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No. _____

Court of Appeals No. 59477-0-1

King County Superior Court No. 05-2-08240-2 KNT

CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

SOUND INFINITI, INC., d/b/a INFINITI OF KIRKLAND, a Washington corporation; ex rel AFSHIN PISHEYAR, a shareholder thereof; INFINITI OF TACOMA AT FIFE, INC., a Washington corporation, ex rel AFSHIN PISHEYAR, a shareholder thereof; S&I OF WA L.L.C., a Washington limited liability company, ex rel AFSHIN PISHEYAR, a member thereof; RDA PROPERTIES, LLC, a Washington limited liability company, ex rel AFSHIN PISHEYAR, a member thereof; and AFSHIN PISHEYAR, an unmarried individual,

Appellant/Cross-Respondent,

v.

RICHARD M. SNYDER and JEANNE C. SNYDER, husband and wife, and their marital community; RICHARD M. SNYDER as Trustee of the SNYDER CHILDREN'S IRREVOCABLE TRUST FOR THE BENEFIT OF ZACHARY SNYDER and the SNYDER CHILDREN'S IRREVOCABLE TRUST FOR THE BENEFIT OF TRAVIS SNYDER; and DAVID HANNAH and MARTHA M. HANNAH, husband and wife, and their marital community,

Respondents/Cross-Appellants.

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PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Afshin Pisheyar asks this Court to accept review of the Court of Appeals decision designated in Part II. Mr. Pisheyar, a minority shareholder in two closely-held corporations, was the Appellant/Cross-Respondent in the Court of Appeals of the State of Washington, Division II, case number 59477-0-I, and the Plaintiff in King County Superior Court, Cause No. 05-2-08240-2 KNT.

II. CITATION TO THE COURT OF APPEALS DECISION

The published opinion of the Court of Appeals, __ Wn. App. __, 2008 WL 2486563, issued June 23, 2008, is set out in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Is an issue of substantial public interest presented when the Court of Appeals effectively overturned long-standing common law protections for a minority shareholder who sued majority shareholders for breach of fiduciary duty and other misconduct, who then retaliated by eliminating the plaintiff as a shareholder of the corporations?

2. Is an issue of substantial public interest presented when the Court of Appeals held that, in the absence of fraud, the statutory appraisal remedy provides the exclusive remedy for a plaintiff who has his shareholder status forcibly revoked by majority shareholders after he sues them for breach of fiduciary duty and other misconduct?

3. Is an issue of substantial public interest presented when the Court of Appeals held that a plaintiff lacks standing to maintain

shareholder derivative claims after the plaintiff's shareholder status is forcibly revoked, although the plaintiff was a shareholder when he started the derivative action and did not acquiesce in the retaliatory corporate acts that revoked his shareholder status?

4. Is an issue of substantial public interest presented when the Court of Appeals characterized damages suffered only by the plaintiff as derivative and dismissed these damage claims for lack of standing?

IV. STATEMENT OF THE CASE

A. Pisheyar, Snyder and Hannah Form a Business.

For many years, Plaintiff Afshin Pisheyar worked for Defendant Richard Snyder at his car dealerships. When Pisheyar told Snyder that he intended to leave, Snyder suggested that Pisheyar invest with him, and they eventually became joint owners of several car dealerships. RP 12-8-05, p. 63, l. 5-13, CP 562. In 1996, Snyder and Pisheyar opened a new car dealership, Sound Infiniti, Inc., with Defendant David Hannah. RP 11-15-05, p.71, l. 19-23. CP 606-612. Snyder owned 51 percent of the shares. CP 443. To protect Hannah and Pisheyar's investments, they agreed that minority shareholders could not be terminated as officers except for serious misconduct. CP 427.

Initially, Snyder was sole owner of the dealership's real property. In January 2002, Snyder decided to sell the real property to an outside buyer. CP 95-96. When Hannah and Pisheyar learned Snyder had agreed to sell the real property, Pisheyar came up with a plan where the three men would

own the property and Snyder would still receive the full purchase price. CP 96-97. In return, Snyder would include Pisheyar and Hannah in future dealerships he obtained, and the three would be partners in both the dealerships and the property. CP 558-60. Snyder accepted the offer and rescinded his contract with the outside buyer. *Id.*

In 2003, in accord with their agreement, the three men formed a new dealership, Infiniti of Tacoma at Fife, Inc., and became joint owners in the dealership's real property. CP 13, 560, 2526-29.

In January 2005, Pisheyar was told that the shareholders would not receive their usual dividends, because the Corporations did not have sufficient funds. CP 562-68, 730-33. Pisheyar later learned that Snyder and Hannah had secretly taken some \$900,000 from the Corporations' lines of credit to buy land for a new Nissan dealership, from which Pisheyar had been excluded, causing Sound Infiniti to become undercapitalized. CP 681-86, 732-33.

B. Pisheyar Files Suit and the Defendants Retaliate.

In March 2005, Pisheyar sued Snyder and Hannah, alleging both personal and shareholder derivative claims, including breach of fiduciary duty and oppression of a minority shareholder. CP 1-11. In July 2005, Snyder and Hannah notified Pisheyar of a directors' meeting to discuss "stock splits" and indemnification for attorneys' fees. CP 33, 38. At the meeting, Pisheyar learned that the defendants were not planning stock

splits but instead sought to eliminate him as a shareholder through “reverse stock splits.” CP 33-35, 43-44.

The trial court initially enjoined the majority shareholders from terminating Pisheyyar’s shareholder status and advancing themselves fees. CP 997-99. When the court later dissolved the injunction, Snyder and Hannah voted, over Pisheyyar’s opposition, to approve reverse stock splits whose sole purpose was to eliminate Pisheyyar as a shareholder of both Corporations. CP 173-74. They then fired Pisheyyar as an officer of Sound Infiniti, CP 250, and moved to dismiss the shareholder derivative claims because Pisheyyar was no longer a shareholder. CP 2069. Although Pisheyyar protested that he was challenging “the propriety of the very action that would deprive him of shareholder status,” CP 3152, the trial court held that Pisheyyar had lost his standing. CP 309-311.

The trial court also dismissed most of Pisheyyar’s claims for minority shareholder oppression and damages, by dismissing any claim arising from Defendants’ implementation of the reverse stock split, conduct resulting in reduced dividends or profits, or breach of the shareholder agreement, holding that such claims were derivative. CP 509.

Noting the absence of Washington precedent, the Court of Appeals granted discretionary review. The Court of Appeals held that the appraisal process in RCW 23B13.020 was Pisheyyar’s sole remedy and that he did not have the right to challenge the propriety of the reverse stock splits. In addition, the court affirmed that because Pisheyyar was no longer a shareholder he lacked standing to continue litigating derivative claims.

The appellate court reversed the trial court's ruling as to Pisheyar's loss of fringe benefits, holding that these claims also should have been dismissed as derivative claims.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Traditionally, Washington courts have protected minority shareholders like Pisheyar from the misconduct of the majority by recognizing common law claims for breach of fiduciary duty and oppression of minority shareholders. This protection is enhanced when the minority shareholder is a founding member of a closely held corporation.

In an issue of first impression, the Court of Appeals held that in the absence of fraud, the appraisal remedy in RCW 23B.13.020¹ is the sole recourse for a plaintiff who has been forcibly removed as a shareholder, and that majority shareholders may remove a minority shareholder even after he has filed a derivative action alleging misconduct by the majority.

By allowing majority shareholders to easily eliminate a complaining shareholder, the decision effectively overturns long-standing common law protections for minority shareholders. If allowed to stand, the decision will have a chilling effect on minority shareholders who witness misconduct by the majority. With appraisal as the sole remedy, no minority shareholder will be able to effectively challenge misconduct by the majority.

