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DIVISION TWO, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ADAM ROSEN, an individual; DAVID ROSEN, an individual; and MATTHEW ROSEN, an individual; individually and derivatively on behalf of ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Plaintiffs-Appellants,

v.

HARVEY ROSEN, an individual; and DIANNE ARENSBERG, an individual,

Defendants-Respondents,

and

ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Defendant.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Hon. Edmund Murphy

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF APPENDICES	vii
TABLE OF AUTHORITIES.....	viii
I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES	3
III. RESTATEMENT OF THE CASE	4
A. Rosen Supply Company has sold plumbing supplies around the Puget Sound since 1946. For 30 years, Harvey Rosen and Dianne Arensberg have owned a majority of Rosen Supply’s shares—just as its founders (their parents, Max and Sara Rosen) had intended. When Rosen Supply incorporated in 1978, Washington’s statutory one-vote-per-share presumption applied, and that same presumption applies today.....	4
B. Rosen Supply and its shareholders signed a Revised Stock Purchase Agreement in 1989 expressly to preserve Harvey’s and Dianne’s majority-shareholder position.	5
C. Along with the Revised Stock Purchase Agreement, Max and Sara created a Stock Ownership Trust to allow their grandchildren to receive a minority interest in Rosen Supply, while preserving Harvey and Dianne’s majority-shareholder position.	7
D. Several years ago, Rosen Supply’s shareholders began discussing a sale of Harvey’s and Dianne’s shares to Adam, David, Matt, and Devin. But negotiations broke down over the share price and the payment terms. So Harvey and Dianne turned their attention to a possible sale of Rosen Supply’s assets for fair-market value to a third party.	10
E. At a special meeting held in December 2017, Harvey and Dianne, supported by Devin, voted their majority shares to revise Rosen Supply’s Bylaws and to elect a new board	

TABLE OF CONTENTS

	<u>Page</u>
of directors. David and Matt lost their positions on the board, while Adam retained his.....	11
F. Adam, David, and Matt immediately sued Harvey and Dianne to block a potential sale of Rosen Supply’s assets, claiming that corporate acts had to be approved by a majority vote in which each shareholder was limited to a single vote, rather than by a majority vote of the shares. During discovery, Harvey and Dianne learned that for years the three nephews had been spying on Harvey’s and Dianne’s e-mails, including their confidential attorney–client communications, because the nephews feared a sale of the business’s assets.....	12
G. Despite Harvey’s and Dianne’s poor health and their right to a priority trial date, Adam, David, and Matt sought to delay the proceedings for at least five months by seeking a continuance of the trial date, which the trial court denied.....	13
H. On cross-motions for summary judgment, the trial court declared: (1) Adam, David, and Matt had failed to establish that Rosen Supply’s Articles displaced Washington’s statutory one-vote-per-share presumption; (2) the 1989 SPA did not limit Rosen Supply’s right to sell substantially all of its assets; and (3) the three resolutions approved by Harvey, Dianne, and Devin’s majority vote (counting by shares) at the special meeting were valid.....	14
I. The trial court concluded that Rosen Supply was required to indemnify Harvey and Dianne for their reasonable litigation expenses because they had been sued in their capacity as corporate directors and had fully prevailed against all of Adam, David, and Matt’s claims. The court declared that Harvey and Dianne did not violate the 1989 SPA. It reviewed and made significant reductions to Harvey and Dianne’s attorneys’ fees request before entering a fees-and-costs award.....	15

TABLE OF CONTENTS

	<u>Page</u>
IV. STANDARD OF REVIEW.....	16
V. ARGUMENT.....	17
A. Consistent with the long-standing consensus of American corporate law, the statutory presumption in Washington for almost a century has been that each shareholder has one vote per share. This default rule is incorporated into every Washington corporation’s articles of incorporation and may be displaced only when the articles clearly express an intent to provide for a different way of counting votes.....	17
1. The early common law limited a corporation’s shareholders to one vote regardless of the number of shares they owned. As stock corporations became the common form for corporate organization, the early rule was replaced by voting based on the number of shares held by a shareholder, rather than the number of shareholders.	18
2. Model Business Corporation Acts, enacted by virtually every American jurisdiction during the twentieth century, have uniformly abrogated the old per-capita rule in favor of a statutory presumption of one vote per share.	19
3. The statutory one-vote-per-share presumption is intended to preserve the vital principle of corporate democracy.	21
4. The statutory presumption in Washington is that a shareholder has one vote per share. This default rule is incorporated into every corporation’s articles of incorporation.	23
5. Washington’s statutory presumption of one vote per share may only be rebutted by manifestly clear and unmistakable language in the articles of incorporation showing an intent to provide for a different voting rule.	24

TABLE OF CONTENTS

	<u>Page</u>
B. The trial court correctly granted the Majority Shareholders summary judgment because the Minority Shareholders failed to prove that Rosen Supply’s Articles show a clear and express intent to displace the statutory default one-vote-per-share rule and instead to provide for a per-capita rule.	26
1. The Articles do not contain the sort of language that the courts have recognized to be necessary to express a clear intent to displace the statutory default of one vote per share.	26
2. The only language in the Articles on which the Minority Shareholders rely has been uniformly interpreted, under every statute akin to RCW 23B.07.210(1), to require per-share voting.	29
3. The extrinsic evidence relied on by the Minority Shareholders fails to show that Rosen Supply’s Articles were clearly intended to displace the statutory default one-vote-per-share rule.	38
(a) The supposed intent of Max and Sara Rosen that Rosen Supply remain a “family business” is inadmissible evidence under the context rule.	39
(b) The Original 1978 Bylaws.	40
(c) The Updated 2017 Bylaws.	41
(d) The 1989 Stock Purchase Agreement.	42
(e) The Grandchildren’s Stock Ownership Trust.	44
(f) The Minority Shareholders’ course of conduct.	45

TABLE OF CONTENTS

	<u>Page</u>
4. The Minority Shareholders’ cherry-picked excerpts of Harvey’s and Dianne’s deposition testimony are legally irrelevant to the Majority Shareholders’ right to vote their shares to approve a third-party transaction by a two-thirds majority vote, and the Board’s right by a majority vote to ratify or approve the transaction.....	47
5. This Court should resolve all doubts in interpreting the Articles in favor of the presumption against disenfranchising the Majority Shareholders.....	50
6. Endorsing the Minority Shareholders’ per-capita argument would lead to inequitable and anomalous results.	51
C. The trial court correctly ordered Rosen Supply to indemnify the Majority Shareholders because they were sued derivatively as corporate directors and were “wholly successful on the merits” in having all of the Minority Shareholders’ claims dismissed.....	52
D. The trial court properly exercised its discretion in awarding the Majority Shareholders their reasonable fees and costs in successfully defending against all the Minority Shareholders’ claims.	58
1. The trial court properly exercised its discretion in “significantly” reducing the Majority Shareholders’ fees request.	58
2. The Majority Shareholders were not required to segregate their recoverable expenses under RCW 23B.08.520. The claims and counterclaims were also so interrelated that segregation of fees was impossible.....	62
3. A comparison of the fees incurred by the losing party with the fees the prevailing party incurred is merely one factor, among many others, the trial	

TABLE OF CONTENTS

	<u>Page</u>
court may consider in exercising its discretion to award fees.....	66
VI. RAP 18.1 REQUEST FOR FEES AND COSTS	67
VII. CONCLUSION.....	68

INDEX OF APPENDICES

- Appendix A:** Trial court's summary-judgment order concluding that each share of stock in Rosen Supply is entitled to one vote (CP 648-50)
- Appendix B:** Trial court's order concluding that Harvey and Dianne are entitled to indemnification from Rosen Supply (CP 1074-77)
- Appendix C:** Trial court's letter ruling explaining the rationale of its fees-and-costs award (CP 1233-35)
- Appendix D:** Trial court's findings of fact and conclusions of law supporting the fees-and-costs award (CP 1515-18, 1547-49)
- Appendix E:** Ballinger Code discussed and analyzed in *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 60 P. 135 (1900)

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	38
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983)	59
<i>Brand v. Dep't of Labor & Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999)	65
<i>Bright v. Frank Russell Invs.</i> , 191 Wn. App. 73, 361 P.3d 245 (2015)	65, 66
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007)	33
<i>Cano-Garcia v. King County</i> , 168 Wn. App. 223, 277 P.3d 34 (2012)	16
<i>Crest Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 115 P.3d 349 (2005).....	17, 58, 61
<i>Golconda Mining Corp. v. Hecla Mining Co.</i> , 80 Wn.2d 372, 494 P.2d 1365 (1972)	24, 25, 27
<i>Grayson v. Nordic Constr. Co., Inc.</i> , 92 Wn.2d 548, 599 P.2d 1271 (1979)	43
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	38, 40
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999)	38, 39
<i>Howe v. Wash. Land Yacht Harbor, Inc.</i> , 77 Wn.2d 73, 459 P.2d 798 (1969)	24, 25, 27, 41
<i>Hume v. Am. Disposal Co.</i> , 124 Wn.2d 656, 880 P.2d 988 (1994)	63, 64

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>In re Marriage of Allen</i> , 78 Wn. App. 672, 898 P.2d 1390 (1995).....	25, 29
<i>In re Marriage of Briscoe</i> , 134 Wn.2d 344, 949 P.2d 1388 (1998)	24, 25
<i>In re Marriage of Rufener</i> , 52 Wn. App. 788, 764 P.2d 655 (1988)	25, 29
<i>In re Marriage of Sagner</i> , 159 Wn. App. 741, 247 P.3d 444 (2011).....	24, 25, 29
<i>In re Marriage of Williams</i> , 115 Wn.2d 202, 796 P.2d 421 (1990)	35
<i>LaHue v. Keystone Inv. Co.</i> , 6 Wn. App. 765, 496 P.2d 343 (1972)	56
<i>Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N)</i> , 119 Wn. App 665, 82 P.3d 1199 (2004).....	62
<i>Lokan & Assocs., Inc. v. Am. Beef Processing, LLC</i> , 177 Wn. App. 490, 311 P.3d 1285 (2013).....	16
<i>Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.</i> , 123 Wn.2d 678, 871 P.2d 146 (1994)	55
<i>Markel Am. Ins. Co. v. Dagmar’s Marina, LLC</i> , 139 Wn. App. 469, 161 P.3d 1029 (2007).....	45
<i>McNabb v. Dep’t of Corrs.</i> , 163 Wn.2d 393, 180 P.3d 1257 (2008)	16
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003)	16
<i>Muridan v. Redl</i> , 3 Wn. App. 2d 44, 413 P.3d 1072 (2018).....	59

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Pub. Util. Dist. 1 v. Int’l Ins. Co.</i> , 124 Wn.2d 789, 881 P.2d 1020 (1994)	58
<i>Reece v. Good Samaritan Hosp.</i> , 90 Wn. App. 574, 953 P.2d 117 (1998)	25, 38
<i>Roats v. Blakely Island Maint.</i> , 169 Wn. App. 263, 279 P.3d 943 (2012).....	16
<i>Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.</i> , 164 Wn. App. 641, 266 P.3d 229 (2011).....	45
<i>Standing Rock Homeowners Ass’n v. Misich</i> , 106 Wn. App. 231, 23 P.3d 520 (2001)	67
<i>State ex rel. Johnson v. Heap</i> , 1 Wn.2d 316, 95 P.2d 1039 (1939).....	21
<i>State ex rel. Mitchell v. Horan</i> , 22 Wash. 197, 60 P. 135 (1900).....	<i>passim</i>
<i>Tanner Elec. Coop. v. Puget Sound Power & Light Co.</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996)	17
<i>Unifund CCR Partners v. Sunde</i> , 163 Wn. App. 473, 260 P.3d 915 (2011).....	17, 52, 58
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	24, 25, 27, 29
<i>Walden Inv. Grp. v. Pier 67, Inc.</i> , 29 Wn. App. 28, 627 P.2d 129 (1981)	16, 24, 38
<i>Wash. State Labor Council v. Federated Am. Ins. Co.</i> , 78 Wn.2d 263, 474 P.2d 98 (1970).....	21
<i>Wilkinson v. Chiwawa Cmtys. Ass’n</i> , 180 Wn.2d 241, 327 P.3d 614 (2014)	34

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Other State Cases	
<i>Bank of Los Banos v. Jordan</i> , 167 Cal. 327, 139 P. 691 (1914)	32
<i>Commonwealth ex rel. Hanrahan v. Smith</i> , 1910 WL 3099, 19 Pa. D. 638 (Pa. C.C. 1910)	19, 22, 36
<i>Damerow Ford Co. v. Bradshaw</i> , 876 P.2d 788 (Or. Ct. App. 1994).....	54
<i>Deskens v. Lawrence Cty. Fair & Dev. Corp.</i> , 321 S.W.2d 408 (Ky. Ct. App. 1959).....	27, 28, 29
<i>Detroit Trust Co. v. Manilow</i> , 261 N.W. 303 (Mich. 1935).....	32
<i>Feess v. Mechanics' State Bank</i> , 115 P. 563 (Kan. 1911).....	22, 49
<i>Fein v. Lanston Monotype Mach. Co.</i> , 85 S.E.2d 353 (Va. 1955)	1, 22
<i>Fredericks v. Pa. Canal Co.</i> , 2 A. 48 (Pa. 1885)	31
<i>Grove v. Daniel Valve Co.</i> , 874 S.W.2d 150 (Tex. App. 1994).....	54
<i>Groves v. Rosemound Improvement Ass'n, Inc.</i> , 413 So.2d 925 (La. Ct. App. 1982).....	27, 28, 29
<i>Hill v. Erwin Mills, Inc.</i> , 80 S.E.2d 358 (N.C. 1954)	22, 49
<i>Hyams v. Old Dominion Co.</i> , 93 A. 747 (Me. 1915).....	22
<i>In re LJM2 Co-Investment, L.P.</i> , 866 A.2d 762 (Del. Ch. 2004)	23

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>In re P.B. Mathiason Mfg. Co.</i> , 99 S.W. 502 (Mo. Ct. App. 1907).....	18, 19, 36
<i>In re Westech Capital Corp.</i> , Consol. C.A. No. 8845-VCN, 2014 WL 2211612 (Del. Ch. May 29, 2014).....	29, 50
<i>Jenkins v. Morgan</i> , 112 S.E.2d 23 (Ga. Ct. App. 1959).....	25
<i>Ky. Package Store, Inc. v. Checani</i> , 117 N.E.2d 139 (Mass. 1954).....	1, 21, 44, 49
<i>Luthy v. Ream</i> , 270 Ill. 170, 110 N.E. 373 (1915).....	22
<i>Martin v. Carl</i> , 132 A.2d 601 (Md. 1957).....	21
<i>Muller v. Theo. Hamm Brewing Co.</i> , 268 N.W. 204 (Minn. 1936).....	32
<i>Poole & Kent Corp. v. C. E. Thurston & Sons, Inc.</i> , 209 S.E.2d 450 (N.C. 1974).....	25
<i>Proctor Coal Co. v. Finley</i> , 33 S.W. 188 (Ky. 1895).....	19, 36
<i>Providence & Worcester Co. v. Baker</i> , 378 A.2d 121 (Del. 1977).....	18, 20
<i>Rainbow Navigation, Inc. v. Yonge</i> , CIV. A. No. 9432, 1989 WL 40805 (Del. Ch. Apr. 24, 1989).....	50
<i>Rohe v. Reliance Training Network, Inc.</i> , No. 17992, 2000 WL 1038190 (Del. Ch. July 21, 2000).....	50
<i>Sabre Farms, Inc. v. Jordan</i> , 717 P.2d 156 (Or. Ct. App. 1986).....	55

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Sagusa, Inc. v. Magellan Petroleum Corp.</i> , Civ.A. No. 12,977, 1993 WL 512487 (Del. Ch. Dec. 1, 1993).....	27, 28, 29
<i>Salamone v. Gorman</i> , 106 A.3d 354 (Del. 2014).....	29, 51
<i>Serrano v. Unruh</i> , 186 Cal. Rptr. 754, 652 P.2d 985 (Cal. 1982)	63, 64
<i>Seward v. Am. Hardware Co.</i> , 171 S.E. 650 (Vir. 1933)	36, 37
<i>Smith v. Iron Mountain Tunnel Co.</i> , 125 P. 649 (Mont. 1912).....	35, 36, 37, 38
<i>Stifel Fin. Corp. v. Cochran</i> , 809 A.2d 555 (Del. 2002).....	52
<i>Stringer v. Car Data Sys., Inc.</i> , 841 P.2d 1183 (Or. 1992).....	21
<i>Taylor v. Griswold</i> , 14 N.J.L. 222 (N.J. 1834)	18
<i>Taylor v. Hinkle</i> , 200 S.W.3d 387 (Ark. 2004).....	45, 51
<i>W. Cottage Piano & Organ Co. v. Burrows</i> , 144 Ill. App. 350 (1908).....	19, 32, 36
<i>Weinburgh v. Union Street-Ry. Advert. Co.</i> , 37 A. 1026 (N.J. Ch. 1897).....	31, 32
<i>Weisbart v. Agri Tech, Inc.</i> , 22 P.3d 954 (Colo. App. 2001).....	52, 53, 54
<i>Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.</i> , 515 S.E.2d 277 (Va. 1999)	21, 44, 49

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Yanow v. Teal Indus., Inc.</i> , 422 A.2d 311 (Conn. 1979).....	21
<i>Zinvest, LLC v. Gunnersfield Enters., Inc.</i> , 405 P.3d 1270 (Mont. 2017).....	36
Federal Cases	
<i>Cottrell v. Duke</i> , 737 F.3d 1238 (8th Cir. 2013)	57
<i>Heffernan v. Pac. Dunlop GNB Corp.</i> , 965 F.2d 369 (7th Cir. 1992)	53, 54
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)	65, 66
<i>Lambert v. People of the State of California</i> , 355 U.S. 225, 78 S. Ct. 240, L. Ed. 2d 228 (1957).....	37
<i>Marbury v. Madison</i> , 5 U.S. 137, 2 L. Ed. 2d 60 (1 Cranch 1803)	35
<i>Ross v. Bernhard</i> , 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)	57
<i>Saxton v. Fed. Hous. Fin. Agency</i> , 245 F. Supp. 3d 1063 (N.D. Iowa 2017)	57
<i>Shawmut Ass'n v. Secs. & Exch. Comm.</i> , 146 F.2d 791 (1st Cir. 1945).....	36
<i>Simon Borg & Co. v. New Orleans City R.R. Co.</i> , 244 F. 617 (E.D. La. 1917).....	32
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982)	37
<i>Toledo Traction, Light & Power Co. v. Smith</i> , 205 F. 643 (N.D. Ohio 1913).....	32

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Witco Corp. v. Beekhuis</i> , 38 F.3d 682 (3d Cir. 1994)	54
Washington Statutes	
1 BAL. CODE § 4255 (1897).....	34
Former RCW 23A.08.300 (repealed 1989).....	24, 26, 42
Laws of 1933, ch. 185, § 28	42
RCW 4.44.025	13
RCW 23B.01.400(5)	43
RCW 23B.02.020(3)(e).....	23
RCW 23B.02.060(4)	41
RCW 23B.02.070.....	23
RCW 23B.06.240.....	23
RCW 23B.06.250.....	23
RCW 23B.06.300.....	23
RCW 23B.07.210(1)	<i>passim</i>
RCW 23B.07.250.....	23
RCW 23B.08.100.....	23
RCW 23B.08.210.....	23
RCW 23B.08.300.....	55
RCW 23B.08.520.....	<i>passim</i>
RCW 23B.08.540.....	23
RCW 23B.08.540(1)	15, 52, 67

TABLE OF AUTHORITIES

	<u>Page(s)</u>
RCW 23B.11.010.....	43
RCW 23B.12.010(1)(a).....	43
RCW 23B.12.020.....	44
RCW 23B.13.020(1)(a).....	43
RCW 4.24.510	62
RCW 49.48.030	63
RCW 7.24.100	67

Other State Statutes

7 PA. STAT. AND CONS. STAT. ANN. § 1212 (1965)	20
7 R.I. GEN. LAWS § 7-1.2-708 (2005).....	20
18 GUAM CODE ANN. § 28709 (2017).....	20
805 ILL. COMP. STAT. ANN. 35/16 (1965)	20
ALA. CODE § 10A-2-7.21 (2009).....	20
ALASKA STAT. ANN. § 10.06.420 (2002)	20
ARIZ. REV. STAT. ANN. § 10-721 (1996).....	20
ARK. CODE ANN. § 4-26-708 (1965).....	20
CAL. CORP. CODE § 700 (1977)	20
COLO. REV. STAT. ANN. § 7-107-202 (1994).....	20
CONN. GEN. STAT. ANN. § 33-705 (1997).....	20
D.C. CODE ANN. § 29-305.21 (2011).....	20
DEL. CODE ANN. 8, § 212 (2002)	20
GA. CODE ANN. § 7-1-436 (2016).....	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
HAW. REV. STAT. ANN. § 414-142 (2000).....	20
IDAHO CODE ANN. § 30-1-721 (2015).....	20
IND. CODE ANN. § 23-1-30-2 (1986).....	20
IOWA CODE ANN. § 490.721 (1989).....	20
KAN. STAT. ANN. § 17-6502 (2016).....	20
KY. REV. STAT. ANN. § 271B.7-210 (2010).....	20
LA. STAT. ANN. § 12:1-721 (2016).....	20
MASS. GEN. LAWS ANN. 156D, § 7.21 (2004).....	20
MD. CODE ANN., CORPS. & ASS'NS § 2-507 (2014).....	20
ME. REV. STAT. ANN. 13-C, § 722 (2003).....	20
MICH. COMP. LAWS ANN. § 487.13601 (2000).....	20
MINN. STAT. ANN. § 66A.38 (2005).....	20
FLA. STAT. ANN. § 607.0721 (1997).....	20
MISS. CODE ANN. § 79-4-7.21 (1988).....	20
MO. REV. STAT. § 351.245 (2000).....	20
MONT. CODE ANN. § 35-1-524 (1991).....	20, 36
N.C. GEN. STAT. ANN. § 55-7-21 (1989).....	20
N.D. CENT. CODE ANN. § 10-19.1-74 (2005).....	20
N.H. REV. STAT. ANN. § 293-A:7.21 (2014).....	20
N.J. STAT. ANN. § 14A:5-10 (1960).....	20
N.M. STAT. ANN. § 53-11-33 (2001).....	20
N.Y. BUS. CORP. LAW § 614 (2008).....	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
NEB. REV. STAT. ANN. § 21-263 (2017).....	20
NEV. REV. STAT. ANN. § 78.350 (2015).....	20
OHIO REV. CODE ANN. § 1701.44 (2006).....	20
OKLA. STAT. ANN. 18, § 427 (1919).....	20
OR. REV. STAT. § 60.227 (2018).....	20
R.I. GEN. LAWS § 7-1.2-708 (2005).....	20
S.C. CODE ANN. § 33-7-210 (1988).....	20
S.D. CODIFIED LAWS § 47-1A-721 (2005).....	20
TENN. CODE ANN. § 48-17-202 (1995).....	20
TEX. BUS. ORGANIZATIONS CODE ANN. § 200.263 (2006).....	20
UTAH CODE ANN. § 16-10a-721 (1992).....	20
VA. CODE ANN. § 13.1-662 (2005).....	20
Vt. STAT. ANN. 11A, § 7.21 (1993).....	20
W. VA. CODE § 31D-7-721 (2002).....	20
Wis. STAT. ANN. § 180.0721 (1991).....	20
WYO. STAT. ANN. § 17-16-721 (2009).....	20

Other Authorities

5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2020 (updated electronically Sept. 2018).....	33
5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2026 (updated electronically Sept. 2018).....	19, 20
5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2045 (updated electronically Sept. 2018).....	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
13 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6045.10 (1995).....	53
18 C.J.S. CORPORATIONS § 48 (updated electronically June 2019).....	41
31 WASH. PRACTICE: BUSINESS LAW 23B.08.520 (updated electronically Feb. 2019).....	52
BLACK’S LAW DICTIONARY (11th ed. 2019).....	4, 45
Grant M. Hayden & Matthew T. Bodie, <i>One Share, One Vote and the False Promise of Shareholder Homogeneity</i> , 30 CARDOZO L. REV. 445 (2008).....	22
RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981)	45
REV. MODEL BUS. CORP. ACT § 8.52 Official Comment (1984)	56
Robert B. Heglar, <i>Rejecting the Minority Discount</i> , 1989 DUKE L.J. 258 (1989).....	23
Stephen F. Ross & Daniel Tranen, <i>The Modern Parole Evidence Rule and Its Implications for New Textualist Statutory Interpretation</i> , 87 GEO. L.J. 195 (1998).....	34

I. INTRODUCTION

In the administration of corporations it is a fundamental principle that the majority in value of the stockholders can . . . regulate and control the lawful exercise of corporate powers. . . . The holders of a minority stock interest cannot be permitted to restrain those holding a majority of the shares from exercising their rights to vote because their votes would be adverse to the views of the minority.^[1]

The holders of the majority of the shares of a corporation have the right and the power, by the election of directors and by the vote of their stock, to determine the policy of their corporation and to manage and control its action.^[2]

Harvey Rosen and Dianne Arensberg have each dedicated over 50 years—as the majority shareholders of Rosen Supply Company—to building a successful plumbing-supply business. Now they want either to sell their shares to their minority-shareholder nephews for fair-market value or, if agreement cannot be reached on a fair-market price, to sell Rosen Supply’s assets to a third party.³

Adam, David, and Matthew Rosen—three of the minority-shareholder nephews—have sued their aunt and uncle. Their admitted goal: to gain negative control over the business to prevent their aunt and uncle from carrying out corporate acts that could lead to the sale of Rosen

¹ *Ky. Package Store, Inc. v. Checani*, 117 N.E.2d 139, 141-42 (Mass. 1954).

² *Fein v. Lanston Monotype Mach. Co.*, 85 S.E.2d 353, 360 (Va. 1955).

³ Harvey Rosen and Dianne Arensberg will be collectively referred to as the *Majority Shareholders* unless dictated by the context. Adam, David, and Matthew Rosen, the minority-shareholder nephews who brought this action, will be collectively referred to as the *Minority Shareholders* unless dictated by the context. Devin Rosen, who is Harvey’s son, is a minority shareholder, but he neither sued nor was sued in this action. Since most of the parties share the same last name, their first names will also be used as necessary to avoid confusion; no disrespect is intended.

