Business Law Section Direct v. Derivative Task Force
Ancillary Issues Research

Prepared by:
Giuliana Medonia, 3L
Nova Southeastern University, Shepard Broad College of Law
Law Clerk, The Entrepreneur Lawyers

Ancillary Issue 1: Does the ninety (90) day window to purchase shares in response to an action to dissolve terminate if a voluntary dismissal of the court for dissolution is filed?

Relevant Statutes:

CORPORATIONS:

607.1436 Election to purchase instead of dissolution.—

(1) In a proceeding under s. 607.1430(1)(b), the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

(2) An election to purchase pursuant to this section may be filed with the court at any time within 90 days after the filing of the petition under s. 607.1430(1)(b) or at such later time as the court in its discretion may allow. If the election to purchase is filed by one or more shareholders, the corporation shall, within 10 days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this section. Shareholders who wish to participate must file notice of their intention to join in the purchase no later than 30 days after the effective date of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding and shall participate in the purchase in proportion to their ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs. After an election has been filed by the corporation or one or more shareholders, the proceeding under s. 607.1430(1)(b) may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his or her shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.

(3) If, within 60 days after the filing of the first election, the parties reach agreement as to the fair value and terms of the purchase of the petitioner's shares, the court shall enter an order directing the purchase of the petitioner's shares upon the terms and conditions agreed to by the parties.

(4) If the parties are unable to reach an agreement as provided for in subsection (3), the court, upon application of any party, may stay the proceeding to dissolve under s. 607.1430(1)(b) and shall, whether or not the proceeding is

stayed, determine the fair value of the petitioner's shares as of the day before the date on which the petition under s. 607.1430 was filed or as of such other date as the court deems appropriate under the circumstances.

607.1430 Grounds for judicial dissolution.—

(1) A circuit court may dissolve a corporation or order such other remedy as provided in s. 607.1434:

..

(b) In a proceeding by a shareholder to dissolve a corporation if it is established that:

1. The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and:

a. Irreparable injury to the corporation is threatened or being suffered;

b. The business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock; or

c. Both sub-subparagraphs a. and b.; or

2. The shareholders are deadlocked in voting power and have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors;

3. The corporate assets are being misapplied or wasted, causing material injury to the corporation; or

4. The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

LLC:

605.0706 Election to purchase instead of dissolution.—

(1) In a proceeding initiated by a member of a limited liability company under s. 605.0702(1)(b), the company may elect, or, if it fails to elect, one or more other members may elect, to purchase the entire interest of the petitioner in the company at the fair value of the interest. An election pursuant to this section is irrevocable unless the court determines that it is equitable to set aside or modify the election.

(2) An election to purchase pursuant to this section may be filed with the court within 90 days after the filing of the petition by the petitioning member under s. 605.0702(1)(b) or at such later time as the court may allow. If the election to purchase is filed, the company shall within 10 days thereafter give written notice to all members, other than the petitioning member. The notice must describe the interest in the company owned by each petitioning member and must advise the recipients of their right to join in the election to purchase the petitioning member's interest in accordance with this section. Members who wish to participate must file notice of their intention to join in the purchase within 30 days after the effective date of the notice. A member who has filed an election or notice of the intent to participate in the election to purchase thereby becomes a party to the proceeding and shall participate in the purchase in proportion to the ownership interest as of the date the first election was filed unless the members otherwise agree or the court otherwise directs. After an election to purchase has been filed by the limited liability company or one or more members, the proceeding under s. 605.0702(1)(b) may not be discontinued or settled, and the petitioning member may not sell or otherwise dispose of the interest of the petitioner in the company unless the court determines that it would be equitable to the company and the members, other than the petitioner, to authorize

such discontinuance, settlement, sale, or other disposition or the sale is pursuant to a deadlock sale provision described in s. 605.0702(1)(b).

605.0702 Grounds for judicial dissolution.—

(1) A circuit court may dissolve a limited liability company:

..

(b) In a proceeding by a manager or member to dissolve the limited liability company if it is established that:

1. The conduct of all or substantially all of the company's activities and affairs is unlawful;

2. It is not reasonably practicable to carry on the company's activities and affairs in conformity with the articles of organization and the operating agreement;

3. The managers or members in control of the company have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

4. The limited liability company's assets are being misappropriated or wasted, causing injury to the limited liability company, or in a proceeding by a member, causing injury to one or more of its members; or

5. The managers or the members of the limited liability company are deadlocked in the management of the limited liability company's activities and affairs, the members are unable to break the deadlock, and irreparable injury to the limited liability company is threatened or being suffered.

Notes:
There are not many decisions that clearly address this issue. It appears that as long as an election to purchase has not been filed, the dissolution proceeding can be voluntarily dismissed and the option to purchase shares terminates. If an election has already been filed, the dissolution cannot be discontinued or settled unless a court determines it would be equitable. Courts have not identified an "equitable" situation where they overlooked an election and discontinued a dissolution action.

6th District Court of Appeal	**1st District Court of Appeal**	**2d District Court of Appeal**	**Circuit Court of the Thirteenth Judicial Circuit of Florida**
Royal United Props. v. Royal, 370 So. 3d 1020; 2023 Fla. App. LEXIS 6673; 48 Fla. L. Weekly D 1893. Respondent filed for judicial dissolution, petitioning the trial court for relief from a shareholder deadlock pursuant to 607.1430(1)(b). Petitioners filed notices of election to purchase	*Graham v. Uphold*, 245 So. 3d 964 (Fla. 1st DCA 2018). The parties were 50\50 owners in a small corporation. As a result of a continuing deadlock, Appellee filed for dissolution pursuant to 607.1430(2). Appellant elected to purchase Appellee's shares in lieu of dissolution under 607.1436. After the parties failed to agree on	*Jones v. Pfaff*, 77 So. 3d 884 (Fla. 2d DCA 2012). Appellant filed for judicial dissolution and Appellee elected to purchase the shares. The trial court determined the fair value of the shares. Appellee then decided not to purchase Appellant's shares and instead file articles of dissolution. Appellant sought continued judicial dissolution of the	*Simcic v. McQuilken*, 2020 Fla. Cir. LEXIS 11264. There is not much detail in the opinion of this case, but the Court applied 607.1436(2). An election to purchase interest instead of dissolution was filed. After this filing was made, the Plaintiff filed a voluntary dismissal.

respondent's interests instead of dissolution pursuant to 607.1436. Although Respondent initially brought his action under the statute titled "Ground for Judicial Dissolution", he argues that he is not seeking dissolution as the remedy for the deadlock, but rather alternative relief such as an equitable division of assets. Respondent argued, and the trial court agreed, that because Respondent was not seeking dissolution as the remedy for deadlock, the statutory right to purchase Respondent's shares under 607.1436 was not triggered. This argument failed, and this Court disagreed with the trial court. This Court stated that according to the plain language of 607.1436, the triggering event that gave rise to Petitioners' right to purchase Respondent's shares was Respondent's filing of "a proceeding under s. 607.1430(1)(b)." In accepting Respondent's argument that its selected remedy controls whether Petitioners' right to purchase was triggered, the trial court misapplied the plain language of the statute. The Court acknowledged that 607.1436(1) states that a notice of election may be set aside if "the court determines that it is equitable to set aside or modify the election," and that no such finding was	the fair value of the shares, Appellant asked the court to make the determination pursuant to 607.1436(4), which triggered a stay of the dissolution proceedings. While the stay was still in effect, Appellee asked the court to appoint a custodian pendente lite to preserve the corporation's assets and to carry on and manage its business and affairs. The trial court granted the appointment and this court reversed. The court reasoned that although it is under the court's authority to appoint a custodian, they can only do so during a judicial dissolution proceeding. Because the dissolution proceedings were required by statute to be stayed while determining the value of the shares, the court did not have the authority to make the appointment. There was no voluntary dismissal in this case. However, this case shows how the court treats a dissolution proceeding once an election has been filed. Once an election is filed and the parties ask the court to determine the fair value of the shares, there is a "statutory stay" of the proceeding which would prevent a dismissal or other events from occurring.	Corporation but the trial court declined jurisdiction over the matter on the basis of the language in 607.1436(6), (7). This court affirmed, but the concurrence by J. Morris provides some insightful information regarding the statute. This case was applying the 2012 version of 607.1436(7) which stated: (7) The purchase ordered pursuant to subsection (5) shall be made within 10 days after the date the order becomes final **unless, before that time, the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to ss. 607.1402 and 607.1403, which articles shall then be adopted and filed within 50 days thereafter.** Upon filing of such articles of dissolution, the corporation shall be dissolved in accordance with the provisions of ss. 607.1405 and 607.1406, and the order entered pursuant to subsection (5) shall no longer be of any force or effect, except that the court may award the petitioning shareholder reasonable fees and expenses of counsel and any experts in accordance with the provisions of subsection (5) and the petitioner may continue to pursue any claims previously asserted on behalf of the corporation. In the concurrence, J. Morris cited to *Fierro v. Templeton*, 857 So. 2d 931, 933 (Fla. 4th DCA	The Court held that because the election had **already been filed**, the voluntary dismissal must be stricken and the claim for judicial dissolution be reinstated. The Court cited to 607.1436(2), which states that "after an election has been filed by the corporation or one or more shareholders, the proceeding under s. 607.1430(1)(b) may not be discontinued or settled...".