The Court of Appeals also held that Pisheyar lost his standing to maintain shareholder derivative claims. Unless the decision is reversed,

¹ RCW 23B.13.020 and its legislative history is attached as Appendix B.

majority shareholders will have the power to defeat all derivative claims simply by stripping a plaintiff of shareholder status. Minority shareholders who witness misconduct by the majority will have to remain silent or risk being forced to sell their shares of stock.

The decision effectively grants majority shareholders immunity from suit. If a minority shareholder files suit challenging the majority's improper acts, the majority shareholders need only remove the minority shareholder, thereby prohibiting the minority shareholder from pursuing both individual claims (such as breach of fiduciary duty and minority oppression) and derivative claims.

Because the protection of minority shareholders and allowing derivative actions to proceed to an adjudication on the merits are issues of substantial public interest, this Court should grant review.

A. Grounds for Review

A petition for discretionary review should be granted if it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

B. The Common Law Protects Minority Shareholders By Allowing Claims Against Majority Shareholders for Breach of Fiduciary Duty and Oppression of Minority Shareholders.

Washington law recognizes that majority shareholders owe a fiduciary duty to minority shareholders. *Wool Growers Service Corp. v. Ragan*, 18 Wn.2d 655, 691, 140 P.2d 512 (1943). This fiduciary duty incorporates a duty of good faith and fair dealing towards minority shareholders. R.J.

McGaughey, *Washington Corporate Law Handbook* § 7.10 at 143 (1993) (“McGaughey”); *Hay v. Big Bend Land Co.*, 32 Wn.2d 887, 897, 204 P.2d 488 (1949) (principle that majority shareholders “must, at all times, exercise good faith toward the minority stockholders is well recognized.”)

Similarly, Washington law provides that corporate officers and directors owe a fiduciary duty of good faith and loyalty to the corporation they serve and its shareholders. *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986) (directors and officers are fiduciaries and are not permitted to retain any personal profit or advantage); McGaughey, § 5.13 at 86-88 (noting that “courts will vigorously scrutinize transactions involving conflicts of interest or self-dealing.”). Majority shareholders and directors act in bad faith when their actions benefit them, rather than the corporations and shareholders they serve. *Interlake Porsche & Audi, Inc.*, 45 Wn. App. at 509.; *Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 381, 391 P.2d 979 (1964) (fiduciary duty violated when officers or directors acquire a personal profit or advantage).

The fiduciary duties of majority shareholders and directors are enhanced in a closely held corporation.² The duty owed between shareholders in closely held corporations, such as those at issue here, has been described as similar to the heightened fiduciary duty that exists among partners: a duty of utmost good faith and loyalty. 2 F. H. O’Neal

² A “closely held corporation” means a corporation with few shareholders, who are typically involved as owners and managers, and for which there is usually no ready market for the sale of the corporation’s shares. *Rogers Walla Walla, Inc. v. Ballard*, 16 Wn. App. 81, 89 n.9, 553 P.2d 1372 (1976).

and Robert B. Thompson, *O'Neal's Oppression of Minority Shareholders and LLC Members* §§ 7:04, 7:05 (2006).

In addition to the remedies for breach of fiduciary duty, courts at common law had the equitable power to liquidate a corporation on a showing of irreparable injury to the shareholders and the corporation. *Henry George & Sons, Inc. v. Cooper-George, Inc.*, 95 Wn.2d 944, 948, 632 P.2d 512 (1981). Washington eventually adopted the Washington Business Corporation Act, which allows judicial dissolution when the “directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, *oppressive*, or fraudulent.” RCW 23B.14.300(2)(b) (emphasis added). While RCW 23B.14.300 refers only to dissolution, courts retain authority to fashion remedies short of dissolution to redress oppressive conduct by controlling shareholders. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 717-18, 64 P.3d 1 (2003).

C. The Decision Involves an Issue of Substantial Public Interest Because It Effectively Overturns Washington Law Protecting Minority Shareholders from Majority Shareholder Oppression.

Pisheyar’s suit alleged that Snyder and Hannah used the assets of the two Corporations for their own benefit and to the detriment of the Corporations and Pisheyar. CP 98. Without Pisheyar’s knowledge, Snyder and Hannah took some \$900,000 from the lines of credit of the Corporations, leaving the Corporations undercapitalized and with insufficient funds to distribute the usual shareholder dividends. CP 104, 564-68, 681, 730-33. In retaliation for the suit, Snyder and Hannah used

reverse stock splits³ to eliminate Pisheyar as a shareholder of both corporations.

The Court of Appeals held that in the absence of fraud, Pisheyar's sole remedy for these reverse stock splits is the appraisal process in RCW 23B.13.020 and that, as a matter of law, Pisheyar could not maintain claims for breach of fiduciary duty or minority oppression. The Court of Appeals held this to be the law even when a shareholder files suit *before* the Defendants eliminate him as a shareholder.

The Court of Appeals based its holding on three grounds: the statute prohibits common law claims other than fraud, its legislative history supports this conclusion, and the appraisal process provides Pisheyar with an adequate remedy. As discussed below, the reasoning of the Court of Appeals on all three grounds warrants reversal of the decision.

1. The Statutory Appraisal Remedy Should Not Be Used To Facilitate Majority Shareholder Misconduct.

In 1989, the Washington Legislature enacted chapter 23B RCW. In its comments to chapter 23B, the Legislature stated that it substantially relied on the provisions, purposes, and principles of the ABA's Revised Model Business Corporation Act (RMBCA) of 1984. *Ballard Square*

³ A reverse stock split occurs when a number of shares are combined into one share, which may result in a minority shareholder being left with a fractional share. *Lerner v. Lerner Corp.*, 750 A.2d 709, 718 (Md. Ct. Spec. App. 2000). For fractional shares, Washington law permits a corporation either to issue fractions of a share or purchase the fractions. RCW 23B.06.040(1)(a). Thus, the corporation does not have to eliminate a shareholder with a fractional share, but can simply issue a fractional share. Here, both Corporations, over Pisheyar's objections, chose to remove Pisheyar as a shareholder by purchasing his fractional shares. CP 34-35, 48, 73-74.

Condominium Owners Ass'n v. Dynasty Const. Co., 126 Wn. App. 285, 292-93, 108 P.3d 818 (2005).

RCW 23B.13.020 allows a shareholder to receive the "fair value" of his or her shares if the shareholder dissents from a corporate action that "effects a redemption or cancellation of all of the shareholder's shares."

RCW 23B.13.020(1). The Act also states that:

(2) 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).

A shareholder who disagrees with the corporation's valuation of the shares may submit an estimate of fair value. RCW 23B.13.280. If the corporation disagrees with the estimate, it may file an appraisal action. RCW 23B.13.300. These statutory provisions are commonly called "dissenter's rights" or the "appraisal remedy." *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 358 (Colo. 2003).

a) Historically, the Appraisal Remedy Was Intended To Protect Minority Shareholders.

At common law, unanimous shareholder approval was required before a corporation could engage in a fundamental corporate transaction. *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 536 n.6, 61 S. Ct. 376, 85 L.Ed. 322 (1941); Barry M. Wertheimer, *The Purpose Of The Share-*

holders' Appraisal Remedy, 65 Tenn. L. Rev. 661, 662 (1998) (“Wertheimer”). Individual shareholders had the ability to veto fundamental corporate changes. Wertheimer at 662. To prevent an individual from arbitrarily blocking such changes, state legislatures amended the law to permit such transactions by a majority vote. Wertheimer at 662; *Voeller*, 311 U.S. at 536 n.6. However, this “opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted.” *Voeller*, 311 U.S. at 536 n.6.

Thus, “[t]he original goal of the appraisal remedy was to protect minority shareholders from being stuck in illiquid investments not of their choice.” Wertheimer at 680. Today, every American jurisdiction has some form of statutory appraisal rights. *Id.* at 661 n.2.

b) “Fraudulent” in RCW 23B.13.020 Encompasses Fiduciary Duty and Minority Oppression Claims.