Supply's assets. Even though a potential sale of the business's assets for fair-market value would equally benefit all shareholders in proportion to their interest in the business, the Minority Shareholders seek (in the name of preserving a "family business") to freeze Rosen Supply in place.

Consistent with the universal consensus of authority, the trial court correctly applied long-standing Washington corporate law that shareholders vote by shares—a presumption that can be displaced only by the clearest of evidence that a corporation's founding shareholders intended otherwise. The Minority Shareholders failed to overcome that presumption, and this failure doomed their case in every salient particular—as they themselves recognized by a stipulation entered at the conclusion of the trial-court proceedings that the resolution of this issue compelled the dismissal of all their claims. The trial court also correctly concluded that the Majority Shareholders were entitled to be reimbursed for their litigation expenses, including attorneys' fees and costs, for having been sued in their capacity as directors of Rosen Supply. It reasonably exercised its discretion in setting the amount of fees and costs to be awarded.

This Court should thus (1) affirm the summary-judgment order declaring that the shareholders of Rosen Supply have one vote for each share they own; (2) affirm the order requiring Rosen Supply to indemnify the Majority Shareholders for the expenses they incurred as directors in successfully defending against all of the Minority Shareholders' claims; and (3) affirm the order awarding the Majority Shareholders their reasonable attorneys' fees and costs.

II. RESTATEMENT OF THE ISSUES

1. **Washington’s Statutory “One Share, One Vote” Presumption.** The statutory presumption is that each shareholder in a Washington corporation has one vote per share. This default rule is incorporated automatically into every Washington corporation’s articles of incorporation, absent a clearly expressed intent in the articles to displace the statutory presumption and to provide for a different voting rule. Rosen Supply’s articles embrace the statutory presumption by connecting voting power to shares. Even so, the only provision in the articles the Minority Shareholders rely on to support their contention that the articles displaced the statutory presumption—“a majority of the stockholders”—has been interpreted by the Washington Supreme Court, the overwhelming majority of courts in other jurisdictions, and the preeminent treatise to mean “a majority in interest” rather than “a majority in number only.” Did the trial court correctly declare on summary judgment that each share of Rosen Supply stock is entitled to one vote? *Yes.* (CP 649.)

2. **Rosen Supply’s Right to Sell Substantially All of Its Assets.** Section 16 of the 1989 Stock Purchase Agreement (1989 SPA) expressly permits Rosen Supply to sell substantially all of its assets, to cease doing business, to liquidate the business, or to exercise all other rights available under Washington law. Did the trial court correctly declare on summary judgment that Section 16 of the 1989 SPA permits Rosen Supply to sell substantially all of its assets to a third party? *Yes.* (CP 649.)

3. **The Majority Shareholders’ Right to Indemnification.** Washington permits a corporation’s directors to be indemnified when they are wholly successful on the merits in any proceeding to which they were a party because of being a corporate director. The Minority Shareholders filed their lawsuit as a shareholder-derivative action, principally alleging that the Majority Shareholders breached their fiduciary duties as directors of Rosen Supply. The trial court ultimately dismissed every claim asserted by the Minority Shareholders. Did the trial court correctly conclude that the Majority Shareholders are entitled to indemnification from Rosen Supply? *Yes.* (CP 1076.)

4. **Reasonableness of the Fees and Costs Awarded to the Majority Shareholders.** A trial court has broad discretion in determining the reasonableness of fees, and its decision to award fees will be upheld absent manifest unreasonableness. The trial court here carefully reviewed the Majority Shareholders’ fees request, which sought fees for six different

categories of work performed. In a detailed letter ruling, the trial court analyzed each category and reduced the Majority Shareholders' fees request for each category by at least 19%. Did the trial court appropriately exercise its discretion in awarding the Majority Shareholders what the court found to be reasonable fees and costs for successfully defending against all of the Minority Shareholders' claims? *Yes.* (CP 1233-35, 1515-18, 1547-49.)

III. RESTATEMENT OF THE CASE

A. Rosen Supply Company has sold plumbing supplies around the Puget Sound since 1946. For 30 years, Harvey Rosen and Dianne Arensberg have owned a majority of Rosen Supply's shares—just as its founders (their parents, Max and Sara Rosen) had intended. When Rosen Supply incorporated in 1978, Washington's statutory one-vote-per-share presumption applied, and that same presumption applies today.

Rosen Supply Company sells wholesale plumbing supplies at several locations around the Puget Sound. CP 57, 65, 85-87. Max and Sara Rosen founded the business as a general partnership in 1946. CP 56. They had three children: Byron Rosen, Harvey Rosen, and Dianne Arensberg. CP 324.

Dianne and Harvey began working for Rosen Supply in the 1960s. CP 55, 108. They each have spent over 50 years working to build the business. CP 55, 108.

Rosen Supply incorporated in Washington in 1978 by filing its articles of incorporation (the *Articles*), which have never been amended or restated.⁴ CP 64-72, 322-23, 342-50. Max, Sara, Byron, Harvey, and

⁴ The articles of incorporation, sometimes referred to by the case law as the corporate charter or the certificate of incorporation, define the rights and obligations of the corporation and its shareholders. BLACK'S LAW DICTIONARY 139, 281, 293 (11th ed. 2019).

Dianne were Rosen Supply's founding shareholders and directors. CP 77, 324.

Rosen Supply issued 1,000 outstanding shares of stock: 150 shares each to Max and Sara, 250 shares each to Harvey and Byron, and 200 shares to Dianne. CP 324.

After Bryon died in 1979, Rosen Supply redeemed (bought back) his 250 shares.⁵ CP 324, 352-59. Nine years later it reissued those shares pro rata to the four remaining shareholders, resulting in the following share ownership:

Max:	200 shares (original 150 shares + 50 new shares)
Sara:	200 shares (original 150 shares + 50 new shares)
Harvey:	333.333 shares (original 250 shares + 83.333 new shares)
Dianne:	266.667 shares (original 200 shares + 66.667 new shares)

CP 324, 370-73.

B. Rosen Supply and its shareholders signed a Revised Stock Purchase Agreement in 1989 expressly to preserve Harvey's and Dianne's majority-shareholder position.

By the late 1980s, Max and Sara were planning their retirement and succession plan for Rosen Supply. CP 111. In 1989, the four shareholders of Rosen Supply signed a Revised Stock Purchase Agreement (the *1989 SPA*). CP 324, 375-81. By that time, Max and Sara had already worked for Rosen Supply for over forty years. Byron's sons (Adam, David, and

⁵ When Rosen Supply redeemed Byron's 250 shares, the total number of outstanding shares was 750.

Matthew) and Harvey's sons (Aaron and Devin) had just started to work for the business. CP 132, 148, 165, 182.

The 1989 SPA accomplished four goals:

First, if a shareholder wanted to sell his or her shares, or if a shareholder died, the 1989 SPA required the remaining shareholders or Rosen Supply to buy those shares. CP 78-80.

Second, the 1989 SPA sought to "preserve" Harvey's and Dianne's "majority shareholder position" by giving them the right to buy each other's shares "to assure [them] a fifty-one (51%) percent shareholder position in the [business] throughout the remainder of their lives." CP 77, 79.

Third, the 1989 SPA allowed Rosen Supply to sell substantially all of its assets to a third party:

Nothing contained in this Agreement shall limit the rights of [Rosen Supply] from selling substantially all of [its] assets, cease doing business entirely, liquidate [Rosen Supply], or carry out such other rights as would be available to it under the corporate law of the State of Washington.

CP 81-82; *see also* CP 400, 405, 410 (acknowledging that the Minority Shareholders are "bound by" the "1989 SPA"). The prior superseded 1978 SPA contained a virtually identical provision. CP 77, 356.

Fourth, the 1989 SPA allowed Max and Sara to gift a portion of their shares in Rosen Supply to their grandchildren, either directly or through an irrevocable trust of which Harvey and Dianne were co-trustees, so that each grandchild was gifted a 5% interest in the business subject to the

grandchild's completion of four years of continuous service with Rosen Supply. CP 77-78.

The 1989 SPA provides for two different valuation formulas for the buyout of a shareholder's interest: the *Fred Axe* valuation and the shareholders' own valuation. CP 79-80. (Fred Axe was a certified public accountant for Rosen Supply's then-attorney, John Dayhoff. CP 325.)

The *Fred Axe* valuation is described in a letter attached to the 1989 SPA. CP 79-80, 383-84. It provided for two different valuation formulas: one for a "significant control block of shares," which applied to any shareholder owning 20% or more of the shares, and the other for a "nonsignificant control block of shares," which applied to any shareholder owning less than 20% of the shares. CP 79-80, 383-84.

The shareholders could deviate from the *Fred Axe* valuation—and determine their own valuation of the shares—by unanimous consent. CP 80.

C. Along with the Revised Stock Purchase Agreement, Max and Sara created a Stock Ownership Trust to allow their grandchildren to receive a minority interest in Rosen Supply, while preserving Harvey and Dianne's majority-shareholder position.

The 1989 SPA allowed Max and Sara to gift 50 shares to their grandson Adam, and to gift their remaining 350 shares to a Grandchildren's Stock Ownership Trust (the *Trust*). CP 77-78, 327. The day after the 1989 SPA was signed, Max and Sara created and funded the Trust. CP 386-95.

Max and Sara named Harvey and Dianne as the co-trustees of the Trust. CP 386. As the co-trustees, they held “the voting rights to the stock held in trust,” entitling them each “to vote one-half of the stock.” CP 388. Consistent with the 1989 SPA allowing Rosen Supply to sell its assets, Harvey and Dianne were authorized as the trustees to vote the Trust’s shares to sell the business’s assets if Harvey and Dianne determined that such a sale was in the beneficiaries’ best interests. CP 392.

The Trust provided for distribution of 50 shares to each of Max and Sara’s grandchildren, conditioned on completion of four years of continuous service with Rosen Supply. CP 386-88. Since Adam had already completed four years of continuous service, he received his gift of 50 shares directly from Max and Sara. CP 132, 386. Of Max and Sara’s nine grandchildren, and in addition to Adam, only four eventually qualified to receive a gift of 50 shares each from the Trust: Aaron, David, Devin, and Matt. CP 111-12, 327-28.

The Trust was eventually terminated, and the 150 shares remaining in the Trust were issued pro rata to Adam, Aaron, David, Devin and Matt. CP 182-83, 27-28. As a result, each of them own a total of 80 shares, for which they paid nothing. CP 132, 327-28.

When the Trust terminated, Harvey became the president of Rosen Supply—the position he currently holds today. CP 323. Dianne is the treasurer; Devin is the secretary; and Adam, David, and Matt are vice-presidents. CP 75, 323.

In 2012, Aaron chose to have Rosen Supply redeem his 80 shares for \$96,523. CP 230, 328. Aaron's buyout was individually negotiated, as to both price and payment terms. *Compare* CP 80 ¶9, *with* CP 230 ¶1.2. Rosen Supply did not use the *Fred Axe* valuation to value his shares; instead, as expressly allowed by the 1989 SPA, the shareholders unanimously agreed on a different valuation formula. CP 114, 328. Aaron's 80 shares were not reissued, so there are currently 920 outstanding shares that are held by the remaining shareholders as follows:

Harvey: 333.333 shares (36.2% interest)

Dianne: 266.667 shares (29% interest)

Adam: 80 shares (8.7% interest)

David: 80 shares (8.7% interest)

Matt: 80 shares (8.7% interest)

Devin: 80 shares (8.7% interest)

CP 226, 262, 323, 328. Harvey and Dianne together own **600 shares**, representing about **65%** of the shares. CP 130, 185, 226, 239, 323. Adam, David, and Matt together own **240 shares**, representing about **26%** of the shares. CP 323.

D. Several years ago, Rosen Supply’s shareholders began discussing a sale of Harvey’s and Dianne’s shares to Adam, David, Matt, and Devin. But negotiations broke down over the share price and the payment terms. So Harvey and Dianne turned their attention to a possible sale of Rosen Supply’s assets for fair-market value to a third party.

Starting about six years ago, Rosen Supply’s shareholders began discussing a succession plan for the business. CP 114-19, 133, 512-31. By then, Harvey and Dianne were each in their 70s.

In May 2017, Harvey and Dianne offered to sell their shares to Adam, David, Matt, and Devin, or to have Rosen Supply redeem their shares for a combined \$5,184,074, based on an earlier third-party valuation that reflected a \$7,949,000 overall value for the business. CP 235, 237-38, 328.⁶ The offer was not accepted and was eventually withdrawn. CP 328. Harvey and Dianne did not offer, and have never offered, to sell their shares to a third party. CP 175, 452.

With no likely sale of their shares to Adam, David, and Matt, Harvey and Dianne began to seek a third-party transaction either to sell Rosen Supply’s assets or to effect a merger in order to “take advantage of the market.” CP 59; *see also* CP 114-20, 201-02, 219-20, 329.

In November 2017, Adam, David, and Matt proposed to buy Harvey’s and Dianne’s shares. CP 256-57, 328. Harvey and Dianne rejected the offer because both the price and the payment terms were

⁶ Harvey and Dianne held about 65% of the outstanding shares in Rosen Supply. CP 323. Harvey and Dianne’s \$5,184,074 offer to Adam, David, Matt, and Devin to buy their shares corresponded almost exactly to 65% of Rosen Supply’s total valuation of \$7,949,000. CP 219.

unacceptable, considering the recently appraised fair-market value of the business. CP 328.

E. At a special meeting held in December 2017, Harvey and Dianne, supported by Devin, voted their majority shares to revise Rosen Supply's Bylaws and to elect a new board of directors. David and Matt lost their positions on the board, while Adam retained his.

On December 1, 2017, a special meeting was held to vote on three resolutions: (1) to remove three directors from the board of directors; (2) to elect three directors to the board; and (3) to update and modernize Rosen Supply's Bylaws, which had not been updated since their original adoption in 1978. CP 201-05, 329, 1316-17.

All of the shareholders and their legal counsel attended the special meeting. CP 262. Revised Bylaws were adopted based on a vote conducted on a per-share basis. Adam, David, and Matt objected, claiming the Articles mandated per-capita (per-person) voting, and they abstained from voting. CP 262-64, 329, 1286-96. Cumulative voting was used to elect the new directors, which allowed Adam, David, and Matt, as the minority shareholders, to elect one board member. CP 329. As a result, David and Matt were removed as directors, and Harvey, Dianne, Devin, and Adam retained their director positions. CP 263, 329.

F. Adam, David, and Matt immediately sued Harvey and Dianne to block a potential sale of Rosen Supply's assets, claiming that corporate acts had to be approved by a majority vote in which each shareholder was limited to a single vote, rather than by a majority vote of the shares. During discovery, Harvey and Dianne learned that for years the three nephews had been spying on Harvey's and Dianne's e-mails, including their confidential attorney-client communications, because the nephews feared a sale of the business's assets.

Just minutes after the special meeting concluded, Adam, David, and Matt served Harvey and Dianne with their verified complaint for declaratory relief, which took the form of a shareholder-derivative action against Harvey and Dianne in their capacity as corporate directors. CP 329. The self-proclaimed goal of their lawsuit was to prevent Harvey and Dianne from voting their shares to cause Rosen Supply to engage in a corporate transaction with a third party. CP 174-75, 330.

Adam, David, and Matt asserted four claims: (1) Harvey and Dianne breached their fiduciary duties as directors by adopting resolutions on a per-share basis at the special meeting; (2) Harvey and Dianne anticipatorily breached the Articles by failing to sell their shares to Adam, David, and Matt; (3) the resolutions adopted at the special meeting were invalid; and (4) Harvey and Dianne should be enjoined from enforcing the resolutions adopted at the special meeting. CP 6-8.

Harvey and Dianne learned through discovery that, beginning in 2013, Adam and David had begun surreptitiously accessing, reading, and copying Harvey's, Dianne's, Devin's, and other employees' work and personal e-mails. CP 329-30, 422-24, 447, 685. Adam and David even read and copied Harvey's e-mails containing privileged communications with

his lawyers, and shared the contents of those e-mails with Matt. CP 330, 447.

Ultimately, Adam, David, and Matt produced in discovery 14 binders of documents containing several years' worth of Harvey's communications with his lawyers and third parties. CP 330. They admitted to spying on Harvey and Dianne because they opposed a sale of Rosen Supply's assets. CP 329-30.

G. Despite Harvey's and Dianne's poor health and their right to a priority trial date, Adam, David, and Matt sought to delay the proceedings for at least five months by seeking a continuance of the trial date, which the trial court denied.

In September 2018, Adam, David, and Matt sought to delay the November 2018 trial until April 2019, despite Harvey's and Dianne's age and poor health condition, which entitled them to a priority trial date. CP 654-57, 685, 691-92, 1408; RCW 4.44.025 (priority trials permitted for aged or ill parties). At the time, Harvey was 77 years old, had been recently hospitalized three times, and had undergone multiple outpatient treatments. CP 685. Dianne was 81 years old and "physically frail." CP 691-92. Both of their depositions had to be cut short because of physical exhaustion. CP 685, 691, 696-97.

The trial court denied the motion to continue the trial date for lack of good cause. CP 1429.

H. On cross-motions for summary judgment, the trial court declared: (1) Adam, David, and Matt had failed to establish that Rosen Supply's Articles displaced Washington's statutory one-vote-per-share presumption; (2) the 1989 SPA did not limit Rosen Supply's right to sell substantially all of its assets; and (3) the three resolutions approved by Harvey, Dianne, and Devin's majority vote (counting by shares) at the special meeting were valid.

The parties cross-moved for partial summary judgment on whether Rosen Supply's Articles displaced Washington's statutory one-vote-per-share presumption. CP 13-41, 296-321; RP (8/17/18) 13. Adam, David, and Matt asserted that the Articles mandate per-capita voting, meaning that the shareholders—regardless of the number of shares they own—each have one vote. CP 20, 30-36. Harvey and Dianne rejoined that the Articles did not depart from Washington's statutory presumption. CP 298-99, 310-21.

The trial court agreed with Harvey and Dianne and granted them summary judgment. CP 648-50 (trial court's order, copy attached as *App. A* to this brief). In addition to declaring that Rosen Supply's shareholders vote on a per-share basis, the trial court declared:

- The 1989 SPA did not limit Rosen Supply's right to sell substantially all of its assets. CP 649.
- Rosen Supply validly updated its Bylaws at the special meeting, and those Bylaws remain in effect. CP 649.
- Rosen Supply's board of directors consists of Harvey, Dianne, Devin, and Adam under the cumulative-voting procedure conducted at the special meeting. CP 650.

Consistent with these rulings, the trial court dismissed Adam, David, and Matt's claims about the enforceability of the actions taken at the special meeting and their claim for injunctive relief. CP 651-53.

The parties later stipulated that the trial court's summary-judgment order had effectively dismissed all of Adam, David, and Matt's claims. CP 796-98, 1075.

I. The trial court concluded that Rosen Supply was required to indemnify Harvey and Dianne for their reasonable litigation expenses because they had been sued in their capacity as corporate directors and had fully prevailed against all of Adam, David, and Matt's claims. The court declared that Harvey and Dianne did not violate the 1989 SPA. It reviewed and made significant reductions to Harvey and Dianne's attorneys' fees request before entering a fees-and-costs award.

Harvey and Dianne claimed, and the trial court agreed, that they were entitled to be indemnified by Rosen Supply for their litigation fees and costs incurred in successfully defending Adam, David, and Matt's claims under RCW 23B.08.520, RCW 23B.08.540(1), and Article XI of Rosen Supply's Bylaws. CP 770-89, 1076; RP (11/2/18) 51. The court declared that Harvey and Dianne had not violated the 1989 SPA. CP 1076 (trial court's order, copy attached as *App. B*); RP (11/2/18) 50-51.

Harvey and Dianne sought an award of \$611,302.24 in fees and costs, which the trial court found to be "excessive." CP 1078-90; 1094-1193, 1493-1507. The trial court analyzed and made substantial reductions to each of the six categories of Harvey and Dianne's fees request. *Compare* CP 1096, *with* CP 1233-35 (letter ruling), *and* CP 1515-18, 1547-49 (findings of fact and conclusions of law and order, copies attached as *App. C* and *App. D*). The court ultimately awarded Harvey and Dianne \$487,918.74 in fees and costs for having successfully defended against every claim asserted by Adam, David, and Matt and for the fees they

incurred in establishing their right to indemnification. CP 1234-35, 1517-18, 1548.

Adam, David, and Matt appealed, challenging the trial court's substantive corporate-law and fees determinations.⁷

IV. STANDARD OF REVIEW

This Court reviews the grant of a summary judgment on a declaratory-relief claim de novo. *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). It views the facts and the reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). It presumes the trial court disregarded any inadmissible evidence. *Cano-Garcia v. King County*, 168 Wn. App. 223, 249, 277 P.3d 34 (2012). Summary judgment is proper if the written contract, viewed in context with the other objective manifestations, has only one reasonable meaning. *Lokan & Assocs., Inc. v. Am. Beef Processing, LLC*, 177 Wn. App. 490, 499, 311 P.3d 1285 (2013).

Articles of incorporation are a contract between the corporation and its shareholders. *Walden Inv. Grp. v. Pier 67, Inc.*, 29 Wn. App. 28, 30-31, 627 P.2d 129 (1981). This Court thus interprets a corporation's articles under accepted rules of contract interpretation. *Roats v. Blakely Island Maint.*, 169 Wn. App. 263, 273-74, 279 P.3d 943 (2012). Contract interpretation is a question of law if the interpretation does not require the

⁷ The Majority Shareholders are dismissing their cross-appeal of the trial court's fees-and-costs award by motion filed simultaneously with this brief.

use of extrinsic evidence, or only one reasonable inference can be drawn from the extrinsic evidence. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

This Court reviews de novo whether a party is entitled to attorney fees. *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011). Once a party is determined to be entitled to fees, a trial court has “broad discretion” to decide the reasonableness of fees. *Id.* at 484. A trial court abuses its discretion only when its decision to award fees is “manifestly unreasonable.” *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005).

V. ARGUMENT

A. Consistent with the long-standing consensus of American corporate law, the statutory presumption in Washington for almost a century has been that each shareholder has one vote per share. This default rule is incorporated into every Washington corporation’s articles of incorporation and may be displaced only when the articles clearly express an intent to provide for a different way of counting votes.

The Minority Shareholders offer a highly selective and limited assortment of authorities that, unrebutted, could give the misimpression that the question of voting per share versus voting per capita is unsettled under prevailing American corporate law. In fact, the voting system the Minority Shareholders seek to impose on Rosen Supply’s shareholders represents an attempt to revive an approach to corporate governance that has been rejected in every jurisdiction (including Washington) for many decades, and that may now only be imposed on a corporation’s shareholders based on the

clearest demonstration that they expressly intended to be bound by such an antiquarian approach.

- 1. The early common law limited a corporation's shareholders to one vote regardless of the number of shares they owned. As stock corporations became the common form for corporate organization, the early rule was replaced by voting based on the number of shares held by a shareholder, rather than the number of shareholders.**

At common law, before the emergence of stock corporations, a corporation's members had equal rights, and each member had only one vote. *Taylor v. Griswold*, 14 N.J.L. 222, 237 (N.J. 1834); *In re P.B. Mathiason Mfg. Co.*, 99 S.W. 502, 505 (Mo. Ct. App. 1907). As stock corporations became more prevalent, the common law at first still limited shareholders to one vote regardless of the number of shares they owned. *Providence & Worcester Co. v. Baker*, 378 A.2d 121, 123 (Del. 1977). The common law thus required a corporation's shareholders to vote per capita, rather than according to their relative financial interest in the business.

By the early twentieth century, restrictions on voting by share had virtually disappeared. *Id.*; *State ex rel. Fritz v. Gray*, 153 N.E. 187, 190 (Ohio Ct. App. 1925). Courts had increasingly found the "soundness of the view limiting stockholders to a single vote, however many shares they may own," to be "very doubtful" as applied to modern stock corporations. *In re P.B. Mathiason*, 99 S.W. at 505. Courts came around to the view that the old common-law per-capita rule did not apply to modern stock corporations, whose shareholders had varying interests based on their degree of financial

stake in the business. *Proctor Coal Co. v. Finley*, 33 S.W. 188, 190-91 (Ky. 1895).

The traditional per-capita-voting rule gave way to a new per-share-voting rule that a share is the voting unit “in a meeting of the stockholders of a private business corporation on all questions in regard to the management of the corporation, or of its business policies[.]” *In re P.B. Mathiason*, 99 S.W. at 505. And the prevailing rule soon became that each stockholder is entitled to one vote for each share of stock. *Commonwealth ex rel. Hanrahan v. Smith*, 1910 WL 3099, 19 Pa. D. 638, 640 (Pa. C.C. 1910) (omitted from the Atlantic regional reporter); *W. Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350, 370 (1908) (omitted from the North Eastern regional reporter).

2. Model Business Corporation Acts, enacted by virtually every American jurisdiction during the twentieth century, have uniformly abrogated the old per-capita rule in favor of a statutory presumption of one vote per share.

By the turn of the twentieth century, corporate statutes were already being enacted nationwide against the backdrop of the evolving common law. *See Gray*, 153 N.E. at 190. While these early statutes initially varied by jurisdiction, most jurisdictions eventually came to model their statutory schemes after the Model Business Corporation Act and its revised iterations. 5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2026 (updated electronically Sept. 2018) (FLETCHER ON CORPORATIONS). These

Model Acts have specifically and consistently provided that each share in a corporation is presumptively entitled to one vote. *Id.*

Every jurisdiction, including Washington, has by now adopted statutes similar to the voting provisions found in the Model Acts. *Id.* The one-vote-per-share presumption prevails to such an extent that it must be deemed the gold standard of corporate governance. *Baker*, 378 A.2d at 123; 5 FLETCHER ON CORPORATIONS §§ 2026, 2045. Indeed, every state in the union has adopted this presumption as the default rule in its corporate law.⁸ This universal codification reflects the salutary policy that a shareholder's voting power should be tailored to the shareholder's financial interest in the business, consistent with modern principles of corporate democracy.

