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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

TODD B. SCOBEY, CYNTHIA KING, and JACKSON SCOBEY, by his next friend TODD B. SCOBEY, and STRONG WATERPROOFING, LLC,	)	
Plaintiffs,	)	
VS.	)	**NO. 17-691-BC**
JOE STRONG,	)	
Defendant.	)	

MEMORANDUM AND ORDER: (1) DENYING DEFENDANT'S MOTION TO DISQUALIFY; (2) PROVIDING INSTRUCTIONS ON LLC REPRESENTATION; AND (3) SETTING 8/25/17 DEADLINE TO SCHEDULE RULE 16 CONFERENCE

The Defendant has filed a motion to disqualify G. Kline Preston IV as Counsel of record for the Plaintiffs. The Defendant asserts that Attorney Preston should be disqualified for these reasons.

— The interests of the Individual Plaintiffs and the Plaintiff LLC are adverse because Defendant Strong's Declaration and Answer assert wrongful conduct taken by Individual Plaintiffs against the LLC.

— Attorney Preston, in his role as attorney for the LLC prior to this lawsuit, has been privy to information that could be used against the LLC and its president if Attorney Preston were to continue to represent the Individual Plaintiffs.

Additionally, the Defendant asserts that as the majority voting interest of the LLC he has discharged Attorney Preston as Counsel for the LLC and has retained new Counsel, Attorney McMillan.

After considering the record, the law and argument of Counsel, it is ORDERED that the *Motion* of Defendant Joe Strong to disqualify Attorney Preston as Counsel of record for the Plaintiffs is denied without prejudice to reassert disqualification if the Defendant files claims on behalf of the LLC, such as breach of fiduciary duty or mismanagement, against some of the Individual Plaintiffs. The basis for this ruling is two-fold: (1) lack of ripeness and (2) ambiguity of the Operating Agreement on voting rights.

With respect to the first ground for denial of the *Motion*, the Court understands that the Defendant prudently filed the *Motion* at this time to preclude assertion later by the Plaintiffs of a waiver of the claim of disqualification of Counsel. The status of the lawsuit, however, is that the Defendant is completing an audit to determine whether to file a counterclaim, whether the constituents of the counterclaim would include breach of fiduciary duty against all or some of the Plaintiffs, and whether that claim would be on behalf of the Defendant, individually, and/or on behalf of the LLC. At this time the record on this issue is defensive only. The record consists of the Defendant's Declaration and Answer. Without the assertion of a counterclaim against some of the Individual Plaintiffs, the conflict of Attorney Preston is hypothetical. Using a hypothesis as the basis for disqualification is counter to the cautious approach and definite grounds needed for disqualification.

> Shareholders may bring derivative and individual actions simultaneously. *See In re TransOcean Tender Offer Securities Litig.*, 455 F. Supp. 999, 1014 (N.D. Ill. 1978). While there is always a theoretical conflict of interest, the great weight of authority rejects a *per se* rule prohibiting such representation. *Id*.

> Because there is no evidence in the record to support a finding that William A. Hall is incapable of fairly representing the interests of the corporation in the derivative action while maintaining his individual suit, the existence of both is no reason to deny him standing.

Hall v. Tennessee Dressed Beef Co., 957 S.W.2d 536, 540 (Tenn. 1997); *see also Proffitt v. Smoky Mountain Woodcarvers Supply, Inc.,* No. E2011-01801-COA-R3CV, 2012 WL 1691548, at *8 (Tenn. Ct. App. May 15, 2012) ("Absent a conflict of interest, there is no bar to a shareholder maintaining a derivative action while also pursuing an individual claim against the corporation and other defendants.").