The Court of Appeals contends that the Legislature’s use of “fraudulent” unambiguously prohibits Pisheyar from raising any common law claims short of actual fraud. Decision at 9-14. This holding ignores the long-standing common law protections for minority shareholders. As this Court has stated: “Abrogation of the common law requires irreparable inconsistency. . . . Such inconsistency is not presented by mere silence.” *Ballard Square Condominium Owners Ass’n v. Dynasty Const. Co.*, 158 Wn.2d 603, 627, 146 P.3d 914 (2006) (citation omitted). In RCW 23B13.020, the Legislature elected to use “fraudulent” instead of

fraud. In discussing the meaning of “fraudulent” in the appraisal remedy, the Supreme Court of Nevada noted that:

[T]he term “fraudulent,” as used in the Model Act, has not been limited to the elements of common-law fraud; it encompasses a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders.”

Cohen v. Mirage Resorts, Inc., 62 P.3d 720, 728-29 (Nev. 2003).

Similarly, in construing Minnesota’s appraisal statute, the Minnesota Court of Appeals held that: “the Minnesota legislature intended the term ‘fraudulent’ . . . to be construed more broadly than strict common-law fraud.” *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. App. 1986). See also, *McMinn v. MBF Operating Acquisition Corp.*, 164 P.3d 41, 51 (N.M. 2007) (in the appraisal remedy the term “fraudulent” incorporates a claim for breach of fiduciary duty).

Thus, Washington’s use of “fraudulent” means the Legislature intended it to be construed more broadly than common-law fraud. This contention is supported by the Legislative history to RCW 23B.13.020.

c) The Legislative History Indicates the Legislature Intended To Preserve Breach of Fiduciary Duty and Oppression Claims.

In discussing the exclusivity of the appraisal remedy, the Legislative History to RCW 23B13.020 states specifically that the presence of the appraisal remedy should not prohibit a court’s freedom to address breaches of fiduciary duty:

But the prospect that shareholders may be “paid off” does not justify the corporation proceeding without complying with procedural requirements or fraudulently. **If the corporation attempts an action . . . in violation of a fiduciary duty—to take some examples—the court’s freedom to intervene should be unaffected by the presence or absence of dissenters’ rights under this chapter.** Because of the variety of situations in which procedural defects and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters’ rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (**appraisal remedy may not be adequate “where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved”**); Walter J. Schloss Associates v. Arkwin Industries, Inc., 455 N.Y.S.2d 844, 847-52 (App. Div. 1982) (dissenting opinion), reversed, with adoption of dissenting opinion, 460 N.E.2d 1090 (Ct. App. 1984).

The Official Legislative History to RCW 23B.13.020, Senate Journal 51st Legis. 3087-88 (1989), at 13.020-3 to 13.020-4 (emphasis added).

The Court of Appeals acknowledges that the “references to ‘fiduciary duty’ and ‘self-dealing’ suggest that the legislature . . . intended to preserve independent damages claims.” Decision at 12. Nevertheless, the court noted that the Legislature omitted the term “unlawful” that preceded “fraudulent” in the original MBCA. The Court of Appeals contends that this omission suggests the Legislature intended to limit dissenting shareholders’ independent remedies to actual fraud. *Id.*

In *Sifferle*, however, the court rejected this argument. In construing Minnesota’s appraisal remedy—which also omitted “unlawful”—the court

noted that this omission, combined with a legislative history similar to Washington's, meant that the term "fraudulent" should be construed to include claims for breach of fiduciary duty:

We think that by choosing to exclude the term "unlawful" from [Minnesota's appraisal statute], when it was present in § 80(d) of the Model Act, and by approving the above-cited comments to the Model Act, the Minnesota legislature intended the term "fraudulent" . . . to be construed more broadly than strict common-law fraud.

Sifferle, 384 N.W.2d at 507 (footnote omitted).

The Court of Appeals also contends that the cases cited in the Legislative history support its decision. Decision at 12-13 (discussing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) and *Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 90 A.D.2d 149, 455 N.Y.S.2d 844 (1982)).

In *Weinberger*, however, the Delaware Supreme Court noted that the statutory remedy of appraisal for a dissenting shareholder may not always be appropriate:

The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved. [citation omitted] Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages.

Weinberger, 457 A.2d at 714. Although claiming that it is not clear whether *Weinberger* intended to permit independent breach of fiduciary claims, the Court of Appeals admitted that "later Delaware cases

interpreting *Weinberger* have found that it allows separate suits for damages based on breach of fiduciary duty.” Decision at 13 n.3.⁴

The court’s reliance upon *Walter J. Schloss Associates* is also misplaced. In that case, the plaintiff withdrew his equitable claims and sought only money damages that would have been identical to the relief available in the appraisal process. *Walter J. Schloss Associates*, 90 A.D.2d at 161. Here, in contrast, Pisheyar sought equitable relief: an injunction, appointment of a receiver and the granting of an ownership interest in Nissan of the Eastside, Inc. CP 269. In addition, Pisheyar requested money damages that are unrelated to the valuation of his shares. Thus, *Walter J. Schloss Associates* is distinguishable from the case at hand.

d) RCW 23B.13.020 Should Not Be Used To Facilitate Oppression by the Majority.

The Court of Appeals fails to acknowledge that the use of a reverse stock split to eliminate a minority shareholder can, by itself, constitute oppression. As the *Lerner* court noted:

The weight of authority indicates that the use of a reverse split and elimination of fractional shares for the purpose of eliminating minority stockholders may raise fairness, business purpose, or other similar issues justifying judicial intervention.

⁴ The Court of Appeals also cited two Washington cases, *Matthews v. Wenatchee Heights Water*, 92 Wn. App. 541 (1998) and *Matteson v. Ziebarth*, 40 Wn.2d 286, 297, 242 P.2d 1025 (1952). Decision at 13-14. These cases provide little assistance in analyzing the exclusivity of RCW 23B.13.020. The *Matthews* case, for example, simply states without analysis that the statute provides the exclusive remedy absent fraud, citing *Matteson*. 92 Wn. App. at 555. The *Matteson* case was decided long before RCW 23B.13.020 was enacted; thus neither *Matthews* nor *Matteson* is helpful. In addition, *Matteson* did not involve a reverse stock split but rather an attempt to avoid a merger to which the shareholder failed to dissent. 40 Wn.2d at 296. Under the statute in effect at that time, a shareholder who failed to dissent was bound by the corporate action. *Id.*

Lerner, 750 A.2d at 720 (citations omitted); *see also Applebaum v. Avaya, Inc.*, 805 A.2d 209, 218 (Del. Ch. 2002) (noting that “reverse stock splits can be employed as instruments of oppression”).

Similarly, a breach of fiduciary duty occurs when the majority’s control of a closely held corporation is used to deny a minority shareholder’s participation in the corporation:

Majority or controlling shareholders breach such fiduciary duty to minority shareholders when control of the close corporation is utilized to prevent the minority from having an equal opportunity in the corporation.

Crosby v. Beam, 548 N.E.2d 217, 221 (Ohio 1989) (citations omitted). Thus, a majority shareholder’s use of a reverse stock split to “freeze out” a minority shareholder in a closely held corporation is itself oppressive and a breach of fiduciary duty.

If the Decision is allowed to stand, it will have the effect of encouraging misconduct and retaliation by majority shareholders. If the minority shareholder objects, the majority need only institute a reverse stock split and the complaining voice will be eliminated.