⁸ ALA. CODE § 10A-2-7.21 (2009); ALASKA STAT. ANN. § 10.06.420 (2002); ARIZ. REV. STAT. ANN. § 10-721 (1996); ARK. CODE ANN. § 4-26-708 (1965); CAL. CORP. CODE § 700 (1977); COLO. REV. STAT. ANN. § 7-107-202 (1994); CONN. GEN. STAT. ANN. § 33-705 (1997); DEL. CODE ANN. 8, § 212 (2002); D.C. CODE ANN. § 29-305.21 (2011); FLA. STAT. ANN. § 607.0721 (1997); GA. CODE ANN. § 7-1-436 (2016); 18 GUAM CODE ANN. § 28709 (2017); HAW. REV. STAT. ANN. § 414-142 (2000); IDAHO CODE ANN. § 30-1-721 (2015); 805 ILL. COMP. STAT. ANN. 35/16 (1965); IND. CODE ANN. § 23-1-30-2 (1986); IOWA CODE ANN. § 490.721 (1989); KAN. STAT. ANN. § 17-6502 (2016); KY. REV. STAT. ANN. § 271B.7-210 (2010); LA. STAT. ANN. § 12:1-721 (2016); ME. REV. STAT. ANN. 13-C, § 722 (2003); MD. CODE ANN., CORPS. & ASS'NS § 2-507 (2014); MASS. GEN. LAWS ANN. 156D, § 7.21 (2004); MICH. COMP. LAWS ANN. § 487.13601 (2000); MINN. STAT. ANN. § 66A.38 (2005); MISS. CODE ANN. § 79-4-7.21 (1988); MO. REV. STAT. § 351.245 (2000); MONT. CODE ANN. § 35-1-524 (1991); NEB. REV. STAT. ANN. § 21-263 (2017); NEV. REV. STAT. ANN. § 78.350 (2015); N.H. REV. STAT. ANN. § 293-A:7.21 (2014); N.J. STAT. ANN. § 14A:5-10 (1960); N.M. STAT. ANN. § 53-11-33 (2001); N.Y. BUS. CORP. LAW § 614 (2008); N.C. GEN. STAT. ANN. § 55-7-21 (1989); N.D. CENT. CODE ANN. § 10-19.1-74 (2005); OHIO REV. CODE ANN. § 1701.44 (2006); OKLA. STAT. ANN. 18, § 427 (1919); OR. REV. STAT. § 60.227 (2018); 7 PA. STAT. AND CONS. STAT. ANN. § 1212 (1965); 7 R.I. GEN. LAWS § 7-1.2-708 (2005); S.C. CODE ANN. § 33-7-210 (1988); S.D. CODIFIED LAWS § 47-1A-721 (2005); TENN. CODE ANN. § 48-17-202 (1995); TEX. BUS. ORGANIZATIONS CODE ANN. § 200.263 (2006); UTAH CODE ANN. § 16-10a-721 (1992); VT. STAT. ANN. 11A, § 7.21 (1993); VA. CODE ANN. § 13.1-662 (2005); W. VA. CODE § 31D-7-721 (2002); WIS. STAT. ANN. § 180.0721 (1991); WYO. STAT. ANN. § 17-16-721 (2009).

3. The statutory one-vote-per-share presumption is intended to preserve the vital principle of corporate democracy.

Shares of stock in a corporation are a proprietary right. *Fein v. Lanston Monotype Mach. Co.*, 85 S.E.2d 353, 360 (Va. 1955). The right to vote is one of the most important rights of stock ownership. *Wash. State Labor Council v. Federated Am. Ins. Co.*, 78 Wn.2d 263, 271, 474 P.2d 98 (1970); *State ex rel. Johnson v. Heap*, 1 Wn.2d 316, 322-23, 95 P.2d 1039 (1939).

The one-vote-per-share rule now codified in every American jurisdiction embraces the modern principle of corporate democracy that majoritarian decision-making based on a majority financial interest should control. *Yanow v. Teal Indus., Inc.*, 422 A.2d 311, 316 n.5 (Conn. 1979); *Stringer v. Car Data Sys., Inc.*, 841 P.2d 1183, 1184 (Or. Ct. App. 1992). This rule grants majority shareholders the right to vote their shares to determine the policy of the corporation and to manage and control its actions. *Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 288 (Va. 1999); *Yanow*, 422 A.2d at 317-18; *Martin v. Carl*, 132 A.2d 601, 604 (Md. 1957); *Fein*, 85 S.E.2d at 360; *Ky. Package Store, Inc. v. Checani*, 117 N.E.2d 139, 141 (Mass. 1954).

This principle was well stated over 100 years ago by the Kansas Supreme Court:

No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.

Feess v. Mechanics' State Bank, 115 P. 563, 567 (Kan. 1911). The minority's votes are thus unavailing against the majority's will because the majority has control over the corporation's management and policy. *Fein*, 85 S.E.2d at 360; *Hyams v. Old Dominion Co.*, 93 A. 747, 752 (Me. 1915); *Luthy v. Ream*, 270 Ill. 170, 180-82, 110 N.E. 373 (1915). Minority shareholders "do not have the right to dictate corporate policies" but must submit to the majority's will "so long as the majority act in good faith and within the limitation of the law." *Hill v. Erwin Mills, Inc.*, 80 S.E.2d 358, 362 (N.C. 1954). Indeed, "it is not difficult to understand the injurious results of committing to the control of the owners of a minority of the stock the regulation of the corporation's affairs in matters usually controlled by the owners of a majority[.]" *Gray*, 153 N.E. at 190.

Each share represents a portion of a shareholder's financial interest in the corporation, equal to every other share. *Gray*, 153 N.E. at 191. A shareholder's degree of financial interest in the corporation is proportionate to the number of shares the shareholder owns. The one-vote-per-share rule allows a corporation's shareholders to tailor their financial interest in the corporation to their voting power because the right to manage the affairs of a corporation is vested in those who have the larger financial interest. *Gray*, 153 N.E. at 191; *Hanrahan*, 19 Pa. D. at 640. That rule remains to this day the "touchstone of corporate governance," preserving the vital interest in shareholder democracy. Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 471 (2008). With the demise of the minority veto power that

could be exercised at common law, majority shareholders can now approve corporate acts despite objections from the minority. Robert B. Heglar, *Rejecting the Minority Discount*, 1989 DUKE L.J. 258, 267 (1989).

4. The statutory presumption in Washington is that a shareholder has one vote per share. This default rule is incorporated into every corporation's articles of incorporation.

Washington has long been in full accord with these fundamental principles. By statute, every shareholder in a Washington corporation presumptively has one vote for each share they own:

[U]nless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

RCW 23B.07.210(1).⁹ The Washington Business Corporation Act uniformly defines voting rights and quorum requirements in terms of the number of shares—not the number of shareholders. RCW 23B.02.020(3)(e) (referring to RCW 23B.07.210); RCW 23B.07.250(1). These statutory presumptions are useful because they relieve the shareholders “of the burden of explicitly specifying every single one of those [laws] that they wish to adopt.” *In re LJM2 Co-Investment, L.P.*, 866 A.2d 762, 779 (Del. Ch. 2004).

⁹ RCW 23B.07.210 and its statutory one-vote-per-share presumption is not an outlier in the Washington Business Corporation Act. The Act contains many provisions permitting a corporation to depart from the statutory default rules if its articles of incorporation “provide otherwise.” *See, e.g.*, RCW 23B.02.070; RCW 23B.06.240; RCW 23B.06.250; RCW 23B.06.300; RCW 23B.07.250; RCW 23B.08.100; RCW 23B.08.210; RCW 23B.08.540.

When Rosen Supply filed its Articles in 1978, the presumptive one-vote-per-share rule applied—just as it does today. Former RCW 23A.08.300 (repealed 1989). A corporation’s articles are a contract between the corporation and its shareholders, *Walden*, 29 Wn. App. at 30-31, and parties are presumed to contract with reference to the existing law. *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980); *Golconda Mining Corp. v. Hecla Mining Co.*, 80 Wn.2d 372, 380, 494 P.2d 1365 (1972); *Howe v. Wash. Land Yacht Harbor, Inc.*, 77 Wn.2d 73, 84, 459 P.2d 798 (1969). Rosen Supply’s founding shareholders are thus presumed to have embraced the statutory presumption in their Articles, absent proof they instead intended by the Articles to “provide otherwise.” RCW 23B.07.210(1).

5. Washington’s statutory presumption of one vote per share may only be rebutted by manifestly clear and unmistakable language in the articles of incorporation showing an intent to provide for a different voting rule.

The Minority Shareholders acknowledge that Washington follows the default rule of one vote per share. The failure to displace a statutory presumption expressly results in its “automatic inclusion.” *In re Marriage of Sagner*, 159 Wn. App. 741, 749, 247 P.3d 444 (2011). A statutory presumption cannot be displaced by mere implication or inference. *In re Marriage of Briscoe*, 134 Wn.2d 344, 348, 949 P.2d 1388 (1998). So when a corporation’s articles are silent, ambiguous, or otherwise unclear, the statutory presumption applies.

This appeal thus turns on whether the Minority Shareholders have shown that Rosen Supply’s Articles expressly “provide otherwise” than for the statutorily presumed one-vote-per-share rule under RCW 23B.07.210(1), and instead clearly provide for per-capita voting—a voting scheme that even they readily admit is “unusual.” *App. Op. Br.* at 27.

To do so requires the Minority Shareholders to meet the “heavy burden,” *Reece v. Good Samaritan Hosp.*, 90 Wn. App. 574, 579, 953 P.2d 117 (1998), to prove that the Articles show a clear and express intent to displace the statutory default rule and to provide—in manifestly clear and unmistakable language—for per-capita voting. *Wagner*, 95 Wn.2d at 98-99; *In re Sagner*, 159 Wn. App. at 749; *In re Marriage of Allen*, 78 Wn. App. 672, 676, 898 P.2d 1390 (1995); *In re Marriage of Rufener*, 52 Wn. App. 788, 791, 764 P.2d 655 (1988).¹⁰ As shown below, they did not, and cannot, meet this heavy burden.

¹⁰ While *Wagner*, *Sagner*, *Allen*, and *Rufener* all arose in the family-law context, the well-established law about statutorily presumptive rules being incorporated into contracts and the burden to show a clear intent to displace those rules applies equally here. Compare *In re Briscoe*, 134 Wn.2d at 348 (family law’s statutorily presumptive rules), with *Golconda Mining*, 80 Wn.2d at 380 (corporate law’s statutorily presumptive rules), and *Howe*, 77 Wn.2d at 84 (same). In fact, the cases relied on by our state Supreme Court in *Wagner* to support this law all arose in the commercial context. See *Wagner*, 95 Wn.2d at 99 (citing *Jenkins v. Morgan*, 112 S.E.2d 23 (Ga. Ct. App. 1959); *Poole & Kent Corp. v. C. E. Thurston & Sons, Inc.*, 209 S.E.2d 450 (N.C. 1974)).

B. The trial court correctly granted the Majority Shareholders summary judgment because the Minority Shareholders failed to prove that Rosen Supply’s Articles show a clear and express intent to displace the statutory default one-vote-per-share rule and instead to provide for a per-capita rule.

1. The Articles do not contain the sort of language that the courts have recognized to be necessary to express a clear intent to displace the statutory default of one vote per share.

The Minority Shareholders initially claim in passing that the Articles “make no reference to voting by share or a majority of the outstanding shares.” *App. Op. Br.* at 25. They are wrong. The Articles do refer to voting by shares and expressly embrace the statutory presumption by connecting voting power to shares—not to individual shareholders—in Article II § 3: “The corporation shall not be entitled to vote . . . on any shares of its own stock which it may hold.” CP 65-66.

Even so, the Articles need not refer to voting by shares; nor must the Articles expressly incorporate the statutory presumption. Why? Because when Rosen Supply adopted its Articles, per-share voting was statutorily presumed—just as it is today. Former RCW 23A.08.300 (repealed 1989); RCW 23B.07.210(1).¹¹ As a result, the Majority Shareholders need not prove that Rosen Supply affirmatively adopted a one-vote-per-share rule. Rather, if they are to prevail here, it is the Minority Shareholders who have the heavy burden to prove the founding shareholders of Rosen Supply

¹¹ As discussed more fully in Section V.B.1 of this brief, 78 years before Rosen Supply had incorporated in Washington, the Washington Supreme Court had already interpreted a phrase virtually identical to the one on which the Minority Shareholders rely, and it expressly rejected the Minority Shareholders’ reading of that provision. *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 200, 60 P. 135 (1900).

intended by their Articles to displace the statutory presumption and to clearly and expressly “provide otherwise” for per-capita voting. *See Wagner*, 95 Wn.2d at 98; *Golconda Mining*, 80 Wn.2d at 380; *Howe*, 77 Wn.2d at 84.

Three cases from other jurisdictions are particularly instructive to show how a corporation’s articles can displace the statutory default one-vote-per-share rule by clearly and expressly “provid[ing] otherwise”: *Sagusa, Inc. v. Magellan Petroleum Corp.*, Civ.A. No. 12,977, 1993 WL 512487 (Del. Ch. Dec. 1, 1993); *Groves v. Rosemound Improvement Association, Inc.*, 413 So.2d 925 (La. Ct. App. 1982); and *Deskins v. Lawrence County Fair & Development Corp.*, 321 S.W.2d 408 (Ky. Ct. App. 1959).

- In *Sagusa*, several shareholders challenged provisions in the corporation’s articles requiring per-capita voting. The Delaware Chancery Court analyzed whether the per-capita-voting provision in the corporation’s articles was valid. *Sagusa*, 1993 WL 512487, at *1. The per-capita provision at issue stated:

Any matter to be voted upon at any meeting of stockholders **must be approved, not only by a majority of the shares voted at such meeting . . . , but also by a majority of the stockholders present in person or by proxy and entitled to vote thereon**; provided, however, except and only in the case of the election of directors, if no candidate for one or more directorships receives both such majorities, and any vacancies remain to be filled, each person who receives **the majority in number of the stockholders present** in person or by proxy and voting thereon shall be elected to fill such vacancies by virtue of having received such majority.

Id. (emphasis added). Consistent with Delaware’s statutory scheme allowing corporations to provide rules different from the statutory default one-vote-per-share rule, the court held that the per-capita provision was clearly expressed and thus valid. *Id.* at *2-3.

- In *Groves*, a shareholder sued a corporation and its president to compel them to recognize his right to vote all of his 220 shares. The corporation’s articles stated:

Each shareholder shall be entitled to one vote at all membership meetings which said vote may be in person or by written proxy.

Id. at 926 (emphasis added). The Louisiana Court of Appeals held that despite the shareholder’s owning 220 shares, he had only one vote. *Id.* at 927. The court concluded that the language limiting a shareholder to one vote expressed a clear intent to depart from Louisiana’s one-vote-per-share default rule. *Id.*

- In *Deskins*, the plaintiffs owned 60% of the outstanding shares of a corporation. At a stockholders’ meeting, the plaintiffs tried to vote all of their shares to elect two directors. *Deskins*, 321 S.W.2d at 409. The corporation’s articles stated:

Each share of stock in this corporation shall have one vote, but no person, organization, or association, regardless of the number of shares owned shall have more than four votes in any of the business upon which the stockholders may be called upon to vote.

Id. (emphasis added). The Kentucky Court of Appeals held that this provision expressly barred the plaintiffs from voting all their shares to elect the directors. *Id.*

Sagusa, Groves, and Deskins all serve to show the sort of language reflecting a “clear intent” to “expressly” provide in “specific or manifestly clear and unmistakable language” for a voting rule different from the statutory presumption. *Wagner*, 95 Wn.2d at 98-99; *In re Sagner*, 159 Wn. App. at 749; *In re Allen*, 78 Wn. App. at 676; *In re Rufener*, 52 Wn. App. at 791. A corporation’s articles must expressly connect voting power with shareholders, rather than shares. Otherwise the statutory presumption “results in automatic inclusion.” *In re Sagner*, 159 Wn. App. at 749.

Rosen Supply’s Articles say nothing about displacing the statutory presumption of per-share voting. Nor do the Articles provide in specific or manifestly clear and unmistakable language for per-capita voting. If the original shareholders had intended to “provide otherwise” in the Articles, they “could have used the phrase ‘per capita’ or comparable wording.” *In re Westech Capital Corp.*, Consol. C.A. No. 8845-VCN, 2014 WL 2211612, at *14 (Del. Ch. May 29, 2014) (unpublished), *aff’d in part and rev’d in part*, *Salamone v. Gorman*, 106 A.3d 354 (Del. 2014). They could have done what was done in *Sagusa, Groves, and Deskins*. But they did not do so.

2. The only language in the Articles on which the Minority Shareholders rely has been uniformly interpreted, under every statute akin to RCW 23B.07.210(1), to require per-share voting.

The only provision within the four corners of the Articles that the Minority Shareholders point to as support for their argument that the Articles provided for an admittedly unusual per-capita-voting scheme is in

Article VIII § 4. That provision, which concerns ratification of prior corporate acts, states:

Any contract, transaction, or act of the corporation or of the directors or of any officers of the corporation which shall be ratified by **a majority or a quorum of the stockholders** of the corporation at any annual meeting or any special meeting called for such purpose, shall insofar as permitted by law, be as valid and as binding as though ratified by every stockholder of the corporation.

CP 70 (emphasis added). The highlighted phrase, according to the Minority Shareholders, shows a clearly expressed intent to displace the statutory presumption by “provid[ing] otherwise”—namely, for shareholder voting on a per-capita basis. *App. Op. Br.* at 25-26. This is where, according to them, the analysis begins and ends in their favor. *App. Op. Br.* at 26.

But the Washington Supreme Court 119 years ago rejected virtually the identical argument now advanced by the Minority Shareholders that the phrase “a majority of the stockholders” means per-capita voting. *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 60 P. 135 (1900).

In *Horan*, two corporate trustees were removed by a stockholder vote in which two-thirds of the shares—but less than two-thirds of the stockholders present—voted for their removal. *Id.* at 200. The operative statute provided that “two-thirds of the stockholders” of a corporation could vote to remove a trustee and to elect a replacement. *Id.* The trustees argued the phrase means “two-thirds of the persons holding stock.” *Id.* The Washington Supreme Court rejected the trustees’ per-capita argument and concluded that the legislature had contemplated the control of the corporation’s business interests “by a majority of the shares held.” *Id.* The

Supreme Court held that the phrase “two-thirds of the stockholders” means “holders of two-thirds of the stock.” *Id.*

The Washington Supreme Court was not alone in rejecting what has become the Minority Shareholders’ preferred interpretation of the phrase “majority of the stockholders.” The Pennsylvania Supreme Court had previously held that the phrase “at least two-thirds of the stockholders” means any number of stockholders, and even a single stockholder, owning at least two-thirds of the stock. *Fredericks v. Pa. Canal Co.*, 2 A. 48, 49-50 (Pa. 1885).

The New Jersey Chancery Court had likewise been called on to interpret the bylaws of a closely held corporation of six shareholders to determine whether the phrase “majority of the stockholders” means “in number” or “in interest.” *Weinburgh v. Union Street-Ry. Advert. Co.*, 37 A. 1026, 1028 (N.J. Ch. 1897). In *Weinburgh*, the holders of 30% of the company’s shares argued, as the Minority Shareholders argue here, that the “plain, clear, ordinary meaning” of “majority of stockholders” means “only a majority of stockholders as persons.” *Id.* at 1028; *see also App. Op. Br.* at 28, 31, 35 (arguing that the “plain language” of the phrase “majority of the stockholders” in the Articles means “per shareholder”). The court rejected that argument and held that the phrase “majority of stockholders” means “majority in interest of the stockholders”:

I think weight should also be given to the common, if not universal, practice of allowing voting by shares in private business corporations, which has obtained in this state . . . , and also obtains generally throughout the United States. . . . **Late cases in the courts of other states seem to hold that the natural and ordinary**

meaning of the words ‘majority of stockholders,’ without other qualifications, even in a statute, indicates a majority in interest, and not in number.

Id. at 1028-29 (emphasis added).

In the decades since the Washington Supreme Court decided *Horan*, the overwhelming weight of authority has validated our Supreme Court’s holding that the phrase “majority of the stockholders” or its variants definitively means “majority of the stockholders in interest.” *See, e.g., Toledo Traction, Light & Power Co. v. Smith*, 205 F. 643, 858 (N.D. Ohio 1913) (holding that the term “stockholders” means “stockholders in interest”); *Muller v. Theo. Hamm Brewing Co.*, 268 N.W. 204, 207 (Minn. 1936) (holding that the phrase “majority of all stockholders” means “the vote of the holders of the majority of all shares of stock”); *Detroit Trust Co. v. Manilow*, 261 N.W. 303, 305 (Mich. 1935) (holding that the phrase “two-thirds of the holders of bonds then outstanding” means “the obvious intent . . . to authorize holders of two-thirds in amount of the bounds then outstanding to act, rather than two-thirds of the number of bondholders”); *Simon Borg & Co. v. New Orleans City R.R. Co.*, 244 F. 617, 618-19 (E.D. La. 1917) (holding that the phrase “three-fourths of all the stockholders” means “three-fourths of the stock entitled to vote”); *Bank of Los Banos v. Jordan*, 167 Cal. 327, 327-28, 139 P. 691 (1914) (holding that the phrase “majority of stockholders” means a “majority in interest of the stockholders, and not a majority in numbers only”); *Gray*, 153 N.E. at 190 (citing *Fletcher on Corporations, Toledo Traction, Burrows, Weinburgh, and Horan* for the proposition that an articles provision “requiring the affirmative vote of a

majority of the stockholders, or of a majority of those present at the meeting, means a majority in interest rather than a majority in number only”).

Reflecting this overwhelming authority, the preeminent corporate-law treatise states that a provision in a corporation’s articles “requiring the affirmative vote of a majority of the shareholders, or of a majority of those present at the meeting, means a majority in interest rather than a majority in number only.” 5 FLETCHER ON CORPORATIONS § 2020 (cited by the Minority Shareholders but misleadingly omitting this critical principle); *see also* 1 CORPORATE GOVERNANCE GUIDE, 2015 WL 6888447, ¶ 2220 (Wolters Kluwer 2018) (“A majority of the shareholders’ in almost all cases does not mean a majority in number, but a majority in interest, and if the phrase refers to action at a shareholders’ meeting, it should be understood to refer only to a majority of shares represented at the meeting unless otherwise indicated.”).

Saying literally nothing about this veritable Mount Everest of authority, the Minority Shareholders try to distinguish *Horan* on two grounds: (1) *Horan* interpreted a statute rather than corporate articles, and (2) *Horan* is old. *App. Op. Br.* at 28-29. Neither is a compelling reason for this Court not to follow *Horan*.

As for the supposed difference between interpreting a statute and articles of incorporation, the same goal for contract interpretation applies to statutory interpretation: to determine the drafters’ intent. *Compare Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (“Our goal in statutory interpretation is to effectuate the legislature’s intent.”), *with*

Wilkinson v. Chiwawa Cmty. Ass'n, 180 Wn.2d 241, 250, 327 P.3d 614 (2014) (“[O]ur primary objective in contract interpretation is determining the drafter’s intent.”); *see also* Stephen F. Ross & Daniel Tranen, *The Modern Parole Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 222 (1998) (“The aim of both contract and statutory interpretation is to ascertain the meaning of the words used by the writing’s creator.”).

So why should a court assume that by using the phrase “majority of the stockholders” in Article VIII § 4, the founding shareholders of Rosen Supply intended to depart from the well-established meaning of that phrase—including as reflected in a binding decision of the Washington Supreme Court—just because some prior court decisions involved interpreting a corporate-governance statute rather than a specific corporate article? It makes far more sense to conclude that the founding shareholders of Rosen Supply did not intend to depart from the well-established meaning of the phrase “majority of the stockholders,” and instead intended that the phrase would be given its ordinary meaning of voting per share.

As for *Horan* being old, to begin, the Washington Supreme Court’s decision in *Horan* was consistent with Washington’s then-existing statutory corporate scheme, which even by then had already embraced voting per share rather than voting per capita. 1 BAL. CODE § 4255 (1897) (analyzed in *Horan*, copy attached as *App. E*) (“[E]ach stockholder . . . shall be entitled to as many votes as he may own . . . shares of stock[.]”). And because the Washington legislature “is presumed to be aware of judicial construction of

prior statutes,” *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990), it should be presumed that the legislature embraced *Horan* when it later adopted the Model Business Corporation Act with its presumption of voting per share. *Horan* has never been repudiated by any court—let alone our Supreme Court—and it remains in line with the nearly uniform consensus of courts that have interpreted the phrase “majority of the stockholders” to mean a “majority of the stockholders in interest.” *Horan* may be old, but as a matter of corporate law, *Horan* is “old” in the same way that *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 2d 60 (1 Cranch 1803), is “old” for constitutional law.

Against all of this authority, the Minority Shareholders offer—as the primary support for their per-capita interpretation of the phrase “a majority of the stockholders” in Article VIII § 4—a Montana Supreme Court decision, *Smith v. Iron Mountain Tunnel Co.*, 125 P. 649 (Mont. 1912), that is only slightly less hoary than *Horan* and no longer has any persuasive weight even in Montana.

Smith interpreted a Montana statutory scheme, and focused specifically on one statute’s use of the phrase “shares of stock” and another statute’s use of the phrase “shareholders.” *Id.* at 651. Placing great weight on this distinction, the Montana Supreme Court held that the phrase “three-fourths of the stockholders” means “three-fourths of the whole number of stockholders,” rather than three-fourths of the shares of stock. *Id.* at 650-51.

But the statutory scheme examined in *Smith* was materially different from the Washington statute at issue in *Horan*. Unlike the Montana statute, the Washington statute analyzed in *Horan* was consistent with the then-emerging modern one-vote-per-share presumption. *See App. E; see also Finley*, 33 S.W. at 190-91; *Gray*, 153 N.E. at 190; *Burrows*, 144 Ill. App. at 370; *In re P.B. Mathiason*, 99 S.W. at 505; *Hanrahan*, 19 Pa. D. at 640. And Montana has since adopted the Model Business Corporation Act with its one-vote-per-share presumption. MONT. CODE ANN. § 35-1-524 (1991).

No court has followed or even spoken favorably of *Smith*. Almost seventy-five years ago, the First Circuit—in declining to follow *Smith*—dismissively described it as the product of applying the “old common law method by which stockholders voted per capita.” *Shawmut Ass’n v. Secs. & Exch. Comm.*, 146 F.2d 791, 796 (1st Cir. 1945). When given the opportunity, the Montana Supreme Court will presumably overrule *Smith*, as it did recently with one of its prior cases relying on an interpretation of a statute that had since been amended, because the amendments had “undermined the foundation” of the prior case’s holding. *Zinvest, LLC v. Gunnersfield Enters., Inc.*, 405 P.3d 1270, 1278 (Mont. 2017). To say that Montana’s adoption of the Model Business Corporation Act, with its presumption of voting per share, has similarly “undermined the foundation” of *Smith* would be an understatement of the first order.