> It is well-settled that shareholders have the right to bring direct and derivative actions simultaneously. *J. I. Case Co. v. Borak*, 377 U.S. 426, 431, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964); *Yamamoto v. Omiya,* 564 F.2d 1319, 1326 (9th Cir. 1977). Of course, there is always a theoretical conflict of interest in situations where a plaintiff in a single lawsuit seeks redress not only on behalf of the corporation but also from the corporation. *Kammerman v. Pakco Companies, Inc.*, CCH Sec. L. Rep. P 96,318 at p. 93,065, n.3 (S.D.N.Y. 1978). Nevertheless, the great weight of authority rejects a *Per se* rule prohibiting such representation, and simultaneous prosecutions have been permitted where the asserted "antagonism" between the primary and derivative actions is merely a "surface duality." *Id.*; *Bertozzi v. King Louie International, Inc.,* 420 F. Supp. 1166, 1179-80 (D.R.I. 1976). At this stage of the proceedings, there is merely a potential conflict of interest present. Moreover, if this potential conflict should crystallize, for example, if and when the question of remedy is reached, the court has sufficient authority to deal with any problems that may arise. *See, e. g., Id.* at 1180.

In re TransOcean Tender Offer Sec. Litig., 455 F. Supp. 999, 1014 (N.D. Ill. 1978) (cited with authority the Tennessee Supreme Court in *Hall v. Tennessee Dressed Beef Co.,* 957 S.W.2d 536, 540 (Tenn. 1997)).

There is, then, an insufficient record at this time to demonstrate that the LLC's interest and benefit is adverse to actions taken by the Individual Plaintiffs.

As to the second basis on which disqualification of Attorney Preston is sought, it also is not ripe. At this time the record does not demonstrate that Attorney Preston is privy to information that could be used against the Defendant that is confidential or other inside/unknown information to the Individual Plaintiffs. Attorney Preston has never represented the Defendant. Further, during oral argument Attorney Preston represented that he did not know the Defendant well or much, and had only had one or a few conversations and dealings with him in the context of LLC matters. At this time there is an insufficient record of some sort of inside or confidential information Attorney Preston has gleaned which would disqualify him from representing parties who have an interest adverse to the Defendant.

With respect to the assertion by the Defendant that as manager of the LLC he relieved Attorney Preston of his duties and, on that basis, Attorney Preston is not permitted to proceed as the attorney representing the LLC, the Court concludes, at this preliminary stage of the proceedings, the Operating Agreement is ambiguous with respect to voting rights. Tennessee Code Annotated section 48-248-405 is the baseline. It provides "Each member, manager or director, as applicable, of an LLC shall have equal voting rights per capita with each other member . . . ." Under this provision, the three Individual Plaintiff members of the LLC would outnumber the Defendant if the Plaintiffs' vote the same. Per capita, the Individual Plaintiffs collectively hold a majority.

At paragraph 16 of his Declaration, the Defendant testifies that he has not agreed and would never agree to per capita voting. He cites to the part of the Operating Agreement which allocates him a 54% "Member Equity Interest" at section 1.6(b) and also referred to as "Equity Ownership" in section 1.10 as the basis for his claim of holding a majority voting interest.

Tennessee Code Annotated sections 48-249-102(11) and (13) differentiate between financial rights and governance rights (the right to vote). Moreover, the Revised LLC Act allows parties to contract in the Operating Agreement to allocation of voting rights. If, however, the Operating Agreement is silent and does not allocate voting rights, then, under section 48-249-205(a), voting is per capita.

The Court has reviewed the Operating Agreement thoroughly, and there is no apparent provision for voting rights. As the definitional sections of Tennessee Code Annotated section 48-249-102(11), (13), (17) make clear, membership percentage interests are not necessary synonymous with voting rights. It is the function of the Operating Agreement to state clearly if voting rights are synonymous with membership percentage interests as that is a deviation from the statutory norm of per capita voting.

> Another important topic involving management of the LLC, which a practitioner should address in the LLC documents, is the voting power of the

> members, managers, and directors. The default provisions of the Revised Act state that "[e]ach member, manager or director, as applicable, of an LLC shall have equal voting power per capita with each other member, manager or director." If this voting rule is not addressed in the LLC documents, unintended consequences may occur. For example, in a member-managed LLC, if one member contributes ninety-nine percent of the capital and the other member contributes one percent of the capital, the default rule would provide that each member shares voting power equally. If that is not the desired result, the LLC document should specify how voting will be determined. Another example of unintended consequence may occur in a manager-managed LLC with two managers where the members desire for each manager to have the right to take action without the other manager. The Revised Act's default rule requires a majority vote of the managers with each voting on a per capita basis. If the default rule requiring equal voting power is not amended in the LLC documents, the intent of the members could be defeated.