2. Appraisal Should Not Be the Exclusive Remedy When a Shareholder Challenge Does Not Involve the Share Price.

As *Walter J. Schloss Associates* indicates, appraisal should not be the exclusive remedy when a minority shareholder raises claims other than the inadequacy of the share price. *See also McMinn*, 164 P.3d at 53 (“Nothing in the appraisal statute indicates that cashed-out shareholders cannot pursue claims based on conduct antecedent or unrelated to the

appraisal-triggering transaction itself”); *IRA for Benefit of Oppenheimer v. Brenner Cos.*, 419 S.E.2d 354, 357 (N.C. App. 1992) (appraisal is not the exclusive remedy when shareholder has presented claims of breach of fiduciary duty, . . . self-dealing, . . . or similar claims based on allegations other than inadequacy of stock price alone”); *Stepak v. Schey*, 51 Ohio St.3d 8, 553 N.E.2d 1072 (1990) (breach of fiduciary duty claims not related to appraisal price may be raised outside appraisal statute); *Yanow v. Teal Indus., Inc.*, 178 Conn. 262, 422 A.2d 311, 322 n.10 (1979) (noting that plaintiffs are not precluded from bringing “claims antecedent to and unrelated to the merger,” notwithstanding statute expressly making appraisal the exclusive remedy).

The Court of Appeals also suggests that Pisheyar may raise his breach of fiduciary duty claim in the appraisal proceeding. Decision at 15-16. This argument, however, assumes Pisheyar’s claims are solely related to the value of the share price. Decision at 16. That is not the case: The appraisal remedy cannot compensate Pisheyar for decreased shareholder distributions resulting from Snyder and Hannah’s use of corporate funds for their own purposes, loss of fringe benefits, termination of Pisheyar’s employment, and the elimination of Pisheyar as a shareholder in retaliation for asserting claims. Nor does the appraisal process address Pisheyar’s equitable claims for an injunction, appointment of a receiver, and granting of an ownership interest in Nissan of the Eastside, Inc.

D. The Decision Involves Substantial Public Interest Because It Denies Standing To Maintain Derivative Claims Even When a Plaintiff Was a Shareholder When Litigation Began and Opposed the Revocation of his Shareholder Status.

Civil Rule 23.1 requires a plaintiff filing a derivative suit to allege that he or she was “a shareholder or member *at the time of the transaction of which he complains* or that his share or membership thereafter devolved on him by operation of law. . . .” CR 23.1 (emphasis added). See also RCW 23B.07.400 (for derivative suit, plaintiff must hold shares “when the transaction complained of occurred”). Until the decision below, no Washington case had addressed the issue of whether a litigant in a shareholder derivative suit must maintain shareholder status throughout the case. Although the general rule is that a shareholder must do so, there are several exceptions to this rule. 13 W.M. Fletcher, *Fletcher Cyclopaedia of the Law of Corporations*, § 5972 (2007).

To address this issue, the American Law Institute adopted the rule that a shareholder must continue to hold the shares throughout the litigation unless “the failure to do so is the result of corporate action in which the holder did not acquiesce.” *Principles of Corporate Governance* § 7.02 (ALI 1994) (the “*Principles*”). Oregon courts adopted this rule in *Noakes v. Schoenborn*, 841 P.2d 682 (Or. Ct. App. 1992).

In *Noakes*, the trial court dismissed derivative claims because the plaintiffs were no longer shareholders. *Id.* at 684-85. On appeal, the court noted that the rationale for the traditional rule is that “a former shareholder, who would not benefit from a corporate recovery, might be

willing to accept an improper or inadequate settlement.” *Id.* at 685 (quoting from the comments to § 7.02). However, because the plaintiffs did not acquiesce in the corporate act that deprived them of shareholder status and because they were “better able to represent the interests of the corporation, primarily because the other shareholders were involved with, or acquiesced in, the wrongdoing,” the Oregon court held that the plaintiffs had standing to maintain the derivative action. *Id.* at 686.

Like the plaintiffs in *Noakes*, Pisheyar owned stock in the Corporations when he filed suit and lost his shareholder status pursuant to a corporate action he opposed. Like the plaintiffs in *Noakes*, Pisheyar is better suited to maintain a derivative action because the other shareholders are involved in the wrongdoing that harmed the Corporations.

Nevertheless, the Court of Appeals held that Pisheyar lacked standing and that a minority shareholder’s sole recourse to maintain a derivative suit is to maintain shareholder status by enjoining a reverse stock split. Decision at 18-19. However, in considering an injunction the trial court may not adjudicate the ultimate merits of the case. *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998).

A shareholder who files a derivative action should not be limited to an injunction hearing to determine the ultimate merits of the case. Nor should a shareholder be forced to resort to seeking a preliminary injunction to maintain shareholder status. Rather, a shareholder who had standing when the derivative suit is filed should have standing to have the

derivative claims resolved at trial, where the ultimate merits of the plaintiffs' case should be properly adjudicated.

This Court should follow *Noakes* and adopt the rule for standing as stated in § 7.02 of the *Principles*. Under this rule, a shareholder who owned stock when litigation commences must continue to hold the stock, unless the failure to do so is the result of corporate action that the holder opposed. Because Pisheyar had standing when he filed suit, and because he did not agree with the acts that stripped him of his shareholder status, this Court should hold that he has standing to maintain derivative claims.

VI. CONCLUSION

For the above reasons, Pisheyar requests that this Court grant his petition for review and reverse the decision of the Court of Appeals so that Pisheyar may pursue his full range of remedies at trial.

DATED this 21st day of July, 2008.

VANDEBERG JOHNSON & GANDARA, LLP

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APPENDICES

Appendix A: The published opinion of the Court of Appeals, ___ Wn. App. ___, 2008 WL 2486563, issued June 23, 2008.

Appendix B: RCW 23B.13.020 and its Official Legislative History, Senate Journal 51st Legis. 3087-88 (1989), from Washington Business Corporate Act (23B), Washington State Bar Association (2005), pages 13-020-1 to 13.020-4.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SOUND INFINITI, INC., d/b/a INFINITI)
OF KIRKLAND, a Washington)
corporation; ex rel AFSHIN PISHEYAR,)
a shareholder thereof; INFINITI OF)
TACOMA AT FIFE, INC., a Washington)
corporation, ex rel AFSHIN PISHEYAR,)
a shareholder thereof; S&I OF WA)
L.L.C., a Washington limited liability)
company, ex rel AFSHIN PISHEYAR, a)
member thereof; RDA PROPERTIES,)
LLC, a Washington limited liability)
company, ex rel AFSHIN PISHEYAR, a)
member thereof; and AFSHIN)
PISHEYAR, an unmarried individual,)

Petitioners,)

v.)

RICHARD M. SNYDER and JEANNE C.)
SNYDER, husband and wife, and their)
marital community; and DAVID)
HANNAH and MARTHA M. HANNAH,)
husband and wife, and their marital)
community,)

Respondents,)

RICHARD M. SNYDER as Trustee)
of the SNYDER CHILDREN'S)
IRREVOCABLE TRUST FOR THE)
BENEFIT OF ZACHARY SNYDER)
and the SNYDER CHILDREN'S)
IRREVOCABLE TRUST FOR THE)
BENEFIT OF TRAVIS SNYDER.)

Defendant.)

DIVISION ONE

No. 59477-0-1

(Consolidated with
No. 59571-7-1)

PUBLISHED OPINION

FILED: June 23, 2008

Dwyer, A.C.J. — Richard Snyder and David Hannah, the majority shareholders of two closely held corporations, Sound Infiniti, Inc., and Infiniti of Tacoma at Fife, Inc. (Infiniti of Tacoma), used reverse stock splits to eliminate Afshin Pisheyyar's minority interest in those corporations. In this discretionary review proceeding, we are asked to decide whether the statutory appraisal procedure set forth in chapter 23B.13 RCW, which entitles Pisheyyar to receive from the corporations an amount of money equal to the fair value of his former interest, is the sole remedy provided to him in this circumstance, or whether he may also maintain independent claims against the majority shareholders in a forum other than the appraisal proceeding. We hold that Pisheyyar's sole remedy is provided by the statutory appraisal process. Accordingly, we affirm the trial court's dismissal of Pisheyyar's individual claims against Snyder and Hannah. We also affirm the trial court's ruling that most of Pisheyyar's other stated claims were derivative of his shareholder status and that Pisheyyar thus lost standing to pursue those claims when he ceased to be shareholder. Because the trial court erred, however, by ruling that Pisheyyar could maintain independent, personal claims arising out of the loss of in-kind "perquisites" to which he asserted an entitlement as an incident of his status as a shareholder, we reverse that ruling and remand this action to the trial court for dismissal of those claims.

