 1153.

75. *Id.*

76. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.").

77. *See* Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 252 (2004) (noting that special relationships between merchants were the original source of fiduciary duties in joint ventures in the sixteenth century).

most sensitive" emphasizes the importance of fiduciary duties within the co-owner relationship.[78]

Upon entering into a business relationship, co-owners have a reasonable expectation of their position and rights within the business.[79] Reasonable expectations may derive from the terms of the co-owners' agreement upon formation; however, issues that were not initially discussed among the co-owners may later arise and cause conflict.[80] Indeed, in addition to express agreements, the conduct of the parties may give rise to reasonable expectations.[81] To uphold a co-owner's reasonable expectations and to protect the minority owner from being wrongfully excluded from participating in the business, some courts have imposed a general right not to be oppressed.[82] Because oppression results from a majority owner depriving a minority owner of some reasonable expectation, courts are left to examine and sift through the parties' agreements and conduct to determine what their reasonable expectations are.[83]

Corresponding with this right is the duty of the co-owners not to perpetuate oppressive conduct.[84] As referenced above, fiduciary relationships in the context of closely-held business differ from that of trusts.[85] The interdiction of any acts by the trustee motivated by self-interest is not present in closely-held businesses. In closely-held businesses, self-interests are present as co-owners have different notions of what is best for the business.[86] Because majority owners may be in the position where they must make a business decision that is incongruent with the minority owner's wishes, they are

78. *Meinhard*, 164 N.E. at 546.

79. Kleinberger, *supra* note 73, at 1155–56 (discussing in detail the existence of reasonable expectations in closely-held corporations and noting the difficulty in this concept as owners' reasonable expectations may conflict).

80. *Id.* at 1149 (examining McQuade v. Stoneham, 189 N.E. 234 (1934)).

81. *Id.* at 1155–56 (discussing in detail the existence of reasonable expectations in closely-held corporations and noting the difficulty in this concept as owners' reasonable expectations may conflict).

82. *Id.* at 1151–53.

83. *See* Joseph W. Anthony & Karlyn Vegoe Boraas, *Betrayed, Belittled . . . But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 WM. MITCHELL L. REV. 1173, 1178–79 (1996) (explaining reasonable expectations may include lifetime employment and compensation).

84. Kleinberger, *supra* note 73, at 1153 (describing the right not to be oppressed as direct, arising out of the relationship between the owners, not the relationship between the entity and the aggrieved owner).

85. *See supra* text accompanying notes 76–78.

86. Kleinberger, *supra* note 73, at 1157–60.

entitled to the right of "selfish ownership."[87] For example, in a leading case, *Wilkes v. Springside Nursing Home, Inc.*,[88] the Supreme Judicial Court of Massachusetts proclaimed that "the controlling group in a close corporation must have some room to maneuver in establishing the business policy."[89] Therefore, majority owners may exercise discretion in making decisions regarding a business even if it harms a minority owner so long as (1) there is a legitimate purpose, and (2) the majority owners' objective could not be accomplished through less destructive means.[90]

Where selfish ownership is intertwined with the duty of loyalty, courts are inconsistent in their analyses of breach of fiduciary cases among co-owners in closely-held businesses. The examination of whether a co-owner in a closely-held business has breached a fiduciary duty is fact intensive, and the evaluators' individual moral beliefs may affect the final determination.[91] Where one court finds a breach of fiduciary duty, another may not.[92]

The inconsistencies that are prevalent among courts' decisions involving fiduciary duties are indicative of the origin from which they arose: the English court of equity.[93] Where law failed to give an adequate remedy for one whose trust and confidence was abused, equity provided relief.[94] The Chancellors of the courts of equity had a great degree of discretion when deciding a case; fairness and equity prevailed over consistency and predictability.[95] This theme remains in modern day fiduciary duty analysis and manifests itself in the closely-held business context.

87. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976).

88. 353 N.E.2d 657 (Mass. 1976).

89. *Id.* at 663.

90. *Id.* at 663.

91. *See* DeMott, *supra* note 59, at 891–92.

92. *See, e.g.*, Landstrom v. Shaver, 561 N.W.2d 1, 7–12 (S.D. 1997) (overruling the trial court's determination of oppression by applying both the reasonable expectations test and the burdensome, harsh, and wrongful conduct test).

93. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1452–78 (2002) (examining the numerous fiduciary relationships arising out of equity courts).

94. *Id.* at 1493–94 (addressing possible remedies, in law and in equity, available for breaches of fiduciary duties).

95. *See* DeMott, *supra* note 59, at 880–82.

B. Lawyer's Liability for Aiding and Abetting Breach of Fiduciary Duty

1. Breach of Fiduciary Duty

Breaches of fiduciary duty do not fall neatly within the confines of traditional tort law because a breach of fiduciary duty is a civil cause of action for which damages or equitable relief, such as disgorgement, may be awarded.[96] Furthermore, depending on the remedy the plaintiff seeks, a breach of fiduciary duty claim does not necessarily give rise to a jury trial.[97] Despite the equitable nature of fiduciary duties, breaches of these duties are likened to torts for the purpose of imposing aiding and abetting liability.[98] The Restatement provides a basis of liability for those who know "that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ."[99] Section 876(b) provides the foundation upon which most civil aiding and abetting decisions are based. The Restatement's elements—the underlying breach of duty, the secondary actor's knowledge of that breach, and the secondary actor's substantial assistance furthering the breach—are prevalent in decisions in which courts have addressed the issue of whether liability may be imposed for aiding and abetting breach of fiduciary duty.[100]

2. Aiding and Abetting Breach of Fiduciary Duty by Lawyers

a. Policy

Though one who aids and abets a fiduciary in breaching a duty may be subject to liability, determining whether a lawyer should be

96. *See id.*

97. *See* Pereira v. Farace, 413 F.3d 330, 338 (2d Cir. 2005) (finding that when determining whether breach of fiduciary duty claim was an action at law or in equity, lower court should have applied a two-part test: first, whether the action would have been equitable in eighteenth century England, and second, whether the remedy sought was equitable or legal in nature (citing Grafinanciera v. Nordberg, 492 U.S. 33, 42 (1989))).

98. *See, e.g.*, Zastrow v. Journal Commc'ns, Inc., 718 N.W.2d 51, 60 (Wis. 2006) (stating that breach of fiduciary duty of loyalty is an intentional tort and distinguishing it from the duty of care element of negligence which is an issue of carelessness).

99. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

100. *Id.*

liable for assisting her client's breach of fiduciary duty adds complexity to the aiding and abetting analysis. The determination compels courts to reconcile distinct and perhaps equally important fiduciary relationships that conflict. The question of whether lawyers should be included in the scope of secondary actors subject to liability for aiding and abetting is an issue of growing concern.[101]

It is commonly held that lawyers do not owe duties to non-clients.[102] When a fiduciary breaches his duty of loyalty with the substantial assistance of his lawyer, the causes of action against the lawyer that are afforded to the entrustor are limited. The lack of privity between the entrustor and the lawyer eliminates the entrustor's ability to assert a malpractice claim against that lawyer.[103] For example, in *Spinner v. Nutt*,[104] the trustee's lawyer failed to advise the trustee to make an investment in which there was a high probability of yielding a substantial profit for the trust. The court held that the beneficiaries of the trust were neither the lawyer's clients nor intended beneficiaries of the contract.[105] Thus the plaintiffs' malpractice claim failed because the lawyer's conduct was negligent and not intentionally done to assist the trustee in depriving the trust of the expected profits.[106]

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101. *See generally* Richard Mason, *Civil Aiding and Abetting*, 61 BUS. LAW. 1135, 1136 (2006) (noting that civil aiding and abetting provides a cause of action against professionals and is increasingly being used to hold professionals liable for underlying torts).

102. *See* McIntosh County Bank v. Dorsey & Whitney, LLP, ___ N.W.2d ___, No. A06-486, 2008 WL 598288, at *5 (Minn. March 6, 2008) (recognizing that, generally, "an attorney is liable for professional negligence only to a person with whom he has an attorney-client relationship."). This rule has been relaxed in some states. *See, e.g.*, Calvert v. Scharf, 619 S.E.2d 197, 203–04 (W. Va. 2005) (holding that under certain circumstances a beneficiary will have standing to sue a lawyer for malpractice if the lawyer negligently drafts the will for which the plaintiff is the beneficiary); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (discerning that a lawyer may be liable to third party beneficiaries in certain situations).

103. *See, e.g.*, Cacciola v. Nellhaus, 733 N.E.2d 133, 137–39 (Mass. App. Ct. 2000) (holding that a partner could not bring forth a claim for legal malpractice absent an "express [individual] attorney-client relationship," but providing other grounds for relief to a disgruntled owner by holding that the lawyer representing the partnership owed direct fiduciary duties to all partners); Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484 (Tex. 1992) (examining the policy reasons supporting the strict privity requirement for malpractice claims).

104. 631 N.E.2d 542 (Mass. 1994).

105. *Id.* at 544–45 (holding that *trustee's* lawyers did not owe duty of care to beneficiaries).

106. *Id.* at 546 (stating that "[a]n allegation that the trustees acted under the legal advice of the [lawyers], without more, is insufficient to give rise to a claim

Lawyers representing fiduciaries are in a unique position, especially when those fiduciaries are obligated to act with undivided loyalty to and in the best interests of the entrustor.[107] In these cases, a lawyer's representation may be limited to advising the client in acting in his role as a fiduciary. In light of the limited scope of the lawyer's representation, it is questionable whether the lawyer's representation to the fiduciary client would ever encompass advising the fiduciary to breach its duty to the entrustor[108]—an act that neither the lawyer nor the client has the right to do. For example, where a trustee's lawyer assists the trustee in depleting trust assets to pay off the trustee's personal gambling debts, there is little justification for protecting the lawyer's *right* to advise her client to act unlawfully.[109]

Even a cursory review of aiding and abetting law will reveal that lawyers should not be immune from a court's application of liability if the requisite elements of the Restatement section 876(b) are found.[110] Although the lawyer-client relationship is a fiduciary one, this relationship should not negate the lawyer complying with the general duty to refrain from knowingly and substantially assisting another in violating the law. In addition to the obvious argument that no one should be "above the law," other policies provide cogent reasons why lawyers should be included, at least in some contexts, among possible aiders and abettors. Fiduciary relationships are pervasive, and the widespread presence of

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that [a lawyer] is responsible to third persons for the fraudulent acts of his clients.").

107. Generally, lawyers representing fiduciaries are not in fiduciary relationships with their clients' entrustors. *See* Am. Cenntennial Ins. Co., 843 S.W. 2d at 484. It may, however, be argued that where the client has no self-interest in its relationship with the entrustor, the lawyer's advice would never fall outside the scope of acting in the best interests of the entrustor. *But see* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (finding that a lawyer's role is restricted to lawyer's loyalties to fiduciary-client and that this arrangement allows the lawyer to understand her role in representing the fiduciary and encourages the client to be forthright with the lawyer).

108. *See* Barksdale, *supra* note 38, at 598–99 (providing policy reasons why lawyers should be immune from liability).

109. *See, e.g.*, Wolf v. Mitchell, Silberberg, & Knupp, 90 Cal. Rptr. 2d 792 (Ct. App. 1999) (holding the beneficiary's allegations were sufficient to state claim against trustee's lawyer under exception to general rule against trust beneficiaries' standing for a third party's active participation in breach of trust).

110. *See* Barksdale, *supra* note 38, at 601 (discussing the role lawyers play in clients' breaches of fiduciary duties in closely-held businesses and advocating for lawyer accountability to third parties for aiding and abetting clients' breaches).

fiduciary duties emphasizes their importance to modern-day society. Protecting the entrustor in a fiduciary relationship furthers important objectives of both tort law and fiduciary law such as protecting the innocent party, compensating the victim, and encouraging socially desirable behavior.[111] Trust and loyalty are fundamental to fiduciary relationships.

Not all courts find the policies supporting the liability of lawyers persuasive. California, for example, establishes multiple barriers to liability for participating in clients' breaches.[112] Similar to a malpractice claim, the entrustor's ability to assert a claim against the lawyer for breach of fiduciary duty is often foreclosed due to the lack of privity between an entrustor and the fiduciary's lawyer. In addition, California's strong public policy of protecting the trust and confidence existent in the lawyer-client relationship is exemplified by the broad scope of the agent's immunity doctrine, discussed infra.[113]

Despite the policies supporting lawyer immunity, the majority of jurisdictions that have addressed the issue of a lawyer's liability for assisting her client's breach of fiduciary duty recognize that lawyers may be held liable.[114] The scope of this liability, however, is quintessentially unclear. The lack of clarity derives from both the lawyer's position as a fiduciary to her client and the elusive nature

111. *See* Tuttle, *supra* note 55 at 901; *see also* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (broadly categorizing the objectives of tort law into at least five groups: compensation-deterrence theory, enterprise liability theory, economic deterrence theory, social justice theory, and individual justice theory).

112. *See infra* Part IV.

113. *See generally* Reynolds v. Schrock, 142 P.3d 1062 (Or. 2006) (holding that a lawyer acting within the scope of representation may not be held liable for aiding and abetting her client's breach of fiduciary duty). *But see* Tuttle, *supra* note 55, at 934 (describing the underlying rationale for protecting confidentiality: the law protects communications between lawyer and client so that the lawyer can help conform his conduct to the law's requirements); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2006) ("a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."). For more discussion regarding a lawyer's immunity from liablity under the agency theory see *infra* Part IV.

