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No. 81923-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

AFSHIN PISHEYAR,

Petitioner,

v.

RICHARD M. SNYDER, et ux., and DAVID HANNAH, et ux., et al.,

Respondents,

BRIEF OF *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

The Association of Washington Business (“AWB”), the state’s chamber of commerce and principal institutional representative of the statewide business community makes this short *amicus curiae* submission to express concern with the ramifications of reversing the well-reasoned decision of the Court of Appeals.

Quite simply, Washington Business Corporations Act (“WBCA”) unambiguously establishes the fair value of shares, established in a judicial appraisal proceeding if necessary, as the exclusive remedy for dissenting shareholders absent claims of procedural irregularity or actual fraud. RCW 23B.13.020. The fact the dissenting shareholder had filed a derivative action on behalf of the corporation prior to being divested of his shares does not change this fact. There are sound policy reasons, rooted in the corporate form and the vesting of governance in officers and directors, for this exclusivity approach. There are legal protections for minority and dissenting shareholders contained within the appraisal proceeding.

Armed with a cache of out-of-state cases construing out-of-state statutes with varying degrees of kinship to the WBCA, petitioner suggests Washington law should say something other than what it does, and has been construed to, say on this matter; and that otherwise it is insufficiently protective of minority shareholder rights. But even if that were true, the

remedy for addressing that public policy concern is in the Legislature, not in this court. The Court of Appeals' decision should be affirmed.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB, founded in 1904, is the state's oldest and largest general business trade association. AWB represents over 6,800 member businesses who are engaged in all aspects of commerce in Washington and who provide jobs to over 650,000 employees in Washington. Acting as the state's chamber of commerce, AWB is also an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

AWB's membership includes many companies that are incorporated under Washington law, as well as companies that have incorporated elsewhere but have chosen to reincorporate in Washington. AWB also represents smaller unincorporated entities that must choose whether to incorporate in Washington or under the laws of another state. AWB's interest is therefore in a clear, stable body of corporate law that appropriately recognizes the proper role of officers and directors in managing corporate affairs and that contains important procedural safeguards to protect corporations and their shareholders from the serious harms caused by meritless derivative litigation.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

- A. Is payment of the fair value of shares the exclusive remedy of a dissenting shareholder under Washington law?
- B. Does a former shareholder, once divested, have standing to proceed derivatively on behalf of the corporation?

IV. STATEMENT OF THE CASE

For the sake of brevity, AWB adopts, as if set forth herein, the statement of the case provided by respondents Snyder and Hannah. *See Resp'ts Supp. Br.* at 3-8.

V. ARGUMENT

A. APPRAISAL AND PAYMENT OF FAIR VALUE IS THE EXCLUSIVE REMEDY FOR DISSENTING SHAREHOLDERS UNDER WASHINGTON LAW.

The WBCA permits majority shareholders to undertake corporate acts that eliminate minority shareholders' interests in the corporation. RCW 23B.13.020(1)(d). To compensate shareholders who disagree with those (or certain other) acts, the statute includes a provision protecting dissenting shareholders by entitling them to the fair value of their shares. RCW 23B.13.020(2). If necessary, the fair value of the shares may be established through an appraisal proceeding in Superior Court as to which the jurisdiction is "plenary and exclusive." RCW 23B.13.300.

The dissenters' rights provision unambiguously bars collateral attack on the corporate action absent procedural irregularity or fraud:

A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter *may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements* imposed by this title, RCW 25.10.900 through 25.10.955, the articles of incorporation, or the bylaws, *or is fraudulent* with respect to the shareholder or the corporation.

RCW 23B.13.020(2) (emphasis added). That fair value of the shares is an exclusive remedy for dissenting shareholders cannot seriously be disputed as a matter of Washington law. *See Matteson v. Ziebarth*, 40 Wn.2d 286, 297, 242 P.2d 1025 (1952); *Matthews v. Wenatchee Heights Water Co.*, 92 Wn. App. 541, 555, 963 P.2d 958 (1998).

It would be erroneous to assume this bar on collateral actions fosters a regime under which minority shareholders may suffer oppression without redress. In its notably well-reasoned and didactic opinion, the Court of Appeals correctly rejected this assumption:

In valuing the shares of an ousted shareholder, the court overseeing an appraisal action brought pursuant to chapter 23B.13 RCW may account for all prior reductions in the value of those shares caused by actual breaches of fiduciary duty, including the extraction of unreasonable salaries, misuse of corporate funds, or other self-dealing. Put another way, in order to ascertain the present value of the dissenting shareholder's interest in the corporation, the court may consider any majority shareholder misconduct affecting the minority shareholder's interest that occurred before the point in time that the appraisal-triggering transaction occurred. To be clear: the court is *not* limited to determining the value of the

minority shareholder's interest at the fixed point in time when the appraisal-triggering action occurred, without reference to prior actions by the majority that may have resulted in that value being reduced.