I

Snyder and Pisheyyar, together with Hannah, formed Sound Infiniti (doing business as Infiniti of Kirkland) to operate an Infiniti automotive dealership.

Ultimately, Hannah came to own 51 percent of Sound Infiniti, with Snyder owning 30 percent and Pisheyar owning 19 percent, respectively. There were no other shareholders. When the three men formed Sound Infiniti, they entered into a "Buy-Sell Agreement between Shareholders and Sound Infiniti," which provided that the shareholders who served as officers of the corporation could "only be terminated for cause based on dishonesty, fraud, misappropriation, theft and/or substance abuse."

Snyder independently formed another company, S & I of WA L.L.C. (S & I), to acquire the land where Infiniti of Kirkland was to be located, develop the land, and lease it back to Sound Infiniti. At the time of its formation, S & I had three members: Snyder (together with his wife) and two separate irrevocable trusts benefiting the Snyders' children.

Later, Snyder began to contemplate having S & I sell the property on which Infiniti of Kirkland is located. When Pisheyar and Hannah learned of this, they proposed to Snyder that he instead sell them each a third of S & I in exchange for the same total amount of money he would have received by selling to an outside party. Pisheyar contends, that as part of this transaction, Snyder made an oral agreement to include Pisheyar (as well as Hannah) in any future dealerships that Snyder acquired. Both Snyder and Hannah vigorously dispute that any such agreement was made.

Nonetheless, the following year, the three men (together with another man, Robert Curtis) did form a new corporation, Infiniti of Tacoma, to operate an

Infiniti dealership in Fife. Corporate ownership was arranged such that Snyder owned 51 percent, Hannah 25 percent, Pisheyar 19 percent, and Curtis 5 percent of the total shares. Snyder, Hannah, and Pisheyar also formed another company, RDA Properties, LLC, (RDA) to purchase and develop the land for the planned Fife dealership, and then lease it back to Infiniti of Tacoma. Snyder, Hannah, and Pisheyar each owned a third of RDA.

All of the parties agreed that, other than serving as the secretary of Sound Infiniti and as a director of Infiniti of Tacoma, Pisheyar would have no role in the operations or management of the corporations. He was to be strictly an investor. The corporations have always been successful and profitable. Contrary to Pisheyar's assertions to the contrary, the trial court found that the corporations have always met the financial requirements imposed by Infiniti of North America, Inc., and complied with their tax obligations.

In spite of the general good standing of the corporations, the relationship between Pisheyar, on one hand, and Snyder and Hannah, on the other, soured after a confrontation between Snyder and Pisheyar in Snyder's office. Thereafter, Pisheyar began to demand increased information about and increased authority over the day-to-day operations of the dealerships, which Snyder and Hannah declined to provide, pointing out that Pisheyar had never been entitled to operational control. Pisheyar viewed this as Snyder and Hannah excluding him from meetings and decision-making that he had a right to be involved in, notwithstanding his non-managerial role in the corporations.

Pisheyar felt particularly aggrieved by the decision to have Sound Infiniti and Infiniti of Tacoma together loan Snyder \$900,000 to purchase land for a separate Nissan dealership in which Pisheyar was not invited to participate.

Snyder and Hannah deny excluding Pisheyar from any corporate decision-making in which he was entitled to participate, but agree that by February 2005 they had decided that personal and business conflicts with (and distrust of) Pisheyar had seriously impaired their ability to work with him, prompting their desire to eliminate him as a shareholder.

Pisheyar filed this action in King County Superior Court on March 9, 2005, in both his individual capacity and derivatively as a shareholder of the corporations. He alleged that Snyder and Hannah "engaged in oppression" of him as a minority shareholder, converted corporate assets, otherwise breached their fiduciary duties, and breached both their purported oral agreement to include him in Snyder's new Nissan dealership and the LLC agreements of S & I and RDA. After various amendments of his complaint, Pisheyar included damages claims for loss of corporate perquisites and for unlawful termination.¹

After their motion to dismiss Pisheyar's claims was denied, Snyder and Hannah called a directors' meeting of Infiniti of Tacoma (of which Pisheyar continued to be a director) "to consider (1) indemnifications, (2) a stock split, and (3) such other matters coming before the board." The indemnification referred to was the advance to Snyder and Hannah of their attorney fees incurred in

¹ Pisheyar was discharged as the secretary of Sound Infiniti following his filing of this suit against it.

defending this action. The “stock split” mentioned was not a standard stock split. Rather, Snyder and Hannah proposed amending Infiniti of Tacoma’s articles of incorporation to institute a reverse stock split, whereby the 100 outstanding shares of the corporation would be reduced to four. Under this arrangement, Pisheyar’s interest in the corporation would be reduced to a fractional share, eliminating him as a shareholder in exchange for a cash payout equivalent to the value of his fractional interest. The same arrangement was made for Sound Infiniti by consent of the directors (Snyder and Hannah) in lieu of a directors’ meeting.

Pisheyar immediately sought, and was granted by the trial court, a temporary restraining order barring Snyder and Hannah from implementing the reverse stock splits. In its order, the trial court also scheduled a hearing to determine whether its injunction should be “modified, extended, or dissolved.”

The trial court held this hearing over two separate days in November and December of 2005. The injunction hearing clarified the alleged bases for Pisheyar’s shareholder derivative claims—that Snyder and Hannah had harmed the corporations

(1) by improperly borrowing money from the Corporations; (2) by directing personnel of Infiniti of Kirkland to improperly report fringe benefit expenses on Form W-2s to the Internal Revenue Service (“IRS”); (3) by applying for and being awarded a new Nissan car dealership in their individual capacities; and (4) by purchasing excessive life insurance on Mr. Hannah’s life at corporate expense.

It also clarified the alleged bases for Pisheyar’s purported individual claims:

(1) the Individual Defendants’ having been awarded a new Nissan car dealership without Pisheyar being offered an opportunity to

participate in that business; (2) the Individual Defendants' plan to implement reverse stock splits for both corporations, which would result in Pisheyar owning fractional shares, which the Corporations would purchase from him; and (3) the Individual Defendants' plan to have the Corporations advance payments to them for their attorneys' fees incurred in defending this action.

After hearing extensive testimony and reviewing voluminous submissions, the trial court found that the loans made to Snyder by the corporations were expressly allowed by the corporate bylaws, did not impair the corporations' ability to meet the capital requirements imposed by Infiniti of North America, and did not otherwise harm the corporations. The court further found that Snyder and Hannah did not direct employees to misrepresent their incomes or expenses to the IRS, that the Nissan dealership opportunity belonged solely to Snyder in his individual capacity, that Hannah's life insurance policy was proper, and that Pisheyar's preemptive rights under Sound Infiniti's Buy-Sell Agreement did not bar the reverse stock split for that corporation. Based on these findings, the trial court concluded that Pisheyar could not demonstrate a likelihood that he would succeed on the merits of his claims or that he otherwise had a right to relief and, accordingly, dissolved the injunction.