114. *See* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 186–87 (Minn. 1999) (stating that "most courts in addressing [aiding and abetting clients' fiduciary duties] have not excluded professionals from aiding and abetting liability."). *But see* Pavicich v. Santucci, 102 Cal. Rptr. 2d 125, 131–35 (Ct. App. 2000) (holding that under agency principals, attorneys are not liable for client's breaches when acting within their scope of representation).

of the second and third elements of aiding and abetting, knowledge and substantial assistance.

b. Knowledge

The second element of aiding and abetting is the lawyer's knowledge that her client's (the primary actor) conduct constitutes a breach of fiduciary duty.[115] Though most courts use actual knowledge as the standard for determining aiding and abetting liability to lawyers, few courts spend any significant time delineating what actual knowledge is and what facts support the existence of actual knowledge. Black's Law Dictionary defines actual knowledge as "[d]irect and clear knowledge, as distinguished from constructive knowledge" and that it exists where a person sees something "first hand."[116] Constructive knowledge is knowledge that "one using reasonable care or diligence should have."[117] Knowledge is, therefore, contextual, "attributed by law to a given person."[118] Constructive knowledge requires an objective inquiry, as opposed to actual knowledge, which requires a subjective inquiry.[119] Where a court employs the actual knowledge standard in determining liability of lawyers for aiding and abetting, "red flags," which *should* alert the lawyer to her client's breach, may not be enough.[120] The requirement of actual knowledge, therefore,

115. For more discussion of the knowledge element of aiding and abetting see *infra* Part III.

116. BLACK'S LAW DICTIONARY 888 (8th ed. 2004). *See also In re* Lee Memory Gardens, Inc., 333 B.R. 76, 80 (Bankr. M.D. N.C. 2005) (having knowledge means "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence about a fact." (quoting BLACK'S LAW DICTIONARY 888 (8th ed. 2004))).

117. *See* BLACK'S LAW DICTIONARY 888 (8th ed. 2004).

118. *Id.*

119. *See* Combs, *supra* note 14, at 283 n.204.

120. *See* Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 83 (5th Cir. 2001) ("to act knowingly means to act with actual knowledge. This means that [the plaintiff] must prove that [the defendant] actually knew two things: that [the primary actor] owed a fiduciary duty to [the plaintiff] and that [the primary actor] was breaching that duty. It is not enough for [the plaintiff] to show that [the defendant] would have known these things if it had exercised reasonable care."). *But see* McNulty & Hanson, *supra* note 49, at 43–44 (noting that in analyzing the requirement of actual knowledge, plaintiff may prove defendant had knowledge by circumstantial evidence, usually through a series of "red flags" that leads one to ask how the defendant could not have seen them along the way, but recognizing that "[t]here is a danger in such a must-have-known analysis . . . [in that] the secondary actor's alleged awareness of the fraud is subjected to the

guards against a lawyer being obligated to investigate any reasonably questionable business decisions of her client.

Where there is an obvious breach of fiduciary duty, a court could easily find the requisite degree of knowledge to impose aiding and abetting liability onto a lawyer without making a lawyer an investigator with respect to her client's business decisions. An obvious breach is more likely to exist when a fiduciary's primary objective is to act in the best interests of the entrustor because conduct that falls outside of the scope of what is considered "in the best interests" is evident.[121] A lawyer's exposure to aiding and abetting liability when the boundaries of the fiduciary's conduct are clear is exhibited in the trust context. For example, in a situation where a trustee commingles trust assets with his own and takes from the trust in order to pay personal debts, the fiduciary's conduct is clearly outside the scope of what is in the best interests of the beneficiary.[122] The underlying breach is quickly detected. Therefore, where a lawyer assists the trustee in acting in a way that is contrary to the trustee's role as a fiduciary, the second element of aiding and abetting—knowledge of the underlying breach—is more easily found.

The ease with which courts find knowledge of underlying obvious breaches is exemplified in *In re Senior Cottages of America, LLC*.[123] In that case, the court found that the plaintiff's complaint adequately stated an aiding and abetting breach of fiduciary duty claim against the lawyer.[124] The primary actor was a manager, governor, and majority owner of Senior Cottages of America, LLC.[125] Senior Cottages was an insolvent limited liability company

scalpel of the legal dissector, not from the vantage of foresight, but from the perspective of omniscient hindsight.").

121. *See, e.g.*, Cal Pak Delivery, Inc. v. United Parcel Serv., Inc., 60 Cal. Rptr. 2d 207, 213 (Ct. App. 1997) (holding that "[s]urreptitiously contacting the opposing party and offering to dismiss a client's action or forego filing a valid cause of action in return for payment of fees directly to the attorney, creates a conflict of interest and constitutes an obvious breach of the attorney's fiduciary obligation to the client.") (internal citations omitted).

122. *See, e.g.*, Wolf v. Mitchell, 90 Cal. Rptr. 2d 792 (Ct. App. 1999) (holding that the beneficiary's allegations were sufficient to state a cause of action under an exception to the general rule against the trust beneficiaries asserting claims against third parties).

123. 482 F.3d 997 (8th Cir. 2007) (reversing the lower court's conclusion that bankruptcy trustee lacked standing to assert claims against manager and attorney for aiding and abetting).

124. *Id.* at 1007.

125. *Id.* at 999.

that operated nursing homes eligible for low-income housing tax credits.[126] Before filing bankruptcy, the majority owner formed an independent limited liability company to benefit from the tax credits.[127] Instead of finding an arm's-length buyer, the majority owner transferred Senior Cottages's assets to the independent limited liability company.[128] The independent company did not give a "reasonably equivalent value" in exchange for the credits and this arrangement was found to be fraudulent.[129] The majority owner stripping the business of its assets constitutes an obvious breach of fiduciary duty to the business. Therefore, it had to have been obvious to the lawyer when the lawyer advised the majority in structuring the arrangement that depleted Senior Cottages's assets.[130]

c. Substantial Assistance

In general, for a lawyer to be liable for aiding and abetting her client's breach of fiduciary duty, the lawyer must provide substantial assistance in furtherance of that breach.[131] In practice, liability may turn on how much substantial assistance is enough.[132] Similar to the challenges that courts face in grasping the knowledge element, courts find difficulty in the ambiguity of the substantial assistance element. This difficulty is evidenced in reviewing the various applications of the third element.

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126. *Id.* at 999–1000.

127. *Id.* at 1000.

128. *Id.*

129. *Id.* (referring to findings of an earlier Minnesota state court decision, *DKM II, Inc. v. Senior Cottages of America, LLC*, No. 98-16654 (Minn. Dist. Ct. Apr. 12, 2000), and stating that decision was incorporated by reference in the amended complaint).

130. *Id.* at 1007. The complaint plead that the majority owner:

> [B]reached his fiduciary duties to Senior Cottages in stripping the company of its assets without reasonable compensation; that [law firm] knew that [majority owner's] actions were in breach of his fiduciary duties; and that [law firm] provided substantial assistance to [majority owner] and advised its client, Senior Cottages, to conclude the transaction. These allegations are sufficient to plead a claim for aiding and abetting a breach of fiduciary duty.

Id.

131. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (requiring substantial assistance for civil aiding and abetting liability).

132. Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (providing a detailed analysis of substantial assistance finding).

Some courts refer to substantial assistance as knowing participation, the gravamen of an aiding and abetting claim.[133] These courts drop the descriptor "substantial" and replace it with the descriptor "knowing."[134] This modification creates a redundancy of the second element and might signal that less substantial participation might suffice to impose liability.[135] Despite the absence of the word *substantial*, courts' analyses in reviewing aiding and abetting claims against lawyers have not significantly changed. These cases do illustrate the semantic problems courts have with the ambiguous standards.

In determining whether the facts support the existence of a lawyer's substantial assistance, courts turn to the factors in comment d of the Restatement (Second) of Torts section 876(b) for guidance.[136] The first factor, the nature of the act encouraged,

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133. *See, e.g.*, Holmes v. Young, 885 P.2d 305, 309 (Colo. Ct. App. 1994). In *Holmes*, the court explained that:

> The gravamen of a claim of aiding and abetting a breach of fiduciary duty is the defendant's "knowing participation" in the fiduciary's breach of trust; wrongful intent is not necessary as the factfinder is required only to "find that the [defendant] knew of the breach of duty and participated in it."

Id. (quoting S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 848 (2d Cir. 1987).

134. *See, e.g.*, Mann v. GTCR Golder Rauner, L.L.C., 483 F. Supp. 2d 864, 878 (D. Ariz. 2007) (holding that a claim for aiding and abetting a breach of fiduciary duty requires "(1) the existence of a fiduciary relationship; (2) a *breach* of that *duty*; (3) knowing participation by the non-fiduciary; and (4) damages." (citations omitted)). *See also* Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756 (S.D. 2002) (providing that "[l]egal authorities . . . are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby."); *Young*, 885 P.2d at 308–09 (acknowledging that a cause of action for aiding and abetting a breach of fiduciary duty requires "(1) breach by a fiduciary of a duty owed to [a] plaintiff, (2) [a] defendant's knowing participation in the breach, and (3) damages.").

135. *See* Combs, *supra* note 14, at 267 (describing the changing elements of the judicial tests).

136. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). In pertinent part, comment d provides the following guidance:

> The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered. . . . [A]lthough a person who encourages another to commit a tortious act may be responsible for other acts by the other, ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him.

Id. (internal cross-references omitted).

is essential to establishing the type of assistance that would matter in terms of furthering the client's tortious conduct.[137] Since breaches of fiduciary duties occur in multiple contexts, breaches vary. Depending on what is necessary for the breach to occur, a fiduciary may require some specialized knowledge held by the lawyer.

The substantial assistance analysis benefits, perhaps, from evaluating the third element, the amount of the lawyer's assistance to her client, with the second element, knowledge.[138] Generally, where lawyers are involved, neither silence nor inaction meets the threshold of substantial assistance.[139] In addition, some courts have stated that the performance of ordinary and routine professional services like drafting documents or even advising clients does not constitute substantial assistance.[140] For example, in an analogous context in which an accountant provided services such as preparing financial statements, setting up accounts, recording conveyances, and providing tax advice, the court deemed these services as "routine" and therefore not substantial assistance.[141] The analysis of an accountant's liability is applicable to lawyers because lawyers and accountants are similarly situated as professionals owing fiduciary duties to their clients.[142] Moreover, in both professions, a variety of

137. *See Halberstam*, 705 F.2d at 483–84 (noting that in a physical battery case, a defendant's "war cry" for continued beating may have contributed to the assaulter's rage).

138. RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. d (1979).

139. *See* McNulty & Hanson, *supra* note 49, at 19–20 (stating that "action is a necessary predicate for substantial assistance" and therefore "silence or inaction is legally insufficient").

140. Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 189 (Minn. 1999).

141. *Id.* (noting that generally professionals performing routine services should not be held liable for the torts of their clients). *But see* Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768–69 (Ill. Ct. App. 2003) (stating that communicating the competitive advantages available to the company to other parties, but specifically not to the plaintiff; reviewing and counseling the plaintiff's former partner with regard to the production of investment offering memoranda, financial projections, and marketing literature, which purposely failed to identify plaintiff as a partner; and drafting, negotiating, reviewing, and executing documents, including the releases relating to the purchase of plaintiff's interest, may constitute substantial assistance in an aiding and abetting claim).

142. *See* Malmsteen v. Berdon, LLP, 477 F. Supp. 2d 655, 662 (S.D.N.Y 2007) (holding that although "[c]ourts do not generally regard the accountant-client relationship as a fiduciary one, where the allegations include knowledge and concealment of illegal acts and diversions of funds . . . a [breach of fiduciary duty] cause of action against an accountant will be permitted to stand.") (internal

services are performed, some of which require the professional to go beyond merely filling out forms.

For the proposition that the performance of routine services is not substantial assistance, courts often cite to dicta in the Massachusetts case *Spinner v. Nutt*.[143] In *Spinner*, the beneficiaries of a trust alleged that the lawyer's legal advice to his client, a trustee, induced the trustee's breach of fiduciary duty.[144] In refusing to impose liability on the trustee's lawyers for aiding and abetting the trustee's breach of fiduciary duty, the court stated that legal advice alone was insufficient to hold lawyers liable.[145] The *Spinner* court's recital of the facts indicates that in advising the trustees, the lawyers were merely negligent and did not intentionally further the breach.[146] This distinction is important because it addresses the limitation on a secondary actor's liability when acting negligently. Indeed, it is plausible that *Spinner* relieves negligent lawyers of liability but still holds open the possibility of a lawyer's ordinary and routine services constituting substantial assistance if intentionally done to aid a client's breach of fiduciary duty.[147]

3. Aiding and Abetting in Closely-Held Businesses

a. Introduction to Squeeze-Outs

The liability of lawyers for aiding and abetting breaches of fiduciary duties in the contexts described above extends to the context of closely-held businesses. In contrast to the aiding and abetting analysis in "plain vanilla" breaches of fiduciary duty, the aiding and abetting analysis in closely-held businesses is less clear

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quotations and citations omitted); CPJ Enterprises, Inc. v. Gernander, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994) (stating that "[t]he lawyer-client relationship is jealously guarded and restricted to only those two parties because it is a fiduciary relationship of the highest character.").

143. *See, e.g.*, *Witzman*, 601 N.W.2d at 189 (citing Spinner v. Nutt, 631 N.E.2d 542, 546 (Mass. 1994) for the proposition that "substantial assistance" means something more than routine professional services).

144. *Spinner*, 631 N.E.2d. at 546.

145. *Id.*

146. *Id.*

147. *See, e.g.*, Anstine v. Alexander, 128 P.3d 249, 255 (Colo. Ct. App. 2005) (distinguishing lawyers rendering "professional advice" and defendant lawyer advising client in how to transfer escrowed insurance premiums "off shore" to purchase illegal Swiss insurance policies), *rev'd on other grounds*, 152 P.3d 497 (Colo. 2007).

due to the unique nature of the duties owed by majority owners.[148] Proving that the lawyer had actual knowledge of the breach of duty adds even more complexity to the aiding and abetting analysis.