The Minority Shareholders also cite a 1933 Virginia Supreme Court decision, *Seward v. American Hardware Co.*, 171 S.E. 650 (Vir. 1933), for the proposition that while per-share voting is the statutory default, there is

“authority to the contrary.” *Id.* at 661. Given the historical development of the law described earlier, it is not surprising that the Virginia Supreme Court in 1933 would acknowledge there was—at that time at least—still “authority to the contrary,” while simultaneously repudiating the old common-law method of per-capita voting and affirming the statutory default of per-share voting. *Seward*, 171 S.E. at 661.

Seward actually supports the Majority Shareholders’ position—and the trial court’s conclusion here—by holding that the phrase “majority of preferred stockholders” means “majority of stockholders in interest.” *Id.* at 634. In doing so, the Virginia Supreme Court cited *Horan* as one of several authorities supporting the conclusion that the phrase “majority of preferred stockholders” means “majority of interest,” and dismissed *Smith* as “authority to the contrary” that the Virginia Supreme Court plainly was choosing not to follow. *Id.* at 635-36.

This Court should likewise place *Smith* in its historical context and dismiss it as an “isolated deviation from the strong current of precedents—a derelict on the waters of the law”—whose foundation has been so undermined that it is no longer binding precedent, even in Montana. *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982) (citing and quoting with approval Justice Frankfurter’s dissenting opinion in *Lambert v. People of the State of California*, 355 U.S. 225, 232, 78 S. Ct. 240, L. Ed. 2d 228 (1957)).

In the end, the Minority Shareholders are left to rely on an interpretation of a single phrase in the ratification provision of Rosen

Supply's Articles as proof of the supposed clear and unmistakable intent of Rosen Supply's founding shareholders to displace the statutory presumption of per-share voting and to provide for per-capita voting. This is a claim that no court, other than the Montana Supreme Court in 1912, has ever endorsed, and is plainly insufficient to meet the Minority Shareholders' "heavy burden" to show that the trial court erred in reaching the opposite conclusion. *Reece*, 90 Wn. App. at 579.

3. The extrinsic evidence relied on by the Minority Shareholders fails to show that Rosen Supply's Articles were clearly intended to displace the statutory default one-vote-per-share rule.

The Minority Shareholders resort to a grab bag of extrinsic evidence that they claim establishes the context for their preferred interpretation of Rosen Supply's Articles that per-capita voting, and not per-share voting, is what the founding shareholders of Rosen Supply intended.

As previously stated, articles of incorporation constitute a contract between the corporation and its shareholders. *Walden*, 29 Wn. App. at 30-31. Washington follows the context rule of contract interpretation to determine intent. *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). Under that rule, extrinsic evidence is admissible as an aid in determining the parties' intent. *Id.* at 667-69. But extrinsic evidence is not admissible (1) to show a party's subjective intent as to the meaning of a contract term; (2) to show an intent independent of the contract; or (3) to vary, contradict, or modify the written contract. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005); *Hollis v.*

Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Much of the Minority Shareholders' proffered extrinsic evidence is inadmissible under Washington's context rule, and none of it is proof of a clear intent to depart from the statutory presumption of voting by share.

(a) The supposed intent of Max and Sara Rosen that Rosen Supply remain a "family business" is inadmissible evidence under the context rule.

As they did in the trial court, the Minority Shareholders make the emotional plea here that Rosen Supply's status as a "family business," coupled with the founding shareholders' encouragement of their grandchildren to work in the business by gifting shares of stock, somehow suffices to establish that Rosen Supply's Articles were clearly intended to provide for per-capita voting. *App. Op. Br.* at 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 16, 17, 27, 30 (counting not less than fifteen references to the term "family business" as if it were some sort of different entity to which Washington corporate law does not apply); CP 57, 113.

They base this contention principally on their own speculation that their grandparents intended to require per-capita voting to preserve Rosen Supply as a family business. CP 174, 175, 428, 435-36 (Matt) (speculating about his grandparents' intent even though he never spoke to them); CP 187 (David) (speculating that Rosen Supply's status as a "family company" is what his grandparents supposedly "intended" and "wanted"); CP 132 (Adam) (stating that he never spoke with his grandparents about their gift of shares to him but he nonetheless believed he understood their intent to maintain Rosen Supply as a family business).

This kind of speculation about someone else’s supposed subjective intent, which the Minority Shareholders admitted at their depositions was not based on personal knowledge, is plainly inadmissible under the context rule and therefore entitled to no weight. *Hearst Commc’ns*, 154 Wn.2d at 503-04 (stating that a party’s subjective intent is irrelevant if the objective intent can be determined from the written terms). And it contradicts the provisions of the 1978 SPA and the 1989 SPA entered into by the founding shareholders of Rosen Supply, both of which explicitly reserve the right of Rosen Supply to sell its assets and to cease doing business. CP 81-82, 357.

Applying this well-established Washington contract law disposes of the Minority Shareholders’ “family business” argument as a supposed basis for setting aside the statutory presumption in favor of voting by share.¹²

(b) The Original 1978 Bylaws.

The Minority Shareholders cite Articles III and XI of the Bylaws, which they claim support their per-capita-voting argument. Article III states: “Any director or all directors, may be removed by **a majority vote of shareholders present . . .**” CP 192 (Art. III § 2; emphasis added). But this language is not materially different from the phrase “ratified by a

¹² The fact that Harvey and Dianne expressed the belief during their depositions that the stock-sale restrictions in the 1989 SPA had outlived their usefulness is equally unavailing to prove a clear intent on the founding shareholders’ part to displace the one-vote-per-share presumption, and instead to lock in the debilitating limitation on corporate democracy of per-capita voting. As this case illustrates, per-capita voting would allow the Minority Shareholders to frustrate the efforts of the owners of a clear majority of the shares to manage the corporation’s affairs (*e.g.*, to update the Bylaws, to elect a new board of directors, and to take advantage of a strong market to the sell the business’s assets at a favorable price). *See* Section V.B.4.

majority or a quorum of the stockholders” in Article VIII § 4 of the Articles. And as discussed earlier, that phrase has been held repeatedly to mean voting by a majority in interest, rather than a majority in number.¹³

Any suggestion that the 1978 Bylaws could effectively displace the statutory default one-vote-per-share rule with per-capita voting is wrong. A corporation’s bylaws cannot establish a voting regime that conflicts with its articles. RCW 23B.02.060(4). The articles control over the bylaws, just as the corporate statutes control over the articles. 18 C.J.S. CORPORATIONS § 48 (updated electronically June 2019); *see Howe*, 77 Wn.2d at 77, 84-85. Given this universal rule of corporate governance, it makes no sense to treat the 1978 Bylaws as evidence of an intent to displace per-share voting with per-capita voting.

(c) The Updated 2017 Bylaws.

At the December 2017 special meeting, the Majority Shareholders voted to update virtually every section of Rosen Supply’s outdated 1978 Bylaws. *Compare* CP 191-99 (1978 Bylaws), *with* CP 207-17 (2017 Bylaws). This update included language confirming the per-share nature of Rosen Supply’s voting regime. CP 207-17. The Minority Shareholders contend that, by doing so, the Majority Shareholders have conceded that the 1978 Bylaws had not provided for voting by share. *App. Op. Br.* at 30-31.

¹³ In addition, Article XI of the Bylaws is consistent with the 1989 SPA. *Compare* CP 197-99, *with* CP 78-80. While the 1978 Bylaws and the 1989 SPA limit the right of Rosen Supply’s shareholders to sell their shares to a third party, none of those corporate documents limit the right of Rosen Supply to sell substantially all of its assets; indeed the 1989 SPA expressly permits Rosen Supply to do so. CP 81-82; *see also* Section V.B.3.d.

The Articles, and not the Bylaws, control shareholder voting. So no change to the Bylaws could have altered Rosen Supply's voting regime, which by statutory presumption has always been one vote per share. RCW 23B.07.210; RCW 23B.02.060(4); Former RCW 23A.08.300 (repealed 1989); Laws of 1933, ch. 185, § 28. And the Minority Shareholders offer no evidence that, before December 2017, the shareholders had voted other than by one vote per share in Rosen Supply's 41-year history.

The 1978 Bylaws had not been amended or updated since their adoption. The decision to update and restate the Bylaws in their entirety, rather than some sort of concession, was a responsible act of corporate governance by the Majority Shareholders and served to bring one of Rosen Supply's key corporate documents into the twenty-first century.

(d) The 1989 Stock Purchase Agreement.

The 1989 SPA reflects the intent of Rosen Supply's founding shareholders to "preserve" Harvey's and Dianne's "majority shareholder position" in Rosen Supply. CP 459. To effectuate that intent, the 1989 SPA gave the Majority Shareholders "the right to purchase from each other, or from their respective estates, all or a portion of the stock owned by the other" to "assure" that they maintained "a fifty-one (51%) percent shareholder position . . . throughout the remainder of their lives." CP 461. This belies the claim that Rosen Supply's Articles were intended to provide for per-capita voting because a "majority shareholder position" would be valueless to Harvey and Dianne unless they could use their voting power to control how Rosen Supply is governed. Per-capita voting thus would render

these provisions of the 1989 SPA meaningless and frustrate the founding shareholders' expressly stated intent.

The Minority Shareholders claim the 1989 SPA was “plainly drafted” to keep Rosen Supply as a family business and to prevent Rosen Supply from being sold to a third party except under limited circumstances. *App. Op. Br.* at 12. Again, they are wrong.

Section 16 of the 1989 SPA strikes a careful balance between the rights of the shareholders and the rights of Rosen Supply—consistent with the fundamental principle that a corporation is a separate legal entity from its shareholders. *Grayson v. Nordic Constr. Co., Inc.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979). The Act defines both a corporate “merger” and a corporate-asset sale to be “corporate actions”—not an act of individual shareholders. *See* RCW 23B.11.010; RCW 23B.12.010(1)(a); RCW 23B.13.020(1)(a); RCW 23B.01.400(5). By contrast, a sale of stock owned by individual shareholders is not a “corporate action.” RCW 23B.01.400(5).

Like its 1978 predecessor, the 1989 SPA does not restrict Rosen Supply's corporate actions. Instead, as the trial court correctly concluded, both SPAs provide that while the shareholders' right to sell their shares is restricted, Rosen Supply's right to sell its assets, enter into a merger, or take any other corporate action permitted by the Act is unimpaired. CP 81-82, 649. And, of course, Washington law protects minority shareholders by providing for a two-thirds vote of shares, rather than a simple majority, to

sell the corporation's assets, and provides for dissenters' rights. RCW 23B.12.020; RCW 23B.13.020.

The Majority Shareholders' desire to find a suitable third party to buy Rosen Supply's assets is not at odds with the 1989 SPA. Section 16 reflects the clear intent of Rosen Supply that the Majority Shareholders could, if they desired, and based upon their right to control the management of the company, vote as part of a two-thirds majority to sell substantially all of Rosen Supply's assets. *See* Section II.A.3; *see also Willard*, 515 S.E.2d at 288 (concluding that majority shareholders could exercise their rights by voting to approve the sale of corporate assets to a third party); *Checani*, 117 N.E.2d at 141 (stating the "fundamental principle" that majority shareholders can "regulate and control the lawful exercise of corporate powers").

(e) The Grandchildren's Stock Ownership Trust.

The provisions of the Grandchildren's Trust also support the trial court's conclusion that the Articles were not intended to provide for per-capita voting. The Trust specifically provided that the Majority Shareholders, as the co-trustees of the Trust, would each have been "entitled to vote one-half of the stock held in trust," making manifest what is presumptively Rosen Supply's voting-by-share scheme. CP 91.

The Minority Shareholders argue that because Max and Sara Rosen knew how to expressly use "voting by shares" language in the Trust, and did not use that language in the Articles, the presumption must be that "the change in usage was purposeful and reflects different and not parallel

meaning.” *App. Op. Br.* at 34 (citing *Markel Am. Ins. Co. v. Dagmar’s Marina, LLC*, 139 Wn. App. 469, 480, 161 P.3d 1029 (2007) (analyzing a garden-variety breach-of-contract case)). The obvious problem with this argument is that the statutory presumptions under the Washington Business Corporation Act are incorporated automatically into every Washington corporation’s articles. There was thus no need to expressly provide for voting by shares in the Articles; it was already presumed. And as discussed earlier, because the Articles do not reflect a clear and express intent to displace the statutory one-vote-per-share presumption, the default rule must, as a matter of law, be deemed incorporated in the Articles.¹⁴

(f) The Minority Shareholders’ course of conduct.

To the extent there is any ambiguity in a contract, which includes articles of incorporation, “a court will accord considerable weight to the construction the parties themselves give to it, evidenced by subsequent statements, acts, and conduct.” *Taylor v. Hinkle*, 200 S.W.3d 387, 396 (Ark. 2004). Course of conduct accepted or acquiesced in without objection is relevant to determining the parties’ intent. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.*, 164 Wn. App. 641, 655-56, 266 P.3d 229 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g (1981); BLACK’S LAW DICTIONARY 444 (11th ed. 2019).

Even before May 2017, the Minority Shareholders and Devin had been discussing a succession plan for Rosen Supply. CP 507. In May 2013,

¹⁴ In addition, and unlike the Articles, the Trust language dealt specifically with how co-owners of the same block of shares should handle voting those shares if they disagreed with each other.

Adam and David met with Rosen Supply's then-legal counsel, Janet Gray, to discuss a potential buy-sell agreement. CP 507-08. Ms. Gray summarized the meeting in detail and sent her minutes of the meeting to Adam and David, specifically requesting that they make any changes. CP 520, 521-24. Those minutes state:

- iii. All major business decisions shall require the affirmative vote of the shareholders holding 75% of the issued and outstanding shares of stock.
 - 1. In other words, Harvey and Dianne collectively own approximately 60% of the stock [sic], and for voting purposes, they don't have two votes, but have approx[imately] 60% of the votes [sic].

CP 531.

A few days later, Adam sent Ms. Gray his additions and deletions to the meeting minutes using red font and strikethroughs, stating that all the Minority Shareholders had "agreed to the various changes." CP 525, 527-31. Of the many edits and deletions they made to the minutes, the Minority Shareholders did not alter the portion of the minutes reflecting that Harvey and Dianne collectively owned about 60% of the stock, "and for voting purposes, they [didn't] have two votes, but ha[d] [about] 60% of the votes." CP 525, 531.¹⁵

The proposed buy-sell agreement was never signed by the parties and never did take effect. But the Minority Shareholder's course of conduct in working to draft a succession plan for the future of Rosen Supply shows

¹⁵ Ms. Gray incorrectly noted Harvey and Dianne's combined financial interest in Rosen Supply; they own about 65% of Rosen Supply's shares.

that they accepted and acquiesced in without objection the Majority Shareholders' right to vote all of their shares for all major business decisions. If the parties' course of conduct is to be weighed at all, it weighs in favor of the Majority Shareholders and against the Minority Shareholders' attempt to show by clear evidence an intent to displace per-share voting with per-capita voting.

4. The Minority Shareholders' cherry-picked excerpts of Harvey's and Dianne's deposition testimony are legally irrelevant to the Majority Shareholders' right to vote their shares to approve a third-party transaction by a two-thirds majority vote, and the Board's right by a majority vote to ratify or approve the transaction.

Dianne testified by deposition that it did not matter to her now if Rosen Supply remained a family business because "all the shareholders," and not just Harvey and Dianne, should "take advantage of the market." CP 59. She testified that selling Rosen Supply's assets to a third party would benefit not only Harvey and Dianne but would benefit all the shareholders of Rosen Supply equally. CP 59. Harvey testified by deposition that the markets, the sales, every phase of the business, the shareholders' personal lives, and the shareholders' positions have all "changed," and that "it's

pretty hard to live under an agreement [the 1989 SPA] that was done 40 [sic] years ago.” CP 120.¹⁶

The Minority Shareholders offer this testimony to show that Harvey and Dianne supposedly believe they no longer must abide by the 1989 SPA and can instead advance their personal interests at the expense of the Minority Shareholders to force a sale of Rosen Supply’s assets to a third party. *App. Op. Br.* at 3, 13, 17, 33, 38. But that is not true.

The founding shareholders’ supposed intent that Rosen Supply would forever be a “family business” was supposedly enshrined in the 1989 SPA. Under the 1989 SPA, any shareholder desiring to sell their shares must sell them either to the remaining shareholders or to Rosen Supply itself. CP 79-80. This ensures that only Rosen family members can own shares in the business, and consequently, the Majority Shareholders have never attempted to sell their shares to anyone other than the Minority Shareholders. CP 175.

But while the 1989 SPA prohibits the sale of Rosen Supply stock to third parties, “[n]othing contained” in the 1989 SPA limits Rosen Supply’s right to sell “substantially all of its assets” to a third party. CP 81. Such a sale under Washington law must be approved by a majority of the board of

¹⁶ When the 1989 SPA was signed, Harvey and Dianne were only in their 50s, so if they had sold their shares to the other shareholders at that time, it would have still made sense for them to accept a 15% down payment followed by monthly installments, as prescribed by the 1989 SPA. But now Harvey is 78 and Dianne is 81 years old, so such a payment plan would no longer make sense. *See* CP 230 (reflecting that all the shareholders agreed to a buyout of Aaron’s shares in 2012 that was different from the buyout provisions of the 1989 SPA). This further explains why Harvey and Dianne prefer to cause Rosen Supply to pursue a sale of the business’s assets, given the Minority Shareholders’ unwillingness to pay fair-market value for their shares or to pay all cash. CP 81-82.

directors and by a two-thirds majority vote of the outstanding shares of a corporation. RCW 23B.12.020. A sale of all of Rosen Supply's assets, as authorized by Section 16 of the 1989 SPA, can just as effectively end Rosen supply as a "family business" as would the sale of a controlling-share interest to a third party. If preserving Rosen Supply as a "family business" was such an absolute goal of the founding shareholders, they would not have included Section 16 in the 1989 SPA. CP 81-82.

The Majority Shareholders, along with Devin, comprise three of Rosen Supply's four board members and hold more than two-thirds of Rosen Supply's outstanding shares. They thus have the votes needed to approve a sale. Selling Rosen Supply's assets for fair-market value while the market is ripe would benefit all of the shareholders. But regardless, the fact that a sale would favor the interests of the Majority Shareholders "is not a disqualification of the right to vote." *Willard*, 515 S.E.2d at 288.

It has long been a fundamental principle that the majority shareholders can control and manage the lawful exercise of corporate powers, including the right to determine the policy of the corporation. "No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs." *Feess*, 115 P. at 567. And minority shareholders "cannot be permitted to restrain those holding a majority of the shares from exercising their rights to vote." *Checani*, 117 N.E.2d at 141-42; *see also Hill*, 80 S.E.2d at 362

(stating that minority shareholders “do not have the right to dictate corporate policies”).

5. This Court should resolve all doubts in interpreting the Articles in favor of the presumption against disenfranchising the Majority Shareholders.

A corporation enjoys great flexibility in crafting its articles of incorporation. But courts should hesitate to construe a corporate contract as disabling a majority of a corporate electorate from exercising their voting rights unless the interpretation of the contract is “certain and unambiguous.” *See Rohe v. Reliance Training Network, Inc.*, No. 17992, 2000 WL 1038190, at *16 (Del. Ch. July 21, 2000) (unpublished). A contract that deprives the majority shareholders from exercising their statutorily presumptive voting rights “is an unusual and potent document.” *Id.* (quoting *Rainbow Navigation, Inc. v. Yonge*, CIV. A. No. 9432, 1989 WL 40805, at *4 (Del. Ch. Apr. 24, 1989) (unpublished)). The contract must “clearly intend” to deprive the majority shareholders from exercising their voting rights; otherwise a “court ought not to resolve doubts in favor of disenfranchisement.” *Id.*

Thus, even if it could be said that the Articles at issue here are unclear about whether the statutory default of per-share voting applies, this Court should “resolve any remaining ambiguity to interpret the [Articles] as requiring a majority of shares vote.” *In re Westech*, 2014 WL 2211612, at *14 (concluding that a company’s shareholders’ agreement did “not make clear that it is a per capita voting mechanism”). The “presumption against disenfranchisement”—consistent with the vital principle of corporate

democracy—requires interpreting the Articles “consistent with the default rule” of one vote per share. *Salamone v. Gorman*, 106 A.3d 354, 370-71 (Del. 2014).

6. Endorsing the Minority Shareholders’ per-capita argument would lead to inequitable and anomalous results.

Adopting the Minority Shareholders’ argument would mean that, had Aaron Rosen sold only 79 of his 80 shares back to Rosen Supply, his one share would now give him the same voting power as Harvey’s 333.333 shares. Put another way, per capita voting would lead to the inequitable and anomalous result that a shareholder holding 98% of a corporation’s shares could be subjugated to the will of the other two shareholders, each of whom held only one share. *Hinkle*, 200 S.W.3d at 396. This scenario is precisely why the one-vote-per-share presumption exists and why, despite the flexibility to displace the statutory presumption, the shareholders’ intent to do so must be clearly and expressly stated in the corporation’s articles.

The Minority Shareholders have failed to meet their “heavy burden” to show that Rosen Supply’s Articles clearly express the intent of the founding shareholders to displace the one-vote-per-share scheme in favor of per-capita voting. Their extrinsic evidence does not begin to approach such a showing. Thus the trial court correctly granted the Majority Shareholders summary judgment.

C. The trial court correctly ordered Rosen Supply to indemnify the Majority Shareholders because they were sued derivatively as corporate directors and were “wholly successful on the merits” in having all of the Minority Shareholders’ claims dismissed.

This Court reviews de novo whether a party is entitled to attorneys’ fees. *Sunde*, 163 Wn. App. at 483-84.

Washington’s mandatory-indemnification statute provides for indemnification of a director for expenses incurred in litigation:

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.

RCW 23B.08.520; *see also* RCW 23B.08.540(1) (permitting a trial court to order indemnification if the “director is entitled to mandatory indemnification under RCW 23B.08.520”). Washington courts apply a presumption “in favor of indemnification.” 31 WASH. PRACTICE: BUSINESS LAW 23B.08.520 (updated electronically Feb. 2019); *see also Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) (interpreting Delaware’s indemnification statute “broadly” to further the remedial goals it was intended to achieve).

The policy for mandatory indemnification is that if a person is sued because of the person’s status as a corporate director, the corporation should pay the resulting litigation expenses. Indemnification “encourage[s] capable and responsible individuals to accept positions in corporate management.” *Weisbart v. Agri Tech, Inc.*, 22 P.3d 954, 957 (Colo. App.

2001) (quoting 13 FLETCHER ON CORPORATIONS § 6045.10 (1995)). It promotes the “desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated.” *Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369, 375 (7th Cir. 1992).

Rosen Supply’s Bylaws permit indemnification of directors “to the full extent permitted by the Washington Business Corporation Act,” and the Articles do not limit a director’s right to indemnification. CP 808-09. Thus indemnification is required if the director is “wholly successful” in defending any proceeding to which the director was a party “because of being a director.” RCW 23B.08.520.

The Minority Shareholders focus solely on the phrase “because of being a director of the corporation,” arguing that the Majority Shareholders were not entitled to indemnification because they “were not sued by reason of the fact that they were directors of officers.” *App. Op. Br.* at 37-38.

“[C]ourts have construed the terms ‘because’ or ‘by reason of the fact that’ in an expansive, rather than restrictive, fashion.” *Weisbart*, 22 P.3d at 957.¹⁷ For instance, Delaware has provided “broad statutory indemnification protection in situations where a corporate officer or director successfully defends against claims of personal liability that arise from or

¹⁷ “The terms ‘because’ and ‘by reason of the fact that’ have the same meaning.” *Weisbart*, 22 P.3d at 957 (citing authorities).

have a nexus to his corporate position.” *Witco Corp. v. Beekhuis*, 38 F.3d 682, 692 (3d Cir. 1994).

The Seventh Circuit, discussing the “nexus” required under Delaware law, rejected the claim—much like the one made by the Minority Shareholders here—that a director or officer must be sued for a breach of duty to the corporation or for a wrong committed on the corporation’s behalf to be entitled to indemnification. *Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369 (7th Cir. 1992). The court instead determined that the claim need only be “connected” to the party’s “status” as director or officer, reasoning that the statutory phrase “by reason of the fact” is “broad enough to encompass suits against a director in his official capacity as well as suits against a director that arise more tangentially from his role, position, or status as a director.” *Id.* at 372, 375 (permitting indemnification where the party “may have been sued, at least in part, because he was a director”).

Whether a person has been sued in part “because of being a director of a corporation” is determined by looking at the substance of the allegations and the nature and context of the transaction giving rise to the complaint. *Weisbart*, 22 P.3d at 958; *Grove v. Daniel Valve Co.*, 874 S.W.2d 150, 153 (Tex. App. 1994).

The Oregon Court of Appeals, interpreting Oregon’s identical mandatory-indemnification statute, has already twice rejected arguments identical to the Minority Shareholders’ arguments here. *See, e.g., Damerow Ford Co. v. Bradshaw*, 876 P.2d 788, 791-92, 798 (Or. Ct. App. 1994) (holding that the defendant director Preble was entitled to mandatory

indemnification because the plaintiff “*could* have brought this [breach-of-fiduciary-duty] action against Preble, even if he had not been an officer or director,” but the plaintiff “did not do that”); *Sabre Farms, Inc. v. Jordan*, 717 P.2d 156, 157-58, 161 (Or. Ct. App. 1986) (holding that the director defendants were entitled to mandatory indemnification because the claim that they breached their fiduciary duties by self-dealing when they asked non-interested members of the board to approve a resolution that would have benefitted the director defendants personally “would not have been brought against them if they had not been [directors]”), *supplemented*, 723 P.2d 1078 (1986).

The Minority Shareholders filed their lawsuit as a shareholder-derivative action. CP 1, 6, 10-12. They alleged that as “members and former members of the Board,” the Majority Shareholders owed Rosen Supply fiduciary duties “as Board members.” CP 6; *see Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 697, 871 P.2d 146 (1994) (stating that corporate directors owe fiduciary duties to the corporation and all shareholders) (citing RCW 23B.08.300). They alleged that by voting their shares to adopt three resolutions at the special meeting, the “Defendant Board Members” exceeded their authority as directors of Rosen Supply and breached fiduciary duties based on their role as directors. CP 6-8. Their declaration of service of the summons and verified complaint confirms that the Majority Shareholders were sued in their capacities as “governing persons” of Rosen Supply. CP 1003-04.