After the reverse stock splits became effective, Snyder and Hannah moved to dismiss Pisheyar's claims on the basis that they were all derivative, and that Pisheyar no longer had standing to pursue them because he was no longer a shareholder in either corporation.² The trial court initially granted the motion in part. It dismissed additional claims on reconsideration. Ultimately, the

² Pisheyar's wrongful termination claim was dismissed in response to a separate motion.

court also concluded that Pisheyar could not maintain independent, individual claims against Snyder and Hannah for breach of fiduciary duty in relation to either their decision to eliminate his interest in the corporations, or for alleged prior wrongdoing, because the sole remedy available to a shareholder who dissents from a fundamental corporate change is an action for payment of his or her former shares' value:

The court finds that the remedy available to Plaintiff under RCW 23B.13.020(1)(d) is exclusive, as there is no evidence before the court that the transaction either failed to comply with procedural requirements, or was fraudulent. See Matthews v. Wenatchee Heights Water Co., 92 Wn. App. 541, 555 (1998), and Official Legislative History of RCW 23B.13.020: "The [dissenter's rights] remedy is the exclusive remedy unless the transaction fails to comply with procedural requirements or is 'fraudulent.'"

The trial court did, however, characterize Pisheyar's claims for "alleged deprivation of shareholder 'perquisites', such as demo cars, sports tickets, and the like" as valid individual claims for damages. Accordingly, it declined to dismiss those claims.

The trial court then certified this series of orders as appropriate for discretionary review by this court, which the parties sought by two separate petitions. The causes were consolidated, and we granted discretionary review of the trial court's orders with respect to three specific issues:

1. Does RCW 23B.13.020 provide an exclusive remedy to a minority shareholder when a closely held corporation implements a reverse stock split?
2. Were Pisheyar's derivative claims properly dismissed?

3. Should Pisheyar's "perquisite" claims also have been categorized as derivative and, accordingly, dismissed?

II

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. KMS Fin. Servs., Inc. v. City of Seattle, 135 Wn. App. 489, 495-96, 146 P.3d 1195 (2006) (citing Trimble v. Wash. State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)). Whether a trial court's interpretation of the Washington Business Corporation Act (WBCA), Title 23B RCW, is correct is a question of statutory construction and so is reviewed de novo on appeal. Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 612, 146 P.3d 914 (2006). "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Resort to aids of statutory construction such as legislative history is appropriate only if a statute is susceptible to more than one meaning and, thus, is ambiguous. Campbell & Gwinn, 146 Wn.2d at 12.

III

Pisheyar contends that the trial court erred by barring his damages claims against Snyder and Hannah based on its conclusion that the appraisal remedy set forth in the WBCA is the exclusive remedy for shareholders who dissent from fundamental corporate changes, absent a showing of actual fraud related to the

corporate action. We disagree. The unambiguous text of the statute, its legislative history, and controlling case law all compel the conclusion that appraisal is the exclusive remedy for dissenting shareholders in such a circumstance.

The text of the WBCA expressly provides that appraisal is the exclusive remedy for shareholders who dissent from a fundamental corporate change unless the change was procedurally flawed or was somehow fraudulent:

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). Among the actions that a shareholder is entitled to dissent from, and so obtain the fair value of his or her shares through an appraisal proceeding in the superior court, is “[a]n amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation.” RCW 23B.13.020(1)(d). Thus, the reverse stock splits undertaken by the boards of Sound Infiniti and Infiniti of Tacoma qualify as corporate actions that Pisheyar was entitled to, and did, in fact, dissent from pursuant to the provisions of chapter 23B.13 RCW.

Without clearly articulating precisely why he believes that the above-

quoted portion of RCW 23B.13.020 is ambiguous, Pisheyar now contends that this statute means something other than what it says—i.e., he contends that he *may*, in fact, challenge the corporate actions that eliminated his shares in a proceeding entirely separate from the ongoing appraisal proceeding currently pending in King County Superior Court.

In support of this argument, Pisheyar requests that we review the legislative history of the 1989 enactment of RCW 23B.13.020, Laws of 1989, ch. 165, Sec. 141, contending that it demonstrates that, although the legislature specifically provided that procedurally correct corporate actions may be challenged in court by dissatisfied shareholders only if they are “fraudulent,” the legislature in fact intended that term to broadly encompass any allegation of breach of fiduciary duty or unfairness. Without accepting Pisheyar’s contention that the statutory language is ambiguous and that recourse to legislative history is appropriate, we conclude that RCW 23B.13.020’s legislative history in fact requires the opposite interpretation of the one urged upon us by Pisheyar.

Section 13.02(b) of the Revised Model Business Corporation Act (MBCA), which provided the template for RCW 23B.13.020(2), states that dissatisfied shareholders may not challenge an appraisal-triggering corporate action outside of a statutory appraisal proceeding unless the corporate action “is *unlawful* or fraudulent” with respect to the shareholder or the corporation. Rev. Model Bus. Corp. Act § 13.02(b) (1984) (emphasis added). The Official Comment addressing this exclusivity provision, reproduced in the legislative history of the

WBCA, states that it “basically adopts the New York formula as to exclusivity of the dissenters’ remedy of this chapter.” It continues:

The remedy is exclusive unless the transaction fails to comply with procedural requirements or is “fraudulent.” . . . If [however] the corporation attempts an action in violation of the corporation law on voting, [or] in violation of a fiduciary duty—to take some examples—the court’s freedom to intervene should be unaffected by the presence or absence of dissenters’ rights under this chapter [, which] is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters’ rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (appraisal may not be adequate “where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved.”); Walter J. Schloss Associates v. Arkwin Industries, Inc., 455 N.Y.S.2d 844, 847-52 (App. Div. 1982) (dissenting opinion), reversed, with adoption of dissenting opinion, 460 N.E.2d 1090 (Ct. App. 1984).

Senate Journal, 51st Leg., 2nd Spec. Sess., at 3088 (Wash. 1989). Pisheyar contends, not unreasonably, that the references to “fiduciary duty” and “self-dealing” in this history suggest that the legislature (or at least the drafters of the MBCA, who actually wrote this text, which was then copied unaltered into the Senate Journal) intended to preserve independent damages claims.

What this argument ignores, however, is that the legislature, when it actually enacted RCW 23B.13.020(2), specifically omitted the phrase “unlawful or” that preceded the word “fraudulent” in the original MBCA. This, at minimum, *suggests* that the legislature intended to limit independent remedies for dissenting shareholders to instances of actual fraud. A reading of the actual cases cited in the legislative history, as well as Washington’s own case law

extant at the time of RCW 23B.13.020(2)'s enactment, confirms this conclusion.

For example, in the Weinberger case cited in the Comment, it is not at all clear that the court intended that dissenting stockholders should routinely be able to maintain independent actions for garden-variety breach of fiduciary duty claims in the face of an appraisal-triggering event, rather than simply having the alleged diminution in the shareholder's interest addressed in the appraisal, with equitable relief restricted to the type—an injunction—that Pisheyar attempted but failed to obtain in this action. See Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) (“a plaintiff’s monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding,” allowing for other equitable relief in “*certain cases*”) (emphasis added).³

More clearly, the dissent in Walter J. Schloss Associates, cited in the Comment as the “formula” that the MBCA 13.02(b) “basically adopts,” unambiguously rejects the proposition that a disgruntled shareholder may maintain a separate damages action for breach of fiduciary duty in the face of an appraisal-triggering event, holding instead that a separate action is only allowed if a remedy *other than damages* is warranted. See Walter J. Schloss Assocs. v.

³ In fairness to Pisheyar, later Delaware cases independently interpreting Weinberger have found that it allows separate suits for damages based on breach of fiduciary duty allegations. See, e.g., Rabkin v. Phillip A. Hunt Chem. Corp., 498 A.2d 1099, 1103-04 (Del. 1985).