Frank L. Watson, Jr., Mary Ann Jackson, *The Tennessee Revised Limited Liability Company Act: A Practitioner's Guide to Avoiding the Pitfalls*, 37 U. Mem. L. Rev. 311, 329 (2007).

> The LLC statutes that provide for management by members and for voting rules permit members to contract around the statutory default rules. Thus, the parties can agree to vote per capita or to provide for majority, supermajority, or unanimous voting even if the statute provides a different rule. The parties also can agree to delegate management authority to a single member, or to an outside manager even in a member-managed firm. There is no apparent reason why class voting rules would not be allowed even in the absence of such provisions. Indeed, the courts probably will allow LLC members to contract for whatever management rules they want, subject to explicit prohibitions in the statute. This, at least, is the appropriate result from a policy standpoint. It is true that, in a closely held business, agreements may poorly protect the parties because of such problems as high bargaining costs, the parties' lack of sophistication, multiple representation by counsel, and careless reliance on forms. Nevertheless, non-enforcement may cause even higher costs in terms of unpredictability and discouraging the parties from contracting in advance. Accordingly, courts should generally enforce agreements subject to providing

> relief in certain circumstances, such as where application of the rule has unexpected oppressive results.

§ 8:3.Voting by members, 1 Ribstein and Keatinge on Ltd. Liab. Cos. § 8:3 (West 2017).

Accordingly, based upon the four corners of the Operating Agreement, the Plaintiffs have established, at this preliminary stage, a prima facie case that the voting rights are per capita. That would give them a majority interest and the right to bring a direct action on behalf of the LLC against the Defendant for breach of fiduciary duty. Under these circumstances, the Defendant would not have the managerial right to discharge the Counsel, Kline Preston, for the LLC.

For this same reason, the notice of voluntary nonsuit, submitted by Attorney McMillan, hired by Defendant Strong on behalf of the LLC, is ineffective. The Defendant has failed to establish, at this preliminary stage of the proceedings, that the Plaintiffs do not have a majority of the voting rights and, therefore, the Defendant has not established that Attorney McMillan is sole counsel for the LLC.

Additionally, even if the Individual Plaintiffs do not have a majority voting interest to bring a direct claim, they have stated grounds for a derivative claim. On that basis, as well, Attorney Preston can represent the Individual Plaintiffs and the LLC until adversity between the Plaintiffs is demonstrated. As discussed above, this issue is not ripe.

Based upon the foregoing analysis and authorities, the Court determines that it is premature to disqualify Attorney Preston as Counsel of record for the Plaintiffs in this lawsuit, and for this reason has denied Defendant's *Motion*.

Lastly, looking ahead in this litigation and also analyzing, practically, the status of the LLC, presently there is the circumstance of the LLC being represented by two different attorneys with the LLC asserting inconsistent positions. Such odd results occur in disputes of closely-held member LLCs just as it does with corporations.[1] To establish some structure in this unusual circumstance, it is ORDERED that until further order no attorneys fees for this litigation shall be paid by the LLC. All attorneys fees must be paid by the Individual parties. Claims of the Individual parties to seek recovery in this litigation of fees expended both on behalf of themselves individually and on behalf of the LLC are not waived and are preserved for future determination.

Additionally, there is no prohibition to the Defendant retaining Attorney McMillan to represent the interests of the LLC asserted by Defendant Strong. Thus, at this stage of the lawsuit, Attorney Preston represents the claims of the Plaintiffs, including the LLC, because no counterclaim has yet been filed. Attorney Goldammer represents Defendant Strong, and Attorney McMillan has been retained by Defendant Strong to investigate and advise on LLC claims adverse to the Individual parties. The Court authorizes Attorney McMillan to proceed in this role. Proceeding this way is not unprecedented.

> Derivative suits raise a somewhat different question. Here a minority shareholder seeks to bring suit on behalf of the entity, usually because the claim is against the controlling managers who will not cause the corporation to sue themselves. Ostensibly the corporation is a named plaintiff. But practically the defendant is defending actions taken by the corporation. In that setting courts permit the same lawyer to represent both the corporation and the

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[1] Attached as an Appendix are cases and legal treatises.