When entering into a closely-held business, a minority owner has certain reasonable expectations with regard to ownership and control.[149] By virtue of the majority owner's position as the majority interest holder, the majority owner has control of the business. To protect the minority owner from the majority owner's abuse of that control, the majority owner owes the duty not to use his power to oppress the minority owner by acting contrary to the minority owner's reasonable expectations.[150] If the majority owner fails to adhere to his duty not to oppress, a squeeze-out occurs.

A squeeze-out is essentially a majority owner's use of control over the business to eliminate or reduce minority owners' interests in the business; a majority owner's actions are at the expense of a minority owner's reasonable expectations.[151] Majority owners exert their control to accomplish a squeeze-out by applying one or several mechanisms.[152] For example, a majority owner may terminate a minority owner's position of employment or use voting power to weaken a minority owner's control over business affairs. Majority owners may also decide to withhold or restrict dividends while increasing their own salaries.[153] When a majority owner uses more than one mechanism, squeeze-outs can become complex.

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148. *See generally* Part III.A.2.

149. Kleinberger, *supra* note 73, at 1155–56.

150. *Id.* at 1153.

151. *See* F. HODGE O'NEAL AND ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 1.01, at 1–2 (rev. 2d ed. 2005).

152. *See generally* Franklin A. Gevurtz, *Squeeze-Outs and Freeze-Outs in Limited Liability Companies*, 73 WASH. U. L.Q. 497, 517–538 (1995) (examining provisions in partnership law and corporation law that have promoted or inhibited squeeze-outs, and discussing which provisions should be included in limited liability company statutes to minimize risk of member squeeze-outs).

153. O'NEAL & THOMPSON, *supra* note 151, §§ 3–5. Other squeeze-out mechanisms include: siphoning off corporate earnings by leases and loans favorable to the majority; siphoning off a corporation's profits by having other enterprises perform services; fraudulent or unfair contracts; appropriation of corporate assets, contracts, or credit for personal use; corporation's purchase of shares from majority shareholder at a high price; dilution of minority's interest through issuance of stock; withholding information; and changing rights through charter amendments. *Id.*

Squeeze-outs occur for a variety of reasons.[154] In general, a majority owner's improper motivation lies at the root of oppression. Improper motivation may arise from dissention among the co-owners of the business.[155] Common types of discord include the co-owners disagreeing on valuing the interest of the shares,[156] the entry of a minority owner into a competing business, the co-owners' failure to appreciate the problems with a change in control,[157] or the drive of one owner with superior talent to advance in the business.[158] In addition, oppression may be motivated entirely by a majority owner's greed or desire for power.[159]

The majority owner's desire to gain control at the expense of the minority owner's reasonable expectations induce some squeeze-outs, but legitimate business purposes motivate others.[160] Majority owners have a certain degree of latitude to make decisions in furtherance of their own interests and to act on behalf of the business.[161] For example in *Exadaktilos v. Cinnaminson Realty Co.*, the majority dealt with a derelict minority owner by discharging the minority owner from his position in the business.[162] The minority owner filed suit against the business and the majority owner claiming that the majority owner's actions constituted

154. *See id.* § 2.01 at 2 ("The underlying causes of squeeze-outs are not always clear.").

155. *Id.* § 2.02.

156. *See id.* § 2.16 at 46 (noting that multiple factors will affect the price at which the majority owners and minority owners value the business).

157. *Id.* § 2.12 at 32 (stating that because withdrawing owners have usually acquired a specific skill in the particular business, existing owners frequently see employment in a similar line of business).

158. *Id.* § 2.06 at 15 (quoting an anonymous lawyer that "a typical scenario of this includes: 'Our client ___ was lazy and dumb. The defendant ___ was energetic and sharp. There was no fraud involved.' "); § 2.06 at 16 (stating that "[i]n the long run, the capable tend to gain the upper hand" and that "[e]ven in a family corporation, the dominant business person in the family often eventually pushes out less able relatives, diminishes their participation, or excludes them from new opportunities which arise out of the enterprise.").

159. *See, e.g.*, Goben v. Barry, 676 P.2d 90, 97 (Kan. 1984) (stating that the owner's actions including failing to account or divide the property, increasing his own salary, concealing withdrawals, and denying co-owner's interest in the company were motivated "solely [by] monetary gain.").

160. *See* O'NEAL & THOMPSON, *supra* note 151, § 2.11 at 3.

161. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976).

162. Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561–62 (N.J. Super. Ct. Law Div. 1979) (holding that there was no oppressive action toward plaintiff by controlling owners).

oppression.[163] The minority owner claimed that he had an expectation of a management position in the business and that the majority owner's action infringed on this expectation.[164] The court, however, found no oppression because the minority owner failed to "learn the business," a condition precedent to his employment in the company.[165]

There may be several legitimate reasons why a majority owner would want to distance himself and the business from the minority owner. For example, if a minority owner ages and experiences correlative health issues, his decreased capacity to work could have a harmful effect on the business.[166] But regardless of the majority owner's motive, if the majority owner pursues his self-interest in a way that is unfair to the minority owner, it is wrongful. If, in *Exadaktilos*, the co-owners didn't agree that the minority owner's employment and right to manage was contingent on his satisfactory performance in the business, the court may have found oppression.

Oppression occurs when proper motivation—a legitimate business purpose—is improperly executed.[167] For example, in *Royals v. Piedmont Electric Repair Co.*, the minority owner was involved in a sexual harassment claim that allegedly caused the business to suffer.[168] After the claim arose, the majority owners began the minority owner's removal by limiting the minority

163. *Id.* at 554.

164. *Id.* at 556.

165. *Id.* at 561–62.

166. S*ee, e.g.,* Bermann v. Meth, 258 A.2d 521 (Pa. 1969). Here the minority owner brought a derivative action on behalf of closely-held business against an owner whose age and ill health caused him to reduce the number of hours each day he worked. In reviewing the trial court's decision that the defendant's salary constituted corporate waste, the court found that even though the defendant was not contributing the same amount of time and labor to the corporation as he did before he became ill, his salary, which was comparable to that of years past, was not excessive.

167. *See, e.g.*, Gimpel v. Bolstein, 477 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1984) (holding that "actions to date of majority owners with respect to minority [owner] essentially excluded from all participation in operation, management, or profits of the corporation by reason of that owner's alleged dishonest acts were not so 'oppressive,' that is, burdensome, harsh, or wrongful, as would warrant dissolution of the corporation" but that "court had discretion to fashion other appropriate remedy to protect rights of minority [owner]").

168. Royals v. Piedmont Elec. Repair Co., 529 S.E.2d 515, 520 (N.C. Ct. App. 2000) (holding that the minority owner's reasonable expectations were not caused by his sexual harassment claim but were frustrated by the majority owners' actions).

owner's activity in running the business.[169] The majority then terminated the minority owner's employment and withheld compensation while refusing to buy the minority owner's shares for anything less than half the book value.[170] In addition, the majority fired the minority owner's grandson, Royal, from his position as director.[171] The court, proclaiming North Carolina's reputation of being "a pioneer and 'shining light' in the protection of minority [owner] rights," found the majority's conduct oppressive.[172] The minority owner's reasonable financial and managerial expectations were unrelated to the sexual harassment charge.[173] The majority's actions, therefore, "manifest[ed] an intent to control the company without any minority [owner] or director input."[174]

b. Complexity of Squeeze-outs

When the majority owner desires to disguise the oppression of the minority owner, squeeze-outs become complex. The level of sophistication needed to avoid an obvious breach of fiduciary duty requires expertise. The majority owner's ability to orchestrate squeeze-outs requires strategy and other technical assistance that lawyers are well-equipped to provide. An example of strategic complexity is found in *Aranki v. Goldman & Associates*.[175] In *Aranki*, the majority owner's lawyer assisted the squeeze-out of the minority owner by initiating a lawsuit, the merits of which were questionable, against the minority owner for theft and conversion.[176] At the same time, the lawyer advised the majority to place the minority in default of a personal loan between the two parties.[177] The sequence of events in the squeeze-out was designed to deplete the minority's funds, leaving him vulnerable to unfair settlement terms.[178]

169. *Id.* at 517.
170. *Id.* at 517–18.
171. *Id.* at 517.
172. *Id.* (citing Robert Savage McLean, *Minority Owners' Rights in the Close Corporation under the New North Carolina Business Corporation Act*, 68 N.C. L. REV. 1109, 1125–26 (1990)).
173. *Id.* at 520–21.
174. *Id.* at 521.
175. 825 N.Y.S.2d 97 (N.Y. App. Div. 2006).
176. *Id.* at 511–12.
177. *Id.*
178. *Id.* (holding that the complaint set forth facts that would show that the defendants colluded to freeze plaintiffs out of "company's management and profit sharing" and "force them to surrender, at reduced price, their minority membership interest in company" and that the allegations were sufficient to bring

The need for expertise in accomplishing a squeeze-out is also evident in the level of technical complexity of squeeze-outs. For example, in *Granewich v. Harding*, the majority owner attempted to oust the minority owner by removing him from employment.[179] When the minority owner challenged the majority's actions, the majority hired a lawyer to accomplish the squeeze-out.[180] The lawyer's legal expertise, shown by the lawyer advising his clients to call special meetings, to amend the corporate by-laws, and to issue stock to dilute the value of the minority's interest, was essential to the oppression scheme.[181]

c. Is the Client's Conduct a Breach of Fiduciary Duty?

In plain vanilla breaches of fiduciary duty, where the fiduciary's breach is obvious, a lawyer should have no problem recognizing that her client's conduct constitutes a breach. But in closely-held businesses, a majority owner's wrongful conduct toward the minority owner may not be obvious. A minority owner's reasonable expectations in a specific business are peculiar to the agreements made among the owners of the business. Similarly, the legitimate business purposes of a majority owner are unique and highly contextual. A minority owner's reasonable expectations are often ambiguous, and a majority owner's actions appearing to further legitimate business interests, could, in fact, be oppressive.

Unless a majority owner's breach of fiduciary duty is obvious, it may be difficult for an "outsider," a court, or even a lawyer, to determine whether the actions of the majority owner were unlawful. A court that addresses oppression, therefore, must

forth a cause of action against the lawyers for aiding and abetting). The strategy described in the text was detailed in Plaintiffs-Appellant's brief to the appellate court. Brief of Plaintiffs-Appellants, Aranki v. Goldman & Assoc., LLP, 825 N.Y.S.2d 97 (N.Y. App. Div. 2006) (No. 2005-11033), 2006 WL 3831020.

179. Granewich v. Harding, 985 P.2d 788, 795–96 (Or. 1999) (holding that attorneys knew and participated in scheme to "squeeze out" minority owner, which resulted in breach of fiduciary duties of majority owners).

180. *Id.* at 791. *See also* Barksdale, *supra* note 38, at 577–78 (stating that "[a]ttorneys routinely facilitate corporate squeeze-outs because the close corporation is a legal entity whose very existence derives from attorney input and whose rules of governance and procedures are not easily understood by laypersons . . . . [B]y definition, a squeeze-out involves the controlling shareholder's utilization of powers of control and 'some legal device or technique' to remove the minority shareholder from the entity . . . that can only be accomplished by an attorney with knowledge of the statutory mechanisms authorizing such action.")

181. *Granewich,* 985 P.2d at 791–92.

scrutinize the facts to determine the minority owner's reasonable expectations,[182] and whether the majority owner, in pursuing a legitimate purpose, adequately yielded to those reasonable expectations—that is, whether the "same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."[183] This determination necessarily precedes the aiding and abetting issue.

An example of a situation where a majority owner's actions against a minority owner seemed legitimate, but in fact constituted a squeeze-out, is found in *Leslie v. Boston Software Collaborative*.[184] *Leslie* involved a software repair business that was owned and operated by the plaintiff minority owner and two other owners.[185] Upon the business's inception, each owner emphasized a different area in running the business and had some degree of technical proficiency.[186] All of the owners were employees, and to a certain degree their salaries reflected the amount of income each generated by servicing the business's clients.[187]

The minority owner conflicted with the majority over various issues, including the compensation scheme.[188] In addition, the minority owner was the subject of numerous employee and client complaints.[189] The majority owners' dissatisfaction with the minority owner culminated after reading a threatening e-mail from

182. *See* Royals v. Piedmont Electric Repair Co., 529 S.E.2d 515, 519 (N.C. Ct. App. 2000) (citing Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) (stating that "a complaining owner's reasonable expectations cannot be viewed in a vacuum; rather they must be examined and re-evaluated over the entire course of the various participants' relationships and dealings.")).

183. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976) ("The majority, concededly, have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation to the minority."). *See, e.g.*, Bermann v. Meth, 258 A.2d 521, 523–24 (Pa. 1969) (upholding owner's reasonable expectations of compensation and concluding that even though the ailing the owner's ability to work had decreased, the wages given to the ailing owner was not corporate waste).

184. No. 10268BLS, 2002 WL 532605 (Mass. Super. Ct. Feb. 12, 2002) (reviewing minority owner's claim of squeeze-out).

185. *Id.* at *1.

186. *Id.*

187. *Id.* at *2 (stating that the business was run similarly to a law firm, with the owners generating "billable hours" when directly servicing clients).