But these cases were not decided until after the drafters of the MBCA wrote the comments that were later reproduced en masse in the legislative history of the WBCA. Indeed, what these cases actually tell us is that, while the Delaware and New York approaches were similar (or were thought to be similar) with respect to exclusivity at the time the MBCA was drafted, later Delaware cases have rejected the New York approach expressly adopted by the MBCA drafters. See, e.g., Berger v. Intelident Solutions, Inc., 911 A.2d 1164, 1171-72 (Del. Ch. 2006) (rejecting New York approach).

Arkwin Indus., Inc., 90 A.D.2d 149, 162, 455 N.Y.S.2d 844 (1982) (Mangano, J. dissenting) (“an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative”).

Existing Washington case law at the time of the WBCA’s adoption mirrors this view. In Matteson v. Ziebarth, 40 Wn.2d 286, 297, 242 P.2d 1025 (1952), our Supreme Court (examining a precursor to RCW 23B.13.020) held that it was “of the view that, under our own act, the statutory remedy is likewise exclusive as to unfairness or breach of fiduciary duty short of actual fraud.” There is nothing in the text or history of the WBCA indicating that the legislature intended to abrogate this holding, rather than codify it. Accordingly, we conclude that when the legislature enacted RCW 23B.13.020, it intended to confirm, rather than modify, the exclusivity of the appraisal remedy. We reaffirmed this rule post-WBCA—albeit without significant discussion—in our opinion in Matthews v. Wenatchee Heights Water Co., 92 Wn. App. 541, 555, 963 P.2d 958 (1998).

Pisheyar proposes that we ignore this authority and instead reach the opposite result based on the rationale of the New Mexico Supreme Court’s decision addressing a similar situation, McMinn v. MBF Operating Acquisition Corp., 142 N.M. 160, 164 P.3d 41 (2007). But McMinn is not based on the actual language of New Mexico’s appraisal statute (also modeled on MBCA section 13.02); rather, it relies on the unsupported assertion that the New Mexico legislature intends to amend that statute but simply has not yet gotten

around to it. See McMinn, 142 N.M. at 169 (“our statute does not reflect legislative attention to the current dilemma,” and thus its text may be disregarded). Further, the McMinn decision is premised on the fact that, in New Mexico, if appraisal is a dissenting shareholder’s sole remedy for breach of fiduciary duty, then “controlling shareholders in close corporations potentially could engage in oppressive tactics in breach of their fiduciary duties, and then escape liability for those actions simply by instituting an appraisal-triggering transaction.” McMinn, 142 N.M. at 170.

While this might be true in New Mexico, it is not true in those jurisdictions with the better-reasoned analyses concerning the scope of the appraisal proceeding. See, e.g., Bingham Consol. Co. v. Groesbeck, 105 P.3d 365, 374 (Utah Ct. App. 2004) (“[T]he court may consider evidence of breach of fiduciary duty in an appraisal to assess the credibility of the majority shareholder’s proposed valuation.”); HMO-W Inc. v. SSM Health Care Sys., 234 Wis.2d 707, 728, 611 N.W.2d 250 (2000) (“When assertions of misconduct such as unfair dealing are intertwined with the value of shares subject to appraisal, a shareholder may make these assertions within the context of an appraisal action.”). Indeed, the dissent in Walter J. Schloss Associates, upon which MBCA 13.02(b) is based, itself adopts this view. See 1 F. Hodge O’Neal & Robert B. Thompson, O’Neal and Thompson’s Oppression of Minority Shareholders and LLC Members § 5:32, at 5-281 n.71 (2d ed. 2005) (dissent in Walter J. Schloss Associates stands for proposition that “majority shareholder’s

fiduciary duty to the minority can be weighed in determining fair value”); see also Albert Trostel & Sons Co. v. Notz, 536 F. Supp. 2d 969, 982 (E.D. Wis. 2008) (applying HMO-W, 234 Wis.2d 707); Steinberg v. Amplica, Inc., 42 Cal.3d 1198, 1209, 233 Cal. Rptr. 249 (1986) (“nothing in the appraisal statutes to prevent vindication of a shareholder’s claim of misconduct in an appraisal proceeding”); Fleming v. Int’l Pizza Supply Corp., 676 N.E.2d 1051, 1057 (Ind. 1997) (“legislature did not foreclose the ability of dissenting shareholders to litigate their breach of fiduciary duty or fraud claims within the appraisal proceeding”).

A similar scope of proceeding applies in Washington appraisal actions. 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.

This being the case, both the plain text and the legislative history of RCW

23B.13.020 make clear that the legislature intended appraisal to be the exclusive remedy for shareholders who dissent from fundamental corporate changes. Contrary to Pisheyar's contention, the pending appraisal proceeding may properly determine the value of his former interests in the corporations, providing for such diminution in the value of those interests that Pisheyar can demonstrate resulted from breaches of fiduciary duty on the part of Snyder or Hannah. Because the WBCA expressly prohibits a separate and duplicative damages action, we affirm the trial court's ruling on this question.

IV

Pisheyar next contends that the trial court erred by dismissing his derivative claims following his loss of shareholder status as a result of the reverse stock splits. Because, however, neither the language of Civil Rule 23.1 nor applicable case law supports the proposition that a person who is no longer a shareholder may maintain a shareholder derivative claim, we reject this argument.

CR 23.1 provides that a plaintiff stating a shareholder derivative claim must allege that he or she "was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law." Pisheyar points to this language for the proposition that the rule only requires him to be a shareholder *at the time* that his derivative claim was filed. Thus, he argues, he may not thereafter lose standing due to corporate actions beyond his control that deprive him of

shareholder status. We disagree.

Pisheyar ignores that CR 23.1 goes on to provide 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.” Thus, under the plain text of the rule, in order to maintain a derivative claim after its filing, Pisheyar was required to continue to “fairly and adequately represent the interests” of *similarly situated shareholders*. This presupposes that his interest as a shareholder continues throughout the litigation. Because it did not, Pisheyar lost his standing to maintain derivative claims on behalf of the shareholders of Sound Infiniti and Infiniti of Tacoma.

Washington case law accords with this conclusion, as do the decisions of the majority of other jurisdictions. 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.”). See also Lewis v. Anderson, 477 A.2d 1040, 1046 (Del. 1984) (adopting “nearly universally” held view that “a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but . . . must also maintain shareholder status throughout the litigation”).

Here, Pisheyar could have maintained his status as a shareholder, and thus maintained his standing to pursue his derivative claims outside of the

appraisal context, had he demonstrated to the trial court a likelihood of his success on those claims, thus justifying the continuance of the temporary injunction. He decidedly failed to do so. The trial court ruled that Pisheyar produced “no credible, admissible evidence that either of the Corporations were harmed by the loans to Snyder, no credible, admissible evidence that the Corporations were harmed by any alleged improper reporting to the IRS,” no “competent evidence that the Nissan dealership has anything to do with the Infiniti dealerships [and thus] nothing from which the Court could conclude that it was a corporate opportunity,” and “no evidence that he or Infiniti of Kirkland has been harmed by Infiniti of Kirkland’s decision to purchase the key-man policy on Hannah’s life.”

Because Pisheyar had a full and fair opportunity to demonstrate to the trial court that there was a likelihood that the actions of Snyder and Hannah had damaged the corporations, and thus enjoin the reverse stock split that eliminated his interest in the corporations, there is no basis to depart from the well-established rule that a shareholder must remain a shareholder in order to maintain corporate derivative claims. Accordingly, we affirm the trial court’s ruling dismissing Pisheyar’s derivative claims for lack of standing.

V

The final issue before us is whether the trial court erred by allowing Pisheyar’s claims alleging loss of corporate perquisites to proceed after both the entry of summary judgment on Pisheyar’s wrongful termination claim and the

cessation of Pisheyar's ownership of stock in the corporations. We conclude that, to the extent that Pisheyar's claims for loss of corporate perquisites arose out of his status as an officer or director of the corporations, those claims have already been dismissed as a result of the trial court's entry of summary judgment dismissing Pisheyar's claim that he was wrongfully terminated. We further conclude that, to the extent that Pisheyar's purportedly personal claims for damages were for benefits denied him because he ceased to be a shareholder, those claims are also not cognizable outside of the appraisal context and so must be dismissed.