made by the trial court in its order setting aside the notice of election. However, the Court chose not to clarify this issue and stated that they will not address “whether Petitioners’ right to purchase Respondent’s shares is an unconditional right”.		2003), which held that "the language in 607.1436(7) leaves no question that the filing of an intention to adopt articles of dissolution . . . automatically nullifies the order directing the purchase of shares and triggers the dissolution process *without further order of the court*.". J. Morris then explained that under this reading of 607.1436(7), a shareholder could avoid judicial dissolution sought by another shareholder “simply by asserting his intention to purchase the shares but then later filing the notice of intention to adopt articles of dissolution, either because he intended to do so all along or because he was dissatisfied with the determined fair value of the petitioning shareholder's shares”. “Depriving the trial court of jurisdiction over the dissolution would deprive the petitioning shareholder of the right to supervision of the trial court over the dissolution, which could include the appointment of a receiver by the trial court or other actions by the trial court necessary to preserve the assets of the corporation”. The Florida legislature removed this troublesome language from 607.1436(7). The statute now reads: ‘the purchase ordered pursuant to subsection (5) shall be made within 10 days after the date the order becomes final”. It does	

		not permit a party to file articles of dissolution after the election to purchase is made. This change may relate to this ancillary issue because it shows that the legislature has acknowledged that a party should not lose its right to purchase and its right to have the court supervise the dissolution process just because the other party decides to walk away.	

Ancillary Issue 2: Can a derivative claim be dismissed only with court approval? Is that approval needed for each derivative count, or only as to an entire action?

Relevant Statutes:

CORPORATIONS:
607.0744 Dismissal.—

(1) A derivative proceeding may be dismissed, in whole or in part, by the court on motion by the corporation if a group specified in subsection (2) or subsection (3) has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation. In all such cases, the corporation has the burden of proof regarding the qualifications, good faith, and reasonable inquiry of the group making the determination.

(2) Unless a panel is appointed pursuant to subsection (3), the determination required in subsection (1) shall be made by:

(a) A majority of qualified directors present at a meeting of the board of directors if the qualified directors constitute a quorum; or

(b) A majority vote of a committee consisting of two or more qualified directors appointed by majority vote of qualified directors present at a meeting of the board of directors, regardless of whether such qualified directors constitute a quorum.

(3) Upon motion by the corporation, the court may appoint a panel consisting of one or more disinterested and independent individuals to make a determination required in subsection (1).

(4) This section does not prevent the court from:

(a) Enforcing a person's rights under the corporation's articles of incorporation or bylaws or this chapter, including the person's rights to information under s. 607.1602; or

(b) Exercising its equitable or other powers, including granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

607.0745 Discontinuance or settlement; notice.—

(1) A derivative action on behalf of a corporation may not be discontinued or settled without the court's approval.

(2) If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class, series, or voting group of shareholders, the court shall direct that notice be given to the shareholders affected. The court may determine which party or parties to the derivative action shall bear the expense of giving the notice.

NON-PROFIT CORPORATIONS:

617.07401 Members' derivative actions.—

(1) A person may not commence a proceeding in the right of a domestic or foreign corporation unless the person was a member of the corporation when the transaction complained of occurred or unless the person became a member through transfer by operation of law from one who was a member at that time.

(2) A complaint in a proceeding brought in the right of a domestic or foreign corporation must be verified and allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for at least 90 days after the date of the first demand unless, before the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(3) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in paragraphs (a)-(c) has made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation has the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:

(a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;

(b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(c) A panel of one or more independent persons appointed by the court upon motion by the corporation.

(4) A proceeding commenced under this section may not be discontinued or settled without the approval of the court. If the court determines that a proposed discontinuance or settlement substantially affects the interest of the members of the corporation, or a class, series, or voting group of members, the court shall direct that notice be given to the members affected. The court may determine which party or parties to the proceeding shall bear the expense of giving the notice.

(5) Upon termination of the proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including reasonable attorney's fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(6) The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney's fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and may require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured members only and is limited to a recovery of the loss or damage of the injured members.

LLC:

605.0806 Voluntary dismissal or settlement; notice.—

(1) A derivative action on behalf of a limited liability company may not be voluntarily dismissed or settled without the court's approval.

(2) If the court determines that a proposed voluntary dismissal or settlement will substantially affect the interest of the limited liability company's members or a class, series, or voting group of members, the court shall direct that notice be given to the members affected. The court may determine which party or parties to the derivative action shall bear the expense of giving the notice.

Circuit Court of the Sixth Judicial Circuit of Florida	**Circuit Court of the Fifteenth Judicial Circuit of Florida**	**2d District Court of Appeal**	**3d District Court of Appeal**	**4th District Court of Appeal**
Vology, Inc. v. John K. O'Shea & Beth Coleman Ten Ent, 2021 Fla. Cir. LEXIS 11946. Respondent filed a notice of voluntary dismissal for a	*Third Reef Holdings, LLC v. Stein*, 2019 Fla. Cir. LEXIS 15685. When determining whether or not a proposed settlement of derivative claims	*WLT Software Enters. v. Brooks*, 361 So. 3d 927 (Fla. 2d DCA 2023). Appellant (director of the Corporation), filed a complaint against three	*Gratz v. 1750 James Condo. Ass'n*, 393 So. 3d 818 (Fla. 3d DCA 2024). If, on motion by a corporation, the court appoints an independent analyst	*Spanakos v. Hawk Sys.*, 362 So. 3d 226 (Fla. 4th DCA 2023). A settlement proposal made in an attempt to voluntarily dismiss a