> controlling group of shareholders who are the defendant, but sometimes require separate counsel. Applying similar reasoning, but on the other side of the litigation, a court has refused to find a disqualifying conflict where the same attorney represented an individual shareholder bringing a derivative suit in the name of the corporation and direct suits on behalf of the shareholder against the corporation.

§ 2:2.Lawyer's representation of more than one participant in a closely held enterprise, 1 Close Corp and LLCs: Law and Practice § 2:2 (Rev. 3d ed.) (West 2017) (footnotes omitted).

As the case develops, the Court may need to appoint an attorney to represent the LLC, or disqualify Attorney Preston or Attorney McMillan. Examples of different methods may be found in these cases:

- *Tydings v. Berk Enterprises,* 80 Md. App. 634, 645, 565 A.2d 390, 396 (1989) ("We hold that the circuit court was without authority to appoint counsel for Montgomery Golf. The choice of independent counsel rests with the corporation. We are confident that Montgomery Golf's board of directors will exercise its fiduciary duty to the stockholders and retain competent, independent counsel. That counsel, of course, will, as we have previously stated, represent the interest of the corporation and not of Tydings.").

- *Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 367 (Iowa 1972) ("Herle also here urges his pretrial motion for appointment of separate counsel to represent defendant corporation was erroneously overruled. Viewing the situation in retrospect we are inclined to believe such an appointment would have obviated some of the problems instantly presented.... Here, however, we find neither reversible abuse of discretion by trial court nor actual prejudice to Herle.").

- *Obeid ex rel. Gemini Real Estate Advisors v. La Mack*, No. 14 CV 6498 LTS MHD, 2015 WL 7180735, at *2 (S.D.N.Y. Nov. 9, 2015) ("This case presents the paradigm for these practical concerns. Gemini is owned and controlled by its three principals—plaintiff Obeid and defendants La Mack and Massaro—and each is entitled to one vote, with decisions mandated to be made by majority vote. Unavoidably, then, any replacement attorney would be chosen by Messrs. La Mack

> and Massaro, and would be subject to their direction. Since a mandated change of counsel would not improve matters, and since there is no demonstrated meaningful threat to the integrity of the trial from the challenged joint representation, we would be strongly inclined to allow McGuire Woods to continue as counsel to Gemini as well as to La Mack and Massaro, were such a decision necessary. In any event, however, during the pendency of this motion, new counsel has been substituted to represent the nominal defendants, and that step leaves no basis to disqualify McGuire Woods from representing the other, active defendants on a conflict-of-interest theory.").

Further a Rule 16 Conference shall be scheduled subsequent to the anticipated completion of the audit commissioned by the Defendant. At the Conference, deadlines will be set for the litigation. The deadline for the Defendant to file any counterclaims is September 22, 2017, before the Rule 16 Conference. In addition, logistics of operating the LLC, distribution of funds to the members, designation of Counsel for the LLC, mediation, and appointment of a fiscal agent shall be covered.

It is therefore ORDERED that by August 25, 2017, Counsel shall contact the Docket Clerk, Mrs. Smith (615-862-5719) on their availability for the Rule 16 Conference on these dates and times:

- October 9, 2017 at 1:30 p.m.
- October 10, 2017 at 9:00 a.m.
- October 11, 2017 at 9:00 a.m.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

G. Kline Preston
James D. Kay, Jr.
Benjamin E. Goldammer
Michael A. Johnson
Brandt McMillan

APPENDIX

2 CLOSE CORP AND LLCS: LAW AND PRACTICE, *Direct suits for fiduciary duty claims* § 9:26 (Rev. 3d ed.) (West 2016):

The reasoning common to explaining the difference between derivative and direct suits in the context of publicly held corporation, discussed in a prior section, understate and do not capture the differing policies for derivative suits and limitations on derivative suits that have developed in a non-public setting. For example, in deciding on whether to permit a direct suit, courts do not ignore the reality that the litigation is often a dispute among shareholders. The derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become “purely technical.” There is no practical need to insist on derivative suits when there is little likelihood of a multiplicity of suits or harm to creditors. Any recovery in a derivative suit would return funds to the control of the defendant, rather than to the injured party.