The Minority Shareholders admitted below that the Majority Shareholders were “wholly successful on the merits” in defending against the Minority Shareholders’ derivative claims because the trial court dismissed every claim asserted by the Minority Shareholders. CP 796-97; REV. MODEL BUS. CORP. ACT § 8.52 Official Comment (1984) (stating that a “defendant is ‘wholly successful’ only if the entire proceeding is disposed of on a basis which does not involve a finding of liability”). The trial court not only validated the Majority Shareholders’ actions taken at the special meeting but also held that the Majority Shareholders did not breach any fiduciary duty owed through their position as directors of Rosen Supply. As a result, it correctly ordered Rosen Supply to indemnify the Majority Shareholders for having to defend against the Minority Shareholders’ unmeritorious claims.

The Minority Shareholders claim the trial court erred in ordering Rosen Supply to indemnify the Majority Shareholders because Rosen Supply was an unrepresented nominal defendant. *App. Op. Br.* at 41. Yet they admitted in their initial summary-judgment motion that Rosen Supply would be bound by all the trial court’s rulings. CP 39 (“Judgment would be binding on all shareholders and on [Rosen Supply] itself. *See LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 778[, 496 P.2d 343] (1972); *see also* 46 AM. JUR. 2D JUDGMENTS § 598 ([A] judgment for or against a shareholder in [derivative] actions is generally considered to bind the corporation and its officers, as well as other shareholders, including those not made parties to the action’”).

The Minority Shareholders should be judicially estopped from arguing otherwise; they should be barred from being allowed to bind and benefit Rosen Supply when they wish, but cry wolf when they are dissatisfied with a trial court's rulings potentially affecting Rosen Supply.¹⁸ Even after the trial court declared on summary judgment that Rosen Supply had the right to sell substantially all of its assets, the Minority Shareholders did not argue—as they do here—that because Rosen Supply was an unrepresented nominal defendant, the trial court's ruling could not bind Rosen Supply. Moreover, in shareholder-derivative actions, the corporation and all its shareholders are bound by the trial court's rulings. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970); *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *Saxton v. Federal Hous. Finance Agency*, 245 F. Supp. 3d 1063, 1074 (N.D. Iowa 2017).

Because the Majority Shareholders were sued in their capacity as directors of Rosen Supply, and were wholly successful in defending against the Minority Shareholders' claims, the trial court correctly ordered mandatory indemnification under RCW 23B.08.520. CP 1074-77; RP (11/2/18) 51. This Court should thus affirm the trial court's order requiring Rosen Supply to indemnify the Majority Shareholders for the expenses they incurred in successfully defending against all the Minority Shareholders' claims.

¹⁸ The Minority Shareholders argue, on the one hand, that Rosen Supply is merely a nominal party but, on the other hand, argue that Rosen Supply is such an important party that it must have its own lawyer. The Minority Shareholders can't have it both ways.

- D. The trial court properly exercised its discretion in awarding the Majority Shareholders their reasonable fees and costs in successfully defending against all the Minority Shareholders' claims.**
- 1. The trial court properly exercised its discretion in "significantly" reducing the Majority Shareholders' fees request.**

The Minority Shareholders contend the Majority Shareholders' fees request was so "egregious" that the trial court should have denied it outright. *App. Op. Br.* at 45. They cite no authority for this proposition, nor could they, for there is none to support it. Once the trial court had concluded the Majority Shareholders were entitled under the governing corporate law to an award of fees in successfully defending against all the Minority Shareholders' claims, the only issue left was the proper amount of fees to be awarded. *Pub. Util. Dist. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994).

A trial court has "broad discretion" in determining the reasonableness of fees. *Sunde*, 163 Wn. App. at 484. A trial court abuses its discretion only when its fees decision is "manifestly unreasonable." *Crest*, 128 Wn. App. at 772. By focusing not on whether the trial court abused its discretion, but rather on what they contend were various examples of excessive billing and over-staffing by defense counsel, the Minority Shareholders skirt the real issue.

Washington courts use the lodestar method to determine the reasonableness of attorneys' fees, requiring the court to multiply the number of hours reasonably expended by the attorneys' reasonable hourly rates.

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). That is precisely what the trial court did here.

The trial court found that the “hourly rates of all of the professional timekeepers at Lane Powell . . . were reasonable and appropriate for the work performed and within the range of rates for attorneys providing similar expertise and services in the Puget Sound region.” CP 1517 (FF 2). The Minority Shareholders’ failure to assign error to this finding makes it a verity on appeal. *Muridan v. Redl*, 3 Wn. App. 2d 44, 62-63, 413 P.3d 1072 (2018).

That leaves the trial court’s determination about the reasonableness of the hours expended as the only finding to which the Minority Shareholders have assigned error. The trial court found that the “Lane Powell attorneys, paralegals, and other professionals whose time is claimed” here “spent a reasonable amount of hours in connection with the proceedings, given the complexity of the legal issues presented, the tasks necessary to be completed and the significance of the matters at stake between the parties to this dispute.” CP 1517 (FF 3). It then went on to find that “there was duplication of effort by different attorneys and an excess amount of hours” billed, and made downward adjustments to the fees requested, which it explained in a letter ruling that accompanied its findings and conclusions. CP 1233-35, 1517-18.

The Majority Shareholders divided their fees request into six categories. CP 1096. In its letter ruling, the trial court began by finding the Majority Shareholders’ overall request for fees to be “excessive” (CP 1233),

and then proceeded to make downward adjustments to each and every category of the fees requested, as it determined in its discretion to be appropriate:

- **First category** (fees incurred for an initial claims analysis, answering the complaint, and creating a litigation strategy): **The trial court reduced the requested fees by 39% from \$49,264 to \$30,000.**
- **Second category** (fees incurred for ongoing discovery): **The trial court reduced the requested fees by 23% from \$142,843 to \$110,000.**
- **Third category** (fees incurred for drafting a partial-summary-judgment motion, responding to a cross-motion for partial summary judgment, and drafting a motion to strike inadmissible evidence): **The trial court reduced the requested fees by 19% from \$148,688 to \$120,000.**
- **Fourth category** (fees incurred for trial preparation): **The trial court reduced the requested fees by 29% from \$28,407 to \$20,000.**
- **Fifth category** (fees incurred for drafting a motion for indemnification and opposing a second motion for summary judgment): **The trial court reduced the requested fees by 24% from \$59,236 to \$45,000.**
- **Sixth category** (fees incurred for all other tasks, including intra-office communications, communications with clients, and communications with opposing counsel): **The trial court reduced the requested fees by 24% from \$98,475 to \$75,000.**

CP 1234. The letter ruling reflects the trial court's meticulous review of the billing entries for each category of the fees request through October 31,

2018, which it reduced by at least 19% for each category.¹⁹ *Compare* CP 1096, *with* CP 1233-35.

So while the Minority Shareholders claim the trial court abused its discretion, the record does not support that the trial court failed to apply the lodestar method in reaching its conclusion as to what award of fees was reasonable. And while the Minority Shareholders contend the trial court should have gone further in the reductions it ordered to the fees request,²⁰ they have not shown how the trial court's reductions to the six categories of the Majority Shareholders' fees request were manifestly unreasonable, simply because the reductions did not go as far as the Minority Shareholders would have liked.

That the Minority Shareholders disagree with the trial court's decision not to reduce the Majority Shareholders' fees request even more falls far short of proof that the amount awarded was "manifestly unreasonable." *Crest*, 128 Wn. App. at 772. The trial court correctly applied the lodestar method in arriving at its fees award based on a

¹⁹ In addition, the trial court reduced the Majority Shareholders' requested fees incurred between November 1, 2018, and December 10, 2018, by about 24% from \$62,750 to \$47,750. CP 1234. The trial court awarded the Majority Shareholders all of their requested costs, and found them to be reasonable, for a total costs award of \$21,637.24. CP 1234-35. It ultimately awarded the Majority Shareholders \$469,387.24 in fees and costs. CP 1235, 1517.

²⁰ For instance, they complain that 21 different timekeepers worked on the case, which they say "is impossible to reconcile to the volume of work required." *App. Op. Br.* at 43-44. But most of those timekeepers billed only minimal amounts of time, in some cases less than one hour. CP 1101-02. And some of the Minority Shareholders' contentions are flat-out wrong. For example, they claim that one Lane Powell partner, Ms. Walder, billed about 50 hours at the rate of \$510/hour to draft a motion to strike. *App. Op. Br.* at 44. Yet the record reflects that she billed only 17.8 hours to prepare that motion and two declarations, and 9.1 hours to draft the reply, two additional declarations, and a proposed order. CP 1495.

significant reduction to the amount that had been requested. That the trial court might have ordered more reductions is not proof that the trial court abused its discretion in deciding on the reductions it did make.

2. The Majority Shareholders were not required to segregate their recoverable expenses under RCW 23B.08.520. The claims and counterclaims were also so interrelated that segregation of fees was impossible.

The Minority Shareholders contend the Majority Shareholders were required, but failed, to segregate their fees between recoverable legal expenses and nonrecoverable expenses, relying on *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N)*, 119 Wn. App. 665, 82 P.3d 1199 (2004). But *Loeffelholz* was decided under RCW 4.24.510, which provides immunity from civil liability for defamation to a party that brings a complaint with a government agency about a matter reasonably of concern to the agency, and allows for the recovery of the “expenses and reasonable attorneys’ fees incurred” to a party that succeeds “in establishing [this statutory] defense[.]”

Unlike RCW 4.24.510, which limits a prevailing party’s recovery to only those fees and expense incurred in establishing a particular statutorily defined defense, RCW 23B.08.520 has no such limitation. It instead provides that “a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, *in the defense of any proceeding* to which the director was a party.” (Emphasis added). This necessarily includes the right to all fees and expenses reasonably incurred in the “proceeding,” not just for those claims on which a director was successful,

provided the director was “wholly successful” in the defense of the “proceeding.” And that was the case here.

The Minority Shareholders’ reliance on *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), is similarly misplaced. *Hume* addressed attorneys’ fees under RCW 49.48.030, which provides that fees are awarded only “[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her.” 124 Wn.2d at 672. *Hume* reversed an attorneys’ fee award for work unique to successful harassment claims, but which did not result in wage recoveries. *Id.* at 673. Again, unlike the statute at issue in *Hume*, which allows for the recovery of fees only for specific claims, RCW 23B.08.520 allows for fees and expenses incurred in the successful defense of “*any proceeding* to which the director was a party,” regardless that various claims may have been asserted in those proceedings. (Emphasis added).

The California Supreme Court’s decision in *Serrano v. Unruh*, 186 Cal. Rptr. 754, 652 P.2d 985 (Cal. 1982), is readily distinguishable. *Serrano* did not even concern a challenge to the amount of the prevailing parties’ fees; nor did it suggest that the right to fees could be forfeited. Rather, *Serrano* addressed a question of first impression in California: whether, under the doctrine of “private attorney general” awards, counsel are entitled to recover fees incurred in connection with their fee petitions. *Serrano* remanded to the trial court “the portion of the order that denie[d] compensation for services related to the fee motions,” while merely noting

in passing that courts may deny “outrageously unreasonable” fees claims. *Id.* at 994, 997. So in addition to being nonbinding, *Serrano* is inapposite.

The Minority Shareholders also fail to come to grips with whether segregability was even a possibility, given the facts and circumstances of this case. When the claims in a proceeding are so related that no reasonable segregation of successful and unsuccessful claims can be made, there need not be segregation of attorneys’ fees. *Hume*, 124 Wn.2d at 673. A relevant consideration in determining whether the apportionment of fees is required is if the claims were based on a “common core of facts.” *Bright v. Frank Russell Invs.*, 191 Wn. App. 73, 82, 361 P.3d 245 (2015).

Here both the Minority Shareholders’ verified complaint and the Majority Shareholders’ counterclaims were based on the same core of facts. The written discovery, the depositions taken, and the arguments advanced in defense of the Minority Shareholders’ claims, as well as in support of all of the Majority Shareholders’ counterclaims, were likewise based on a “common core of facts.” Defense counsels’ efforts thus supported both the Majority Shareholders’ counterclaims and their “wholly successful” defense of the Minority Shareholders’ claims, and were so interrelated as to make segregation impossible.

Relatedly, the Minority Shareholders contend the trial court should have reduced the fees request to account for unsuccessful legal theories pursued by the Majority Shareholders. *App. Op. Br.* at 47. But as with interrelated claims, the United States Supreme Court has recognized that

apportionment is not required where a party prevails, even if the party did not prevail on every issue raised:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. ***The result is what matters.***

Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (emphasis in original).

Thus “when parties prevail on any significant issue that is inseparable from issues on which the parties did not prevail, a court may award attorney fees on all issues.” *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 672, 989 P.2d 1111 (1999). Alternative theories cannot be said to be “unrelated, inseparable claims” if the “attorney’s work on each theory is work ‘expended in pursuit of the ultimate result achieved.’” *Id.* at 673 (quoting *Hensley*, 461 U.S. at 435). “The result is what matters.” *Hensley*, 461 U.S. at 435.

The Washington Court of Appeals in *Bright* quoted *Hensley* approvingly in rejecting the mathematical approach that the Minority Shareholders advocate here of apportioning successful and unsuccessful claims by percentage:

We agree with the District Court’s rejection of a mathematical approach comparing the total number of issues

in the case with those actually prevailed upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors.

191 Wn. App. at 80 (quoting *Hensley*, 461 U.S. at 435-36 n.11)

Finally, to the extent it was reasonable and practical to do so, the trial court did deduct an amount from the Majority Shareholders' fees request for those fees that were identifiable as uniquely focused on their unsuccessful counterclaims. CP 1234. The Minority Shareholders have failed to show why it was manifestly unreasonable for the trial court not to have gone beyond the reduction that it did order.

3. A comparison of the fees incurred by the losing party with the fees the prevailing party incurred is merely one factor, among many others, the trial court may consider in exercising its discretion to award fees.

The Minority Shareholders argued to the trial court that the Majority Shareholders' fees request should be reduced because the Minority Shareholders incurred "less than a third" of the Majority Shareholders' claimed expenses. RP (12/10/18) 29, 38. Yet the Minority Shareholders' counsel did not produce a shred of evidence to substantiate their claim of incurring only \$200,000 in fees. RP (12/10/18) 41.

The same trial judge presided over this case from beginning to end, including multiple dispositive and nondispositive motions; as a result, the trial judge was intimately familiar with the litigation history and the—ultimately successful—efforts made by the Majority Shareholders' counsel to prevail against every one of the Minority Shareholders' claims. RP (12/10/18) 16. While the fees incurred by the party challenging a fees

request are appropriate to consider for “comparative purposes,” the trial judge is in the “best position to determine the proper lodestar amount.” *Miller v. Kenny*, 180 Wn. App. 772, 821, 825, 325 P.3d 278 (2014).

Appellate courts should make every effort not to fall prey to the temptation to “second guess the trial court’s determination of a reasonable attorney fee.” *Martinez v. City of Tacoma*, 81 Wn. App. 228, 249, 914 P.2d 86 (1996). That the Majority Shareholders may have expended greater resources to achieve an across-the-board victory against an attempt to frustrate their voting rights does not constitute a valid basis for upending the trial court’s fees award—particularly not an award tempered by a substantial reduction in the amount of fees requested.

VI. RAP 18.1 REQUEST FOR FEES AND COSTS

When a statute or a contract allows an award of fees and costs to the prevailing party in the trial court, the appellate court has the inherent authority to make such an award on appeal. *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). RCW 23B.08.520 requires a corporation to “indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.” RCW 23B.08.540(1) permits a trial court to indemnify a corporate director who is a party to a proceeding. In a declaratory-judgment action, RCW 7.24.100 allows for an award of costs “as may seem just and equitable.” The Bylaws require Rosen Supply to indemnify its directors for

costs, expenses, and fees incurred in defending any proceeding in which its directors were sued. CP 196, 808-09. Because this Court should affirm the trial court's summary-judgment order in the Majority Shareholders' favor concluding that Rosen Supply's shareholders vote on a per-share basis, this Court should award them their reasonable costs, expenses, and fees in defending that order on appeal.

VII. CONCLUSION

This Court should affirm (1) the trial court's order declaring that each shareholder in Rosen Supply is entitled to one vote for each share the shareholder owns; (2) the trial court's order requiring Rosen Supply to indemnify the Majority Shareholders for the expenses incurred in successfully defending against all the claims asserted by the Minority Shareholders; and (3) the trial court's order awarding the Majority Shareholders their reasonable attorneys' fees and costs. This Court should also award the Majority Shareholders their reasonable attorneys' costs, expenses, and fees incurred on appeal.

Respectfully submitted: July 17, 2019.

LANE POWELL PC

By MBK #14405 for
Gail E. Mautner, WSBA No. 13161

CARNEY BADLEY SPELLMAN, P.S.

By Michael B King
Michael B. King, WSBA No. 14405
Kenneth W. Hart, WSBA No. 15511
Rory D. Cosgrove, WSBA No. 48647

Attorneys for Respondents Harvey Rosen and Dianne Arensberg

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Via Appellate Portal to the following:

Gail E. Mautner Mark G. Beard Katie D. Bass Lane Powell, PC PO Box 91302 Seattle WA 98111-9402 mautnerg@lanepowell.com beardm@lanepowell.com schaera@lanepowell.com jobityt@lanepowell.com flabelA@lanepowell.com carchanoh@lanepowell.com eltonp@lanepowell.com	Robert M. Sulkin Avi J. Lipman Leslie E. Barron McNaul Ebel Nawrot & Helgren, PLLC 600 University St Ste 2700 Seattle WA 98101-4151 rsulkin@mcnaul.com alipman@mcnaul.com lbarron@mcnaul.com
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DATED: July 17, 2019.



Patti Saiden, Legal Assistant

INDEX OF APPENDICES

- Appendix A:** Trial court's summary-judgment order concluding that each share of stock in Rosen Supply is entitled to one vote (CP 648-50)
- Appendix B:** Trial court's order concluding that Harvey and Dianne are entitled to indemnification from Rosen Supply (CP 1074-77)
- Appendix C:** Trial court's letter ruling explaining the rationale of its fees-and-costs award (CP 1233-35)
- Appendix D:** Trial court's findings of fact and conclusions of law supporting the fees-and-costs award (CP 1515-18, 1547-49)
- Appendix E:** Ballinger Code discussed and analyzed in *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 60 P. 135 (1900)

APPENDIX

A

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9/11/2018



09-10-18

THE HONORABLE EDMUND MURPHY
Hearing Date: August 17, 2018



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ADAM ROSEN, an individual; DAVID
ROSEN, an individual; and MATTHEW
ROSEN, an individual; individually and
derivatively on behalf of ROSEN SUPPLY
COMPANY, INC., a Washington Corporation,

Plaintiffs,

v.

HARVEY ROSEN, an individual; and
DIANNE ARENSBERG, and individual,

and

ROSEN SUPPLY COMPANY, INC., a
Washington Corporation,

Nominal Defendant,

Defendants.

No. 17-2-13627-7

ORDER GRANTING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT

~~PROPOSED~~

EM

(CLERK'S ACTION REQUIRED)

THIS MATTER having come before the Court upon the filing of the Defendants
Harvey Rosen and Dianne Arensberg's (collectively, "Defendants") Motion for Partial
Summary Judgment, the Court having reviewed all pleadings filed by the parties relating to
the Motion herein, including:

1. Defendants' Motion for Partial Summary Judgment;
2. Declaration of Harvey Rosen in Support of Defendants' Motion for Partial
Summary Judgment and attached exhibits;

~~PROPOSED~~ ORDER GRANTING DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT - 1
No. 17-2-13627-7

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SEATTLE, WA 98111-9402
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1 3. Declaration of Dianne Arensberg in Support of Defendants' Motion for Partial
2 Summary Judgment;

3 4. Declaration of Aaron Schaer in Support of Defendants' Motion for Partial
4 Summary Judgment and attached exhibits;

5 5. Plaintiffs' Opposition, if any;

6 6. Defendants' Reply, if any; and

7 7. ~~Declaration of Leslie Bawon (less documents & testimony~~

8 ~~& stricken by the court and Declaration of Gail E. Manber w/
Attached Exhibits; and (9) Sur Reply Memorandum of Defendants~~

9 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

10 that there is no genuine issue of material fact and that Harvey Rosen and Dianne Arensberg
11 are entitled to judgment as a matter of law GRANTING Defendants' Motion for Partial
12 Summary Judgment AND DECLARING pursuant to chapter 7.24 RCW as follows:

13 1. In accordance with RCW 23B.07.210(1), each outstanding share of Rosen
14 Supply Company, Inc. ("RSC" or "the Company") is entitled to one vote on each matter voted
15 on at a shareholders' meeting;

16 2. In accordance with RSC's Articles of Incorporation, RSC's voting regimen is
17 one share, one vote, along with cumulative voting for the election and removal of directors,
18 and not on a per capita voting basis;

19 3. As provided in Section 16 of the 1989 Stock Purchase Agreement, there is no
20 limitation on RSC's right to sell substantially all of RSC's assets, cease doing business entirely,
21 liquidate RSC, or exercise such other rights as are available consistent with the corporate law
22 of the state of Washington;

23 4. RSC validly updated its Bylaws at RSC's December 1, 2017 Special Joint
24 Meeting of the Shareholders and Board members of RSC and those new Bylaws remain in
25 effect at the Company;

26
[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT - 2
No. 17-2-13627-7

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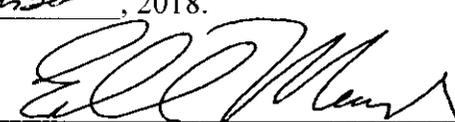
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9/11/2018

1 5. RSC's current Board of Directors is comprised of Harvey Rosen, Dianne
2 Arensberg, Devin Rosen, and Adam Rosen pursuant to the cumulative voting procedure
3 conducted at RSC's December 1, 2017 Special Joint Meeting of the Shareholders and Board
4 members of RSC;

5 6. Plaintiffs' claims with respect to the enforceability of the actions taken at the
6 December 1, 2017 Special Joint Meeting of the Shareholders and Board members of RSC are
7 hereby DISMISSED WITH PREJUDICE.

8 DATED this 5th day of September, 2018.

9
10 
THE HONORABLE EDMUND MURPHY

11 Presented by:
12 LANE POWELL PC

13
14 By 
15 Gail E. Mautner, WSBA No. 13161
16 Mark G. Beard, WSBA No. 11737
17 Aaron Schaer, WSBA No. 52122
Attorneys for Defendants/Counterclaim Plaintiffs,
Harvey Rosen and Dianne Arensberg



18 *Copy Received, Notice of Presentation Waived*
19 *Approved as to Form*
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[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT - 3
No. 17-2-13627-7

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APPENDIX

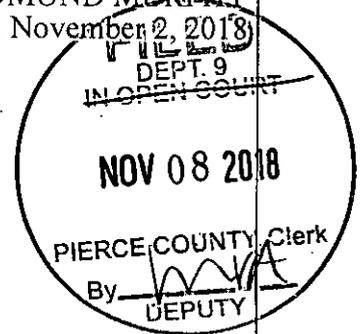
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THE HONORABLE EDMUND MURPHY
Hearing Date: November 2, 2018



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ADAM ROSEN, an individual; DAVID
ROSEN, an individual; and MATTHEW
ROSEN, an individual; individually and
derivatively on behalf of ROSEN SUPPLY
COMPANY, INC., a Washington Corporation,

Plaintiffs,

v.

HARVEY ROSEN, an individual; and
DIANNE ARENSBERG, and individual,

and

ROSEN SUPPLY COMPANY, INC., a
Washington Corporation,

Nominal Defendant,

Defendants.

No. 17-2-13627-7

ORDER RE: (1) DEFENDANTS'
MOTION FOR INDEMNIFICATION
AND OTHER RELIEF AND (2)
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT RE
COUNTERCLAIMS

(CLERK'S ACTION REQUIRED)

THIS MATTER having come before the Court upon the filing of the Defendants
Harvey Rosen and Dianne Arensberg's (collectively, "Defendants") Motion for
Indemnification and Other Relief, and Plaintiffs' Motion for Summary Judgment re
Counterclaims, the Court having reviewed all pleadings filed by the parties relating to the
Motion herein, including:

- 1. Defendants' Motion for Indemnification and Other Relief;

ORDER RE (1) DEFENDANTS' MOTION FOR INDEMNIFICATION & OTHER
RELIEF AND (2) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE
COUNTERCLAIMS - 1
No. 17-2-13627-7

131000.0002/7429523.5

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11/15/2018 8088

1 2. Declaration of Gail Mautner in Support of Defendants' Motion for
2 Indemnification and Other Relief and attached exhibits;

3 3. Plaintiffs' Motion for Summary Judgment Re Counterclaims;

4 4. Declaration of Avi J. Lipman in Support of Plaintiffs' Motion for Summary
5 Judgment Re Counterclaims, with Exhibits A-L attached thereto;

6 5. Defendants' Harvey Rosen and Dianne Arensberg's Opposition to Plaintiffs'
7 Motion for Summary Judgment Re Counterclaims;

8 6. Declaration of Gail Mautner in Support of Defendant's Opposition to Plaintiffs'
9 Motion for Summary Judgment and attached exhibits;

10 7. Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment re
11 Counterclaims;

12 8. Supplemental Declaration of Avi J. Lipman in Support of Plaintiffs' Motion for
13 Summary Judgment re Counterclaims , with Exhibit M attached thereto

14 9. Plaintiffs' Opposition to Defendant's Motion;

15 10. Defendants' Reply in support of their motion; and

16 11. The balance of the files and records herein, other than evidence and argument
17 previously stricken and excluded.

18 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND**
19 **DECREED:**

20 1. Pursuant to the Court's Orders on September 5, 2018 and the parties'
21 September 26, 2018 Stipulation Regarding Discovery and Status of Claims, each and every
22 claim brought by Plaintiffs in their Verified Complaint, dated and filed December 1, 2017, is
23 hereby **DISMISSED WITH PREJUDICE.**

24 2. There are no genuine issues of material fact with regard to the relief requested
25 by both defendants, Harvey Rosen and Dianne Arensberg, on the one hand, and Plaintiffs on
26 the other hand. Accordingly, Defendants are entitled to judgment as a matter of law on some

ORDER RE (1) DEFENDANTS' MOTION FOR INDEMNIFICATION & OTHER
RELIEF AND (2) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE
COUNTERCLAIMS - 2
No. 17-2-13627-7

131000.0002/7429523.5

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1 of their counterclaims, and Plaintiffs are entitled to judgment as a matter of law on other
2 counterclaims. Accordingly, Defendants' Motion for Indemnification and Other Relief and
3 Plaintiffs' Motion for Summary Judgment are hereby **GRANTED** in part and **DENIED** in part
4 as follows.