derivative complaint. The Court cited § 607.0745, stating that derivative claims may not be dismissed absent approval of the Court. The notice of dismissal therefore **technically is ineffective**, and **will be treated as a motion under § 607.0745 requesting dismissal of the derivative complaint** (note that the language of 607.0745 applies to "discontinuance or settlement", not dismissal, but the Court is applying it as if it says dismissal. So, discontinuance and dismissal may be synonymous.). The Court appointed an independent analyst under § 607.0744(3) to determine if the derivative action was in the best interest of the corporation. The Court accepted the analyst's conclusion that maintenance of	should be approved under § 607.0806, courts determine if the settlement is fair and reasonable by considering the following factors: (1) the validity of the claims, possible defenses, and the probability of success if the action were pursued to final judgment (2) the complexity, expense and likely duration of the litigation (3) the benefit to the corporation (4) and such other factors as may be appropriate in the individual case. "Such other factors" in (4) include: probable validity of the claims, the delay, expense and trouble of litigation, amount of the compromise compared with collectibility of a judgment, and views	shareholders alleging breach of contract, breach of fiduciary duty, and unjust enrichment. The complaint stated that it was filed by the Corporation through a Director. The suit was not properly brought as a derivative action because it did not comply with 607.0742 requirements.[1] Because the suit was not brought as a derivative action, the shareholders were able to file a voluntary dismissal on behalf as directed by the Corporation's board of directors majority vote. Appellant now seeks relief from the voluntary dismissal under Fla. R. Civ. P 1.540 ("When a plaintiff files a voluntary dismissal, the defendant may seek relief in a rule 1.540(b) motion by proving fraud on the court and that the voluntary dismissal resulted in	to determine whether or not maintaining a derivative action is in the best interest of the company, the court does not have to assess the validity of the report's conclusions. Citing to *Ezer v. Holdack*, 358 So. 3d 429 (Fla. 4th DCA 2023) ("section 617.07401(3)(b)'s plain language does not require courts to question an investigator's recommendation as long as the court found the investigator was independent and conducted its investigation reasonably and in good faith. The court is not required to apply its own business judgment to assess the merits of the committee's conclusions). *Cornfeld v. Plaza of the Ams. Club, Inc.*, 273 So. 3d 1096 (Fla. 3d DCA 2019). Appellant brought a	derivative suit is not invalid just because it does not state that court approval is a condition to the settlement. The Court stated that "**while settlements in derivative shareholder actions require court approval, court approval is a post-agreement ratification of the settlement, not a condition of settlement**" (citing to *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 672 (Fla. 2004) (holding that "an offer to settle is not invalid simply because there is a requirement of subsequent court approval"); *Bateski By & Through Bateski v. Ransom*, 658 So. 2d 630, 632 (Fla. 2d DCA 1995) (explaining that court approval is "not an essential term" of a settlement but rather is a contingency that does not affect the proposal)).

[1] **607.0742 Complaint; demand and excuse.**—A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity:
(1) The demand, if any, made to obtain the action desired by the shareholder from the board of directors; and
(2) Either:
(a) If such a demand was made, that the demand was refused, rejected, or ignored by the board of directors prior to the expiration of 90 days from the date the demand was made;
(b) If such a demand was made, why irreparable injury to the corporation or misapplication or waste of corporate assets causing material injury to the corporation would result by waiting for the expiration of a 90-day period from the date the demand was made; or
(c) The reason or reasons the shareholder did not make the effort to obtain the desired action from the board of directors or comparable authority.

the suit was not in the corporation's best interest because he had been presented with no evidence to support any of the derivative claims. **The Court therefore approved dismissal with prejudice.**	of the parties involved, pro and con.	affirmative relief to the plaintiff which had an adverse impact on the defendant").[2] The Court held that Appellant has not demonstrated fraud or any other ground for relief under rule 1.540(b). The Court stated that if the Appellant instead took the steps to bring a derivative action when first filing her complaint, the shareholders could not have voluntarily dismissed the lawsuit as they did this one. If a derivative complaint was filed, the lawsuit could have only been dismissed with court approval once a good faith determination has been made that the lawsuit is not in the best interests of the corporation.	derivative action on behalf of a non-profit corporation under 617.07401. The Corporation filed a motion to dismiss, alleging lack of standing, failure to join an indispensable party, failure to state a cause of action, and seeking protection under the business judgement rule. The trial court deferred ruling on the motion to dismiss and instead sought to determine whether maintenance of the action is in the best interest of the Corporation. The trial court appointed an independent investigator who then determined that the suit should be dismissed. The trial court adopted these findings and dismissed the suit with prejudice. Appellant now argues that there are material issues of disputed fact regarding the reasonableness and good faith of the investigation. This Court affirmed the	

[2] **Fla. R. Civ. P. 1.540(b)**
A trial court may grant relief from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment, decree, or order is void; or (5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application.

			trial court decision, stating that the trial court did not abuse its discretion by adopting the investigators findings and concluding that the report was reasonable and conducted in good faith.	

Ancillary Issue 3: Under the provisions allowing for fees and costs upon dismissal based on the determination of independent board members, the court must make a finding that the claim was not brought in good faith. That determination would reopen litigation as to all of the matters which were just resolved by dismissal. So, it is not usable.

Relevant Statutes:

CORPORATIONS:

607.0746 Proceeds and expenses.—On termination of the derivative proceeding the court may:

(1) Order the corporation to pay from the amount recovered in the derivative proceeding by the corporation the plaintiff's reasonable expenses, including reasonable attorney fees and costs, incurred in the derivative proceeding if it finds that, in the derivative proceeding, the plaintiff was successful in whole or in part; or

(2) Order the plaintiff to pay any of the defendant's reasonable expenses, including reasonable attorney fees and costs, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose.

NON-PROFIT CORPORATIONS:

617.07401 Members' derivative actions.—

(5) Upon termination of the proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including reasonable attorney's fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

3d District Court of Appeal	4th District Court of Appeal	Circuit Court of the Eleventh Judicial Circuit of Florida
Cornfeld v. Plaza of the Ams. Club, Inc., 306 So. 3d 1136 (Fla. 3d DCA 2020). Plaintiff's derivative action was dismissed by the Court after an independent investigator concluded that maintenance of the action was not in the Corporation's best interest. The Court awarded the Corporation attorney's fees and costs, including the cost of the independent investigator. The Plaintiff asserted that it was improper to award investigative costs unless the Corporation established and the trial court made a finding that the proceeding was commenced without reasonable cause as required by § 617.07401(5). The Corporation asserted that it was entitled to investigative costs pursuant to Fla. R. Civ. P. 1.420(d) and Fla. Stat. § 57.041(1).[3]	*Spanakos v. Hawk Sys.*, 362 So. 3d 226 (Fla. 4th DCA 2023). An additional route to attorney's fees is through Fla. Stat. § 768.79 and Fla. R. Civ. P. 1.442.[4] Plaintiff brought this derivative action and Defendants served a settlement proposal. Plaintiff did not accept the settlement offer. Later on, Defendants motion for summary judgement was granted. Defendants sought attorney's fees and costs pursuant to § 768.79 and rule 1.442 because the judgement provided Plaintiff with no recovery. Once an offer of judgment has been made and rejected and a judgment of no liability has been entered, the defendant has a right to an award of attorney's fees unless the offer was found to have been made in bad faith." (citing to *Fla. Gas Transmission Co. v. Lauderdale Sand & Fill, Inc.*, 813 So. 2d 1013,	*Tucker v. Ebadian*, 2021 Fla. Cir. LEXIS 15783. This derivative action was dismissed pursuant to the findings of an Independent Special Committee providing that maintenance of the suit was not in the best interest of the Corporation. The Final Judgement reserved jurisdiction to determine entitlement to, and the amount of, attorneys' fees and costs to be awarded to Defendants. Defendants filed motions of attorneys fees pursuant to § 607.07401(5) (this is the 2018 version of the statute that is now 607.0746(2)). Plaintiff asserted that the Court may not award attorneys fees given that the Final Judgement itself did not make findings as to whether the action was commenced without reasonable cause. The Court rejected this argument

[3] **Fla. R. Civ. P. 1.420(d) Dismissal of actions**

(d) Costs. Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs. When one or more other claims remain pending following dismissal of any claim under this rule, taxable costs attributable solely to the dismissed claim may be assessed and judgment for costs in that claim entered in the action, but only when all claims are resolved at the trial court level as to the party seeking taxation of costs. If a party who has once dismissed a claim in any court of this state commences an action based upon or including the same claim against the same adverse party, the court shall make such order for the payment of costs of the claim previously dismissed as it may deem proper and shall stay the proceedings in the action until the party seeking affirmative relief has complied with the order.

Fla. Stat. § 57.041(1) Costs; recovery from losing party

(1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators in actions when they are not liable for costs.

(2) Costs may be collected by execution on the judgment or order assessing costs.