2 CLOSE CORP AND LLCS: LAW AND PRACTICE, *Direct Suits in LLCs* § 9:49 (Rev. 3d ed.) (West 2016) (footnotes omitted):

One of the most notable movements in close corporations law in recent decades has been the increased willingness of courts to permit minority shareholders to bring direct claims for breach of fiduciary duties. That trend can also be seen in the LLC setting and for similar reasons. In a closely held entity where there is one party in control of the entity and another party who is the only party disadvantaged by the act the controlling group has directed the entity to take (such as cutting the return to the minority or increasing the salary or other return to the controlling party) the distinction between individual harm and collective harm blurs and courts have not required the plaintiffs to comply with the derivative requirements. An Indiana court permitted a direct claim versus a manager. A Georgia court permitted direct claim citing the close corporation exception, as did a Utah court, noting it would be illogical to limit the exception to corporations and referring the Utah Supreme Court’s prior recognition of the similar vulnerability of investors in LLCs and closely held corporations.

12B FLETCHER CYC. CORP. § 5911.50 (West 2016) (footnotes omitted):

Courts sometimes recognize the right of a close corporation shareholder to sue directly, as an individual, on a cause of action that would normally have to be brought derivatively. This is because of the special treatment sometimes accorded close corporations and their similarity to partnerships. Additionally, allowing a direct action may allay concerns that derivative claims inure to the benefit of all shareholders, including those who have engaged in wrongdoing. A court has discretion whether to allow a minority shareholder to proceed directly against a corporation. The availability of a direct action frees the minority shareholder from satisfying the many requirements of a derivative action, such as making a demand on the corporation or obtaining court approval to dismiss or settle an action.

A court may acknowledge an exception to the general rule precluding a direct action for corporate injury when a minority shareholder is frozen out of the management of a close corporation through oppressive majority conduct, or in the case of officer or director misconduct-including allegations of self-dealing or breach of fiduciary duty, and in its discretion, may treat an action raising derivative claims as a direct action if it finds to do so will not: (1) unfairly expose the corporation to a multiplicity of actions; (2) materially prejudice the interests of creditors in the corporation; or (3) interfere with a fair distribution of the recovery among all interested persons.

Also, courts may allow shareholders who own all of the stock of the company to proceed against each other directly under the principle that there are no persons not before the court who can be affected by the litigation and that there is no danger of a multiplicity of lawsuits—two reasons used to justify the requirement of a derivative action. Courts may, however, require derivative actions even where the only shareholders are parties to the individual action. Moreover, a court may not recognize any exception for close corporations to the general rule that wrongs against the corporation may be asserted by shareholders only as derivate actions, even for sole shareholder corporations.

Reasons underlying the traditional rule include: (1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in the corporation; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares. Another rationale for the traditional rule is to promote commercial predicatability. A middle approach requires the court to examine the particular facts of each case to determine whether imposing derivative rules is reasonable. At the opposite end of the spectrum is the blanket exception for suits involving close corporations.

The American Law Institute's Principals of Corporate Governance adopts a middle road. Section 7.01(d) provides that a court may treat a shareholder's action as direct if the court finds that to do so will not expose the defendants to multiple actions, will not harm corporate creditors, and will not interfere with a fair recovery among all interested persons. A number of courts have adopted this approach.

Allan B. Cooper et. al., *Too Close for Comfort: Application of Shareholder's Derivative Actions to Disputes Involving Closely Held Corporations,* 9 U.C. Davis Bus. L.J. 171, 174-75; 177-79; 181 (2009) (footnotes omitted):

Court have long required shareholders to pursue corporate governance disputes through derivative actions. There are four primary reasons for this requirement. First, the rule protects creditors by insuring that recovery for misdeeds committed against the corporation redound to the benefit of the entity. Second, the rule benefits all shareholders in a manner proportionate to their ownership interests. Third, the rule discourages crippling strike suits. Lastly, the rule permits the corporation to manage the suit and its resolution under court supervision.

Historically, the sole exceptions to the derivate action requirements were for special injury cases, i.e. instances where a shareholder had suffered some harm not shared with the corporation. Such special injury cases included, for example, employment-based breaches, wrongful refusals to issue or exchange stock, failure to pay declared dividends, fraud in the transfer of stock, etc. However, for the most common source of shareholder dispute—alleged breaches of fiduciary duty resulting from fraud, misrepresentation, waste and the like—the sole remedy for a disgruntled shareholder was to sue in a derivative action.