188. At one point, the owners decided on a compensation scheme that evened out the owners' salaries. But the arrangement did not last long as the majority owners wanted their hard work, which was apparently disproportionate to the minority owner's efforts, to be adequately compensated. *Id.*

189. *Id.* at *2–3.

the minority owner.[190] In dealing with the problematic minority owner, the majority owners placed the minority owner on leave and attempted to negotiate the minority owner's termination.[191] Unable to reach an agreement, the majority fired the minority owner, voted him out of his position as director, and voted to eliminate dividends and replace them with employee bonuses.[192]

In reviewing the minority owner's squeeze-out claim, the court found that the decision to oust the minority owner as a director and to fire him was contrary to his reasonable expectations.[193] Although the majority may have had a legitimate business purpose, there were less harmful alternatives available to pursue their purpose, including modifying the minority owner's job duties, upgrading his skills through education, and searching for a more "creative compensation" structure to meet his needs.[194] Although the court did not order the minority owner's reinstatement as an employee, the court directed that the minority owner receive eight months of severance pay and that he be reinstated as a director to protect his investment in the company.[195] As shown in *Leslie*, a majority owner's conduct that seems justified may still constitute oppression.[196]

Even after scrutinizing the facts, reasonable minds may differ as to whether the majority's actions constitute oppression. For

190. *Id.* at *3–4. In the e-mail, the minority owner stated that his wife reserved the right to "shoot" one of the majority owners. The minority owner was licensed to carry a gun and occasionally kept a gun in the office.

191. *Id.* at *4.

192. *Id.* at *5–6.

193. *Id.* at *8.

194. *Id.*

195. *Id.* at *9.

196. *See, e.g.*, Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994) (reviewing minority owner's appeal of lower court's valuation of minority owner's shares in buyout). In *Pooley*, three brothers owned and shared equal interest in a closely-held corporation. One of the brothers began to behave in a manner that was destructive to the business. *Id.* at 836. During a special owner's meeting, two of the brothers constituting the majority voted the belligerent brother out as a director. *Id.* The brother, as the minority owner, brought suit against the majority. *Id.* The trial court concluded that despite the minority owner's conduct, the majority owners deprived him of his reasonable expectation to participate in the management of the business. *Id.* Though limiting the minority owner's exposure to patrons of the business may have been a legitimate business purpose, the majority could have accomplished this in a different manner. The trial court's determination that the majority owners acted prejudicially by freezing the minority owner out of the business was not appealed. *Id.*

example, in *Landstrom v. Shaver*, the minority owner's views regarding how the corporation should be run clashed with those views of the majority owners.[197] The minority owner sued the majority owners, alleging oppression.[198] Prevailing in the lower court, the minority owner claimed that the majority was frustrating her reasonable expectation to manage the business.[199] In reviewing the majority owner's conduct, which included not updating an accounting system, the court stated that the minority owner's problem with the business arose out the fact that she was outvoted and disappointed, not oppressed.[200] *Shaver* shows how reasonable minds may differ as to what constitutes a breach of a fiduciary duty in the context of closely-held businesses.

The intent of a majority owner to oppress a minority owner is also found where a majority owner uses abusive conduct to coerce a minority owner into giving into its demands. In *Evans v. Blesi*, the minority owner, Blesi, and the majority owner, Evans, had been sole owners of their company for nearly three decades.[201] When Blesi began having health problems, Evans expressed his concern that Blesi's health may have adverse effects on the business.[202] Using concern over Blesi's health problems as a purportedly legitimate business purpose, Evans made threats, including threatening to dissolve and liquidate the business to persuade Blesi to transfer his shares of the business and resign.[203] Succumbing to Evans's tactics,

197. Landstrom v. Shaver, 561 N.W.2d 1, 9–10 (S.D. 1997) (holding that a showing that the minority owner had been outvoted and was subjectively disappointed with corporate management was insufficient to constitute oppression).

198. *Id.* at 2.

199. *Id.* at 10 (quoting the trial court, "[d]efendants' respective efforts in directing the Company, failure to pay adequate attention to safety concerns, deception in obtaining Landstrom's signature to the 1987 Revision, refusal to deal on a good faith basis with her attempts to sell her stock, disdain for her desire to treat employees decently, animosity toward her that they have exhibited during this litigation, and continued actions at annual owner meetings designed to prevent her from meaningfully participating in the Company, all constitute facts from which this Court concludes [majority owners] oppressed [minority owner].").

200. *Id.* at 11–12.

201. Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984) (holding that evidence was sufficient to support allegation that the majority owner breached his fiduciary duty to the minority owner by getting the minority owner to resign).

202. *Id.* at 778.

203. *Id.*

Blesi transferred the shares.[204] The court found that Evans's conduct toward Blesi fell short of the "highest standards of integrity and good faith" that owners in closely-held businesses owe to each other.[205]

Though this case involved flagrantly offensive conduct that obviously constitutes a breach of fiduciary duty, situations arise in which majority owners act quite diplomatically in oppressing minority owners, and breaches of fiduciary duty are not always clear. When aiding and abetting claims are brought against lawyers in these ambiguous cases, courts face another challenging determination: whether a lawyer had actual knowledge of her client's breach of fiduciary duty.

IV. FINDING A SOLUTION

Trust is an "essential component of successful long term business relationship[s]."[206] In closely-held businesses lies an inequity of bargaining power. As such, there is a need to prevent a majority owner's exploitation of a powerless minority trapped in an undesirable business relationship.[207] Indeed, where co-owners owe each other the duty of the utmost good faith and loyalty,[208] lawyers should not be allowed to perpetuate the dishonesty of majority owners by subverting the fiduciary relationship.[209]

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204. *Id.* at 779–80 (noting that Evans's secret preparation, including meeting with lawyers and preparing documents, was a part of a string of intimidating tactics, in violation of fiduciary duty to minority owner).

205. *Id.* at 779.

206. Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of the Doctrine*, 22 CARDOZO L. REV. 51, 55 (2000). *See also id.* n.15 (noting that fiduciary duties are necessary "to afford adequate protection to minority owners and particularly to those in closely held corporations whose disadvantageous and often precarious position renders them particularly vulnerable to the vagaries of the majority.") (quoting Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 473 (Cal. 1963)).

207. *See* Hillman, *supra* note 206, at 55 n.14 (noting Professor Vestal's explanation that "[b]y joining the partnership, each partner agrees to advance the collective interest and not the short term individual interest of the partner. This is not abjuration of self-interest . . . individuals elect to join a partnership because they calculate that they will maximize their individual long-term interest through the collective enterprise.").

208. Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975).

209. *See* Barksdale, *supra* note 38, at 58 (examining the role of lawyers in squeeze-outs and emphasizing the need to protect the "sanctity of the close corporation fiduciary relationship" by imposing liability onto lawyers who aid and abet squeeze-outs).

Cutting the opposite direction of the fiduciary duties that co-owners owe each other is a strong argument in favor of upholding the trust and confidence in the lawyer-client relationship at the expense of other fiduciary relationships.

> [F]or individuals and corporations to obtain the advice and assistance that they must receive from their agents, the agents must have some protection from tort liability to third parties-assists us in determining the rule that should be applied in this case . . . [S]afeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself.[210]

When lawyers fear liability in performing their normal professional duties, such as advising their clients in pursuing legitimate business purposes, it may be difficult for businesses to find skilled lawyers whose services are affordable. This potential chilling effect would greatly impact closely-held businesses since many of these businesses have limited resources. For instance, in some jurisdictions, minority owners in closely-held businesses may bring actions directly instead of derivatively.[211] This opens the door to the potential of minority owners' abuse of majority owners. Small businesses that are ill-equipped to deal with the cost of litigation are easily influenced to settle.[212] Moreover, majority owners who want to pursue legitimate businesses purposes may have difficulty in finding an affordable lawyer if the lawyer fears minority owner aiding and abetting suits.

Although lawyers of majority owners are probably not in imminent danger of a surge of aiding and abetting lawsuits, there is a need for a rule that "works": a rule that both imposes consequences onto those lawyers who knowingly provide substantial assistance to their clients in oppressing minority owners and shields from liability honest lawyers who are merely trying to

210. Reynolds v. Schrock, 142 P.3d 1062, 1067 (Or. 2006) (declining to impose liability onto a lawyer for assisting a client's breach of fiduciary duty).

211. Daniel S. Kleinberger & Imanta Bergmanis, *Direct vs. Derivative, or What's a Lawsuit Between Friends in an "Incorporated Partnership"*, 22 WM. MITCHELL L. REV. 1203, 1265 n.315 (1996).

212. *See* Landstrom v. Shaver, 561 N.W.2d 1, 13 (S.D. 1997) (examining the ALI, Principles of Corporate Governance § 701 and declining to take ALI's approach of allowing all claims of owners in closely-held corporations to be brought directly instead of derivatively because of the large number of small, ill-prepared business in the state).

assist their clients in furthering legitimate business purposes. In addition, the rule must give lawyers the latitude to advise clients and concurrently prevent lawyers from being the necessary handmaidens to their clients' squeeze-outs. These objectives are sensitive to the need of preserving the trust and confidence that lie at the core of both the lawyer-client relationship and the relationships of owners in closely-held businesses.

A. *Approaches*

Approaches to imposing liability onto lawyers vary by state. Some approaches are over-inclusive, in that they leave innocent lawyers vulnerable to minority owner actions of aiding and abetting oppression. In contrast, some approaches are under-inclusive because they fail to hold liable lawyers who knowingly assist their clients' oppressive conduct. This section surveys the approaches of Oregon, California, and Minnesota and shows how they fail to adequately address the fundamental problem in lawyer aiding and abetting analyses: knowledge of the squeeze-out. Finally, this section ends with a solution: a rule that enables minority owners' meritorious actions against lawyers to go forward but prevents innocent lawyers from being forced into litigation.

1. *Oregon's Approach: Agent's Immunity Theory*

The recent Oregon case *Reynolds v. Shrock*[213] presents a strong case for upholding the lawyer-client relationship at the expense of other fiduciary relationships. *Reynolds* arose from some peculiar circumstances. The parties involved included Reynolds, a naturopath, and Schrock, his former patient.[214] Together, the parties had invested in two parcels of real estate: a "lodge" property and a "timber" property.[215] At one point, some sexual improprieties occurred between the two parties and Schrock sued Reynolds.[216]

213. 142 P.3d 1062 (Or. 2006).
214. Reynolds v. Schrock, 107 P.3d 52, 54 (Or. Ct. App. 2005).
215. *Reynolds*, 142 P.3d at 1063.
216. *Reynolds*, 107 P.3d at 54. Initially, a dispute over the land occurred, and Schrock sued Reynolds. *Id.* Schrock then brought a separate suit for "alleged sexual impropriety stemming from the provider-patient relationship." *Id.* The cases were soon consolidated. *Id.*

The parties settled the lawsuit; part of the settlement included restructuring the ownership of the joint investment.[217] Reynolds agreed to convey his interest in the recreational property to Schrock in return for a security interest in the timber property until the timber was sold, at which time Reynolds would obtain the profits of the timber sale, retaining no further interest in either parcel so long as he received at least $500,000.[218]

After the settlement, Schrock's lawyer advised her that she could sell the recreational parcel of land before the timber was sold.[219] The settlement agreement did not require Schrock to retain the property to secure the possible deficiency in the sale of the timber.[220] The lawyer then assisted Schrock in selling the recreational parcel and attempted to hide the sale from Reynolds by telling the escrow agent not to notify Reynolds of the sale.[221] When Reynolds uncovered the transaction, he sued Schrock and her lawyer for breach of fiduciary duty claiming that the settlement agreement created a relationship with Schrock that was akin to a joint venture and that Schrock's actions constituted a breach of the implied covenant of good faith and fair dealing.[222]

By the time the Oregon Supreme Court granted certiorari, Schrock had settled with Reynolds, leaving the lawyer as the remaining defendant.[223] For the purpose of reviewing the lawyer's liability, the parties treated the claim for breach of fiduciary duty and the claim for breach of the covenant of good faith, as a single claim for breach of fiduciary duty.[224]

Both Reynolds and the Oregon Court of Appeals cited a then recent Oregon Supreme Court case, *Granewich v. Harding*,[225] for the proposition that a lawyer who knowingly and substantially assists her client in breaching a fiduciary duty will be held liable for that

217. *Reynolds*, 142 P.3d at 1063–64.

218. *Id.* Under the agreement, Schrock was required to pay the difference if the timber sold for less than $500,000 or Reynolds's security interest in the property would remain. *Id.* at 1063.

219. *Id.* at 1064.

220. *Reynolds*, 107 P.3d at 54.

221. *Id.* Interestingly, after the sale the lawyer received $135,111.71 in fees and Schrock received $209,440.68. *Id.*

222. *Reynolds*, 142 P.3d at 1064.

223. *Id.*

224. *Id.*

225. 985 P.2d 788 (Or. 1999) (describing the elements required to hold lawyer who assists majority owner in squeezing-out minority owner liable for aiding and abetting breach of fiduciary duty).

breach; an initial read of *Granewich* seems to support that conclusion.[226] On review, however, the Oregon Supreme Court distinguished *Granewich* and held that in the case at bar, the lawyer was not liable because he was acting within the scope of representation.[227] In explaining this analysis, the court stated that the lawyer did not do anything that was contrary to the settlement agreement, and that the lawyer was otherwise acting within the scope of representation.[228] In its decision, the court specifically included "assisting the client in conduct that breaches the client's fiduciary duty to a third party" as within the scope of the lawyer's representation.[229]

In *Reynolds*, the privilege that Oregon granted the lawyer is an extension of the immunity accorded to agents acting on behalf of their principals; however, the privilege is misplaced in an analysis of a lawyer's liability for assisting a client's breach of fiduciary duty.[230] The agency privilege is an affirmative defense that relieves an agent who commits a tortious act from liability if she "exercise[es] a privilege held by the principal or if [she] [acts] for the protection of the principal's interests."[231] As *Reynolds* noted, a number of jurisdictions afford lawyers a qualified privilege when advising a

226. *Reynolds*, 107 P.3d at 52, 58 n.4 ("[an] attorney may not 'use his license to practice law as a shield to protect himself from the consequences of his participation in an unlawful . . . conspiracy' and that policy 'should prevent an attorney from escaping liability for knowingly and substantially assisting a client in the commission of a tort.'") (quoting Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 767–69 (Ill. Ct. App. 2003)).