[4] **Fla. Stat. § 768.79 Offer of judgment and demand for judgment**

(7) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

Fla. R. Civ. P. 1.442(h)(1) Proposals for settlement

To the extent that Fla. R. Civ. P. 1.420(d) and Fla. Stat. § 57.041(1) are inconsistent with 617.07401(5), **the more specific statutory provision controls**. Otherwise, a prevailing defendant in a derivative action could seek an award of costs under the less demanding provisions of Rule 1.420 and § 57.041, rendering § 617.07401(5) meaningless. The Court reversed the trial court's order awarding investigative costs to the Corporation because the Corporation did not establish any bad faith and the trial court did not find that the proceeding was commenced without reasonable cause. It seems that this Court did not reopen litigation to look into whether there was any bad faith; the Court just looked back to see if there was any bad faith established while the case was in trial court. The Court further clarified § 617.07401(5) and how it differs from other "more conventional prevailing party" provisions in that it: 1) Only applies to a prevailing defendant 2) Even if a defendant prevails, that party is not entitled to an award of reasonable expenses unless the trial court first finds that the proceeding was commenced without reasonable cause and 3) The ultimate decision to award reasonable expenses is permissive, not mandatory: even if a defendant prevails and the court finds that the proceeding was commenced without	1014 (Fla. 4th DCA 2002)). The Court held that the Defendants were entitled to fees because their settlement offer complied with the form, content, and particularity requirements of § 768.79 and rule 1.442 and was not made in bad faith (because the $500,000 offer was more than adequate).	because the Final Judgement specifically reserved jurisdiction to determine entitlement to attorneys fees. The Court then made the determination that the derivative action was commenced without reasonable cause, entitling Defendants to attorneys fees. The Court found that there is a sufficient record from which to determine whether or not the claims were asserted with reasonable cause. The Plaintiff admitted in his deposition that he had no knowledge of any damage having been suffered by the Corporation arising from the claims in the derivative action. Furthermore, the Plaintiff had ample opportunity at the evidentiary hearing prior to dismissal to proffer evidence that the Corporation had in fact suffered damages as a result of the asserted claims.

(h) Costs and Fees. **(1)** If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

reasonable cause, the statute gives the trial court the discretion to deny an award of reasonable expenses to the prevailing defendant.		

Ancillary Issue 4: In cases where direct and derivative claims are brought, the court generally orders that separate claims must be filed for the direct action by a dismissal order. The court may also sever the claims.

3d District Court of Appeal	4th District Court of Appeal	Circuit Court of the Thirteenth Judicial Circuit of Florida
Lobree v. ArdenX LLC, 199 So. 3d 1094 (Fla. 3d DCA 2016). This Court reversed the trial court's dismissal of the action in its entirety based on the complaint's inclusion of direct and derivative claims in a single cause of action. The trial court should have dismissed **only those counts which it determined were improperly brought**, permitted appellants to file an amended complaint, choosing in which capacity they would continue to pursue this action, without prejudice to appellants pursuing a separate	*Disorbo v. Am. Van Lines, Inc.*, 354 So. 3d 530 (Fla. 4th DCA 2023). The complaint in this case asserts eleven different counts that are a mix of direct and derivative claims. Four of the counts were each brought in both a derivative and individual capacity. Generally, derivative and direct claims cannot be brought together because they are brought in different capacities (Fla. R. Civ. P. 1.110(g) provides that a pleader may set up in the same action as many claims or causes of action or defenses *in the same right* as the pleader has). However, this Court stated that the	*Nexcentri, Inc. v. Tampa Bay Fed. Credit Union*, 2015 Fla. Cir. LEXIS 55678. Complaints that allege derivative and direct claims within the same action require dismissal (citing *Haas v. Rose*, 696 So. 2d 1254 (Fla. 2d DCA 1997)). If this occurs, the court should grant a motion to dismiss with leave to file an amended complaint asserting either the derivative or personal claim(s), and without prejudice to file a separate action asserting the others.

action on the dismissed counts (citing to *Dep't of Ins. v. Coopers & Lybrand*, 570 So. 2d 369 (Fla. 3d DCA 1990)). *Shoma Coral Gables, LLC v. Gables Inv. Holdings*, LLC, 387 So. 3d 336 (Fla. 3d DCA 2023). A "dual-natured" claim is prohibited. This claim is one where a claimant seeks a double recovery by raising direct and derivative claims for a single injury. A corporation and its shareholders may not recover damages from a defendant in both a direct and a derivative action for an identical injury. The facts and circumstances can be the same, but there must be separate and distinct injuries.	trial court "mistakenly relied upon the principle that a plaintiff may not join individual and derivative claims in one action". That is a pleading issue that has "nothing to do with whether claims should be tried together to preserve the right to a jury trial on a legal claim where the legal and equitable claims are factually intertwined". In *Billian v. Mobil Corp.*, 710 So. 2d 984 (Fla. 4th DCA 1998), this Court established that a "jury must make findings concerning all facts which are common to the legal and equitable claims before the trial court may consider granting an equitable remedy". **The Court relied on this principle to overlook the fact that the claims were both direct and derivative. Because the direct and equitable derivative claims were so intertwined, a jury would necessarily have to decide issues that relate to both claims.** The claims are factually intertwined because they all revolve around the same underlying factual issue. The Court further clarified that even if the non-derivative claims were filed in a separate lawsuit, the Plaintiff could have moved for a joint trial or for consolidation of the actions under Fla. R. Civ. P. 1.270(a) because the cases involved common questions of fact. *McKane Fam. Ltd. P'ship v. Sacajawea Fam. Ltd. P'ship*, 211 So. 3d 117 (Fla. 4th DCA 2017). Plaintiff brought claims "individually and derivatively" on behalf of an LC.[5] The trial court did not dismiss the individual claim on the grounds that it was incorrectly brought together	

[5] This company goes by "LC" rather than "LLC" because § 605.0112(4) permits an LLC that was in existence before January 1, 2014, to keep using an abbreviation or designation in its name that was authorized under previous law.

	with the derivative claims. The trial court dismissed this unjust enrichment claim with prejudice for failure to state a cause of action, finding that this claim belonged to the LC and not the Plaintiffs. On appeal, the Court did not disagree with the trial court that the claim should have instead been brought derivatively. However, this Court stated that the dismissal should have been without prejudice so that the claim can be filed derivatively.	

Ancillary Issue 5: 50/50 owners who deadlocked, dissolution/buyout. Who pays the fees? Automatic Direct?

Relevant Statutes:

CORPORATIONS:

607.1436 Election to purchase instead of dissolution.—

(1) In a proceeding under s. 607.1430(1)(b), the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

..

(5) Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, when necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional costs, fees, and expenses as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation of shares among such shareholders. In allocating the petitioner's shares among holders of different classes of shares, the court shall attempt to preserve any existing distribution of voting rights among holders of different classes and series insofar as practicable and may direct that holders of any specific class or classes or series shall not participate in the purchase. Interest may be allowed at the rate and from the date determined by the court to be equitable; however, if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed. If the court finds that the petitioning shareholder had probable grounds for relief under s. 607.1430(1)(b), it may award expenses to the petitioning shareholder, including reasonable fees and expenses of counsel and of any experts employed by petitioner.

607.1430 Grounds for judicial dissolution.—

(1) A circuit court may dissolve a corporation or order such other remedy as provided in s. 607.1434:

..

(b) In a proceeding by a shareholder to dissolve a corporation if it is established that:

1. The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and:

a. Irreparable injury to the corporation is threatened or being suffered;

b. The business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock; or

c. Both sub-subparagraphs a. and b.; or

2. The shareholders are deadlocked in voting power and have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors;

3. The corporate assets are being misapplied or wasted, causing material injury to the corporation; or

4. The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

607.1431 Procedure for judicial dissolution.—

(1) Venue for a proceeding brought under s. 607.1430 lies in the circuit court in the applicable county.

(2) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(3) A court in a proceeding brought under s. 607.1430 may issue injunctions, appoint a receiver or custodian during the proceeding with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

(4) Within 30 days of the commencement of a proceeding under s. 607.1430(1)(b), the corporation shall deliver to all shareholders, other than the petitioner, a notice stating that the shareholders are entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under s. 607.1436 and accompanied by a copy of s. 607.1436.

(5) If the court determines that any party has commenced, continued, or participated in a proceeding under s. 607.1430 and has acted arbitrarily, frivolously, vexatiously, or not in good faith, the court may, in its discretion, award attorney fees and other reasonable expenses to the other parties to the proceeding who have been affected adversely by such actions.