5 3. Defendants are entitled to mandatory indemnification by Rosen Supply
6 Company, Inc. for their reasonable expenses, including attorneys' fees and costs, pursuant to
7 RCW 23B.08.520, RCW 23B.08.540(1) and Article XI of Rosen Supply Company, Inc.'s
8 Amended and Restated Bylaws. Pursuant to RCW 23B.08.540(1), Defendants are also entitled
9 to reimbursement by Rosen Supply Company, Inc. of their reasonable expenses incurred to
10 obtain court-ordered indemnification. Defendants shall, prior to any indemnification or
11 reimbursement, submit a fee and cost petition to the Court for that determination of
12 reasonableness, with a hearing and briefing schedule to be agreed to between the parties.

13 4. Accordingly, Rosen Supply Company, Inc. shall reimburse Harvey Rosen and
14 Dianne Arensberg's reasonable expenses, including attorneys' fees and costs, incurred in
15 connection with these proceedings from December 1, 2017 through the date of this Order.
16 Defendants' Counterclaim for the advancement of expenses is **DENIED**.

17 The Court hereby grants Harvey Rosen and Dianne Arensberg the following
18 **DECLARATORY RELIEF** pursuant to chapter 7.24 RCW:

19 5. The Court hereby declares that Harvey Rosen and Dianne Arensberg have **NOT**
20 violated the 1989 Stock Purchase Agreement.

21 6. Defendants' Counterclaim against Plaintiffs for frivolous litigation pursuant to
22 RCW 4.84.185 and otherwise is **DISMISSED** with prejudice. The Court does not find that
23 Plaintiffs lacked probable cause for bringing their claims.

24 7. The Court **DISMISSES** with prejudice Defendants' Counterclaim that Adam
25 Rosen breached his fiduciary duty as a director of Rosen Supply Company, Inc. by filing this
26 lawsuit.

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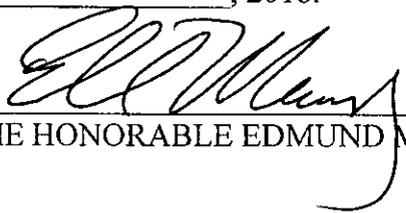
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8. The Court hereby **DENIES** Defendants' request for injunctive relief and **DISMISSES** Defendants' Counterclaim for injunctive relief.

Furthermore, the Clerk of Court is directed as follows:

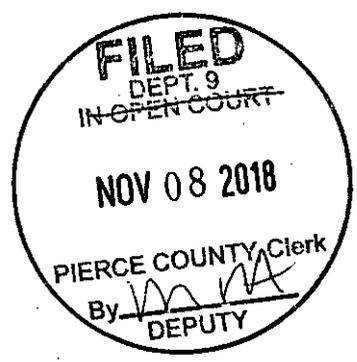
9. As there are no further Claims or Counterclaims in this matter that have not been resolved by the Court's Orders, the trial set for November 29, 2018, and all related pretrial deadlines, are hereby **STRICKEN**.

SO ORDERED this 7th day of November, 2018.


THE HONORABLE EDMUND MURPHY

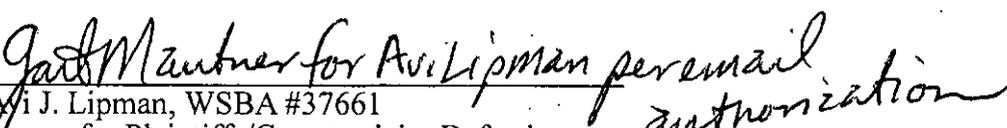
Presented by:
LANE POWELL PC

By 
Gail E. Mautner, WSBA No. 13161
Mark G. Beard, WSBA No. 11737
Kate Bass, WSBA No. 51369
Attorneys for Defendants/Counterclaim Plaintiffs,
Harvey Rosen and Dianne Arensberg



Copy Received Notice of Presentation Waived;
Approved as to Form

MCNAUL EBEL NAWROT & HELGREN, PLLC

By 
Avi J. Lipman, WSBA #37661
Attorneys for Plaintiffs/Counterclaim Defendants,
Adam Rosen, David Rosen, and Matthew Rosen

ORDER RE (1) DEFENDANTS' MOTION FOR INDEMNIFICATION & OTHER RELIEF AND (2) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE COUNTERCLAIMS - 4
No. 17-2-13627-7

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APPENDIX

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17-2-13627-7 52556398 LTR9 12-21-18

**SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**

EDMUND MURPHY, JUDGE
Michelle Van Antwerp, Judicial Assistant
Emily Dirton, Court Reporter
Department 09
(253) 798-3655

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

December 19, 2018



Avi Joshua Lipman
Attorney at Law
600 University St Ste 2700
Seattle, WA 98101-3143

Gail Mautner
Attorney at Law
1420 5th Ave Ste 4200
Seattle, WA 98101-2375

RE: ADAM ROSEN et al. vs. HARVEY ROSEN et al.
Pierce County Cause No. 17-2-13627-7

Dear Counsel:

This matter came before the Court on December 10, 2018, for argument on Defendants' Motion to Approve Attorneys' Fees and Costs Pursuant to RCW 23B.08.520 and RCW 23B.08.540(1). The Court allowed the Plaintiffs to file a declaration in response to the Declaration of Timothy Leyh and for the Defendants to file a reply declaration if they chose to do so. The Court has reviewed all pleadings filed by the parties relating to the Motion, including: Defendants' Motion to Approve Attorneys' Fees and Costs; Declaration of Gail Mautner and attached exhibits; Plaintiffs' Response to Defendants' Motion to Approve Attorneys' Fees and Costs; Declaration of Avi Lipman and attached exhibits; Defendants' Reply in Support of Defendants' Motion to Approve Attorneys' Fees and Costs; Second Declaration of Gail Mautner; Declaration of Timothy Leyh; Declaration of Katie Bass; Declaration of Todd Ziegenbein; Declaration of James Savitt; and Third Declaration of Gail Mautner in Strict Reply to Declaration of James Savitt.

The Court provides this letter in explanation of its decision regarding the award of attorneys' fees. The Court has signed Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion to Approve Attorneys' Fees and Costs. The proper method for calculating a reasonable award of attorneys' fees is the lodestar method. This requires that the court determine the number of hours reasonably expended and multiply it by the attorneys' reasonable hourly rate. The Court may then adjust this calculation either upward or downward. The Court is reducing the requested amount of attorneys' fees in this case. The Court finds that the requested amount of attorneys' fees of \$611,302.24 is excessive.

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The Defendants have broken down their request for fees during the period of December 1, 2017, through October 31, 2018, into six major groups, and the Court will address them individually. The first category is "Legal fees incurred in connection with an initial analysis of the claims, answering the complaint, and creating a strategy for litigation". The Defendants are seeking fees of \$49,264.00. The Court awards \$30,000.00 as reasonable fees for this category.

The second category is "Legal fees incurred in connection with outgoing discovery (including preparing written interrogatories, requests for production, requests for admission, and a motion to compel production) and taking depositions of all three plaintiffs; and Legal fees incurred in connection with responding to incoming discovery (including preparing responses to interrogatories and requests for production) and preparing for and defending depositions of both defendants". The Defendants are seeking fees of \$142,843.00. The Court awards \$110,000.00 as reasonable fees for this category.

The third category is "Legal fees incurred in connection with Defendants' Motion for Partial Summary Judgment and responding to Plaintiffs' cross Motion for Partial Summary Judgment, including preparing a motion to strike improper evidence used in Plaintiff's cross motion". The Defendants are seeking fees of \$148,688.00. The Court awards \$120,000.00 as reasonable fees for this category.

The fourth category is "Legal fees incurred in connection with trial prep, including responding to Plaintiff's Motion to Continue trial date and generating exhibit and witness lists". The Defendants are seeking fees of \$28,407.00. The Court awards \$20,000.00 as reasonable fees for this category.

The fifth category is "Legal fees incurred in connection with preparing Defendants' Motion for Indemnification and Other Relief and opposing Plaintiff's (second) Motion for Summary Judgment". The Defendants are seeking fees of \$59,236.00. The Court awards \$45,000.00 as reasonable fees for this category.

The sixth category is "Legal fees incurred in connection with all other tasks, including intra-office communications, communications with clients, witness interviews, and communication with opposing counsel." The Defendants are seeking fees of \$98,475.00. The Court awards \$75,000.00 as reasonable fees for this category.

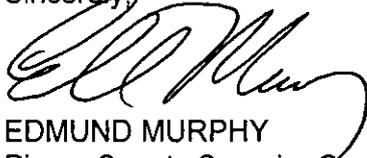
The reasonable attorneys' fees awarded through October 31, 2018, is **\$400,000.00**. The Court is adjusting the requested amount downwards because the Court finds that there is duplication of effort by different counsel and an excessive amount of hours spent on tasks in each category.

The Defendants are requesting costs of \$20,930.60 for the period from December 1, 2017, through October 31, 2018, and the Court finds that amount to be reasonable. The total amount of reasonable expenses incurred through October 31, 2018, therefore, is **\$420,930.60**.

The Defendants are requesting attorneys' fees of \$62,750.00 for the period between November 1, 2018, and December 10, 2018. The Court awards **\$47,750.00** as reasonable fees for this time period, reducing the amount by the estimated \$15,000.00

spent on the unsuccessful counterclaims. The Court is also awarding the requested costs of **\$706.64**. The total award of attorneys' fees and costs is thus **\$469,387.24**.

Sincerely,



EDMUND MURPHY
Pierce County Superior Court Judge

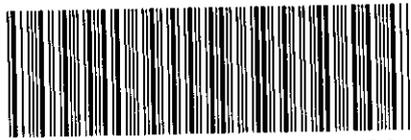
cc: Pierce County Clerk for filing

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APPENDIX

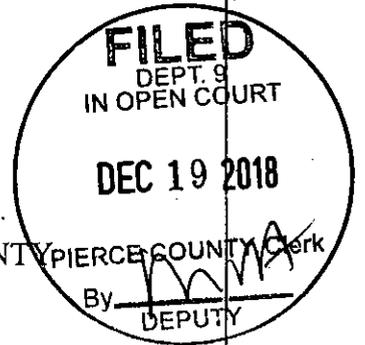
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17-2-13627-7 52556383 ORRE 12-21-18

THE HONORABLE EDMUND MURPHY
Hearing Date: December 10, 2018, 1:30 PM



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY PIERCE COUNTY Clerk

ADAM ROSEN, an individual; DAVID ROSEN, an individual; and MATTHEW ROSEN, an individual; individually and derivatively on behalf of ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Plaintiffs,

v.

HARVEY ROSEN, an individual; and DIANNE ARENSBERG, and individual,

and

ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Nominal Defendant,

Defendants.

No. 17-2-13627-7

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION TO APPROVE ATTORNEYS' FEES AND COSTS

~~PROPOSED~~

EM

(CLERK'S ACTION REQUIRED)

THIS MATTER having come before the Court upon the filing of Defendants' Motion to Set Amount of Attorneys' Fees and Costs, the Court having reviewed all pleadings filed by the parties relating to the Motion herein, including:

1. Defendants' Motion to Approve Attorneys' Fees and Costs;
2. Declaration of Gail E. Mautner in Support of Defendants' Motion to Approve Attorneys' Fees and Costs and attached exhibits;

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION TO APPROVE ATTORNEYS' FEES AND COSTS - 1

No. 17-2-13627-7

131000.0002/7477331.4

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12/21/2018

1 3. Plaintiffs' Opposition to Defendants' Motion to Approve Attorneys' Fees and
2 Costs;

3 4. Defendants' Reply in Support of Defendants' Motion to Approve Attorneys'
4 Fees and Costs;

5 5. Second Declaration of Gail E. Mautner in Support of Defendants' Motion to
6 Approve Attorneys' Fees and Costs and attached exhibits;

7 6. Declaration of Timothy G. Leyh in support of Defendants' Motion to Approve
8 Attorneys' Fees and Costs;

9 7. Declaration of Katie Bass in support of Defendants' Motion to Approve
10 Attorneys' Fees and Costs;

11 8. Declaration of Todd Ziegenbein in support of Defendants' Motion to Approve
12 Attorneys' Fees and Costs;

13 9. Plaintiffs' Motion to Strike Declaration of Timothy G. Leyh;

14 10. Defendants' Opposition to Plaintiffs' Motion to Strike Declaration of Timothy
15 G. Leyh;

16 11. _____;

17 12. _____.

18 The Court hereby makes the following Findings of Fact, Conclusions of Law and
19 Order:

20 1. Per the Court's ruling on November 2, 2018, Defendants Harvey Rosen and
21 Dianne Arensberg ("Defendants") are entitled to mandatory indemnification from Rosen
22 Supply Company, Inc. for all reasonable expenses incurred in connection with this proceeding
23 pursuant to RCW 23B.08.520, RCW 23B.08.540(1) and Article XI of RSC's Amended and
24 Restated Bylaws. The Court's oral ruling was memorialized by Order dated November 7, 2018.

25 2. Lane Powell PC represented Harvey and Dianne as Defendants in connection
26 with these proceedings, which sought declaratory relief, injunctive relief and damages against

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING
DEFENDANTS' MOTION TO APPROVE ATTORNEYS' FEES AND
COSTS - 2

No. 17-2-13627-7

131000.0002/7477331.4

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1 them for alleged breaches of fiduciary duty in their capacities as directors of Rosen Supply
2 Company, Inc. The hourly rates of all of the professional timekeepers at Lane Powell as
3 reflected in the (First) and (Second) Declarations of Gail E. Mautner and the invoices attached
4 as Exhibit A thereto, along with the other declarations offered by Defendants, were reasonable
5 and appropriate for the work performed and within the range of rates for attorneys providing
6 similar expertise and services in the Puget Sound region.

7 3. Lane Powell's lead counsel delegated work as appropriate to lower billing rate
8 attorneys, paralegals and other professionals. ~~All of the Lane Powell attorneys, paralegals, and~~
9 other professionals whose time is claimed in this matter and supported by the evidence offered
10 by Defendants, spent a reasonable amount of hours in connection with this proceeding, given
11 the complexity of the legal issues presented, the tasks necessary to be completed and the
12 significance of the matters at stake between the parties to this dispute, *except that there was duplication of effort by different attorneys and an excessive amount of hours* ^{EM}

13 4. Defendants' Motion to Approve Attorneys' Fees and Costs is GRANTED.
14 Defendants are entitled to attorneys' fees incurred in connection with this proceeding from
15 December 1, 2017 through October 31, 2018 in the amount of ~~\$526,913.00~~ ^{\$400,000.00} _{EM} and costs totaling
16 \$20,930.60, for a total amount of reasonable expenses incurred through October 31, 2018 in
17 connection with these proceedings of ~~\$547,843.60~~ ^{\$420,930.60} _{EM}

18 5. RCW 23B.08.540(1) provides for indemnification of reasonable expenses
19 incurred to obtain court-ordered indemnification. Defendants reasonably incurred attorney fees
20 of ~~\$62,752.00~~ ^{\$47,750.00} _{EM} and costs of \$706.64, for a total amount of reasonable expenses from November
21 1, 2018 through December 10, 2018 in connection with these proceedings of ~~\$63,458.64~~ ^{\$48,461.64} _{EM}

22 6. Based on the foregoing findings and conclusions, Defendants are entitled to a
23 total indemnification award of ~~\$611,302.24~~ ^{\$469,387.24} _{EM} from December 1, 2017 through December 10,
24 2018, as provided in RCW 23B.08.520, RCW 23B.08.540(1) and Article XI of Rosen Supply
25 Company, Inc.'s Amended and Restated Bylaws. Rosen Supply Company, Inc. SHALL pay to
26 Defendants Harvey Rosen and Dianne Arensberg the total amount of ~~\$611,302.24~~ ^{\$469,387.24} _{EM} as

** spent on tasks in each of the designated categories.*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING
DEFENDANTS' MOTION TO APPROVE ATTORNEYS' FEES AND
COSTS - 3

No. 17-2-13627-7

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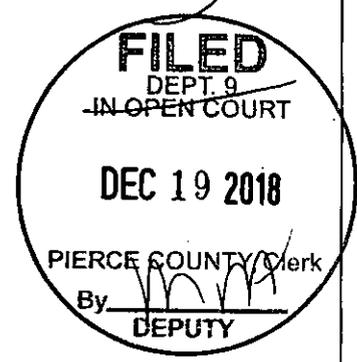
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1 indemnification for their reasonable expenses incurred in connection with the proceeding and
2 in connection with proving their reasonable expenses in this Motion.

3 SO ORDERED this 19th day of December 2018.



4
5 THE HONORABLE EDMUND MURPHY



8 Presented by:

9 LANE POWELL PC

10
11 By Gail Mautner

12 Gail E. Mautner, WSBA No. 13161
13 Mark G. Beard, WSBA No. 11737
14 Katie Bass, WSBA No. 51369
Attorneys for Defendants/Counterclaim Plaintiffs,
Harvey Rosen and Dianne Arensberg

15
16
17 Copy Received Notice of Presentation Waived;
Approved as to Form

18 MCNAUL EBEL NAWROT & HELGREN, PLLC

19
20 By _____

21 Avi J. Lipman, WSBA #37661
22 Attorneys for Plaintiffs/Counterclaim Defendants,
Adam Rosen, David Rosen, and Matthew Rosen

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING
DEFENDANTS' MOTION TO APPROVE ATTORNEYS' FEES AND
COSTS - 4

No. 17-2-13627-7

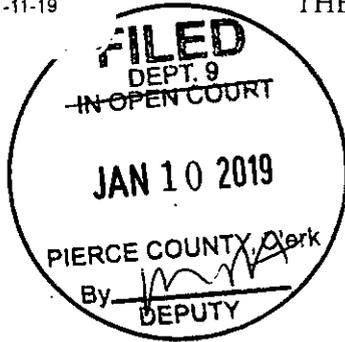
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17-2-13627-7 52656208 ORG 01-11-19

THE HONORABLE EDMUND MURPHY
Hearing Date: January 11, 2019
Without oral argument



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ADAM ROSEN, an individual; DAVID ROSEN, an individual; and MATTHEW ROSEN, an individual; individually and derivatively on behalf of ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Plaintiffs,

v.

HARVEY ROSEN, an individual; and DIANNE ARENSBERG, an individual,

and

ROSEN SUPPLY COMPANY, INC., a Washington Corporation,

Nominal Defendant,

Defendants.

No. 17-2-13627-7

ORDER GRANTING DEFENDANTS' SUPPLEMENTAL MOTION TO APPROVE ATTORNEYS' FEES AND COSTS INCURRED AFTER DECEMBER 10, 2018 HEARING PURSUANT TO RCW 23B.08.520 AND RCW 23B.08.540(1)

~~[PROPOSED AND UPDATED]~~ *EM*

THIS MATTER having come before the Court upon the filing of Defendants' Supplemental Motion to Approve Attorneys' Fees and Costs Incurred After December 10, 2018 Hearing Pursuant to RCW 23B.08.520 and RCW 23B.08.540(1) ("Supplemental Motion to Approve Attorneys' Fees and Costs"), the Court having reviewed all pleadings filed by the parties relating to the Motion herein, including:

1. Defendants' Supplemental Motion to Approve Attorneys' Fees and Costs and Fourth Declaration of Gail E. Mautner with Exhibit A;
2. Plaintiffs' Opposition to Defendants' Supplemental Motion to Approve

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' SUPPLEMENTAL MOTION TO APPROVE ATTORNEYS' FEES AND COSTS - 1
No. 17-2-13627-7
131000.0002/7524107.2 *EM*

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1 Attorneys' Fees and Costs; and

2 3. Defendants' Reply in Support of Defendants' Supplemental Motion to Approve
3 Attorneys' Fees and Costs and Fifth Declaration of Gail E. Mautner.

4 The Court has also reviewed the records and files herein. Being fully advised in this
5 matter, it is hereby ORDERED, ADJUDGED, AND DECREED that:

6 1. Defendants' Supplemental Motion to Approve is **GRANTED**. The Court's
7 findings of fact and conclusions of law issued on December 19, 2018 in connection with the
8 initial Motion to Approve Attorneys' Fees and Costs are incorporated herein by this reference
9 as a basis for this Supplemental Order.

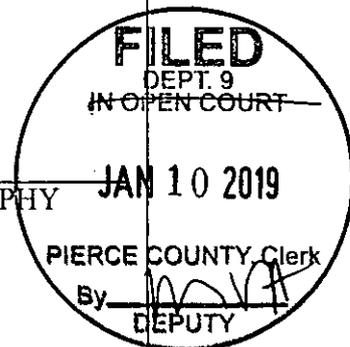
10 2. Defendants are entitled to a supplemental indemnification award of Lane Powell
11 PC's attorneys' fees in the amount of \$5,660.00 and costs of \$11,207.50 for expert witness fees,
12 from December 11, 2018 through December 28, 2018, as provided in RCW 23B.08.520, RCW
13 23B.08.540(1) and Article XI of Rosen Supply Company, Inc.'s Amended and Restated
14 Bylaws.

15 3. Defendants are also entitled to a supplemental indemnification award of
16 attorneys' fees in the amount of \$1,664.00 for their Reply that was submitted in connection
17 with this Supplemental Motion pursuant to RCW 23B.08.520, RCW 23B.08.540(1) and Article
18 XI of Rosen Supply Company, Inc.'s Amended and Restated Bylaw.

19 4. Rosen Supply Company, Inc. SHALL pay to Defendants Harvey Rosen and
20 Dianne Arensberg the supplemental amount of \$18,531.50 as expenses reasonably incurred by
21 them to obtain court-ordered indemnification.

22 SO ORDERED this 10th day of January, 2019

23
24 
25 THE HONORABLE EDMUND MURPHY
26 Pierce County Superior Court Judge



27
[PROPOSED] ORDER GRANTING DEFENDANTS' *EM*
SUPPLEMENTAL MOTION TO APPROVE ATTORNEYS' FEES
AND COSTS - 2

No. 17-2-13627-7
131000.0002/7524107.2

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1 Presented by:

2 LANE POWELL PC

3
4 By Gail Mautner

5 Gail E. Mautner, WSBA No. 13161

6 Mark G. Beard, WSBA No. 11737

7 Katie Bass, WSBA No. 51369

8 Attorneys for Defendants/Counterclaim Plaintiffs,
9 Harvey Rosen and Dianne Arensberg

10 Copy Received Notice of Presentation Waived;
11 Approved as to Form

12 MCNAUL EBEL NAWROT & HELGREN, PLLC

13 By Avi J. Lipman, WSBA #37661

14 Attorneys for Plaintiffs/Counterclaim Defendants,
15 Adam Rosen, David Rosen, and Matthew Rosen

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[PROPOSED] ORDER GRANTING DEFENDANTS' ^{DM}
SUPPLEMENTAL MOTION TO APPROVE ATTORNEYS' FEES
AND COSTS - 3

No. 17-2-13627-7
131000.0002/7524107.2

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APPENDIX

E

each in proportion to the amount contributed by him to the total amount of assessments collected by said district. Said board of directors shall report to the court from time to time as the court may direct, and upon a showing to the court that all indebtedness has been paid, an order shall be entered discharging said board of directors. Upon the entry of such order said board of directors and all the officers of said district shall deliver over to the clerk of said court all books, papers, records and documents belonging to said district, or under their control as officers thereof: Provided, That nothing herein contained shall be construed to validate or authorize the payment of any indebtedness of said district exceeding the legal limitation of indebtedness specified by law for irrigation districts; or any indebtedness contracted by such irrigation district or its officers without lawful authority. [L. '97, p. 208, § 5.]

TITLE XXIII.

OF PRIVATE CORPORATIONS.

CHAPTER I. OF ORGANIZATION AND MANAGEMENT GENERALLY	4250
II. OF FOREIGN CORPORATIONS	4291
III. OF RAILWAY CORPORATIONS AND OTHER TRANSPORTATION COMPANIES.	
ART. 1. GENERAL PROVISIONS REGARDING	4303
ART. 2. REGULATION OF TRANSPORTATION RATES.	4313
ART. 3. LIABILITY FOR INJURY TO STOCK	4332
ART. 4. APPROPRIATION OF LANDS AND HIGHWAYS FOR CORPORATE PURPOSES	4333
IV. OF TELEGRAPH AND TELEPHONE COMPANIES	4355
V. OF BOOM COMPANIES	4378
VI. OF BUILDING AND LOAN ASSOCIATIONS	4395
VII. OF RELIGIOUS, EDUCATIONAL, SOCIAL AND CHARITABLE CORPORATIONS.	
ART. 1. BENEVOLENT AND CHARITABLE CORPORATIONS	4438
ART. 2. SOCIAL AND CHARITABLE ASSOCIATIONS	4445
VIII. OF PATRONS OF HUSBANDRY	4460

CHAPTER I.

OF ORGANIZATION AND MANAGEMENT GENERALLY.

Authorized to subscribe for and deal in shares of other corporations Act 1905, p. 51

§ 4250. How Organized—Conditions and Liabilities.

Corporations for manufacturing, mining, milling, wharfing and docking, mechanical, banking, mercantile, improvement and building purposes, or for the building, equipping and managing water flumes for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads, or constructing canals or irrigation canals, or engaging in any other species of trade or business, may be formed according to the provisions of this chapter; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others: Provided, That no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed: And provided further, That the provisions of the foregoing proviso shall not apply to corporations engaged exclusively in loaning money on real estate, nor to corporations engaged exclusively in raising money from, and loaning or repaying it to, their own members, and which confine their loaning and business operations wholly to the counties of their principal place of business, respectively, and to the counties adjacent and adjoining thereto. [Cf. L. '66, p. 57, § 1; L. '67, p. 137, § 1; L. '69, p. 330, § 1; L. '73, p. 398, § 1; Cd. '81, § 2421; L. '86, p. 84, § 1; L. '91, p. 214, § 1; 1 H. C., § 1497; L. '95, p. 338, § 1.]

See notes to following sections.
See infra § 4291, foreign corporations.
See infra § 4378 et seq., boom companies.
See infra § 4395, building and loan associations.
See infra § 4445, social, charitable and educational societies.
See infra § 4303, railway and other corporations.
See infra § 5637 et seq., appropriation by private corporations.