227. *Reynolds*, 142 P.3d at 1070–72 ("[T]he purpose of privilege requires that lawyers be able to assess the legal problems that their clients bring to them and discuss the full range of options . . . lawyers must be able to assist their clients in implementing those solutions, to the extent that that assistance falls within the legitimate scope of the lawyer-client relationship.").

228. *Id.* at 1071.

229. *Id.* at 1069.

230. Id. at 1068–70 (applying the agency theory of liability).

231. RESTATEMENT (THIRD) OF AGENCY § 343 (1979). *See* RESTATEMENT (SECOND) OF TORTS § 890 (1979) ("One who otherwise would be liable for a tort is not if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that was properly delegated to him."). *See, e.g*, Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 328 (9th Cir. 1982) (applying privilege to corporation's lawyer in claim against lawyer for inducing corporation's contract with third party); Hussie v. Bressler, 504 N.Y.S.2d 510, 511 (N.Y. App. Div. 1986) (stating that "it is well settled that '[a]n agent cannot be held liable for inducing his principal to breach a contract with a third person, at least where he is acting on behalf of his principal and within the scope of his authority.'" (quoting Kartiganer Assoc. v. Town of New Windsor, 485 N.Y.S.2d 782 (N.Y. App. Div. 1985))).

client amounts to an interference with that client's contractual relations with a third party.[232]

Although at first glance this case is about a property transaction, their relationship was similar to a joint venture and Schrock breached her fiduciary duty to Reynolds. Regardless of whether the contract failed to include a provision prohibiting Schrock from selling the recreational parcel, Reynolds had a reasonable expectation that the defendant would not sell it. Similarly, minority owners may have reasonable expectations that are not found in a document. Therefore, the failure of the court to impose liability on the lawyer for aiding and abetting his client's breach may have adverse consequences in the context of oppression in closely-held businesses.

In *Schott v. Glover*,[233] the Illinois Court of Appeals provided a good analysis of the need to limit lawyers' liability arising from advising their clients to breach contracts. The plaintiff, a realty agency, alleged that Glover, the lawyer representing a bank, had caused his client to breach an exclusive agency contract that the realty agency had with the bank.[234] In addressing the potential liability of lawyers for tortious interference with contractual relations, the court stated that a "privilege occurs where the third

232. *Reynolds*, 142 P.3d at 1070. *See also* Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 709 (8th Cir. 1993) (stating that in addition to employee's failure to establish basic elements of tortious interference, "an attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain"); Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 181–82 (Mo. Ct. App. 1996) (recognizing that lawyers are accorded a qualified privilege, when acting within the scope of attorney-client privilege to advise and act for a client even though that advice may cause a client not to perform a contract); Burger v. Brookhaven Med. Arts Bldg., 516 N.Y.S.2d 705 (N.Y. App. Div. 1987) (stating that "an attorney is not liable for inducing his principal [client] to breach a contract with a third person, at least where he is acting on behalf of his principal within the scope of his authority," and that "[a]bsent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client"); Schott v. Glover, 440 N.E.2d 376, 380 (Ill. Ct. App. 1982) (holding that a plaintiff can state a cause of action for tortious interference with a contract against a lawyer if the plaintiff can set forth factual allegations showing actual malice, and stating that "[s]uch allegations, however, would necessarily include a desire to harm, which is independent of and unrelated to the attorney's desire to protect his client.").

233. *Schott*, 440 N.E.2d at 380 (holding that plaintiffs failed to establish a claim against bank's attorney for tortious interference with contractual relations).

234. *Id.* at 377.

party acts [to] protect a conflicting interest which is considered to be of equal or greater value than that accorded to the contractual rights involved."[235] The court recognized that the fiduciary relationship between a lawyer and client was one that necessitated this privilege: not imposing privilege would have the effect of creating a duty to third parties, and "[p]ublic policy requires that an attorney, when acting in his professional capacity, be free to advise his client."[236]

The application of the agent's privilege in the context of tortious interference with contractual relations is warranted.[237] But, in making the decision to hold the lawyer-client relationship superior to the joint venture relationship, the *Reynolds* court improperly analogizes contractual relationships to fiduciary relationships. There is a vast difference between fiduciaries and contracting parties.

First, as a matter of form, the underlying acts that the lawyer assists are different. In aiding and abetting, a breach of loyalty has been compared to an intentional tort;[238] however, the underlying conduct of an action for tortious interference with contractual relations is a breach of contract.[239] A client has the right to breach a contract without incurring liability in tort. Thus, the client's privilege to breach extends to the lawyer. In contrast, a fiduciary does not have the privilege to breach the duty of loyalty.

Second, as a matter of substance, the inter se relationships of the parties are substantially different. Contracting parties are dealing at arm's length, whereas fiduciaries in closely-held businesses owe each other trust and confidence—the utmost honor

235. *Id.* at 379.

236. *Id.*

237. *Id.* (stating that holding lawyers liable for tortuous interference with contractual relations would cause lawyers to owe duties to third parties dealing at arm's length and that duties to third parties would jeopardize fiduciary relationships between lawyer and client).

238. *See* RESTATEMENT (SECOND) TORTS § 874 cmt. b (1979) ("A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act.").

239. *See* Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 709 (8th Cir. 1993) (setting forth the elements of tortious interference with contractual relations as including: "1) the existence of a contract, 2) the alleged wrongdoer's knowledge of the contract, 3) the intentional procurement of a breach, 4) the alleged wrongdoer acting without justification, and 5) damages." (citations omitted)).

and loyalty.[240] Therefore, fiduciaries must resist acting in a purely self-serving manner.

Third, the sources of the duties are different. Contractual obligations are created by contract terms and are owed to the parties of that contract, but fiduciary relationships are created by law and by social policy.[241]

Fourth, contracts and fiduciary duties serve different functions. "[T]he purpose of contract law is not to deter the breach, but . . . to require the breaching party to internalize the costs of the breach."[242] A contract may even be considered a set of alternative promises: the obligor promises that he will perform his end of the bargain or that he will compensate the loss of the benefit to the obligee if he breaches.[243] In closely-held businesses, reasonable expectations formed from the trust and loyalty among the owners comprises the duties owed. Although a court is able to put a value on a minority owner's reasonable expectations, it may not replace the minority owner's subjective view of what he lost.

There are legitimate reasons why parties need to or should break contracts. Indeed, "efficient breaches" are even encouraged by some economists.[244] The "immunity" solution offered by the Reynolds court furthers the important objective of maintaining confidentiality and candor between the client and lawyer. Breach of contract is not necessarily "wrongful" enough to bar lawyer-client privilege. Though barring lawyers from liability for tortious interference with contractual relations is supported by good policy, these policies do not easily transfer to the context of closely-held entities, where oppression is deemed unacceptable; a breach of

240. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

241. *See* Carl A. Pierce, *Client Misconduct in the 21st Century*, 35 U. MEM. L. REV. 731, 895, 895–99 (2005) (providing that fiduciary duties vary depending on the context in which they arise and that, some jurisdictions allow certain fiduciary duties to be contracted out of the business agreement; this further emphasizes that fiduciary duties are imposed by law, both by statute and by common law).

242. *Id.* at 900.

243. *Id.* *See also* L.L. Cole & Son, Inc. v. Hickman, 665 S.W.2d 278, 280 (Ark. 1984) ("The law has long recognized the view that a contracting party has the option to breach a contract and pay damages if it is more efficient to do so.").

244. *See* Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (analyzing whether punitive damages should be awarded to the plaintiff for the defendant's breach of contract and noting that "[an] explanation, offered by economists, is the notion that breaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and that such 'efficient breaches' occur when the breaching party will still profit after compensating the other party for its 'expectation interest.'").

fiduciary duty is not a violation of a mere agreement, but a violation of trust.

2. *California's Approach: Gatekeeping Statute*

California case law is nearly devoid of aiding and abetting claims against lawyers.[245] Although courts recognize the difference between aiding and abetting and conspiracy, attacks on lawyers for assisting their clients' wrongful conduct take the form of conspiracy claims.[246] In deciding lawyer liability cases under conspiracy law, California narrows the scope of a lawyer's liability in assisting a client's breach of fiduciary duty to situations in which the lawyer owes an independent duty to the aggrieved third party or the lawyer acts of outside the scope of representation by deriving a financial benefit from the client's breach.[247] The policy supporting this is the theory that for one to be liable for conspiring to breach a fiduciary duty, that person must owe a duty to breach.[248] A lawyer, therefore, cannot conspire with her client to breach a fiduciary duty owed to a third party unless that lawyer directly owes a fiduciary duty.

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245. *See* Barksdale, *supra* note 38, at 591–96 (examining California's extensive history of lawyer liability for assisting client's in breaching fiduciary duties).

246. *See* Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 340 n.10 (Ct. App. 2005) ("Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort."). *But see* Neilson v. Union Bank of Cal., 290 F. Supp. 2d 1101, 1126 (C.D. 2003) (stating that the bulk of California's leading case law involving a person's liability for participating in another's breach of duty arises in the context of trusts and that "the cases do not clearly distinguish between claims for breach of fiduciary duty, conspiracy to breach a fiduciary duty, and aiding and abetting the breach of fiduciary duty.").

247. *See* Doctors' Co. v. Superior Court of Los Angeles County, 260 Cal. Rptr. 183, 186 (1989) (stating that action for civil conspiracy may not arise if alleged conspirator is not bound by duty to third party and acts as agent of person who owes a duty to third party and holding that lawyers for medical malpractice insurer could not be held liable for damages to plaintiff because lawyers were acting as an agent of insurer and did not act for their own advantage). *See also* Everest Investors 8 v. Whitehall Real Estate Ltd. P'ship. XI, 123 Cal. Rptr. 2d 297, 300–02 (Ct. App. 2002) (holding that third party who owed no direct fiduciary to plaintiff could not be held liable for conspiracy); City of Atascadero v. Merrill Lynch, Pierce, Fenner, & Smith, 80 Cal. Rptr. 2d 329, 342 n.14 (Ct. App. 1998) (noting that "[a]s a general rule, a cause of action for civil conspiracy will not arise if the alleged coconspirator, even though a participant in some agreement underlying the injury, was not personally bound by any duty violated by the wrongdoing.").

248. *Doctors' Co.*, 260 Cal. Rptr.' at 186.

An example of the judiciary's general aversion to imposing liability on lawyers is found in *Skarbrevik v. Cohn, England & Whitfield*.[249] In *Skarbrevik*, the lawyer for a closely-held business assisted the majority owners' squeeze-out of a minority owner by advising the majority to hold a special shareholder's meeting during which they could amend the by-laws and to issue additional stock to the majority owners thereby diluting the minority owner's interest in the business.[250] The majority owners did not heed the lawyer's advice and took action that was unauthorized by the by-laws.[251] The lawyer covered-up his clients' noncompliance by memorializing a meeting that never in fact happened and by filing the requisite documents with the Secretary of State.[252] Despite the lawyer's conduct, the court declined to impose liability onto the lawyer because the lawyer neither owed a duty to the minority owner nor did the lawyer receive any financial benefit from assisting the majority.[253] Although the minority owner did not allege aiding and abetting, the seemingly bizarre outcome most likely would have been the same;[254] California limits the legal obligations that lawyers owe to non-clients in a squeeze-out by emphasizing the lawyer's role as an agent of the client, a position that fundamentally differs from other jurisdictions.[255]

California's restrictive approach to lawyer liability is further shown in California's statutory law. California Civil Code section

249. 282 Cal. Rptr. 627 (Ct. App. 1991).

250. *Id.* at 631 (reviewing the contents of a letter written by the lawyer in which the lawyer acknowledged that the "stock dilution plan was complicated and would take a longer period of time than envisioned"). The majority's reason for wanting to rid the business of the minority owner was that they "'were unhappy with [him] and they could not afford to keep [him] on the books.'" *Id.* at 630.

251. *See id.* at 632.

252. *Id.*

253. *Id.* at 640.

254. Barksdale, *supra* note 38, at 591–600 (commenting on *Skarbrevik* in light of California's history of limiting liability of lawyers).

255. *Compare Skarbrevik*, 282 Cal. Rptr. at 638 (stating that the California Supreme Court in *Doctors'* reaffirmed the rule that "a cause of action for conspiracy may not arise when the '[lawyer], though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have a duty.'") *with* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (stating that "we are not convinced that public policy requires a wholesale exclusion of professionals from aiding and abetting" and that "[t]o grant professionals such immunity would conceivably give them free reign to provide any assistance short of fraud in helping clients engage in conduct the professionals know to be tortious.").

1714.10 addresses the claims that third parties may bring against lawyers for conspiring with their clients in committing a tortious act.[256] Section 1714.10 is deemed the "gate-keeping statute," as it filters claims against lawyers from being included in the complaint.[257] Before filing a complaint against a lawyer for conspiring with a client, the plaintiff must commence a special proceeding by filing a verified petition alleging liability along with supporting affidavits that contain the facts upon which the plaintiff's claim is based.[258] The lawyer against whom the claim is alleged can combat the plaintiff's allegation by submitting opposing affidavits.[259] If the court finds that the petition and the affidavits show a reasonable probability of the plaintiff succeeding in the action, the court will allow the allegation into the complaint.[260]

California's gatekeeping approach may be applied to the aiding and abetting oppression context.[261] Requiring the aggrieved owners to submit to a pre-filing process commands the need for strong facts that support the allegations. The petition aids the court in determining whether there is a "reasonable probability that the party will prevail in the action" or whether the claim is unmeritorious.[262] But these claims would most likely be disposed of on summary judgment. As such, a gatekeeping statute may prevent the lawyer from becoming deeply intertwined in the owners' litigation, a desirable effect in its own right. But a pre-pleading requirement would do nothing to help the fact-finder determine whether a squeeze-out constituted a legitimate business purpose or

256. CAL. CIV. CODE § 1714.10 (West 2007).

257. *See* Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 329 (Dist. Ct. App. 2005) (stating that section 1714.10 is a gatekeeping statute).