LLC:

605.0706 Election to purchase instead of dissolution.—

(1) In a proceeding initiated by a member of a limited liability company under s. 605.0702(1)(b), the company may elect, or, if it fails to elect, one or more other members may elect, to purchase the entire interest of the petitioner in the company at the fair value of the interest. An election pursuant to this section is irrevocable unless the court determines that it is equitable to set aside or modify the election.

..

(5) Upon determining the fair value of the petitioner's interest in the company, unless the petitioner's interest has been acquired pursuant to a deadlock sale provision before the order, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include: payment of the purchase price in installments, when necessary in the interests of equity; a provision for security to ensure payment of the purchase price and additional costs, fees, and expenses as may have been awarded; and, if the interest is to be purchased by members, the allocation of the interest among those members. In allocating the petitioner's interest among holders of different classes or series of interests in the company, the court shall attempt to preserve any existing distribution of voting rights among holders of different classes or series insofar as practicable and may direct that holders of any specific class or classes or series may not participate in the purchase. Interest may be allowed at the rate and from the date determined by the court to be equitable; however, if the court finds that the refusal of the petitioning member to accept an offer of payment was arbitrary or otherwise not in good faith, payment of interest is not allowed. If the court finds that the petitioning member had probable grounds for relief under s. 605.0702(1)(b), it may award expenses to the petitioning member, including reasonable fees and expenses of counsel and of experts employed by petitioner.

605.0702 Grounds for judicial dissolution.—

(1) A circuit court may dissolve a limited liability company:

..

(b) In a proceeding by a manager or member to dissolve the limited liability company if it is established that:

1. The conduct of all or substantially all of the company's activities and affairs is unlawful;

2. It is not reasonably practicable to carry on the company's activities and affairs in conformity with the articles of organization and the operating agreement;

3. The managers or members in control of the company have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

4. The limited liability company's assets are being misappropriated or wasted, causing injury to the limited liability company, or in a proceeding by a member, causing injury to one or more of its members; or

5. The managers or the members of the limited liability company are deadlocked in the management of the limited liability company's activities and affairs, the members are unable to break the deadlock, and irreparable injury to the limited liability company is threatened or being suffered.

605.0805 Proceeds and expenses.—

(1) Except as otherwise provided in subsection (2):

(a) Proceeds or other benefits of a derivative action under s. 605.0802, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and

(b) If the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(2) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the limited liability company.

605.1070 Court costs and attorney fees.—

(1) The court in an appraisal proceeding shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the limited liability company, except that the court may assess costs against all or some of the members demanding appraisal, in amounts the court finds equitable, to the extent the court finds the members acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(2) The court in an appraisal proceeding may also assess the expenses incurred by the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all members demanding appraisal, if the court finds the limited liability company did not substantially comply with the requirements of ss. 605.1061-605.1072; or

(b) Against either the limited liability company or a member demanding appraisal, in favor of another party, if the court finds that the party against whom the expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(3) If the court in an appraisal proceeding finds that the expenses incurred by any member were of substantial benefit to other members similarly situated and should not be assessed against the limited liability company, the court may direct that the expenses be paid out of the amounts awarded the members who were benefited.

(4) To the extent the limited liability company fails to make a required payment pursuant to s. 605.1067 or s. 605.1069, the member may sue the limited liability company directly for the amount owed and, to the extent successful, is entitled to recover from the limited liability company all costs and expenses of the suit, including attorney fees.

Circuit Court of the Fourteenth Judicial Circuit of Florida	**Circuit Court of the Twentieth Judicial Circuit of Florida**	**Circuit Court of the Eleventh Judicial Circuit of Florida**	**Circuit Court of the Twelfth Judicial Circuit of Florida**	**United States District Court for the Middle District of Florida**	**United States District Court for the Southern District of Florida**
Winford v. D17 Props., LLC, 2020 Fla. Cir. LEXIS 1855. Plaintiff brought a derivative action alleging that Defendant misappropriated LLC funds. The Court found in favor of the Plaintiff on the claim. Judicial	*Jones v. Pfaff*, 2012 Fla. Cir. LEXIS 9120. The "Federal Lodestar Approach": When awarding attorney's fees, the court may only approve fees that are reasonable. In reaching this decision, the	*Ektec v. Lozano*, 2021 Fla. Cir. LEXIS 8972. Plaintiff sought attorneys fees as the prevailing party in the dismissal of all Defendants counterclaims. The Court found that the Plaintiff was entitled to	*McCloud v. Bluwave Boat Rental*, 2021 Fla. Cir. LEXIS 11257. Plaintiff sought judicial dissolution of an LLC and Defendant elected to purchase Plaintiff's interest under	*Cox Enters. v. News-Journal Corp.*, 469 F. Supp. 2d 1094 (M.D. Fla. 2006). Once a corporation elects to purchase the shares of a shareholder which has petitioned for	*Agnelli v. Lennox Miami Corp.*, Civil Action No. 20-22800-Civ, 2022 U.S. Dist. LEXIS 125346 (S.D. Fla. July 14, 2022). Plaintiff sought judicial dissolution of a corporation and Defendant

dissolution was therefore triggered under § 607.0702(1)(b)4. The LLC elected to purchase the Plaintiff's interest rather than dissolve the LLC under § 607.0706. It was then determined that the Plaintiff was entitled to an award of attorney's fees and expenses of counsel and experts under § 607.0706(5). The Court is now tasked with determining the scope of this entitlement. More specifically, the primary issue is whether § 605.0706(5) allows for the award of the entirety of time spent by Plaintiff's attorneys or only the time spent determining the fair value of Plaintiff's interest in the LLC. **The Court held that the only fees that should be permitted are those that were reasonably**	court should consider: 1. The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; 2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3. The fee customarily charged in the locality for similar legal services; 4. The amount involved and the results obtained; 5. The time limitations imposed by the client or by the circumstances; 6. The nature and length of the	recover its costs in defending all of the non-derivative claims under both Fla. R. Civ. P. 1.420 and Fla. Stat. § 57.041(2).[6] Plaintiff was also entitled to attorneys fees and costs for success on its claim, Count VII (Unlawful Denial of Access to Books and Records) under 607.1436(5). The Court did not provide much detail as to why, but it is likely because Defendant's unlawful denial of access to books is an illegal\fraudulent behavior under 607.1430(1)(b)(4).	605.0706. There were disputes regarding ownership of the LLC and its assets. Although the owners' "mutual approach to compensation from the business was informal", the Court found that the parties intended to participate in the LLC as equal partners on a 50\50 basis. Defendant argues the purchase price for Plaintiff's interest should be discounted because Plaintiff lacked control over the LLC through her ownership shares. Even if Plaintiff lacked control, a discount would be inappropriate given that after the purchase, Defendant will have 100% ownership in the LLC. The Plaintiff sought fees and expenses of counsel under 605.0706(5), citing that probable cause	dissolution of the corporation, there are only two forms of relief for the petitioner which are authorized by Florida's election-to-purchase statute (§ 607.1436): 1. The fair value of the petitioner's shares 2. Reasonable fees and expenses of counsel and experts The 2nd form of relief may only be issued if prior to the corporation's election to purchase, the petitioner "had probable grounds" to make out a claim for dissolution of the corporation based on an event in 607.1430(1)(b). Here, probable cause was found because the Defendants wasted and misapplied corporate assets when entering into an agreement that "made little sense from a business perspective". Defendants, on	elected to purchase Plaintiff's interest under 607.1436. The Court was tasked with determining the shares' value, as the parties were not able to agree on this amount. Here, contrary to the other cases mentioned so far, the Defendant was the party seeking attorney's fees under 607.1431(5). The Court held that the Defendant was not entitled to fees under 607.1431(5) because the action was not instituted "arbitrarily, frivolously, vexatiously, or not in good faith." The Court does not state exactly what led them to this finding, but it is likely that it was not frivolous for Plaintiff to seek dissolution after he was terminated from a Corporation that he was President, CEO, and shareholder

[6] *supra* note 1.