Sound Infiniti, Inc. v. Snyder, 145 Wn. App. 333, 349, 186 P.3d 1107 (2008).

Despite this “exclusive and plenary” jurisdiction of the appraisal court, RCW 23B.13.300, petitioner seeks a rule that would allow for both a statutory appraisal lawsuit as well as a collateral action asserting tort and breach of fiduciary duty claims. But such collateral attacks should clearly be disfavored as a matter of basic judicial economy. Indeed, exclusivity promotes the public policies of managerial efficiency, discourages extended litigation, and reduces the risk of multiple or duplicative shareholder recovery while at the same time guaranteeing fair value to dissenting shareholders. This statutory framework strikes the right balance between the interests of the corporation and the rights of its shareholders and the Court of Appeals interpretation of it should be affirmed.

B. A PLAINTIFF LOSES STANDING TO PURSUE A DERIVATIVE CLAIM IN THE NAME OF A CORPORATION WHEN HE CEASES TO BE A SHAREHOLDER.

Petitioner lost standing to pursue a shareholder derivative action on behalf of the corporation when he ceased to be a shareholder of the

corporation. This “continuous ownership” rule is “nearly universally held,” *Sound Infiniti*, 145 Wn. App. at 351 (quoting *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984)), and is the rule in Washington. See *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 149, 744 P.2d 1032, 750 P.2d 254 (1987) (“Standing to bring a stockholder derivative claim requires a proprietary interest in the corporation whose right is asserted.”).¹

As the Court of Appeals notes, this common-sense requirement flows from the language of CR 23.1 that “[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders ... similarly situated in enforcing the right of the corporation.” The requirement of similarly situated shareholders “presupposes that his interest as a shareholder continues throughout the litigation.” *Sound Infiniti*, 145 Wn. App. at 350. While petitioner asks this court to essentially carve out an exception to the rule in order to allow continued standing where a shareholder loses status involuntarily, the court should resist the invitation.

Under Washington law, “[d]erivative suits are disfavored and may be brought only in exceptional circumstances.” *Haberman*, 109 Wn.2d at 147. It has long been a public policy judgment of this state that

¹ For citation to a number of other federal and state authorities following the continuous

corporations are appropriately managed by their officers and directors and only in extraordinary circumstances may a shareholder commandeer control of corporate governance to act in the corporation's name. *See, e.g., Gilliland v. Mount Vernon Hotel Co.*, 51 Wn.2d 712, 721, 321 P.2d 558 (1958); *Beall v. Pacific Nat. Bank of Seattle*, 55 Wn.2d 210, 212, 347 P.2d 550 (1960); *McCormick v. Dunn & Black*, 140 Wn. App. 873, 895, 167 P.3d 610 (2007). The continuous ownership rule furthers this policy by reducing the risk that individuals or entities with no actual interest in the outcome of the litigation (other than perhaps attorney's fees) could take the reins of corporate control in litigation and act in the corporation's name. Adopting a rule that untethers standing from shareholder status, on the other hand, subverts that policy and could wreak havoc on a corporation's ability to function effectively and efficiently.

VI. CONCLUSION

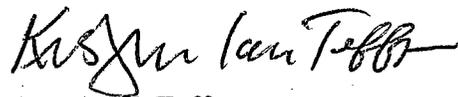
The thorough and well-reasoned decision of the Court of Appeals represents sound corporate law and is consistent with decisions of this court, the federal courts, and the majority of states on the issues presented. Already, at least one other court has relied upon the Court of Appeals' analysis below in resolving a similar dispute. *See Quinn v. Anvil Corp.*, 2008 WL 4810084 (W.D. Wash., Oct. 31, 2008) at *2 (exclusivity of the

ownership rule, see *Br. of Resp't/Cross-App.* at 14-15.

dissenter's rights statute), *4 (application of the continuous ownership rule); *see also Quinn v. Anvil Corp.*, 2009 WL 37157 (W.D. Wash. Jan. 5, 2009) (relying a second time on *Sound Infiniti* to reject a motion for reconsideration). At its essence, petitioners' claims seek relief from what Washington corporate law is and long has been. Those claims are suitable for the Legislature; not this court.

Respectfully submitted this 19th day of October, 2009.

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