258. *See* § 1714.10(a).

259. *Id.*

260. *Id. See also* Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 334 ("As originally enacted, the [§ 1714.10] prohibited a complaint from including a cause of action against an attorney based on a civil conspiracy with his or her client, except upon a court finding that the plaintiff had demonstrated a reasonable probability of prevailing.").

261. *See Sherwood Partners,* 32 Cal. Rptr. 3d at 340 n.10 (stating that "[e]ven though aiding and abetting . . . does not generally require that the defendant owe an independent duty, we believe that as pleaded against an attorney for conduct arising from the representation of a client, and depending on the particular allegations, this tort would still fall within the ambit of section 1710.10 and would thus be subject to is requirements and exceptions.").

262. *See* § 1714.10(a).

oppression, and if so, whether the lawyer had actual knowledge of the oppression.

Interestingly, an unintentional effect of California case law on section 1714.10 highlights California's reluctance to recognize lawyer liability for aiding and abetting client breaches of fiduciary duty. When section 1714.10 is read in light of California case law, it is rendered null.[263] California courts only impose liability onto lawyers where the lawyer directly owes a duty to the plaintiff or where the lawyer is acting in her own self-interest.[264] Section 1714.10 excludes from its scope conspiracy claims against lawyers where the plaintiff alleges that "(1) the [lawyer] has an independent legal duty to the plaintiff, or (2) the [lawyer's] acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the [lawyer's] financial gain."[265] Essentially, there are no viable conspiracy actions to which the gatekeeping statute applies because the actions that are removed from the ambit of section 1714.10 are the only actions in which courts recognize lawyer liability.[266]

3. *Minnesota's Approach: Pleading with Particularity*

In Minnesota, courts use an elevated pleading standard when reviewing claims against lawyers and other professionals for aiding and abetting. The elevated pleading standard arose in *Witzman v. Lehrman, Lehrman & Flom*, an aiding and abetting breach of fiduciary duty case brought against an accountant.[267] The court in *Witzman* equated accountants with other professionals, such as lawyers, for the purpose of imposing aiding and abetting liability.[268] In reviewing the plaintiff's claim, the court stated,

> If professionals have reason to believe that they may be held liable for their clients' torts merely by providing routine professional services to their clients, the

263. *See* Pavicich v. Santucci, 102 Cal. Rptr. 2d 125, 134–35 (Ct. App. 2000) (reviewing owner's claim against co-owner and co-owner's lawyer for conspiracy and holding that there is no viable conspiracy claim to which section 1714.10 applies).

264. *See id.* at 135.

265. § 1714.10(c).

266. *See Santucci*, 102 Cal. Rptr. 2d at 134–35.

267. 601 N.W.2d 179, 186 (Minn. 1999) (evaluating issue of first impression for professional's liability under RESTATEMENT (SECOND) TORTS § 876 (1979) for aiding and abetting a client's breach of fiduciary duty).

268. *Witzman*, 601 N.W.2d at 186.

> professionals may face a conflict between serving their clients and protecting their own interests. Thus, applying aiding and abetting liability to professionals has the potential to undermine the trust essential to any professional-client relationship.[269]

In reconciling the court's reluctance to expose lawyers to plaintiffs' aiding and abetting claims, the court stated that in aiding and abetting claims against professionals, the court will "narrowly and strictly interpret the elements of the claims and require the plaintiff to plead with particularity facts establishing each of these elements."[270] Interestingly, after the court heightened the pleading requirement for allegations against professionals for aiding and abetting, it strayed from the prevailing actual knowledge standard and stated that the requisite degree of knowledge necessary to impose liability on a professional for aiding and abetting a breach of fiduciary duty depends on the circumstances of each case.[271]

In its decision, the *Witzman* court expressed the policy concerns that were expressed in the California and Oregon cases. Having a similar effect to a gatekeeping statute, pleading with particularity weeds out meritless claims that are not based on facts, but it also stops some meritorious claims from reaching the purview of the court. The problem with the pleading standard is that it fails to address what facts will give rise to a finding of actual knowledge. As discussed above, squeeze-out cases often involve technical and strategic complexity. As with the court's determination of oppression, when analyzed in hindsight, aiding and abetting oppression may be found by deconstructing the scheme that gave rise to the minority owner's complaint. A complaint with well-pleaded facts may not give the reviewing court sufficient insight into the lawyer's involvement in the scheme.

B. Creating a Rule

The approaches described above work well in jurisdictions that have decided as a matter of policy to subordinate the fiduciary relationships between co-owners to the relationships between lawyers and their clients. Restricting the liability of lawyers for their

269. *Id.*
270. *Id.* at 187.
271. *Id.* at 188 (stating that a professional's long-term or in-depth relationship with defendant may suffice to lower the standard of knowledge to constructive knowledge).

clients' breaches makes sense in the context of closely-held businesses because of the problems in distinguishing oppression from legitimate business purposes; however, eliminating the minority owner's ability to pursue an action against the majority owner's lawyer for aiding and abetting a squeeze-out eliminates the liability disincentive of lawyers in orchestrating squeeze-outs. Therefore, a rule is needed to impose liability on lawyers who knowingly assists their clients' squeeze-outs and to prevent innocent lawyers from being drawn into litigation by minority owners' allegations of oppression.

A rule neither over-inclusive nor under-inclusive hinges on the knowledge element of aiding and abetting. A minority owner suing a lawyer for aiding and abetting oppression must establish that the lawyer had knowledge of the majority owner's oppression. The lawyer's knowledge of oppression necessitates the lawyer's knowledge of the minority owner's reasonable expectations. As shown above, reasonable minds may differ as to what a minority owner's reasonable expectations are and to what extent the majority owner treaded upon those reasonable expectations in pursuing a business decision. The ideal rule resolves the ambiguities of a minority owner's reasonable expectations before an innocent lawyer becomes entrapped in litigation.

Three main issues arise in establishing a lawyer's knowledge for the purpose of aiding and abetting liability. The first issue is the requisite standard of knowledge that lawyers facing liability must possess.[272] The second issue is the type of circumstantial evidence a plaintiff must bring forth to show that a lawyer had actual knowledge.[273] The third issue is whether there should be any procedural barriers to a plaintiff alleging aiding and abetting oppression.[274]

1. *Standard of Knowledge*

Standards of knowledge lie on a continuum. On one end is constructive knowledge, the "knew or should have known"

272. *See id.* at 188(discussing the use of constructive knowledge and actual knowledge in the context of professional liability for aiding and abetting).

273. *See, e.g.*, Granewich v. Harding, 985 P.2d 788, 791–92 (Or. 1999) (stating that a well-pleaded claim of a lawyer's assistance was sufficient to reverse lower court's dismissal of claim against lawyer).

274. *See, e.g.*, Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d. 325, 339–40 (Ct. App. 2005).

standard, and at the other end is actual knowledge. In aiding and abetting liability, the standard of knowledge required often reflects the policy objectives that are being pursued. For example, in *Diduck v. Kaszycki & Sons Contractors*,[275] the Second Circuit stated that constructive knowledge sufficed to hold the defendant liable for aiding and abetting a breach of fiduciary duty in the context of the Employee Retirement Income Security Act of 1974 (ERISA).[276] The court stated that a trustee of a pension fund's cursory investigation would have uncovered that the general contractor was not making required contributions to the pension fund, in violation of fiduciary duty.[277] In using this lower standard of knowledge, which essentially imposed the duty to investigate upon the trustee, the court was upholding policies with regard to the thoroughness and application of ERISA.[278]

Though it may have its place in protecting pension plans overseen by the federal government, constructive knowledge should not carry over to squeeze-outs. When the standard of knowledge is "should-have-known," lawyers would be required to investigate suspicious activity. Imposing a duty to investigate implies that the lawyer owes some heightened duty to the minority owner. The duty to investigate would unduly hamper the effective representation of lawyers because it would upset the trust and confidence between the lawyer and her client. Moreover, it is not the lawyer's role to question the policy decisions of her clients,[279] and with the "should-have-known standard," the lawyer will be inclined to make these inquiries out of fear for personal liability.

In the context of lawyer liability, some courts use the constructive knowledge standard loosely without considering the impact that the standard of knowledge would have on lawyers. For example, in *Chem-Age Industries, Inc. v. Glover*,[280] the court reviewed

275. 974 F.2d 270 (2d Cir. 1992).

276. *Id.* at 283.

277. *Id.* ("Although the extent of the duty of inquiry may not be the same in all circumstances, there is no doubt that here even a cursory investigation would have uncovered [primary actor's] breach.").

278. *Id.*

279. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3. (1983). Rule 1.13 addresses the lawyer's role when representing a corporation; however, the limitation of the lawyer's representation relating to "[d]ecisions concerning policy and operations, including ones entailing serious risk" that are not in the lawyer's province should be emphasized. *Id.* Second-guessing the client is different than advising the client.

280. 652 N.W.2d 756 (S.D. 2002).

an appeal of summary judgment that involved alleged lawyer misconduct in a closely-held business.[281] In *Chem-Age*, the founding co-owner's lawyer assisted him in making a number of misrepresentations to the other co-owners regarding their interest in the business.[282] These misrepresentations led to the co-owners pursuing the lawyer in a suit involving a number of different claims, including breach of fiduciary duty, malpractice, fraud, conversion, and aiding and abetting breach of fiduciary duty.[283] In denying the plaintiffs recovery on their breach of fiduciary duty and malpractice actions, the court was steadfast in the importance of maintaining the lawyer-client relationship.[284]

The court then turned to the Restatement to determine whether the lawyer could be held liable for the co-owner's actions.[285] In its analysis, the court cautioned that "[h]olding attorneys liable for aiding and abetting the breach of a fiduciary duty in rendering professional services poses both a hazard and a quandary for the legal profession . . . . [O]verbroad liability might diminish the quality of legal services, since it would impose 'self protective reservations' in the attorney-client relationship."[286] Interestingly, despite the court's emphasis on preventing overly broad liability, the court stated constructive knowledge would suffice in some cases to impose liability on a lawyer for aiding and

281. *Id.* at 769 (noting the increase "in case law and professional literature on attorney liability to third parties."). In *Chem-Age,* the founding co-owner (Dahl) induced two businessmen, Shepard and Peterson, to invest in *Chem-Age* by misrepresenting to them that in return for their investment, they would be equity owners of *Chem-Age*. *Id.* at 761–63. Dahl's attorney, Glover, who had represented Dahl in previous engagements acted as the corporation's attorney. *Id.* Glover prepared the paperwork listing Shepard and Peterson as incorporators and Glover as registered agent. *Id.* Over time, Dahl began to use Chem-Age's credit for personal expenses, including personal gifts to Glover. *Id.* After calling a meeting to address Dahl's suspicious spending habits, Shepard and Peterson learned that Dahl and Glover were in the process of selling Chem-Age's assets. *Id.* In addition, despite the papers that Glover seemingly filed with the Secretary of State, the two businessmen learned that they had no ownership interest in Chem-Age. *Id.*

282. *Id.* at 761–62.

283. *Id.* at 761.

284. *See id.* at 769–71 (listing several reasons why the court is reluctant to relax rule of privity in cases involving third party malpractice claims against lawyers).

285. "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ." RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

286. *Chem-Age*, 652 N.W.2d at 774.

abetting, but that the use of constructive knowledge should be limited to contexts in which the lawyer-client relationship was of long duration.[287]

The court's suggestion that constructive knowledge is an available standard contradicts the court's policy that lawyer liability should be limited. Leaving the door open to constructive knowledge as a standard for lawyer liability for aiding and abetting in closely-held businesses leaves lawyers open to liability. The use of constructive knowledge as the standard for aiding and abetting falls short of providing adequate safeguards against lawyers. It is inappropriate in light of the policies against aiding and abetting having an over-inclusive effect.[288]

To provide primary actors more protection than the constructive knowledge standard allows, some courts have turned to recklessness as a standard of knowledge.[289] A court using recklessness as the standard of knowledge will find knowledge where the conduct indicates a reckless disregard of the consequences of an action or where there is highly unreasonable conduct involving an extreme departure from ordinary care in a situation where a high degree of danger present.[290] Courts rarely spend a significant time evaluating which standard of knowledge to use in reviewing a lawyer's liability for aiding and abetting; however, the court in *Terrydale Liquidating Trust v. Barness*[291] stated that in some contexts, specifically securities, where transactions are highly regulated, the underlying violations that give rise to aiding and abetting liability are clearer cut and a lower standard of knowledge suffices.[292] In contrast to securities cases, the inter se

287. *Id.* at 775.

288. *Compare* Diduck v. Kaszycki & Sons Contractors, 974 F.2d 270, 283 (2nd. Cir. 1992) (analyzing aiding and abetting in the trust context) *with* Chem-Age Industries v. Glover, 652 N.W.2d 756, 774 (S.D. 2002) (delineating the policies against over-inclusive liability to lawyers).

289. *See* Camp v. Dema, 948 F.2d 455, 459–60 (8th Cir. 1991).

290. *See, e.g.*, Bolmer v. McKulsky, 812 A.2d 869, 872 (Conn. App. Ct. 2003). To establish the defendant's recklessness, the plaintiff has to prove that

> on the part of the defendants, the existence of a state of consciousness with reference to the consequences of one's acts. . . . [Such conduct] is more than negligence, more than gross negligence. . . . [I]n order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . .

Id.

291. 611 F. Supp. 1006 (S.D.N.Y. 1984).

292. *Id.* at 1027 n.37.

obligations of co-owners in closely-held businesses are not highly regulated.

When the violation is evident, such as a "plain vanilla" breach of fiduciary duty, it may be appropriate to impose liability under a lesser standard of knowledge.[293] But in the closely-held business context where oppression is not evident, a recklessness standard of knowledge does not resolve the problem of determining whether a lawyer had knowledge of the minority owner's reasonable expectations. Oppression involves an underlying breach that is contingent upon a reviewing court's analysis of the fiduciary relationship, so a higher level of knowledge is necessary to prevent a lawyer from being vulnerable to minority owner attacks.

In criminal law, the doctrine of conscious avoidance has been used as an alternative standard to actual knowledge.[294] A higher standard than recklessness, the doctrine provides that although the defendant may not have possessed actual knowledge, the defendant's lack of knowledge was due to affirmative acts on her part to avoid discovery of the alleged wrongdoing.[295] In criminal conspiracy cases, conscious avoidance may be used to prove that the defendant had knowledge of the "unlawful aims and objectives of the scheme" if "the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact."[296]

293. *Id.* In securities cases, the concern is "typically with the relative degree of involvement of peripheral parties (i.e., brokers, banks, accountants) to the fraud, not the ambiguous nature of the fraud itself." Camp v. Dema, 948 F.2d 455, 459–60 (8th Cir. 1991) (stating that in securities cases "[r]ecklessness satisfies the knowledge requirement where the defendant owes a duty of disclosure to the plaintiff" and that "[p]roof of a defendant's knowledge or intent will often be inferential and cases thus of necessity cast in terms of recklessness.").

294. *See* United States v. Kaplan, 490 F.3d 110, 127 (2d Cir. 2007) ("[A jury] instruction on conscious avoidance is proper only '(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (ii) the appropriate factual predicate for the charge exists.") (quoting United States v. Quattrone, 441 F.3d 153, 181 (2d Cir. 2006)).

295. Elkan Abramowitz & Barry A. Bohrer, *Conscious Avoidance: A Substitute for Actual Knowledge?*, N.Y. L. J., May 1, 2007, at 3.

296. United States. v. Ferrarini, 219 F.3d 145, 154-55 (2d Cir. 2000) (quoting United States v. Rodriguez, 983 F.2d 455, 458 (2d Cir. 1993) (holding that conscious avoidance instruction was harmless error because jury was also instructed on actual knowledge and evidence supported a finding of defendant's actual knowledge of conspiracy to commit fraud).

Although distinguishing between conscious avoidance and actual knowledge may be necessary in criminal law, where a defendant is at risk of incarceration and other harsh penalties, this distinction would not play as pivotal a role if applied to civil aiding and abetting.[297] The burden of proof to impose civil aiding and abetting liability is lower than the burden of proof needed to impose criminal liability.[298] To impose criminal liability, the evidence must be such that jurors are certain beyond a reasonable doubt that the defendant is guilty of the crime.[299] But in the context of civil aiding and abetting, only the greater weight of the evidence is required for the trier of fact to decide that the defendant is liable.[300] In the context of aiding and abetting squeeze-outs, evidence that shows that a lawyer was aware of a high probability that her client's motive was to oppress the minority owner, but continued to assist the client anyway, may be sufficiently convincing to establish actual knowledge by a preponderance of the evidence.[301] Actual knowledge is the correct standard to apply in lawyer aiding and abetting cases because requiring the minority owner to prove actual knowledge does not foreclose the minority owner's opportunity to bring forth meritorious claims and because the lawyer-client relationship should be protected.

2. *Proving Actual Knowledge*

At first glance, meeting the burden of proving actual knowledge appears impossible. Ideally, actual knowledge is established by direct evidence, where the lawyer makes an admission of wrongdoing or where the lawyer drafts documents that include blatant misrepresentations.[302] It is rare that the lawyer

297. *See id.* (stating that evidence that supports finding that defendant had actual knowledge does necessarily support finding that defendant willfully avoided a fact).

298. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423 (1979) (stating that burden of proof in civil matters is typically preponderance-of-the-evidence).

299. *See, e.g.*, *Ferrarini*, 219 F.3d at 154.

300. *See, e.g.*, *Addington*, 441 U.S. at 424.

301. *See supra* note 121 and accompanying text. A high probability of client misconduct should be distinguished from mere "red flags," as lawyers should not be required to investigate their client's motives. *Id.*

302. For example, when a lawyer drafts and sends letters to a plaintiff containing false information regarding the legal effectiveness of the majority owner's previous attempts to remove the plaintiff from the business, direct evidence may be found. Granewich v. Harding, 985 P.2d 788, 791 (Or. 1999).

mentions to another that she not only knew of her client's breach of fiduciary duty but that she substantially assisted her client in furtherance of that breach.[303] For actual knowledge not to be a complete barrier to aiding and abetting claims, it must be possible to prove actual knowledge through circumstantial evidence.[304]

The issue then becomes the quantity and quality of circumstantial evidence needed to impose liability onto a lawyer. Circumstantial evidence must amount to more than creating an inference that the lawyer should have known of her client's unlawful conduct or that the lawyer was reckless in providing assistance in ousting a minority owner in a business where relationships among co-owners are volatile. In situations where there is an absence of misrepresentations or violations of the law, a lawyer's claim that she was acting in furtherance of a client's legitimate business purpose should be given great weight.[305]

a. Assessing knowledge and substantial assistance in tandem

Establishing that the lawyer had actual knowledge requires a

303. *See, e.g.*, *id.* at 791–92 (analyzing lawyer's assistance to determine whether plaintiff stated a valid claim against lawyers); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768–69 (Ill. Ct. App. 2003) (reviewing lawyer's actions to determine whether to dismiss complaint).

304. *See* McNulty & Hanson, *supra* note 49, at 43. In analyzing the requirement of actual knowledge, plaintiffs may prove the defendant had knowledge by circumstantial evidence, usually through a series of "red flags" that leads one to ask how the defendant could not have seen them along the way; however, "[t]here is a danger in such a must-have-known analysis . . . the secondary actor's alleged awareness of the fraud is subjected to the scalpel of the legal dissector, not from the vantage of foresight, but from the perspective of omniscient hindsight." *Id.* at 43–44.

305. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The "McDonnell Douglas" test is used in employment discrimination cases to determine whether an employee has been wrongfully discriminated against. Under the McDonnell Douglas framework, the plaintiff must first establish a prima facie case of employment discrimination. *Id.* at 802. The defendant employer must then present a legitimate non-discriminatory reason for its decision. *Id.* If the defendant offers such a reason, the plaintiff has the burden of proving that the defendant employer's "legitimate" reasons were not the result of improper pretext. *Id.* at 804. Shifting the burden to the plaintiff to prove that the legitimate business purpose was pretextual has received criticism as it is incredibly difficult to do. *See* Joe Keith Windle, *St. Mary's Honor Center v. Hicks: Is the Supreme Court's Definition of Pretext Beneficial or Detrimental to Title VII Plaintiffs?*, 18 AM. J. TRIAL ADVOC. 213, 226–27 (1994) (delineating the difficulties plaintiffs face in prevailing in employment discrimination actions). The burden-shifting results in the court giving deference to the legitimate business decisions of employers. *See id.*

factual inquiry in addition to the initial factual inquiry that resulted in a finding of oppression. The quality and quantity of circumstantial evidence that is sufficient to give rise to a finding of actual knowledge must be such that the fact-finder can be sure that the lawyer knew about the client's breach.[306] Because both oppression and the lawyer-client relationship are so fact specific, a court's analysis of a lawyer's actual knowledge of oppression in one case will not be applicable to another case. As previously discussed, comment (d) to the *Restatement (Second) of Torts* section 876(b) allows the decision maker to use various factors in evaluating whether the lawyer substantially assisted her client in breaching a fiduciary duty.[307] These same factors provide guidance in finding relevant evidence to show that the lawyer had actual knowledge.

Analyzing knowledge and substantial assistance in tandem is not a novel approach; however, it has received some criticism.[308] The concern arises when courts require less assistance with the

306. In determining a lawyer's liability for aiding and abetting, the plaintiff must show by the preponderance of the evidence that the lawyer had actual knowledge. *See, e.g.*, S.E.C. v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 187 (D.R.I. 2004) (stating that plaintiffs fail to establish security regulations violations, including aiding and abetting violations, by a preponderance of the evidence). Therefore, the weight of the evidence must be supportive of the fact-finder's conclusion. *See, e.g.*, Northrup v. State, No. 14-06-00967-CR, 2007 WL 4442611, at *1 (Tex. Ct. App. Dec. 20, 2007). The court in *Northrup* discussed factual sufficiency:

> In reviewing factual sufficiency, we view all the evidence in a neutral light to determine whether (1) the evidence in support of the jury's verdict, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and unjust; and (2) in considering conflicting evidence, the jury's verdict, although legally sufficient, is nevertheless against the great weight and preponderance of the evidence . . . . We consider all the evidence and we do not intrude upon the jury's role of assigning credibility and weight to the evidence.

Id.

307. The factors include: 1) the nature of the act encouraged; 2) the amount of assistance given by the defendant; 3) his presence or absence at the time of the tort; 4) his relation to the fiduciary; 5) the defendant's state of mind. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). A sixth factor, the duration of assistance, originated in case law and is also included in this analysis. Halberstram v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983) ("The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind.").

308. *See* Combs, *supra* note 14, at 274 (arguing that requiring less assistance broadens the scope of liability to the aider and abettor).

showing of more knowledge.[309] Such concern is justifiable, as it is unclear why a greater showing of knowledge would lessen the amount of assistance needed for liability to attach. Just as more knowledge could substitute for less participation, the type and degree of participation may be evidence of knowledge.[310] In the aiding and abetting oppression context where the breach of fiduciary duty is not obvious, a showing that by the very nature and amount of the assistance the lawyer *had to have known* of the underlying breach may be the only way to establish knowledge.

The lawyer's conduct could reflect knowledge in many situations. The length of the lawyer/client relationship or the duration of assistance could be indicative of actual knowledge.[311] Oppression cases involve an entanglement of the minority owner's reasonable expectations and the majority owner's legitimate business interests.[312] A long-time lawyer for the majority owner would have a difficult time asserting that she did not know of the minority owner's reasonable expectations; however, if a lawyer has represented a majority owner for a few months, the lawyer's client's attempt to oppress the minority owner may not be evident. In relationships of short duration, a lawyer may not fully understand the extent of the minority owner's reasonable expectations. The lawyer's lack of exposure to the business diminishes her ability to distinguish between a legitimate business and oppression, especially if the client offers a legitimate (though false) business purpose, such as the minority owner having a nervous breakdown, to support his request.[313]

A long-term relationship between a lawyer and a majority owner is indicative of the lawyer being closely involved in the business; but duration alone does not conclusively show intimacy of

309. *Id.*

310. *See* Witzman v. Lehrman, Lerman & Flom, 601 N.W.2d 179, 188 (Minn. 1999) ("Factors such as the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance provided by the defendant, and the defendant's state of mind all come into play.").

311. *See id.*

312. *See, e.g.*, Pooley v. Mankator Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994); Pedro v. Pedro, 489 N.W.2d 798 (Minn. Ct. App. 1992).

313. *Pedro*, 489 N.W.2d at 801–2 (finding that majority owner's conduct including firing the minority owner, discontinuing the minority owner's benefits, and telling fellow employees that minority owner had a nervous breakdown, was a breach of fiduciary duty).

involvement.[314] The key question is whether the lawyer had sufficient interaction with her client and the business in order to detect oppression.[315] A lawyer who is deeply involved with the affairs of the owners and knows that each owner has a desire to stay in the business, most likely is aware of the owners' reasonable expectations.[316] If it shown that the lawyer had extensive interaction with the owners and the company and the majority owner's purported legitimate business purpose involves a misrepresentation. A lawyer's excuse of not knowing will lack merit.[317] Hence, the lawyer's conduct must be viewed in light of her knowledge of the minority owner's reasonable expectations so that the lawyer who orchestrates a squeeze-out will not be able to benefit from a blurred boundary between minority owner's reasonable expectations and the majority owner's legitimate business purposes.

The factor that is perhaps the most significant in a lawyer aiding and abetting oppression analysis is the nature of the act.[318] As discussed above, lawyers are often necessary in oppression because of the technical and strategic complexity involved in squeeze-outs.[319] For example, in *Granewich v. Harding*,[320] the lawyer's use of overtly aggressive and complex techniques shows how the lawyer's assistance was necessary to the majority owner's objective of removing the minority owner from the business.[321] The level of sophistication of the assistance is sufficient to show that the

314. *See* Halberstam v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983) (stating that the secondary actor's relation to the primary tortfeasor is only one factor to consider); *see also Witzman*, 601 N.W.2d at 188 (stating that duration of assistance is one factor that could lead to a court's use of constructive knowledge as requisite standard of knowledge).

315. *See Halberstam*, 705 F.2d at 488 (stating that the amount of assistance although not overwhelming "added up over time to an essential part of the pattern").

316. *See supra* Part III.B.3.c.

317. The scenario described in the text is based on Pedro v. Pedro, 489 N.W.2d 798 (Minn. Ct. App. 1992), which held that majority owner's actions in ousting the minority owner, including misrepresenting that the minority owner was incompetent, constituted a breach of fiduciary duty. *Id.* at 802.

318. *See* Halberstam, 705 F.2d at 484 ("[T]he nature of the act dictates what aid might matter.").