expended on the issue of the fair value of Plaintiff's membership interest together with those which were reasonably expended in proving the existence of probable grounds for relief under § 605.0702(1)(b). The Court further clarified § 605.0706(5) by stating that it is not a mandatory fee statute; an award is solely under the discretion of the Court. One of the determinations the Court should make when exercising this discretion is whether Plaintiff can recover fees for his successful and unsuccessful claims. To warrant an award of fees for an unsuccessful claim, the Plaintiff must prove that it was "intertwined" with the successful claims: "where a party is entitled to fees for only some of the claims, the court	professional relationship with the client; 7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and 8. Whether the fee is fixed or contingent (citing to *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985)). Here, the Court awarded attorney's fees and expenses of experts pursuant to 607.1436. The Court reasoned that he number of hours expended by counsel for Plaintiff (623.7), the hourly rate charged by counsel for Plaintiff ($250.00 per hour), and the costs of expert witnesses ($59,318.25) were reasonable and were necessarily incurred by the Plaintiff during the course of the		for dissolution existed because the parties were deadlocked, unable to break the deadlock, and irreparable injury to the LLC was being suffered. The Court agreed that probable cause existed because "each owner has accused the other of both wrongdoing, misappropriation, acting unilaterally and acting against the interests of the LLC". In addition to the deadlock, LLC assets are also being misappropriated or wasted. Because probable cause for judicial dissolution existed because the parties were deadlocked (605.0702(4)) and company assets were being wasted (605.0702(5)), the Court awarded the Plaintiff reasonable fees and expenses of counsel and the experts she employed.	behalf of the corporation, entered into the deal purely due to their own personal interests, and overpaid the deal by $9 million by failing to negotiate terms or request an outside assessment. In addition to the 2 forms of relief mentioned above, Plaintiff sought damages equal to the amount of Defendants waste. The Court held that the only two forms of relief available are the fair value of the petitioner's shares and reasonable fees and expenses of counsel and experts; any extra relief for damages would "exceed the fair value of its shares". The Plaintiff's claim for damages has no basis in Florida's election-to-purchase statute. Plaintiff is entitled to the fair value of its shares and the reasonable fees and expenses of its attorneys and experts.	of.

must evaluate the relationship between the claims and where the claims involve a common core of facts **and** are based on related legal theories, a full fee may be awarded" (citing *Effective Teleservices, Inc. v. Smith*, 132 So. 3d 335 (Fla. 4th DCA 2014)).	litigation.				

Ancillary Issue 6: Counterclaims/set offs by the company; Managing legal actions from the company in response to claims.

2nd District Court of Appeal	**3rd District Court of Appeal**	**3rd District Court of Appeal** (continued)	**4th District Court of Appeal**	**Circuit Court of the Eleventh Judicial Circuit of Florida**
PBF of Ft. Myers, Inc. v. D & K P'ship, 890 So. 2d 384 (Fla. 2d DCA 2004). Appellants (a corporation) appeal from an order dismissing its counterclaim because it had been administratively dissolved for failure to file its annual report. Appellants cited to 607.1420(5), which states that a corporation that has been administratively dissolved continues in existence but may only carry on	*Schmitz v. Schmitz*, 49 Fla. L. Weekly D1861 (Fla. 3d DCA September 11, 2024). The parties were involved in a closely-held real estate corporation. The Appellant was removed from his position as president by the Appellees. He brought a complaint seeking to bar this removal. Appellees then filed five counterclaims, individually. The Corporation also brought crossclaims against the Appellant. During these	*Portuondo-Tarajano Int'l Corp. v. Farm Stores Grocery, Inc.*, 88 So. 3d 196 (Fla. 3d DCA 2011) A former employee and officer of the Corporation filed a complaint alleging breaches of contract against the Corporation and its subsidiaries (Defendants).The Corporation filed a counterclaim against the Plaintiff. Plaintiff (Plaintiff 1) filed an amended complaint to add an additional Plaintiff (Plaintiff 2). The Corporation made a settlement	*Cont'l Connections United States, Llc, Bdb Real Estate, Llc, Tg Miami Invs. v. D.O.D. Holdings*, 374 So. 3d 21 (Fla. 4th DCA 2023). The parties formed a manager-managed LLC. The operating agreement provided that the managers could not make major decisions without all members' consent. It defined a major decision as any change that altered the LLC's financial structure. One of the managers took out a large loan in the name of the	*Imc Group v. Comvest Imc Holdings*, 2020 Fla. Cir. LEXIS 17925. Defendant, an LLC, filed a 18-count counterclaim in response to claims against it. Because the Defendant filed "nearly identical declaratory judgement claims" in Count I and Count IV of their counterclaim, these counts were dismissed (citing to *Fernando Grinberg Jr. Success Int'l Props. LLC v. Scottsdale Ins. Co.*, 2010 WL 2510662,

activities necessary to wind up its activities and affairs, liquidate and distribute its assets, and notify claimants.[7] Appellee's cited to 607.1622(6), which states that a corporation that fails to file an annual report may not prosecute or maintain any action in any court until the report is filed.[8] This Court reversed the trial court's order dismissing the counterclaim, holding that the Corporation is not prohibited from pursuing its claim although it is dissolved because the cause of action accrued before the dissolution of the corporation (citing to *Levine v. Levine*, 734 So. 2d 1191, 1197 (Fla. 2d DCA 1999). Additionally, 607.1622(6) pertains only to existing corporations which have failed to file annual reports, not corporations which have already been dissolved (citing to *National Judgment Recovery Agency, Inc. v. Harris*, 826 So. 2d 1034 (Fla. 4th DCA 2002).	proceedings, Appellant repeatedly evaded discovery and concealed evidence. The trial court, after finding that he engaged in bad faith discovery tactics, directed that the burden of proof on all of the direct counterclaims and derivative crossclaims would be shifted. After the shift, counter-plaintiffs are entitled to a judgement on each of their claims unless the counter defendants prove by the greater weight of the evidence that counter-plaintiffs are not entitled to such relief. The trial court found in favor of the counterclaims and crossclaims. On appeal, Appellant argues that the trial court abused its discretion by applying the burden-shifting sanction to the Corporation's derivative crossclaims. He argues that the sanction was unfairly imposed without notice and that this error should void the court's finding of liability as to all crossclaims for which the Corporation would not have prevailed but for the burden	offer to Plaintiff 2. The offer stated that it does not include or cover any claims by and/or against the other Plaintiff, and an acceptance of this offer will result in a voluntary dismissal of the Corporations counterclaim. Plaintiff 2 accepted this offer. The Defendants filed a motion for dismissal asserting that as a result of Plaintiff 2's acceptance of the Corporation's offer, "every existing and possible claim" Plaintiff 2 had against the Corporation "settled and released." The trial court granted the dismissal, including Plaintiff 1's complaint. This Court reversed, holding that the trial court erred by dismissing both Plaintiff's complaints based on Plaintiff 2's acceptance of the Corporation's settlement offer. The only parties bound by an offer of judgment are the parties who made the offer and the parties who accepted the offer," unless the liability of the remaining parties is "derivative	LLC and failed to get the other members' consent. As a result, one of the other manager's sued the LLC and its managers in individual and derivative capacities. In 2016, the trial court found that the defendants violated the operating agreement and breach the duty of loyalty. In 2021, these defendants initiated a new suit in which they sued the LLC. They alleged they lent the LLC money as an initial investment, and they sought to recover these funds. The LLC responded by arguing that the claims were waived by the plaintiffs' failure to file them as a counterclaim in the 2016 lawsuit. A **pleading must state as a counterclaim any claim which** at the time of serving the pleading the pleader has against any opposing party, provided it **arises out of the transaction or occurrence that is the subject matter of the opposing party's claim** and does not require for its adjudication the	at 1 (S.D. Fla. June 21, 2010) (A trial court should not entertain an action for declaratory judgment on issues which are properly raised in other counts of the pleadings and already before the court, through which the plaintiff will be able to secure full, adequate and complete relief.)). Count III of the counterclaim will be tried along with Counts II, III, and IV of the Complaint because the court has the authority to bifurcate compensatory damage issues of a trial. The Court also stayed certain counts of the counterclaim. The remaining counts of the counterclaim, which assert claims that may be affected by the determination of which parties prevail on other claims, were stayed until a final order was issued with respect to these other claims. Additionally, Defendant's initiated a separate lawsuit which was also pending and was seeking substantially the