Amendments to articles of incorporation Act 1905 p. 27, et seq.

§ 4251. Articles of Incorporation, Contents, etc.

Any two or more persons, who may desire to form a company for one or more of the purposes specified in the preceding section, shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of deeds, and file one of such articles in the office of the secretary of state, and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the object for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number of shares of which the capital stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for such length of time (not less than two nor more than six months) as may be designated in such certificate, and the name of the city, town, or locality and county in which the principal place of business of the company is to be located. Amendments may be made to the articles of incorporation, by supplemental articles,

Changing name of company p. 215

Amendments to articles of incorporation Act 1905 p. 27, et seq.

** provisions in law - up to date not used -*

CHAP. I] ORGANIZATION AND MANAGEMENT GENERALLY. [§§ 4252, 4253

executed and filed the same as the original articles. [Cf. L. '66, p. 57, § 2; L. '69, p. 330, § 2; L. '73, p. 398, § 2; L. '79, p. 155, §§ 1-3; Cd. '81, § 2422; 1 H. C., § 1498.]

See infra § 4285 et seq., fees for filing articles, etc.
See infra notes to § 4786.
If a corporation has changed its name it will be presumed to have done so in accordance with the requirements of the statute: King v. Ilwaco, etc., Nav. Co., 1 W., 127.
Although steps have been taken to organize a corporation, the mere use of a corporate name, when there are no articles on file in any public office, will not constitute an estoppel to deny corporate existence, where one of the chief promoters of the company, who is cognizant of all the facts, seeks to charge the alleged corporation as a party to a transaction with himself: Bash v. Culver Gold Mining Co., 7 W., 122.
Where the attempt to change the corporate name was futile and enough appears in one of two names, the defect will not be held fatal after judgment: King v. Ilwaco, etc., Nav. Co., supra.

§ 4252. Copy of Articles as Evidence.

A copy of any certificate of incorporation filed in pursuance of this chapter, and certified by the auditor of the county in which it is filed, or his deputy, or by the secretary of state, shall be received in all the courts and places as prima facie evidence of the facts therein stated. [Cf. L. '66, p. 57, § 3; L. '69, p. 331, § 3; L. '73, p. 399, § 3; Cd. '81, § 2423; 1 H. C., § 1499.]

§ 4253. Corporate Powers Enumerated.

When the certificate shall have been filed, the persons who shall have signed and acknowledged the same, and their successors, shall be a body corporate and politic in fact and in name, by the name stated in their certificate, and by their corporate name have succession for the period limited, and shall have power,—

1. To sue and be sued in any court having competent jurisdiction;
2. To make and use a common seal, and to alter the same at pleasure;
3. To purchase, hold, mortgage, sell, and convey real and personal property;
4. To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation;
5. To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will; except that no trustee shall be removed from office unless by a vote of two-thirds of the stockholders, as hereinafter provided;
6. To make by-laws not inconsistent with the laws of this state or the United States;
7. The management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company as expressed in the articles of incorporation. [Cf. L. '66, p. 57, § 4; L. '69, p. 331, § 4; L. '73, p. 399, § 4; Cd. '81, § 2424; 1 H. C., § 1500.]

See supra § 3650 and notes, rights and liabilities of corporations as to negotiable paper.
See infra notes to § 5455 et seq., receivers.
See infra § 5637 et seq., right to appropriate property.
See infra § 5431 et seq., injunctions.

PLEADINGS AND PRACTICE.—The fact that a defendant corporation has knowledge of the pendency of a suit against it will not dispense with necessity for proper service: Osborne v. Columbia, etc., Corporation, 9 W., 666.
Service of summons upon the agent of a

domestic corporation, in charge of a branch store of his principal, is not sufficient under § 4875, subd. 8, infra, requiring that service upon corporations, with the exception of certain designated classes, be made upon the president, secretary or managing agent thereof: *Id.*

If an action is brought against a corporation in the wrong county, the court has no jurisdiction to render judgment, as §§ 4855, 4856 infra, providing that trial may be had in the county where the action is commenced, although not the proper county, etc., has no application to actions against corporations, such actions being governed by the provisions of § 4854 infra: *McMaster v. Thresher Co.*, 10 W., 147.

If the complaint alleges that defendant is a corporation organized and existing under the laws of the state, and the only answer of the corporation is a general denial, it cannot afterwards complain that there was no affirmative proof of its corporate existence: *Garneau v. Port Blakely Mill Co.*, 8 W., 468.

In an action upon contract against a corporation, an insufficient denial of the complaint admits that the person shown to have made the contract sued on was the authorized agent of the corporation: *Frost v. Ainslie L. Co.*, 3 W., 241.

If a complaint against a corporation does not allege the corporate character of defendant, objection thereto is waived by defendant's plea of counter-claim, as though it were in fact a corporation: *Id.*

CORPORATE MEETINGS, ETC.—All meetings of a corporation will be presumed regular, and the fact that one person acted as president, chairman and secretary would not invalidate the proceedings: *Budd v. W. W. P. & P. Co.*, 2 W. T., 347.

The fact of a trustee of a corporation, who had a demand against it, being present at a meeting of the trustees which gave the note of the company to such trustee in payment, would not of itself invalidate the note: *Id.*

In an action against a corporation, in which it becomes essential to show the proceedings of the board of directors affecting matters at issue, when it has been shown that action was taken in reference thereto, at the meeting of the board, it is competent to show all that was said and done in relation thereto in addition to what is disclosed by the minutes of the board; and especially is this true when the minutes are ambiguous and do not of themselves fully explain the entire transaction: *Tibbals v. Mt. Olympus Water Co.*, 10 W., 329.

POWERS AND LIABILITIES.—An agreement that a corporation is not to engage in a similar business in a certain locality within a stipulated period of time, is inoperative against the individual members of the corporation: *Murray v. Okanogan Live Stock Co.*, 12 W., 259.

An assignment of a claim under an insurance policy, made by the president and general manager of a corporation without being authorized by the board of directors, is valid when subsequently ratified by all the stockholders: *Glover v. Rochester-German Ins. Co.*, 11 W., 143.

A contract is signed by a corporation, within the meaning of the statute of frauds, when the name of the party to be charged is written by him or an authorized agent anywhere in the contract: *Tingley v. Belingham Bay B. Co.*, 5 W., 644.

The refusal of a request to instruct that a corporation must have authority from its board of directors in order to transfer a note is not error when the request is unaccompanied by other instructions sufficient to inform the jury that such authority may be conferred in many ways: *Blue v. McCabe*, 5 W., 125.

A corporation can contract with one of its trustees, and whether under the circumstances the transaction was fraudulent

would be a matter of fact to be established before a jury by the party alleging the fraud: *Budd v. Printing Co.*, 2 W. T., 347.

In an action against a corporation to recover upon a contract for the payment of a certain sum of money, it is error to non-suit plaintiff when the evidence tends to show that the defendant had agreed, in the payment of a water franchise, to give plaintiff paid-up stock of a certain value upon the completion of its works, that defendant had abandoned the enterprise, had agreed with plaintiff to pay the consideration due in cash, and had for a certain period of time paid interest upon its indebtedness under such substituted agreement: *Tibbals v. Mt. Olympus Water Co.*, 10 W., 329.

A mortgage executed by one corporation to another is not to be deemed fraudulent solely because of the fact that the same individual is president of both corporations: *Roy & Co. v. Scott, Hartley & Co.*, 11 W., 393.

Although a note and mortgage may have been executed by the president and secretary of the corporation without authority from its board of trustees, yet the corporation will be estopped from denying their authority where it appears that the corporation was aware of the transaction from the first and never objected or sought to repudiate it; that at regular meetings of its board of trustees the payment of the note and mortgage was considered and two payments thereon made from corporate funds and that no act of repudiation was undertaken until two years after the execution of the note and mortgage, and after they had passed into the hands of innocent purchasers: *Seal v. Puget Sound L. Co.*, 5 W., 422.

Under an allegation in a complaint for foreclosure of a mortgage of due authority of corporate agents to execute the mortgage, proof of subsequent ratification is admissible as it is equivalent to original authority: *Id.*

If all the stockholders of a corporation acquiesce in the execution of a mortgage upon its property, they are estopped from setting up the invalidity of the mortgage on the ground that it was executed without corporate authority: *Roy & Co. v. Scott, Hartley & Co.*, supra.

If a mortgage executed without corporate authority is valid against the corporation and its stockholders, it is valid as against subsequent creditors and incumbrancers: *Id.*

Where the president and secretary of a corporation, without authority of the board of directors, have purchased certain shares of stock for the benefit of the corporation and executed in part payment thereof its notes, and such action has been acquiesced in for more than two years, and in effect ratified by a sale of all the corporate property including the stock in question, to another corporation, which took with full knowledge of the transaction, the objection cannot be raised that the officers of the former corporation acted beyond the scope of their authority in the issuance of the notes: *Miller v. Wash. So. Ry. Co.*, 11 W., 414.

A general understanding by the boards of directors of two corporations, that certain transactions are to be carried on between them by a common agent, followed by a course of dealing in pursuance thereof, which each board has knowledge, is sufficient authority for such transactions, although no resolutions granting that authority are passed by the respective boards: *Roberts v. Washington Nat'l Bk.*, 11 W., 550.

The fact that the boards of directors of two corporations entering into such an agreement were identical, would not render the transactions void, but merely voidable and capable of ratification: *Id.*

Where a course of dealing between two banking corporations has been maintained for a period of two years, knowledge of which could have been obtained from an

examination of the books of either of the banks, it must be presumed that the boards of directors of such banks had knowledge of the transactions: *Id.*

If two banks have entered into an agreement to carry the paper of a partnership in substantially equal proportions, the receiver of one of the banks cannot recover from the other on account of the transfer of a portion of such paper to the receiver's bank, on the ground that it had been made through a common agent: *Id.*

The appointment of a receiver of a corporation does not prevent an action against it on a promissory note executed before the receivership: *Allen v. Olympia L. & P. Co.*, 13 W., 307.

A corporation cannot escape obligation under its contracts on the ground of a want of authority of its officers to execute them, when the corporation has received the benefits of such contracts: *Id.*; *Dexter Horton Nat'l Bk.*, 6 W., 181.

The act of Mar. 15, '93 (L. '93, p. 435, § 5312 infra), providing for proceedings supplemental to execution, does not warrant the insolvent corporation for which a receiver has been appointed for which a receiver: *Allen v. Stallcup*, 13 W., 631.

Where a hospital is maintained and a physician employed by a corporation for the purpose of caring for sick and injured employees, the expense being provided out of certain moneys retained from the monthly wages of the employees, and the corporation makes no profit out of the undertaking, but conducts it as a charitable institution, it is not liable for malpractice or negligence on the part of the physician, but is responsible for ordinary care in selecting him: *Richardson v. Carbon Hill Coal Co.*, 10 W., 648.

A trustee of a corporation cannot recover pay for services rendered the corporation when such services are in the line of his regular duties as such trustee, unless there is some express provision therein for articles of agreement or by-laws, or some other authority therefor than the actions of the trustees themselves: *Burns v. Commenment Bay L. Co.*, 4 W., 558.

A corporation cannot be rendered liable upon a contract between stockholders prior to incorporation, when there is no corporate recognition of such liability: *Bash v. Culver Gold Mining Co.*, 7 W., 122.

In an action upon a note of a corporation signed in its name by its president and secretary, but for which there was no express authorization of the company, the company is estopped from asserting that the officers acted outside of their authority, when all making of numerous notes of the kind in question, had been for a long time ratified by said officers, and informally ratified by the company by its action in paying the same, no fault ever being found with the action of such officers in so conducting the business: *Duggan v. Pacific Boom Co.*, 6 W., 593.

A lumber company which is empowered by its charter to carry on the manufacture and sale of lumber in its various forms, including everything connected with the manufacturing and sale of lumber, and to do any corporations and all kinds of business allowed to authorized by the laws of the state, is authorized to become surety upon the bond of a contractor to whom it furnishes building material when such is the custom of manufacturers of lumber in the same locality: *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 W., 630.

The fact that a bond has been executed by a corporation without the direct authority of a resolution of its board of trustees will not invalidate the bond, when it appears that a majority of the trustees were in consultation about it prior to its execution and consented thereto: *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 W., 630; following

Tootle v. First Nat'l Bank, 6 W., 183; *Allen v. Olympia Light & P. Co.*, 12 W., 307.

A corporation, unless restrained by some statutory provision, may assign its property to a trustee for the purpose of selling same and applying the proceeds to the payment of its debts: *McKay v. Elwood*, 12 W., 579.

If a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized: *Carrigan v. Imp. Co.*, 6 W., 590.

Although a contract of a corporation may not have been properly authorized by its board of trustees, yet, where the corporation continues to receive the benefits accruing from such contract, it is estopped to shire, 6 W., 282.

INSOLVENCY—PREFERENCES, ETC.—A voluntary preference by an insolvent corporation is void: *Thompson v. Huron L. Mfg. Co.*, 9 W., 82; *Conover v. Hull*, 10 W., 675, 685.

The stock and property of an insolvent corporation is a trust fund for the payment of its debts, and such a corporation has no right to prefer a portion of its creditors to the exclusion of others: *Conover v. Hull*, 10 W., 673; See facts of this case as to what constitutes preferences; *Thompson v. Huron L. Co.*, supra; *Allen v. Stallcup*, 13 W., 631.

McKay v. Elwood, 12 W., 579; *Compton v. Schwabacher Bros. & Co.*, 15 W., 306. See notes to § 4276.

The fact that the assets of a corporation are made to exceed its liabilities by computing its book accounts and bills receivable at really less, is not sufficient to negative a charge that the corporation is insolvent: *Conover v. Hull*, supra.

An insolvent corporation may in this state make a common law deed of assignment for the benefit of its creditors, and thereby vest in the trustee the title to the real estate of such corporation so as to prevent subsequent judgment creditors from subjecting the same to the satisfaction of such judgments: *Nyman v. Berry*, 3 W., 734; *Conover v. Huron L. Co.*, 4 W., 604; distinguished in *Klosterman v. Mason Co.*, 7 W., 571, 572; *W.*, 281-283.

The transfer by an insolvent corporation of all its property to the mortgagee thereof is not such a preference over unsecured creditors as to constitute a fraudulent conveyance; nor is such transfer inhibited under Art. XII, § 8, of the Const.: *Klosterman v. Mason Co.*, etc., *Ry. Co.*, 8 W., 281.

The insolvency of a corporation at the time of making a sale does not from that fact alone constitute a fraudulent transfer: *Brook v. Miller Co.*, 8 W., 344; following *Hol-*

which is insolvent of an insurance company to certain creditors of a portion of its assets of the corporation or intimately connected therewith, is such a preference as to constitute a fraudulent conveyance and warrant a recovery by the receiver of the corporation of the property so conveyed: *Smith v. Thomas Hardware Co. v. Perry Stove Mfg. Co.*, (Tex.) 22 L. R. A., 802.

If a corporation is conducting a profitable business it is not chargeable with insolvency from the fact that its indebtedness is in excess of its assets; and a bona fide chattel mortgage given under such circumstances is not invalid on the ground of being a preference by an insolvent corporation: *Brooks v. Skookum Mfg. Co.*, 9 W., 80.

A chattel mortgage given by a dairy association cannot be held void on the ground that it is a preference of creditors by an insolvent corporation, when the evidence

shows that the association had enough money on hand to pay all its indebtedness, but that its business was profitable, and that the mortgage was given for the purpose of inducing the mortgagee to continue to supply milk to the association in order that the business might be carried on: *Leslie v. Wilshire*, 6 W., 282.

Where a corporation which is heavily indebted gives a mortgage, whereby it is enabled to pay the purchase price and secure the legal title to the property mortgaged, and by that means puts itself in better shape for continuing business, such mortgage will not be held to be given by an insolvent corporation for the purpose of hin-

dering, delaying and defrauding creditors: *Vincent v. Snoqualmie M. Co.*, 7 W., 568. Although the resolution passed by the trustees of a corporation authorizing the giving of a mortgage was not described, the fact that provisions were inserted relating to keeping the property insured, and authorizing the mortgagee to take possession, and to foreclose the mortgage in case the property should be attached, would not render the mortgage void: *Id.* Seal necessary to authenticate acts of: *See Eagle, etc., Co. v. Monteith*, 2 Or., 277; *Brown v. Farmers' Supply Co.*, 23 Or., 541; *Moore v. Willamette, etc., Co.*, 7 Or., 359.

§ 4254. **Certain Corporations Authorized to Hold Property.**

All private corporations incorporated by the legislative assembly of the territory of Washington, prior to the tenth day of June, eighteen hundred and seventy-two, other than for religious purposes, be and they are hereby authorized to hold, acquire, own, and possess real and personal property to the extent and to such an amount as to said corporations may seem meet, anything in the acts incorporating said private corporations to the contrary notwithstanding. [L. '91, p. 73, § 1; 1 H. C., § 1501.]

§ 4255. **Corporate Powers, How Exercised—By-Laws, etc.**

The corporate powers of a corporation shall be exercised by a board of not less than two trustees, who shall be stockholders in the company, and at least one of whom shall be a resident of the state of Washington, and a majority of them citizens of the United States, who shall, before entering upon the duties of their office, respectively take and subscribe to an oath, as provided by the laws of this state, and who shall, after the expiration of the term of the trustees first elected, be actually elected by the stockholders, at such time and place, within this state, and upon such notice and in such manner, as shall be directed by the by-laws of the company; but all elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he may own, or represent by proxy, shares of stock, and the person or persons receiving the greatest number of votes shall be trustee or trustees: Provided, That nothing herein contained shall prevent any corporation, by their by-laws, limiting such bona fide shareholder to a single vote, or one vote for every full share of paid up stock, or its equivalent in assessable stock, disregarding the number of shares of stock he may own. (It shall be competent, at any time, for two-thirds of the stockholders of any corporation organized under this chapter to expel any trustee from office, and to elect another to succeed him. In all cases where a meeting of the stockholders is called for the purpose of expelling a trustee and electing his successor, such notice shall be given of the meeting as the by-laws of the company may require.) Whenever any vacancy shall happen among the trustees by death, resignation or otherwise, except by removal and the election of his successor as herein provided, it shall be filled by appointment of the board of trustees. Every such corporation shall at all times keep at its principal place of business in this state an officer or officers, agent or agents, upon whom service of legal process may be made, in conformity with the law: Provided, That service of such process may be made at any time upon any resident trustee of such corporation. [Cf.

CHAP. I.] ORGANIZATION AND MANAGEMENT GENERALLY. [§§ 4256-4260.

L. '66, p. 58, § 5; L. '69, p. 332, § 5; L. '73, p. 400, § 5; Cd. '81, § 2425; 1 H. C., § 1502; L. '95, p. 61, § 1.]

See notes to § 3650 supra, negotiable paper. See notes to § 4253 supra.

§ 4256. **Not to be Dissolved Because Trustees Were Not Elected, etc.**

If it shall happen at any time that an election of trustees shall not be made on the day designated by the by-laws of the company, the corporation shall not, for that reason, be dissolved; but it shall be lawful on any other day to hold an election for trustees, in such manner as shall be provided for in the by-laws of the company, and all acts of the trustees shall be valid and binding upon the company until their successors are elected and qualified. [Cf. L. '66, p. 59, § 6; L. '69, p. 333, § 6; L. '73, p. 400, § 6; Cd. '81, § 2426; 1 H. C., § 1503.]

§ 4257. **Decision of Majority as Quorum is Valid as Corporate Act.**

A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act. [L. '66, p. 59, § 7; L. '69, p. 333, § 7; L. '73, p. 401, § 7; Cd. '81, § 2427; 1 H. C., § 1504.]

§ 4258. **Notice of First Meeting, How to be Given.**

The first meeting of the trustees shall be called by a notice, signed by one or more persons named as trustees in the certificate, setting forth the time and place of the meeting, which notice shall be delivered personally to each trustee, or published at least twenty days in some newspaper in the county in which the principal place of business of the corporation, or if no newspaper is published in the county, then in some newspaper nearest thereto in the state. [L. '66, p. 59, § 8; L. '69, p. 333, § 8; L. '73, p. 401, § 8; Cd. '81, § 2428; 1 H. C., § 1505.]

It is not essential to legality of unstated meeting of the board of trustees of a corporation, that proof of notice of such meeting be spread upon its records. Such proof may be supplied aliunde. *Budd v. Walla Walla P. & P. Co.*, 2 W. T., 347.

§ 4259. **Duty to File Statement.**

Every corporation heretofore organized under the laws of the territory or state of Washington, and every corporation which may hereafter be organized under the laws of this state, shall, on or before the second Tuesday of January of each year, and at such other times as such corporations may elect so to do, file with the county auditor of the county in which such corporation has its principal place of business, a statement, sworn to by its president and attested by its secretary and sealed with its corporate seal, containing a list of all its officers and their respective titles of office, names and addresses, and the term of office for which they have been chosen. [L. '95, p. 355, § 1.]

§ 4260. **Corporations Hereafter Formed to File Statement.**

Every corporation which shall be hereafter organized under the laws of this state shall, within thirty days after it shall have filed its certificate of incorporation with the county auditor of the county in which it has its principal place of business, file with such county auditor a statement, sworn

to by its president and attested by its secretary and sealed with its corporate seal, containing a list of all of its officers and their respective titles of office, names and address, and the term of office for which they have been chosen. [L. '95, p. 355, § 2.]

§ 4261. Stock Personal Estate—Transfer of.

The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of the transfer. [L. '66, p. 59, § 9; L. '69, p. 333, § 9; L. '73, p. 401, § 9; Cd. '81, § 2429; 1 H. C., § 1506.]

See notes to next section.

A subscriber to the capital stock of a corporation who has, in good faith, transferred his shares to another, which transfer has been accepted by the corporation, before an assessment has been made, is not liable for unpaid subscriptions. *Stewart v. Walla Walla, etc., Pub. Co.*, 1 W., 521.

Though the by-laws of a corporation require the entry of transfers on a stock ledger, if none is kept and such transfer is entered according to the custom of the company, the subscription list, and an assignment is indorsed on the shares themselves and a new certificate issued to the purchaser by the company, the latter cannot deny the validity of the transfer: *Id.*

If, in an action against an original subscriber for unpaid installments of his subscription, his defense being that he had transferred his shares to another before the assessment, the general verdict is for plaintiff, but the jury find specially that defend-

ant sold the shares by indorsement on the back thereof, which transfer was entered on plaintiff's book, and that a new certificate was issued in lieu of the one assigned, the judgment should be entered for defendant on the special findings, they being inconsistent with the general verdict: *Id.*

The transfer by a stockholder of his shares of stock in a corporation, although no registration thereof has been made on the books of the corporation, will pass title thereto to the transferee as against the subsequent purchaser on execution sale against the transferer: *National Bank v. Gas & Fuel Co.*, 6 W., 597.

An action for damages for the value of stock of a corporation based upon a refusal to transfer, cannot be maintained by a stockholder or his assignee against another corporation, which had succeeded to all the property, rights and interests of the corporation which issued the stock: *Huggins v. Milwaukee Brewing Co.*, 10 W., 579.

§ 4262. Subscriptions, Assessments, Sale of Shares, etc.

The stockholders of any corporation formed under this chapter may, in the by-laws of the company, prescribe the times, manner, and amounts in which payments of the sums subscribed by them, respectively, shall be made; but in case the same shall not be so prescribed, the trustees shall have the power to demand and call in from the stockholders the sums by them subscribed, at such time and in such manner, payments or installments, as they may deem proper. In all cases notice of each assessment shall be given to the stockholders personally, or by publication in some newspaper published in the county in which the principal place of business of the company is located; and if none be published in such county, then in the newspaper nearest to said principal place of business in the state. If after such notice has been given, any stockholder shall make default in the payment of assessments upon the shares held by him, so many of said shares may be sold as will be necessary for the payment of the assessment upon all the shares held by him, her, or them. The sale of said shares shall be made as prescribed in the by-laws by the company, but shall in no case be made at the office of the company. No sale shall be made except at public auction, to the highest bidder, after a notice of four weeks, published as above directed in this section, and at such sale the person who shall pay the assessment so due, together with the expenses of advertising and sale for the smallest number of shares, or

portion of a share, as the case may be, shall be deemed the highest bidder: Provided, That the amount of the capital stock of any bank incorporated under this act shall not be less than twenty-five thousand dollars, to be divided into shares of one hundred dollars each, all of which shares shall be subscribed, and three-fifths of such capital stock shall be paid in before commencement of business, the remainder to be subject to the call of the trustees; and it shall be the duty of the directors of any such bank to file with their articles of incorporation their affidavit that three-fifths of the capital stock of such bank has been actually paid in. [Cf. L. '66, p. 60, § 10; L. '69, p. 333, § 10; L. '73, p. 401, § 10; Cd. '81, § 2430; L. '86, p. 85, § 2; 1 H. C., § 1507.]

See last section and notes.

Under this section subscriptions to the capital stock of a corporation may be enforced by the corporation as a contract for the payment of money: *Puget Sound, etc., Ry. Co. v. Ouellette*, 7 W., 265; but a corporation cannot enforce subscriptions to its stock until the full capital stock has been subscribed; nor can one corporation subscribe to the capital stock of another: *Denny Hotel Co. v. Schram*, 6 W., 134; 36 Am. St. Rep., 130; followed in *Denny Hotel Co. v. Gilmore*, 6 W., 152; distinguished in *Cole v. Satsop Ry. Co.*, 9 W., 487; 43 Am. St. Rep., 858.

Subscribers to the stock of a corporation are not liable thereon, when the corporation has begun business before its capital stock is all subscribed, unless the acts and conduct of the subscribers are such as to establish a waiver on their part of the conditions precedent to liability: *Birge v. Brown*, 11 W., 249.

Partial payments upon stock subscriptions will not establish a waiver of a full subscription to all the capital stock before liability attaches, when made without knowledge that the entire stock has not been subscribed: *Id.*

Although a stockholder in a corporation, who has given his promissory note in payment of his stock, has been released from its payment by the assumption of his indebtedness by certain other stockholders, yet, when such stockholder subsequently executes another note to the corporation for the full amount of his stock, and agrees to release from liability those who had theretofore assumed his indebtedness, a contract by novation arises, and such stockholder becomes again liable to the corporation for the amount of his second note: *Miles Co. v. Robertson*, 5 W., 352.

In the absence of proof as to the powers of a foreign corporation in regard to the sale and repurchase of its own stock, it will be presumed, for the purpose of upholding a contract, that it possesses such authority: *Yeaton v. Eagle Oil & Refining Co.*, 4 W., 183.