319. *See* Barksdale, *supra* note 38, at 577 (noting that lawyer liability in the squeeze-out context "stems from the necessity of attorney involvement in that type of transaction").

320. 985 P.2d 788 (Or. 1999).

321. *Id.* at 791. The majority owners sought the assistance of the lawyer after they had attempted to remove the minority owner themselves. *Id.*

lawyer had to have known that the client was squeezing out the minority owner.[322]

Even if a lawyer has actual knowledge of her client's breach of fiduciary duty, a lawyer will not be liable for aiding and abetting her client unless the lawyer provided substantial assistance to her client in furtherance of that breach. In the context of professionals, courts are careful not to impose liability on those who conduct "routine professional services."[323] Among the policies that inspire courts to protect professionals from liability for performing routine services is maintaining the trust in the professional-client relationship.[324] Additionally, a wide "liability net" might stifle the willingness of lawyers to represent majority owners in pursuing legitimate business purposes. But when a lawyer is essential to effectuating a complex squeeze-out, she is more than a scrivener. The technical and strategic assistance that a lawyer provides requires more than merely filling out forms for the client. It requires expertise. Therefore, in the oppression context, a squeeze-out that could only occur with the assistance of a lawyer provides the best evidence for establishing not only actual knowledge but substantial assistance.[325]

322. For an example of the need for lawyers in oppression cases, see Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991) (holding that lawyer was not liable conspiring with client/majority owner in breaching fiduciary duties owed to minority owner because lawyer did not owe minority owner any fiduciary duties). In *Skarbevik*, the lawyer knew that the majority of owners intended to dilute the minority owner's interest in the business. *Id.* at 631–32. The lawyer informed his clients that they needed a "legitimate corporate purpose" before any amendment to the by-laws, which would be detrimental to the minority. owner, could be made. *Id.* at 631. The lawyer proceeded to draft documents containing misrepresentations in order to oppress the minority owner. *Id.* at 632.

323. *See* Witzman v. Lehrman, Lehrman, & Flom, 601 N.W.2d 179, 189 (Minn. 1999) ("'[S]ubstantial assistance' means something more than providing routine professional services."). Although *Witzman* involves an aiding and abetting claim against an accountant, it is analogous to contexts in which professionals are providing routine services.

324. *Id.* at 186 ("If professionals have reason to believe that they may be held liable for their clients' torts merely by providing routine professional services to their clients, the professionals may face a conflict between serving their clients and protecting their own interests.").

325. *See* Hefferman v. Bass, 467 F.3d 596, 598–99 (7th Cir. 2006) (finding the facts in the plaintiff/co-owner's complaint against lawyer, including the lawyer drafting an unfair buyout agreement and release, formatting it in such a way as to look like another document, and then giving it to the client/owner in the middle of the night knowing that the client is going to the co-owner's home to trick the co-owner into handing over his interest in the business, were sufficient to allege

3. Procedural Barriers

For the court to find actual knowledge, it must determine whether a squeeze-out is the result of a technically and strategically savvy scheme that is so connected with obvious misconduct so as to imply the lawyer's knowledge.[326] A layperson does not have the knowledge and experience to be able to determine the point at which evidence submitted by the plaintiff establishes the lawyer's actual knowledge of her client's oppression.[327] Just as a co-owner needs the assistance of a lawyer to effect a squeeze-out, a fact-finder's ability to determine the lawyer's actual knowledge requires an expert.[328] Existing procedures for determining legal malpractice liability provide a way to supplement the fact-finder's ability in reviewing the evidence.

In Minnesota, to bring a claim against a lawyer for malpractice, the plaintiff must comply with Minnesota Statutes section 544.42.[329] Section 544.42, subdivision 2 requires a plaintiff who plans on using expert testimony to establish a prima facie case and to submit with the pleadings an affidavit that states that the allegations have been reviewed by the plaintiff's lawyer with the assistance an expert.[330] The initial affidavit must include the lawyer's statement that an expert "whose qualifications provide reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of the expert, the defendant deviated from the applicable standard of care."[331] In addition to this initial affidavit, within 180 days of commencing the action, the plaintiff must provide the defendant with an expert disclosure that:

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substantial assistance and knowledge in an aiding and abetting claim against the lawyer).

326. *See supra* Part III.B.3.b.

327. *See* Barksdale, *supra* note 38, at 577 ("Attorneys routinely facilitate corporate squeeze-outs because the close corporation is a legal entity whose very existence derives from attorney input and whose rules of governance and procedures are not easily understood by lay persons.").

328. *See supra* Part III.B.3.c.

329. *See* Charles E. Lundberg, *Legal Malpractice: Techniques to Avoid Liability 1999*, 608 PLI/LIT 357, 361 (1999) (stating that "[i]n all but the most obvious situations, a legal malpractice plaintiff must establish the applicable standard of care, and the defendant's breach of that standard, through a competent witness—an attorney who has practical experience in the subject matter" and that section 544.42 now requires the same type of expert review for legal malpractice actions as is required in medical malpractice actions).

330. *Id.*

331. MINN. STAT. § 544.42, subdiv. 2 (2006).

> (1) identifies each person the attorney expects to call as an expert; (2) describes the expert's opinion on the applicable standard of care, as recognized by the professional community; (3) explains the expert's opinion that the defendant departed from that standard; and (4) summarizes the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.[332]

The minimum standard in fulfilling the affidavit requirement is to provide the parties and the court with meaningful information with respect to the issues on which the expert will be testifying so as to avoid a directed verdict.[333]

Section 544.42 was enacted ostensibly for the purpose of limiting frivolous claims against professionals.[334] In malpractice claims, the expert's testimony has the dual effect of filtering out frivolous claims against the lawyer and of adding legitimacy to the plaintiff's claim. The requirement of a lawyer's testimony weeds out unmeritorious claims by ensuring that the lawyer's conduct is measured against an objective standard of reasonableness in the legal profession.[335] Furthermore, expert review limits frivolous claims by forcing lawyers who testify on the issue of another lawyer's conduct to "put her name on the line." The risk of disparaging one's professional reputation discourages a lawyer from being an expert for a plaintiff pursuing a bogus claim.

The objectives behind requiring expert testimony in legal malpractice actions are equally present in aiding and abetting fiduciary duty actions against lawyers. Lawyers who assist majority owners in pursuing legitimate business purposes risk being sued by minority owners claiming oppression.[336] Accordingly, a law requiring an expert affidavit and testimony in aiding and abetting actions against lawyers is appropriate. Unlike in a legal malpractice

332. Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 219 (Minn. 2007) (analyzing section 544.42's command for sufficient information in expert affidavits in accountant malpractice claim).

333. *See id.* (holding that the expert's affidavit, which included a detailed description of the factual application drawing certain legal conclusions, was deficient because the affidavit did not identify any standard of care, state how the professional deviated from the applicable standard of care, and show how the deviation caused plaintiff's injury).

334. *Id.* at 217.

335. *See* Noske v. Friedberg, 713 N.W.2d 866, 874 (Minn. Ct. App. 2006) (stating that malpractice does not apply to a "claim based on a lawyer's failure to pursue a particular strategy.").

336. *See supra* Part I.

action, however, where the issue is whether the lawyer was negligent, the issue in an aiding and abetting breach of fiduciary duty action is whether the lawyer had actual knowledge of her client's oppressive scheme and whether she substantially assisted her client.[337] Therefore, in an aiding and abetting action, the focus of the expert's testimony would be something different than the applicable standard of care.

In determining the substance of the expert's testimony, one must be wary of evidence that would be unduly prejudicial to the lawyer and would consequently be inadmissible.[338] In general, expert witnesses are barred from making conclusory statements about a defendant's knowledge or intent.[339] Instead of the defendant/lawyer's actual knowledge being the focus of the expert's affidavit, the testimony must concentrate on the actual squeeze-out.

As discussed above, in the aiding and abetting squeeze-out context, the crux of the actual knowledge and substantial assistance inquiries is the existence of a strategically or technically complex squeeze-out. The expert must use the facts including the business's charter and bylaws (which may allude to the minority owner's reasonable expectations), the documents, the transactions, the availability of alternative decisions that would have protected the minority owner's reasonable expectations, and any other relevant information to analyze the squeeze-out objectively. After

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337. *See* Anstine v. Alexander, 128 P.3d 249, 255 (Colo. Ct. App. 2006).

> A cause of action for aiding and abetting a breach of fiduciary duty requires (1) breach by a fiduciary of a duty owed to a plaintiff, (2) a defendant's knowing participation in the breach, and (3) damages. A claim for legal malpractice requires proof of damages incurred by the plaintiff client and caused by the negligence of an attorney who owes a duty of care to the client.

Id.

338. FED. R. EVID. 403, 704.

339. *See, e.g.*, State v. Richardson, 525 N.W.2d 378, 382 (Wis. Ct. App. 1994) (stating that expert testimony of defendant's mental history was admissible to prove defendant's state of mind, but that expert may not make conclusions about a defendant's "actual beliefs at time of offense, about the reasonableness of those beliefs, or about [defendant's] state of mind before, during and after the criminal act"). Additionally, certain actions against lawyers involving intentional conduct such as intentional misrepresentation , breach of fiduciary duty, and fraud do not require expert witnesses. *See* Smith v. Morris, Manning & Martin, LLP, 589 S.E.2d 840, 844 (Ga. Ct. App. 2003) (stating that statute requiring expert affidavit applies only to claims alleging professional negligence, not claims based on intentional conduct).

examining the mechanisms and level of complexity existent in the squeeze-out, the expert may opine as to whether the squeeze-out was so complex that only a lawyer could have orchestrated it.

This approach is not novel as it has been used in criminal law for establishing a person's connection with a gang.[340] For example, in *People v. Garcia*, the court distinguished an expert's testimony regarding the "culture, habits, and psychology of gangs" from testimony of a defendant's specific intent or knowledge because the former are merely probative and are subjects "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."[341] In *Garcia*, the defendant's particularized knowledge of the gang's activities evidenced his affiliation. Similarly, the expert's affidavit characterizes the squeeze-out as an act that only a select few have the skill to do.

A rule that requires an expert affidavit in aiding and abetting breach of fiduciary duty actions against lawyers equips courts with the expertise necessary to decide complex cases. The rule is not under-inclusive; it protects and encourages the trust and honesty existent in fiduciary relationships among co-owners. If a majority owner establishes a prima facie case of aiding and abetting breach of fiduciary duty with an affidavit combined with a well-pleaded complaint, litigation continues.[342] The rule imposes on lawyers the liability-related disincentive to give necessary assistance in squeeze-outs and prevents lawyers from being necessary handmaidens to their clients' breaches of fiduciary duties. The rule is not over-inclusive; it safeguards the lawyer-client relationship and prevents frivolous minority claims against lawyers. The affidavit is a sufficient barrier to unmeritorious claims. As lawyers have no more

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340. *See, e.g.*, People v. Garcia, 64 Cal. Rptr. 3d 104, 107 (Ct. App. 2007).

> We publish this case because we hold that evidence of actual knowledge of a criminal street gang's current activities, including information about where gang members had hidden gang guns and the identity of members who were engaged in gang shootings, when an expert testifies such information is available only to other active gang members, satisfies the statutory requirement of active participation in a gang.

Id.

341. *Id.* at 114.

342. Other probative factors that may be used to establish actual knowledge such as the duration of the lawyer's assistance would most likely stay in the plaintiff's actual complaint. The duration of assistance and the particular relationship that the lawyer had with the business and the co-owners lead to a subjective inquiry into the lawyer's actual knowledge and best left out of an expert's affidavit stating "objective" opinion.

reason to fear an aiding and abetting claim than they do a malpractice claim, the policies associated with imposing liability onto lawyers for aiding and abetting squeeze-outs, including the chilling effect on representation and the trust existent in the lawyer-client relationship, are not in jeopardy.

V. CONCLUSION

Fiduciary duties are important tools to ensure that the dominant party does not take advantage of the weaker party in a confidential relationship.[343] Inter se fiduciary obligations are fundamental to maintaining trust and confidence among co-owners in closely-held businesses.[344] When co-owners enter into a relationship, there are certain expectations that each owner has that are fundamental to their participation in the business.[345] Safeguarding the duty of loyalty existent among owners in closely-held businesses is necessary to protect minority owners from being oppressed by their stronger counterparts. A continuation of this proposition is that lawyers who aid and abet their clients in oppression should be liable for aiding and abetting breach of fiduciary duty.[346]

Reasonable expectations can be ambiguous, so subjecting lawyers to liability for aiding and abetting oppression could result in lawyers second guessing their clients' motives and objectives in making decisions in closely-held businesses.[347] The fiduciary relationships among co-owners should not jeopardize the trust and confidence between a lawyer and her client. In addition, lawyers could be forced into years of protracted litigation by disgruntled minority owners bringing forth frivolous suits. To protect the lawyer-client relationship and to prevent innocent lawyers from being drawn into litigation, liability should be restricted to cases in which it is clear that the lawyer knowingly assisted her client in oppressing a minority owner.

Preventing aiding and abetting liability from having an over-inclusive effect requires a strong showing that a lawyer knowingly and substantially assisted a majority owner's breach of fiduciary

343. *See supra* Part III.A.1.
344. *See supra* Part III.A.2.
345. *See id.*
346. *See supra* Part III.B.3.c.
347. *See supra* Part IV.A.1.

duty.[348] Where there is a lack of direct evidence revealing a lawyer's liability in the squeeze-out, a minority owner may present certain circumstantial evidence, such as an expert witness, that implicates the lawyer's involvement in the squeeze-out. A threshold finding that a squeeze-out was structured and carried out in such a way that a lawyer had to have been involved strikes a necessary balance between a lawyer's interest in providing advice and assistance to her client and a minority owner's reasonable expectations.

348. *See supra* Part IV.B.