[7] Because this is an older case, the opinion cites to 607.1405. However, this is the same as 607.1420(5) today.
[8] The opinion cites to 607.1622(8), which is equivalent to 607.1622(6) today.

	shifting. "While a trial court has the inherent power to impose sanctions on a party who destroys evidence or perpetuates a fraud upon the court,' that power should be exercised with great restraint because **the courts of this state favor adjudications on the merits**." *E.I. DuPont De Nemours & Co. v. Sidran*, 140 So. 3d 620, 623 (Fla. 3d DCA 2014)". This Court found that the trial court improperly applied the burden-shifting sanctions without proper notice. This is because the trial court did not expressly indicate that it would be applying the sanction to the crossclaims until its second amended findings of fact and conclusions of law, which the Appellant argued was done sub silentio. This Court remanded only as to the crossclaims for which the judgement would not have been the same irrespective of the burden-shifting. *Ferk Fam., LP v. Frank*, 240 So. 3d 826 (Fla. 3d DCA 2018). The parties were	or subsumed within the claims of the other parties to the offer" (citing to *Sec. Professionals, Inc. v. Segall*, 685 So. 2d 1381, 1383 (Fla. 4th DCA 1997). The offer was made only to Plaintiff 2, and therefore Plaintiff 1 is not bound by the offer. Plaintiff 1 alleged claims against the Corporation that were independent of Plaintiff 2, and in which only Plaintiff 1 would be owed fees.	presence of third parties over whom the court cannot acquire jurisdiction (Fla. R. Civ. P. 1.170(a). The Supreme Court in *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 20 (Fla. 1992) decided that the logical relationship test is "the yardstick for measuring whether a claim is compulsory": A claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant. This Court held that under the *Londono* test, the loan repayment claims at issue did not constitute a compulsory counterclaim in the 2016 lawsuit. The 2016 suit was against the defendants for fraudulently obtaining a loan.	same relief as in the counterclaim in this case. The Court stayed the related case pending a final order issued by this Court with respect to the complaint and counterclaims.

	members of an LLC. Appellee filed suit against individual members and the LLC seeking declaratory relief and damages for breach of contract and specific performance. The Appellant and the LLC filed counterclaims and third-party claims against the Appellees'. Three of these claims were brought derivatively from the LLC and two were brought directly from Appellant. The trial court determined that these counterclaims were solely derivative and could not be maintained as a direct action. This Court reversed. In *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014), this Court held that an action may be brought directly only if (1) there is a direct harm to the shareholder or members such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other		Here, the plaintiffs seek to recoup monies lent to the LLC over various periods of time, some of which was before the 2016 lawsuit. Also, a number of these plaintiffs were not even parties in the 2016 lawsuit.	

	shareholders or members. However, Dinuro also held that one must not satisfy the two-prong test when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates. Here, the operating agreement of the LLC explicitly states that “members who are aggrieved by other members may bring direct claims for breach of the provisions of the operating agreement”. Fla. Stat. § 605.0105(1)(a) provides that the operating agreement governs the relations among the members as members. 605.0105(2) provides that “to the extent the operating agreement does not otherwise provide for a matter described in subsection 1, this chapter governs the matter”. This led the Court to hold that ”the plain language of the statute clearly provides that a member may still bring a direct action against another member where the operating agreement so provides, and			

	thus, the exception under *Dinuro* remains applicable under Florida law".			

Ancillary Issue 7: Buy out the minority for a dissolution - should control shift during a minority-initiated dissolution?

Relevant Statutes:

3 Ways for a Corporation to Reach Dissolution:

607.1402 Dissolution by board of directors and shareholders; dissolution by written consent of shareholders.—

(1) A corporation's board of directors may propose dissolution for submission to the shareholders by first adopting a resolution authorizing the dissolution.

(2)(a) For a proposal to dissolve to be adopted, it must be approved by the shareholders pursuant to subsection (5).

(b) In submitting the proposal to dissolve to the shareholders for approval, the board of directors must recommend that the shareholders approve the dissolution, unless:

1. The board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation; or

2. Section 607.0826 applies.

(c) If either subparagraph (b)1. or subparagraph (b)2. applies, the board must inform the shareholders of the basis for its so proceeding without such recommendation.

(3) The board of directors may set conditions for the approval of the proposal for dissolution by shareholders or for the effectiveness of the dissolution.

(4) If the approval of the shareholders is to be given at a meeting, the corporation shall notify, in accordance with s. 607.0705, each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the dissolution is to be submitted for approval. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(5) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (3)) require a greater vote or a vote by voting groups, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on the proposal to dissolve.

(6) Alternatively, without action of the board of directors, action to dissolve a corporation may be taken by the written consent of the shareholders pursuant to s. 607.0704.

607.1401 Dissolution by incorporators or directors.—If a corporation has not yet issued shares, its board of directors, or a majority of incorporators if it has no board of directors, may dissolve the corporation by delivering to the department for filing articles of dissolution that must set forth:

(1) The name of the corporation;

(2) The date of its incorporation;

(3) That none of the corporation's shares have been issued;

(4) That no debt of the corporation remains unpaid;

(5) That the net assets of the corporation remaining after winding up, if any, have been distributed; and

(6) That a majority of the incorporators or directors authorized the dissolution.

607.1430 Grounds for judicial dissolution.—

(1) A circuit court may dissolve a corporation or order such other remedy as provided in s. 607.1434:

(a) In a proceeding by the Department of Legal Affairs to dissolve a corporation if it is established that:

1. The corporation obtained its articles of incorporation through fraud; or

2. The corporation has continued to exceed or abuse the authority conferred upon it by law.

The enumeration in subparagraphs 1. and 2. of grounds for involuntary dissolution does not exclude actions or special proceedings by the Department of Legal Affairs or any state official for the annulment or dissolution of a corporation for other causes as provided in any other statute of this state;

(b) In a proceeding by a shareholder to dissolve a corporation if it is established that:

1. The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and:

a. Irreparable injury to the corporation is threatened or being suffered;

b. The business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock; or

c. Both sub-subparagraphs a. and b.; or

2. The shareholders are deadlocked in voting power and have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors;

3. The corporate assets are being misapplied or wasted, causing material injury to the corporation; or

4. The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

(c) In a proceeding by a creditor if it is established that:

1. The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

2. The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent;

(d) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision; or

(e) In a proceeding by a shareholder if the corporation has abandoned its business and has failed within a reasonable period of time to liquidate and distribute its assets and dissolve.

(2) Paragraph (1)(b) does not apply in the case of a corporation that, on the date of the filing of the proceeding, has shares that are:

(a) A covered security under s. 18(b)(1)(A) or (B) of the Securities Act of 1933; or

(b) Not a covered security, but are held by at least 300 shareholders and the shares outstanding have a market value of at least $20 million, exclusive of the value of outstanding shares of the corporation held by the corporation's subsidiaries, by the corporation's senior executives, by the corporation's directors, and by the corporation's beneficial shareholders and voting trust beneficial owners owning more than 10 percent of the outstanding shares of the corporation.

(3)(a) In the event of a deadlock situation that satisfies subparagraph (1)(b)1. or subparagraph (1)(b)2., if the shareholders are subject to a shareholder agreement that complies with s. 607.0732 and contains a deadlock sale provision, then such deadlock sale provision shall apply to the resolution of such deadlock in lieu of the court entering an order of judicial dissolution or an order directing the purchase of petitioner's shares under s. 607.1436, so long as the provisions of such deadlock sale provision are initiated and effectuated within the time periods specified for the corporation to act under s. 607.1436 and in accordance with the terms of such deadlock sale provision.

(b) For purposes of this section, the term "deadlock sale provision" means a provision in a shareholder agreement that complies with s. 607.0732, which is or may be applicable in the event of a deadlock among the directors or shareholders of the corporation which neither the directors nor the shareholders, as applicable, of the corporation are able to break, and which provides for a deadlock breaking mechanism, including, but not limited to:

1. A redemption or a purchase and sale of shares or other equity securities;

2. A governance change;

3. A sale of the corporation or all or substantially all of the assets of the corporation; or

4. A similar provision that, if initiated and effectuated, breaks the deadlock by causing the transfer of the shares or other equity securities, a governance change, or a sale of the corporation or all or substantially all of the corporation's assets.