A subscriber to the stock of a corporation does not waive any right to object to the validity of other subscriptions, or to dispute the authority of the corporation to sue, merely from the fact that he has made payment on such subscription, when he has no knowledge as to the validity and bona fides of other subscriptions: *Denny Hotel Co. v. Gilmore*, 6 W., 152.

Stockholders of a corporation, whose capital stock has been fully paid by a transfer to the corporation of certain property and franchises, considered in good faith by all parties concerned in the promotion of the corporation, as equivalent in value to the amount of its capital stock, cannot be rendered individually liable to creditors from the fact that by subsequent depreciation in value the property applied in payment of the capital stock becomes greatly impaired in value: *Turner v. Bailey*, 12 W., 634.

Where a party enters into a contract with

a corporation by which he receives fifty shares of stock on payment of five thousand dollars to the corporation, and in consideration thereof is appointed manager of a branch house, under an agreement that in case of his discharge from such position he should return such shares of stock and receive back his five thousand dollars, such transaction renders him a stockholder of such corporation, and does not establish merely the relation of debtor and creditor between them: *Yeaton v. Eagle Oil & Refining Co.*, supra.

The presumption is, that a corporation in bringing suit on stock subscriptions has acted regularly according to its by-laws, and if there is any by-law which renders their action irregular, it is a matter of defense which should be pleaded: *Puget Sound, etc., Ry. Co. v. Ouellette*, supra.

In an action upon a stock subscription to which a plea of general denial was set up, the introduction of proof showing that all of the stock had not been subscribed and of proof in rebuttal showing estoppel is immaterial; and errors, if any, in the court's instructions upon the question of estoppel is not prejudicial: *McKay v. Elwood*, 12 W., 580.

A complaint does not state a cause of action under this section when it fails to allege that the defendant had notice of the call for assessments upon his stock, made by the receiver under the order of the court: *Elderkin v. Peterson*, 8 W., 674. See infra § 5455 et seq. and notes, receivers.

Where an action is brought to recover the whole amount unpaid on the stock of an insolvent corporation held by defendant, and which had been declared to be due and payable by order of the court, sitting as a court of equity, it is error for the court to charge the jury that defendant is not liable to pay the whole of the unpaid balance of his subscription, unless the evidence shows that it and liabilities of the corporation: *Id.*

A charge that "it matters not whether the full quota of stock was subscribed or not in this case," is erroneous because it assumes that the evidence showed such conduct on the part of defendant as an officer of the corporation as would amount to a waiver of the defense that the whole of the capital stock had not been subscribed: *Id.*

The fact that a certificate of stock purports on its face to be paid-up stock will not warrant the court in instructing the jury that the certificate should be considered as paid up and non-assessible, when plaintiff enters a denial to such defense and introduces evidence showing that the certificate was not issued as paid up by the authority of the corporation: *Id.*

Although stock in a corporation has been subscribed for by an individual "as trustee," an action to recover on the subscription may be maintained against the real parties in interest, when the complaint alleges that such trustee made the subscription as the agent of defendants, who were subscribers to the stock, at their request, and for the benefit of each of them in proportion to his

individual subscription: *Cole v. Satsop Ry. Co.*, 9 W., 487; 43 Am. St. Rep., 853.

Subscribers to the stock of a corporation cannot escape liability as against creditors thereof on the ground that a portion of the stock was illegally subscribed for another corporation, when the other stockholders have all taken with full knowledge of that fact, and have paid a portion of their subscription for the purpose of enabling the corporation to commence business and incur indebtedness: *Id.*

A creditor of a corporation, who is himself a stockholder therein, obtained a judgment against it and brought another action against another stockholder, before a justice of the peace, for unpaid subscriptions and sought to enforce its collection and its application in satisfaction of his judgment: *Held*, That unpaid stock subscriptions are a trust fund for the benefit of all creditors, and that to enforce a right to participate therein requires a proceeding in equity: *Burch v. Taylor*, 1 W., 245; followed in *Burch v. Moore*, 1 W., 249; *Burch v. Glover*, 1 W., 250; *Elderkin v. Peterson*, 8 W., 676. See notes to § 4253, "insolvency, etc."

Where a creditor obtained a judgment against a corporation and other persons and brought suit against a stockholder of the corporation to enforce payment of his unpaid subscription, a complaint alleging that the corporation had no assets except its unpaid subscription, but which failed to show that the judgment could not have been made out of the property of the other judgment debtors, does not state a cause of action: *Burch v. Taylor*, *supra*.

A stockholder of a corporation, who deals with its agent, is presumed to know the scope of the agent's authority, and cannot set up in defense of his contract with the corporation conditions limiting his liability, which the agent had no authority to enter into: *Hardin v. Sweeney*, 14 W., 129.

The fact that no call for unpaid stock subscriptions had been made by the directors of the corporation prior to a deed of assignment of the corporate property to a trustee is no defense to an action by the trustee to enforce payment of the stock subscriptions, when corporate indebtedness is in excess of corporate assets: *McKay v. Elwood*, 12 W., 579.

§ 4263. **Executor May Vote, When.**

Whenever any stock is held by a person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder. [L. '66, p. 60, § 11; L. '69, p. 334, § 11; L. '73, p. 402, § 11; Cd. '81, § 2431; 1 H. C., § 1508.]

§ 4264. **Pledge of Stock, Effect of.**

Any stockholder may pledge his stock by a delivery of the certificate or other evidence of his interest, but may, nevertheless, represent the same at all meetings, and vote as a stockholder. [Cf. L. '66, p. 60, § 12; L. '69, p. 334, § 12; L. '73, p. 402, § 12; Cd. '81, § 2432; 1 H. C., § 1509.]

See notes to § 4262 *supra*.
Under this section the interest of a pledgee in shares of stock in a corporation cannot be divested by a judicial sale against the owner thereof, although such shares have not been transferred to the pledgee on the books of the corporation: *National Bank v. Gas & Fuel Co.*, 6 W., 597.

This section intends that a stockholder may pledge his stock, and yet as between himself and the company and his fellow stockholders, he is to be treated as the owner thereof: *Id.*, 602.

Shares of stock are to be treated as personal property transferrable by indorsement and delivery, and the rule which most encourages its transfer and gives the certificate as nearly as possible the character of commercial paper will best subserve the

public interest: *Id.*, 602.
Although a stockholder, after a pledge of any or all of his stock is, under this section, authorized to represent the same at all meetings and vote as a stockholder, and although he is the owner and holder of the balance of the stock remaining after such pledge, yet he would not be unauthorized to transfer or dispose of the property of the corporation to secure an individual indebtedness to the prejudice of corporation creditors: *Stewart v. Gould*, 8 W., 367.

Although the note of a corporation may have been given without any consideration for its execution, a bona fide purchaser thereof for value, to whom certain shares of the capital stock of the corporation were assigned to secure its payment, is a corporation creditor: *Id.*

§ 4265. **Dividends—Capital Stock, How Reduced—Liability of Trustees.**

It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or

severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, That this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter. [L. '66, p. 60, § 13; L. '69, p. 334, § 13; L. '73, p. 402, § 13; Cd. '81, § 2433; 1 H. C., § 1510.]

§ 4266. **Restrictions Upon Issuing Notes, etc.—Liability.**

No corporation organized under this chapter shall, by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidence of debt for circulation as money, except bonds by railroad companies, which shall at no time exceed double the amount of paid-up stock issued by said company. Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise: Provided, That the stockholders of every bank incorporated under this act or the territory of Washington shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; and all such banking corporations shall file, on the first Monday in June, each year, with the state auditor, a report sworn to by its president, vice president, or cashier, of the resources and liabilities, stating the amount of deposits, the aggregate of loans, and the amount upon each class of securities, the names and residence of the shareholders and number of their shares, the directors or officers for the time being, and any other matters affecting the safety of their deposits or the interest of their creditors; and such banking corporations shall have power to exercise, by its board of trustees, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, buying and selling, exchange, coin and bullion, by loaning money on real estate or personal security; to accept and execute all trusts, fiduciary or otherwise, as may be committed to such bank or corporation, by any person, persons, or corporation, or by the order or direction of any court; and may do any other business pertaining to banking: Provided further, That the provisions of this section shall not apply to the debentures or bonds of any company duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon the unencumbered real estate worth at least twice the amount loaned thereon: Provided further, however, That such issue of debentures or bonds shall in no case exceed ten times the capital stock of the issuing corporation. [Cf. L.

*unpaid
Subscription*

'66, p. 61, § 15; L. '69, p. 335, § 15; L. '73, p. 403, § 14; Cd. '81, § 2434; L. '86, p. 85, § 3; L. '88, p. 65, § 1; 1 H. C., § 1511.]

See Art. XII, §§ 4 and 11, of the constitution of the state, as to the liability of stockholders.

No corporation can issue any of its notes or other evidences of debt to circulate as money: Const., Art. XII, § 11.

See notes to § 4262 supra.
See supra §§ 3305, 3307, penalty for payment of wages in orders, etc.

The additional liability imposed by Art. XII, § 11, of the Const., upon stockholders of banking corporations to the extent of the amount of their stock is a secondary, and not a primary, liability, as the stockholders occupy the position of sureties, and creditors must first attempt to enforce their claims against the corporation as the principal debtor: *Wilson v Book*, 13 W., 676.

The fact that a banking corporation is insolvent and in the hands of a receiver will not entitle creditors to proceed against the stockholders upon their secondary liability, until such liability constitutes a part of the receiver's trust fund which the court is authorized to direct him to enforce for the benefit of all the creditors: *Id.*; *Watterson v. Masterson*, 15 W., 511.

The fact that an action by creditors against the stockholders of an insolvent bank includes the receiver of the bank as a party, will not entitle the creditors to enforce the contingent liability of the stockholders by a direct proceeding against them: *Watterson v. Masterson*, 15 W., 511.

§ 4267. Power to Buy and Issue Notes, etc.

All private corporations incorporated by the legislative assembly of the territory of Washington prior to the first day of January, eighteen hundred and sixty-two, other than corporations created for religious purposes, be and they hereby are authorized [and] empowered to issue notes, bonds, mortgages or other evidences of indebtedness and to secure the payment of the same by mortgage, trust deed or otherwise encumbering any real or personal property owned by said corporations. Said corporations shall have power to buy, sell or otherwise deal in notes, bonds and stock of other corporations and shall have power through their duly authorized officers to execute any and all instruments necessary to carry out the powers conferred upon said corporations by the provisions of this section. [L. '93, p. 279, § 1.]

§ 4268. Liability of Executor, etc., Holding Stock as Collateral.

No person holding stock as executor, administrator, guardian, or trustee, or holding it as collaateral security or in pledge, shall be personally subject to any liability as a stockholder of the company; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder, and the estate and funds in the hands of the executor, administrator, or guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in the trust fund would have been if he or she had been living and competent to act and hold the stock in his or her name. [L. '66, p. 62, § 17; L. '69, p. 335, § 17; L. '73, p. 403, § 15; Cd. '81, § 2435; 1 H. C., § 1512.]

§ 4269. Books of Corporation to Show What.

It shall be the duty of the trustees of every company incorporated under this chapter to keep a book containing the names of all persons, alphabetically

A judgment against stockholders of a bank for the recovery against them of their contingent liability over and above the par value of their stock cannot be pleaded as res judicata in an action by the receiver of the bank to recover unpaid subscriptions to the amount of the par value of the stock: *Bar-to v. Nix*, 15 W., 563.

A corporation has authority to receive from a stockholder his certificates of stock in payment of his indebtedness to it, when such transaction is bona fide and for the purpose of protecting the corporation from loss; and stock so taken may be re-issued by the corporation: *Id.*

In an action by a receiver of a bank to enforce stock subscriptions, the defendants, who were directors in the bank, are estopped from setting up that the bank stock had been issued by the bank to them and their notes taken therefor, under a secret agreement that they should not be liable thereon: *Id.*

Where, in an action for the appointment of a receiver for a corporation, the court had determined that unpaid assessments upon the capital stock should be collected, it must be presumed, in an action brought by the receiver for their collection, that such determination was necessary and rightful, although from the record in the original action it may appear that the assets of the bank were sufficient to discharge its indebtedness: *Id.*

arranged, who are or shall be stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners of such shares, which book, during the usual business hours of the day, on every day excepting Sunday and legal holidays, shall be open for the inspection of stockholders and creditors of the company, at the office or principal place of business of the company; and any stockholder or creditor of the company shall have the right to make extracts from such book, or to demand and receive from the clerk or other officer having the charge of such book a certified copy of any entry therein, or to demand and receive from any clerk or officer a certified copy of any paper placed on file in the office of the company; and such book and certified copy shall be presumptive evidence of the fact therein stated in any action or proceeding against the company or any one or more of the stockholders. [L. '66, p. 62, § 18; L. '69, p. 336, § 18; L. '73, p. 403, § 16; Cd. '81, § 2436; 1 H. C., § 1513; see *Ind.*, § 3010.]

§ 4270. Official Acts—Misdemeanor as to Books and Papers.

If at any time the clerk or other officer having charge of such book shall make any false entry, or neglect to make any proper entry therein, or having the charge of any papers of the company shall refuse or neglect to exhibit the same, or allow the same to be inspected or extracts to be taken therefrom, or to give a certified copy of any entry, as provided in the preceding section, he shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the injured party a penalty of not less than one hundred dollars nor more than one thousand dollars, and all damages resulting therefrom, to be recovered in any action of debt in any court having competent jurisdiction; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect, to be sued for and recovered in the name of the people in the superior court of the county in which the principal place of business of the corporation is located. [L. '66, p. 62, § 19; L. '69, p. 336, § 19; L. '73, p. 404, § 17; Cd. '81, § 2437; 1 H. C., § 1514; see *Ind.*, § 3011.]

§ 4271. Capital Stock, How Increased or Diminished.

Any company incorporated under this chapter may, by complying with the provisions herein contained, increase or diminish its capital stock to any amount which may be deemed sufficient and proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum to which the capital is proposed to be diminished, such amount shall be satisfied and reduced so as not to exceed the diminished amount of the capital. [L. '66, p. 63, § 20; L. '69, p. 337, § 20; L. '73, p. 404, § 18; Cd. '81, § 2438; 1 H. C., § 1515.]

§ 4272. Notice of Meeting Called to Increase or Diminish Stock.

Whenever it is desired to increase or diminish the amount of capital stock, a meeting of the stockholders shall be called, by a notice signed by at least a majority of the trustees, and published at least eight weeks in some newspaper

published in the county where the principal place of business of the company is located, or if no newspaper is published in the county, then the newspaper nearest thereto in the state, which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital, and a vote of two-thirds of all the shares of the stock shall be necessary to increase or diminish the amount of capital stock. [L. '66, p. 63, § 21; L. '69, p. 337, § 21; L. '73, p. 404, § 19; Cd. '81, § 2439; 1 H. C., § 1516.]

§ 4273. Certificate to be Made, Filed, etc.—Amount to be Specified.

If, at a meeting so called, a sufficient number of votes have been given in favor of increasing or diminishing the amount of capital, a certificate of the proceedings showing a compliance with these provisions, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock is to be increased or diminished, shall be made out, and signed, and verified, by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the trustees, and filed as required by section 4251, and when so filed, the capital stock of the corporation shall be increased or diminished to the amount specified in the certificate. [L. '66, p. 63, § 22; L. '69, p. 337, § 22; L. '73, p. 405, § 20; Cd. '81, § 2440; 1 H. C., § 1517.]

§ 4274. Power of Trustees Upon Dissolution of Corporation.

Upon the dissolution of any corporation formed under the provisions of this chapter, the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation by the name of the trustees of such corporation, collect and pay the outstanding debts, settle all its affairs, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses. [L. '66, p. 64, § 23; L. '69, p. 337, § 23; L. '73, p. 405, § 21; Cd. '81, § 2441; 1 H. C., § 1518.]

§ 4275. Dissolution Proceedings—Publication of Notice—Order.

Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation. Notice of the application shall then be given by the clerk, which notice shall set forth the nature of the application, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for eight weeks, or if no newspaper is published in the county, by publication in the newspaper nearest thereto in the state. At the time and place appointed, or at any other time to which it may be postponed by the judge, he shall proceed to consider the application, and if

satisfied that the corporation has taken necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved. [L. '66, p. 64, § 24; L. '69, p. 338, § 24; L. '73, p. 405, § 22; Cd. '81, § 2442; 1 H. C., § 1519.]

§ 4276. Removing Principal Place of Business—Notice.

Any corporation desiring at any time to remove its principal place of business into some other county in the state shall file in the office of the county auditor a certified copy of its certificate of incorporation. If it is desired to remove its principal place of business to some other city, town, or locality within the same county, publication shall be made of such removal at least once a week for four weeks in the newspaper published nearest to the city, town, or locality from which the principal place of business or such corporation is desired to be removed. The formation or corporate acts of any corporation hereafter formed under this chapter shall not be rendered invalid by reason of the fact that its principal place of business may not have been designated in its certificate of incorporation: Provided, That within three months from the passage of this chapter, such corporation shall cause publication to be made once a week for at least four weeks in the newspaper published nearest the city, town, or locality, and where the principal place of business of such corporation has been in fact located, designating the city, town, or locality and county where its principal place of business shall be located. On compliance with the provisions of this section in the several cases herein mentioned, the principal place of business of any corporation shall be deemed established or removed at or to any designated city, town, or locality and county in the state. [L. '66, p. 65, § 26; L. '69, p. 339, § 26; L. '73, p. 406, § 24; Cd. '81, § 2444; 1 H. C., § 1520.]

§ 4277. Provisions as to Formation of, Extend to Water Companies.

The provisions of this chapter shall extend to and apply to all associations already formed under any law of this state [or] hereafter to be formed under the provisions of this act, for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure and fresh water. [L. '69, p. 340, § 29; L. '73, p. 408, § 27; Cd. '81, § 2447; 1 H. C., § 1521.]

§ 4278. Water Company May Acquire Lands and Water for its Purposes.

Such water companies, incorporated for the purposes specified in the preceding section, shall have the right to purchase or take possession of and use and hold such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water, upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the company, right-of-way for laying pipes and aqueducts for the use of the company, when the parties cannot agree, shall, so far as the same be applicable, be as prescribed in article 4 of chapter 3: Provided, That nothing therein contained shall be so construed as to authorize the appropriation of water belonging to any person, unless.

the owner thereof shall refuse to supply said town or city with water, after being requested so to do by the town board or city council. [L. '69, p. 340, § 30; L. '73, p. 408, § 28; Cd. '81, § 2448; L. '83, p. 45, § 8; 1 H. C., § 1522.]

§ 4279. **Water Company Must First Obtain Right or Privilege From City.**

Water companies hereafter incorporating, under the provisions of this chapter, must first obtain from the corporate authorities of a city or town intended to be supplied with water the right or privilege so to do; but nothing herein contained shall affect parties now acting under legislative grants or franchises. [L. '69, p. 341, § 31; L. '73, p. 408, § 29; Cd. '81, § 2449; 1 H. C., § 1523.]

§ 4280. **No Subscription to Stock of Mining Corporation is Necessary.**

In incorporations already formed, or which may hereafter be formed under this chapter, where the amount of the capital stock of such corporation consists of the aggregate valuation of the whole number of feet, shares, or interest in any claim in any mining claim in this state, for the working and development of which such corporation shall be or have been formed, no actual subscription to the capital stock of such corporation shall be necessary; but each owner in said mining claim shall be deemed to have subscribed such an amount to the capital stock of such corporation as under its by-laws will represent the value of so much of his interest in said mining claim, the legal title to which he may by deed, deed of trust, or other instrument vest or have vested in such corporation for mining purposes; such subscription to be deemed to have been made on the execution and delivery to such corporation of such deed, deed of trust, or other instrument; nor shall the validity of any assessment levied by the board of trustees of such corporation be affected by the reason of the fact that the full amount of the capital stock of such corporation, as mentioned in its certificate of incorporation, shall not have been subscribed as provided in this section: Provided, That the greater portion of said amount of capital stock shall have been so subscribed; And provided further, That this section shall not be so construed as to prohibit the stockholders of any corporation formed, or which may be formed for mining purposes as provided in this section, from regulating the mode of making subscriptions to its capital stock and calling in the same by by-laws or express contract. [L. '66, p. 65, § 28; L. '69, p. 339, § 28; L. '73, p. 407, § 26; Cd. '81, § 2446; 1 H. C., § 1588.]

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§ 4281. **Right to Appropriate Water, and Build Dams, Reservoirs, etc.**

Any person or persons, or company now incorporated, or that may hereafter become incorporated under the laws of this state, for the purpose of mining or manufacturing, shall have the right to purchase or appropriate and take possession of and divert from its natural channel, and use and hold the waters of any river, creek, or stream in this state that may be required for the mining and manufacturing purposes of any such person or persons, corporation or corporations, and to construct all dams, canals, reservoirs, ditches, pipes,

flumes, and aqueducts suitable and necessary for the controlling, directing, and running such waters to their mines or manufacturing establishments of any such person or persons, corporation or corporations, where the same may be intended to be utilized for such purposes: Provided, That no such appropriation or diversion of the waters of any such river, creek, or stream from its natural channel, nor shall any such dam, canal, reservoir, ditch, pipe, flume, or aqueduct be constructed, to the detriment of any person or persons, corporation or corporations, occupying the lands or being located below the point or place of such appropriation or diversion on any such stream or its tributaries, or above or below such dam, canal, reservoir, ditch, pipe, flume, or aqueduct, or of the owners of the lands through which the waters run in the natural course for the deprivation of the same, or the owners of the land through or upon which such dam, canal, reservoirs, ditch, pipe, flume, or aqueduct may pass through or over, or be situated upon, unless just and adequate compensation be previously ascertained and paid therefor. [L. '79, p. 124, § 1; 1 H. C., § 1589.]

See supra § 4090 and notes, right to appropriate water.

§ 4281a. **Corporations Conveying Water May Appropriate Lands.**

All corporations authorized to do business in the state, and who have been or may hereafter be organized, for the purpose of erecting and maintaining flumes and aqueducts to convey water for consumption or for mining, irrigation, milling, or other industrial purposes, shall have the same right to appropriate lands for necessary corporate purposes, and under the same regulations and instructions as are provided for other corporations; and such corporations organized for such purposes, in order to carry out the object of their incorporation, are authorized to take and use any water not otherwise legally appropriated. [L. '79, p. 134, § 1; Cd. '81, § 2472; 1 H. C., § 1587.]

See infra § 4312, power to build dikes, etc.

§ 4282. **Right of Eminent Domain Extended to Mining Corporations.**

The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of acquiring, owning or operating mines, mills or reduction works, or mining or milling gold and silver or other minerals, which may desire to erect and operate surface tramways or elevated cable tramways for the purpose of carrying, conveying or transporting the products of such mines, mills or reduction works. [L. '97, p. 95, § 1.]

§ 4283. **Right to Enter on Lands to Survey, etc.**

Every corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of acquiring, owning or operating mines, mills or reduction works, or mining or milling gold and silver or other minerals, which may desire to erect and operate surface tramways or elevated cable tramways for the purpose of carrying, conveying or transporting the

products of such mines, mills or reduction works, shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [L. '97, p. 95, § 2.]

§ 4284. **Manner of Appropriation.**

Every such corporation shall have the right to appropriate real estate or other property for right-of-way in the same manner and under the same procedure as now is or may be hereafter provided by the law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [L. '97, p. 95, § 3.]

See infra § 5637 et seq., procedure in eminent domain by private corporations.

§ 4285. **Fees for Filing Articles of Incorporation.**

Every corporation incorporated under the laws of this state, or of any state or territory of the United States, or of any foreign state, having a capital stock divided into shares, shall pay to the secretary of state, for the use of the state, the following fees: Every corporation having a capital stock, ten dollars; the said fee to be due and payable upon the filing of the articles of incorporation in the office or [of] the secretary of state, and no such corporation shall have or exercise any corporate powers, or be permitted to do any business in this state, until the said fees shall have been paid, and the secretary of state shall not file any articles of incorporation or their equivalent or give any certificate thereof, until the said fees shall have been paid. [L. '97, p. 134, § 1.]

§ 4286. **For Supplemental Articles.**

*Changing
Name - Act
1905, p. 215*

Every corporation desiring to file articles amendatory or supplemental, or certificate of increase or decrease of capital stock, shall pay to the secretary of state, for the use of the state, the fee of ten dollars. [L. '97, p. 134, § 2.]

*Act 1905, p. 108, Pamphlet
Same as the original*

§ 4287. **For Certified Copies.**

The fee for furnishing a certified copy of articles of incorporation, with the seal of the state attached, shall be five dollars, payable to the secretary of state, for the use of the state, upon application therefor. [L. '97, p. 134, § 3.]

§ 4288. **No Folio Charge Except, etc.**

There shall be no folio charge for recording articles of incorporation, or for preparing certified copies of the same, the fees herein prescribed covering all charges for filing and recording articles of incorporation, issuing a certificate thereof, and making and certifying to copies of the same: Provided, however, That where the articles to be recorded, or copied or certified to, shall exceed twenty folios, there shall be a further charge of fifteen cents per folio for all such excess. [L. '97, p. 134, § 4.]

§ 4289. **License Fee—Penalty for Non-Payment.**

Every corporation incorporated under the laws of this state, and every

foreign corporation having its articles of incorporation on file in the office of the secretary of state shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees: Every corporation having a capital stock, ten dollars. Every corporation failing to pay the said annual license fee, on or before the first day of July of each and every year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee, the following further fee, as a penalty for such failure: Every corporation, two dollars and fifty cents. Every corporation failing to pay the said license fees and penalties on or before the thirty-first day of December of any year shall forfeit the sum of five dollars for every day which it shall continue to do business as a corporation after said date, to be recovered in an action in any court of competent jurisdiction. [L. '97, p. 135, § 5.]

§ 4290. **Certain Corporations Excepted.**

This act shall not apply to corporations not for pecuniary profit, or to corporations organized for religious, social, fraternal, charitable, benevolent or educational purposes, nor to such insurance companies as are required to pay an annual license under the insurance laws of this state. [L. '97, p. 135, § 6.]

"This act" is embraced in §§ 4285-4290.

CHAPTER II.

OF FOREIGN CORPORATIONS.

§ 4291. **Power of, to do Business in This State.**

Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do [due] to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter: Provided, however, That this chapter shall not be [so] construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized

CARNEY BADLEY SPELLMAN

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