“[A] stockholder may maintain an action in his own right against a third party . . . when the injury to the individual resulted from the violation of some special duty owed to the stockholder *but only when that special duty had its origin in circumstances independent of the stockholder's status as a stockholder.*” Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 585, 5 P.3d 730 (2000) (emphasis added) (quoting Hunter v. Knight, Vale & Gregory, 18 Wn. App. 640, 646, 571 P.2d 212 (1977)). Put another way, Pisheyar may only maintain personal damage claims against third parties—such as Snyder and Hannah in their individual capacities—for the deprivation of perquisites if his alleged entitlement to them arises from *something other than his shareholder status*, such as his status as secretary of Sound Infiniti or his directorship with Infiniti of Tacoma. And, inasmuch as Pisheyar might have had personal damage claims for the loss of corporate perquisites arising out of either of these

positions; those claims were dismissed when the trial court entered summary judgment against him on his wrongful termination claim. Pisheyar retains the right to appeal that ruling after the entry of final judgment, but we have not granted discretionary review of that ruling and so do not further address it herein.

We did, however, grant discretionary review of the issue of whether, as the trial court ruled, Pisheyar could assert personal damage claims for “alleged deprivation of *shareholder* ‘perquisites.’” (Emphasis added). There is evidence in the record tending to show that Pisheyar’s alleged entitlement to benefits such as “demo cars” and “sporting tickets” was due to his status as a shareholder. See Buy-Sell Agreement for Infiniti of Tacoma (“Each of the *Shareholders* shall be entitled to a new ‘demo’ car of his choice from time to time.”) (emphasis added). In effect, these entitlements are nothing more than rights to “in-kind dividends,” and Pisheyar may only seek recompense for their loss, like the loss of any shareholder benefit, in the proper forum—the appraisal proceeding.

Insofar as Pisheyar had any individual entitlement to corporate perquisites related to his status as a shareholder, we hold that the trial court erred by allowing claims alleging the deprivation of such an entitlement to proceed in a separate, duplicative damages action. Accordingly, we remand this cause with instructions that these claims be dismissed. Any diminution in Pisheyar’s remuneration as a shareholder (including loss of in-kind shareholder benefits embodied in the perquisites of which he claims to have been deprived)

must be addressed in the proper forum—the pending appraisal proceeding.

Affirmed in part, reversed in part, and remanded.

Dwyer, A.C.J.

WE CONCUR:

Appelwick, J.

Leach, J.

APPENDIX B

RCW 23B.13.020
RIGHT TO DISSENT

CURRENT SECTION

1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(a) Consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder is entitled to vote on the merger, or (ii) if the corporation is a subsidiary that is merged with its parent under RCW 23B.11.040;

(b) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(c) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

(e) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) 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.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §141 (eff. 7-1-90)

1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(a) Consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by RCW 23B.11.030 or the articles of incorporation, and the shareholder is entitled to vote on the merger, or (ii) if the corporation is a subsidiary that is merged with its parent under RCW 23B.11.040;

(b) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(c) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation that materially reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under RCW 23B.06.040; or

(e) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) 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, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3087-88 (1989)

Section 13.02 Right to Dissent.

Proposed subsection 13.02(a) establishes the scope of a shareholder's right to dissent (and the shareholder's resulting right to obtain payment for the shareholder's shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

(1) A plan of merger if the shareholder (i) is entitled to vote on the merger under Proposed section 11.03 or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under Proposed section 11.04. The right to vote on a merger under Proposed section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporation if the number of its authorized shares is increased as a result of the merger.

(2) A share exchange under Proposed section 11.02 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under Proposed section 12.02 if the shareholder is entitled to vote on the sale or exchange. Proposed subsection 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the net proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by

characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for the shareholder's shares different securities or other property that may not be readily marketable.

The exclusion of court-ordered sales from the dissenter's right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

(4) The Committee rejected the extension made by RMA §13.02 of dissenters' rights to a significant number of amendments to articles of incorporation. The committee concluded that significant overreaching in such transactions would be limited by equity courts' investigations into the fairness of the exercise of majority power. It did preserve dissenters' rights for reverse stock splits resulting in fractions of shares, where the corporation is to pay cash for the shares. It felt that providing the dissenters' right in such circumstances would afford minority shareholders additional protection from such transactions, while enhancing the majority's freedom to make such changes.

(5) Any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grant a right of dissent. Corporations may wish to grant on a voluntary basis dissenters' rights in connection with important transactions (e.g., those submitted for shareholder approval). The grant may be to nonvoting shareholders in connection with transactions that give rise to dissenters' rights with respect to voting shareholders. The grant of dissenters' rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin the transaction. Also, in situations where the existence of dissenters' rights may otherwise be disputed, the voluntary offer of those rights under this section will avoid a dispute.

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters' rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Proposed Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in Proposed section 10.04; such a class is entitled to vote under Proposed section 11.03 and to assert dissenters' rights if the transaction effecting such amendment to the articles also falls within Proposed section 13.02. On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation's assets not in the ordinary course of business, and therefore, that class is not entitled to assert dissenters' rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under Proposed section 11.04 in which minority shareholders of the subsidiary have the right to assert dissenters' rights even though they have no right to vote.

Proposed subsection 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters' remedy of this chapter. The remedy is the exclusive remedy unless the transaction fails to comply with procedural requirements or is "fraudulent." The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding without complying with procedural requirements or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty--to take some examples--the court's freedom to intervene

should be unaffected by the presence or absence of dissenters' rights under this chapter. Because of the variety of situations in which procedural defects and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters' rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983)(appraisal remedy may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved"); Walter J. Schloss Associates v. Arkwin Industries, Inc., 455 N.Y.S.2d 844, 847-52 (App. Div. 1982)(dissenting opinion), reversed, with adoption of dissenting opinion, 460 N.E.2d 1090 (Ct. App. 1984). See also Vorenberg, "Exclusiveness of the Dissenting Stockholders' Appraisal Right," 77 HARV. L. REV. 1189 (1964).

The Committee added Proposed subsection 13.02(c) to retain the substance of the provisions in the old law related to circumstances in which a dissenting shareholder's right to obtain payment terminated.

AMENDMENTS TO ORIGINAL SECTION

Laws 1991, ch. 269, §37 (eff. 7-28-91) (*amends original subsection (1)(a) to add " , RCW 23B.11.080," following "RCW 23B.11.030" and amends subsection (2) to add "RCW 25.10.900 through 25.10.955," following "by this title."*)

CARC COMMENTARY

The current statute (in RCW 23B.13.020(1)(d)) grants dissenters' rights to minority shareholders who have been squeezed out by means of a reverse stock split and subsequent repurchase of their fractional shares. This provision originally represented a Washington variation from the comparable section of the Revised Model Business Corporation Act, but has now been adopted as the model approach in the latest revisions to the RMBCA. Under the proposed changes to RCW 23B.13.020(1)(d), this same basic stance is maintained, but the statutory language is conformed to that of proposed subsection RCW 23B.10.040(1)(i). Thus, any shareholder whose relationship to the corporation is being terminated via an articles amendment will continue to have at least a right to dissent and seek appraisal, even though the squeezed-out minority may not have been afforded separate voting group rights under proposed subsection RCW 23B.10.040(1)(i), or may not have had voting rights at all with respect to the squeeze-out.

* * * * *

Laws 2003, ch. 35, §9 (eff. 7-27-03) (*amends only subsection (1)(d) of the original section to read:*)

(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

CARC COMMENTARY

See CARC Comment to 2003 addition of RCW 23B.11.035.

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