This requirement leads to odd and sometimes unwieldy results in disputes regarding close corporations. Closely held corporations are corporations with few shareholders, where management and ownership are often united, and where a lack of ready market for the shares exists. Closely held corporations are frequently managed more as partnerships than as corporations. Indeed, such businesses are often referred to as "incorporated partnerships" in recognition of their management and profit-sharing structures. Imposing the procedural and substantive constraints of derivative actions, therefore, sometimes inhibits, rather than promotes, a fair and efficient resolution of disputes between or among the "partners." This is especially so because partnership law is free of such constraints and therefore enables straightforward, direct litigation of the merits of the disputes.

Recognizing this problem, in 1992 the American Law Institute (ALI) instituted standards giving courts the discretion to allow direct actions by shareholders of close corporations if the policy reasons otherwise requiring derivative actions (i.e., avoiding a multiplicity of actions, protecting creditors and benefiting all shareholders proportionately) were absent. The ALI's recommendations created a flurry of activity among jurisdictions and legal commentators. A clear split exists among those jurisdictions that have considered the issue. Some courts argued to adopt the ALI approach. Others rejected it.

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In the context of a traditional corporation, those complex, often publicly-traded companies where management and ownership roles are segregated, the shareholder's derivative requirement promotes fairness and efficiency while discouraging strike suits.

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While this model works well with larger corporations, it runs into difficulty when applied to small businesses. Following the traditional shareholder's derivative approach for disputes arising from close corporations grafts an unwieldy framework onto what often are really partnership disputes.

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The rationale behind the shareholder's derivative requirement is nonsensical in this context. Why not, in these circumstances, simply recognize that a shareholder in a close corporation, where ownership and management are united, may sue directly for harms to his investment interest in the corporation?

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While many of the decisions focus on the right of minority shareholders to pursue claims against controlling shareholders, the concept has been extended to circumstances like Watson v. Button, where the dispute involved equal, deadlocked shareholders. For example, courts in various jurisdictions have held that a 50% shareholder in a close corporation can bring an individual action against the other 50% shareholder(s) "if it can demonstrate either a loss peculiarly to itself and different than that suffered by the corporation, or where the remaining 50% shareholder committed the actionable activities in his or her capacity as a director or officer of the corporation."

The issue is significant. It promises to expand from corporate law to the law of business organizations generally. The rise of LLCs and limited partnerships, with their hybrid characteristics of corporations and partnerships, have made them attractive alternatives to corporations. As with closely-held corporations, LLCs and limited partnerships are generally owned by few members who are often involved in management, often with no ready market for membership interests. Whether to permit LLC members or limited partners to sue directly instead of derivatively is an issue that has already been encountered, with some jurisdictions debating whether to permit direct suits by LLC members or by limited partners.

1 RIBSTEIN AND KEATINGE ON LTD. LIAB. COS., *Suits by members individually* § 10:4 (West 2016):

Moreover, for several reasons providing for derivative suits and requiring that some actions be brought derivatively is an inappropriate rule for the closely held firms for which LLCs statutes are primarily designed.

First, in a closely held firm, it is feasible to determine the damages of each member and, therefore, to structure a direct recovery. There is no reason to be concerned that this will bypass creditors since the suit is not intended for the benefit of creditors, and since the reality in a closely held firm is that a derivative recovery will be controlled by the members themselves rather than by non-member directors as in a corporation.

Second, derivative recovery may prejudice members of a closely held firm because they cannot cash in on the award by selling their shares, so that derivative recovery may be locked in the control of wrongdoing insiders.

Third, because each member of a closely held firm is likely to have a significant interest, the possibility of strike suits by nominal holders is diminished.

Fourth, in a closely held firm, it is feasible to have a suit on behalf of the firm approved by a vote of the disinterested, non-defendant, members. For all these reasons, the costs of having a single volunteer member sue on behalf of the firm may exceed the benefits in the typical closely held LLC.

These considerations have led some courts to be lenient in characterizing direct actions in close corporations.