(4) A deadlock sale provision in a shareholder agreement that complies with s. 607.0732 which is not initiated and effectuated before the court enters an order of judicial dissolution under subparagraph (1)(b)1. or subparagraph (1)(b)2., as the case may be, or an order directing the purchase of petitioner's interest under s. 607.1436, does not adversely affect the rights of shareholders to seek judicial dissolution under subparagraph (1)(b)1. or subparagraph (1)(b)2., as the case may be, or the rights of the corporation or one or more shareholders to purchase the petitioner's

interest under s. 607.1436. The filing of an action for judicial dissolution on the grounds described in subparagraph (1)(b)1. or subparagraph (1)(b)2., as the case may be, or an election to purchase the petitioner's interest under s. 607.1436, does not adversely affect the right of a shareholder to initiate an available deadlock sale provision under the shareholder agreement that complies with s. 607.0732 or to enforce a shareholder-initiated or an automatically-initiated deadlock sale provision if the deadlock sale provision is initiated and effectuated before the court enters an order of judicial dissolution under subparagraph (1)(b)1. or subparagraph (1)(b)2., as the case may be, or an order directing the purchase of petitioner's interest under s. 607.1436.

(5) For purposes of subsections (1) and (2), the term "shareholder" means a record shareholder, a beneficial shareholder, or an unrestricted voting trust beneficial owner.

Notes:

It appears that the most common way (and maybe the only way, unless the articles of incorporation, shareholders agreement, or bylaws allow for something different) for minority shareholders to initiate a dissolution proceeding is through judicial dissolution (607.1430(b)1-4)). 607.1402 allows for a plan for dissolution to be proposed by the board of directors. 607.1402(4) states that unless the articles of incorporation or the board require otherwise, this proposal must be approved by a majority of all shareholder votes entitled to be cast on the proposal to dissolve. So, unless the articles or board explicitly require the vote of **all** shareholders (including the minority) to approve a dissolution proposal, all that is required is a majority of votes. 607.0721(1) states that "unless the articles of incorporation or this chapter provides otherwise, each outstanding share, regardless of class or series, is entitled to one vote on each matter submitted to a vote at a meeting of shareholders". Minority shareholders who do not hold many outstanding shares will have significantly less weight in the vote. Therefore, it will be more difficult for minority shareholders to initiate a dissolution this way. Additionally, when filing articles of dissolution, 607.1403 requires "a statement that the proposal to dissolve was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation". Minority shareholders would not be able to file articles of dissolution unless they provide a statement assuring that they complied with the requirement to receive shareholder approval. Therefore, the most common way for minority shareholders to initiate a dissolution proceeding is through judicial dissolution.

I searched through all the Circuit Courts and DCAs but could not find any case law that addressed this issue. In majority of the cases, it seemed that minority shareholders are usually the ones filing for judicial dissolution rather than the ones electing to purchase. The entity or the majority shareholders (who already have control) seemed to be ones who usually elect to purchase.

This issue may also be dependent upon the shareholder agreement. Fla. Stat. § 607.0732 provides that a shareholder agreement can have a lot of control, such as it can eliminate a board of directors or limit their power, govern the voting process, establish a mechanism for breaking a deadlock, etc. So, if a minority shareholder purchased shares that increased their power, they may be able to exercise control and take over depending on how much control their shareholder agreement provides.

4th District Court of Appeal	**Circuit Court of the Eleventh Judicial Circuit of Florida**
Foreclosure Freesearch, Inc. v. Sullivan, 12 So. 3d 771 (Fla. 4th DCA 2009). This case presents an instance where minority shareholders filed for judicial dissolution but were	*Hagstrom v. Co.fe*, 2020 Fla. Cir. LEXIS 19933. Plaintiff owned a minority membership interest in an LLC, but filed articles of dissolution without a resolution or notice being provided to the others

prevented from doing so because majority shareholders basically kicked them out by adopting a "reverse stock split". Although the minority shareholders were not able to regain any control in the corporation, they were entitled to appraisal. Appellees were minority shareholders of the Corporation. Majority shareholder terminated Appellees involvement with the Corporation and initiated a derivative lawsuit alleging that the minority shareholders fraudulently induced the company into treating them as shareholders when they had not paid consideration for their shares. Appellees filed counterclaims against the company and sought judicial dissolution. In response, the majority shareholder adopted a reverse stock split that eliminated all shares held by the minority shareholders. The reverse stock split triggered Appellees statutory appraisal rights 607.1302(e).[9] This statute provides a shareholder whose stock is being repurchased in a reverse split to appraisal rights to obtain fair market value of the stock. 607.1322(1) provides that if a corporate action requiring appraisal rights under 607.1302(1) becomes effective, the corporation must deliver to all shareholders a written appraisal notice and form. Here, the Corporation mailed a written notice that complied with the statutory requirements. Appellees responded to the notice by filing a motion for temporary injunction to stop the reverse stock split and appraisal process until the court made a final determination on their counterclaim against the company. They alleged that If they lost their shares through the appraisal process, they would also lose their standing to assert a shareholder derivative action if their discovery revealed fraud committed by the majority shareholder. The trial court granted the temporary injunction, which this DCA has now reversed. The possibility of losing standing to assert a derivative action was not a valid argument. 607.1330(1) protects against this kind of situation by providing that if a shareholder is dissatisfied with a corporation's offer for the fair value of the appraised shares, they must notify	holding membership interests. This violates 605.0701: **605.0701 Events causing dissolution.**—A limited liability company is dissolved and its activities and affairs must be wound up upon the occurrence of the following: (1) An event or circumstance that the operating agreement states causes dissolution. (2) **The consent of all the members.** (3) The passage of 90 consecutive days during which the company has no members, unless: (a) Consent to admit at least one specified person as a member is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and (b) At least one person becomes a member in accordance with the consent. (4) The entry of a decree of judicial dissolution in accordance with s. 605.0705. (5) The filing of a statement of administrative dissolution by the department pursuant to s. 605.0714. The operating and employment agreements of the LLC contained arbitration clauses. The Plaintiff sought to stay the arbitration initiated against him by the LLC. The Court determined that filing for dissolution without consent or notice to the other member was an arbitrable issue because it violated the Employment Agreement which contained an arbitration clause. 605.0717(1)(b) states that the dissolution of a limited liability company does not "prevent commencement of a proceeding by or against the limited liability company in its name". Therefore, the Court found that the Demand for Arbitration was properly filed on behalf of the LLC.

[9] This case cites to 607.1302(1)(d) of the 2008 Florida statute which is equivalent today to 607.1302(1)(e).
607.1302 Right of shareholders to appraisal.—
(1) A shareholder of a domestic corporation is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:
(e) An amendment of the articles of incorporation with respect to a class or series of shares which reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or the right to repurchase the fractional share so created

the corporation who can then either provide the requested amount or initiate a proceeding with the court. If the corporation does not initiate the proceeding or provide the requested amount within 60 days, the shareholder who made the demand is permitted to commence the proceeding in the name of the corporation.[10] The Appellee's have an adequate remedy at law should the appraisal process continue. In Appellees initial counterclaim, they also alleged breach of fiduciary duty against the majority shareholder. *Williams v. Stanford*, 977 So. 2d 722 (Fla. 1st DCA 2008) established that if Appellees were able to prove the majority shareholders"have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder", the breach of fiduciary duty count may permit relief beyond the appraisal process. This further demonstrates how Appellee's have an adequate remedy at law if the appraisal process continues and if they need to seek additional relief.	

[10] **607.1330 Court action.**—

(1) If a shareholder makes demand for payment under s. 607.1326 which remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest, if and to the extent applicable, calculated and accrued from the date the corporate action became effective and taking into account the amount of any prepayment previously made to the shareholder by the corporation pursuant to s. 607.1326(3). If the corporation does not commence the proceeding within the 60-day period, any shareholder who has made a demand pursuant to s. 607.1326 may commence the proceeding in the name of the corporation.