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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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AFSHIN PISHEYAR,

Appellant/Cross-Respondent,

v.

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

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

This case involves the issue of the appropriate remedy for a former shareholder, Afshin Pisheyar ("Pisheyar"), who is seeking double recovery for claims arising from alleged improper acts of the majority shareholders, including reverse stock splits, despite presenting no evidence of actual damage to either himself or the corporations.

For two-and-a-half years, Pisheyar has pursued these claims, alleging wrongdoing by the majority shareholders Richard Snyder ("Snyder") and David Hannah ("Hannah") in the two corporations, Sound Infiniti, Inc. ("Sound Infiniti") and Infiniti of Tacoma at Fife, Inc. ("Infiniti of Tacoma") (together, the "Corporations"), and availing himself of the full panoply of shareholder protections offered by the Washington Business Corporation Act (the "Act") and Washington courts. The trial court gave Pisheyar every opportunity to support both his derivative and personal claims, allowing Pisheyar to amend his complaint three times and presiding over a two-day evidentiary hearing prior to permitting the reverse stock splits. At every turn, however, Pisheyar failed to present any evidence whatsoever of actual or potential damage to the Corporations arising from any of his allegations, and the trial court concluded that the Corporations would not be harmed if Pisheyar had no standing to pursue derivative claims. After the Corporations implemented the statutorily-permitted reverse stock splits, Pisheyar was entitled to a judicial determination of the full fair value of his shares without any reduction for

his minority status. He is pursuing that remedy in a separate appraisal proceeding before Judge Downing of the King County Superior Court (the "Appraisal Proceeding").

Pisheyar nevertheless seeks two bites of the apple. Not satisfied with the Appraisal Proceeding, Pisheyar continues to pursue in this case his claims for damages relating not only to the alleged actions of Snyder and Hannah but also to the reverse stock splits themselves. But the only damages that he has ever alleged for his various putatively personal claims relate directly to alleged damage to the Corporations. The trial court correctly dismissed those claims on summary judgment, because Pisheyar lacks standing to pursue derivative claims on behalf of the Corporations in which he no longer owns shares and because the Appraisal Proceeding is the exclusive forum for any claims that relate to the fair value of Pisheyar's shares in the Corporations.

The trial court did not err. It simply dismissed on summary judgment claims for which Pisheyar did not present any evidence of recoverable damages. This Court should reject this latest attempt to litigate the same claims in two courts simultaneously and affirm the trial court on these issues.

However, this Court should reverse the trial court's ruling that Pisheyar has a legal right to pursue damages related to the alleged denial of certain corporate perquisites. For the same reasons that it correctly granted judgment for Snyder and Hannah on Pisheyar's personal and

derivative claims, the trial court erred by not granting summary judgment with respect to the corporate perquisite claims.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court committed reversible error by concluding that Pisheyar has a legal right to pursue damages related to the alleged denial of certain corporate perquisites.

III. STATEMENT OF THE CASE

A. The Parties and Their Relationship

Snyder and Hannah have been in the automobile business for approximately 30 years. CP 256 ¶¶ 15, 16; 946; 950. In 1997, Snyder, Hannah and Pisheyar, who began working for Snyder about 15 years earlier, formed Sound Infiniti to establish an Infiniti car dealership in Kirkland, Washington. CP 17; 256 ¶ 19. When Pisheyar initiated this action, Hannah owned 51%, Snyder 30% and Pisheyar 19% of Sound Infiniti. CP 256 ¶ 20. In 2003, Snyder, Hannah, Pisheyar and Robert Curtis formed another corporation, Infiniti of Tacoma, to establish an Infiniti dealership in Fife, Washington. When Pisheyar initiated this action, Snyder owned 51%, Hannah 25%, Pisheyar 19% and Curtis 5% of Infiniti of Tacoma. CP 257 ¶ 24. The shareholders of the Corporations agreed that Pisheyar would have no role in the management of either dealership. CP 257 ¶ 26; 478 § 2; see also RP (12/8/05) 37:18-21. Hannah and Snyder manage the dealerships, both of which are successful

and profitable. CP 257-58 ¶¶ 27-32; 259 ¶ 40; 944; 946; 951; 2455-2457:19; 2458:22-2461:12; 2462:7-8; RP (12/8/05) 41:13-19.

In approximately June 2004, the relationship between Pisheyar, on the one hand, and Snyder and Hannah, on the other, seriously deteriorated. By February 2005, Snyder and Hannah had concluded that irreconcilable differences with Pisheyar—both personal and business—were an obstacle to the continued vitality and success of the Corporations. CP 259 ¶¶ 35-37; 270; 948; 952. Hannah testified that Snyder and Pisheyar "can't be in the same room anymore," and that "it was becoming almost a disease amongst the three of us." RP (11/17/05) 109-10. Consequently, in early 2005, before Pisheyar initiated this action, Snyder and Hannah began exploring options for purchasing Pisheyar's shares in the Corporations. CP 259 ¶ 38; 948; 952; RP (11/17/05) 109:25-110:4.

About one month later, on March 9, 2005, Pisheyar filed his original Complaint, alleging a variety of claims against Snyder and Hannah and against and on behalf of the Corporations. CP 1-11; 253 ¶ 1. In that original Complaint, and in the three that followed, including the extant Third Amended Complaint ("TAC"), Pisheyar alleged that Snyder's and Hannah's actions as officers damaged him both in his individual capacity and his capacity as a shareholder, entitling Pisheyar to recover both personally and derivatively on behalf of the Corporations. CP 1-11; 315-26. In particular, Pisheyar alleged that:

- (1) He was excluded from certain meetings at Sound Infiniti and Infiniti of Tacoma, denied a key to the Sound Infiniti building and denied tickets to sporting events,

gasoline, new demo cars, trips and vacation packages (the "corporate perquisite claims"), CP 319 ¶¶ 4.4.3, 4.5.2;

(2) Snyder and Hannah treated him unfairly, engaged in minority oppression and breached their fiduciary duties, CP 318-23 ¶¶ 4.4.4, 4.5.3, 5.1, 5.3; and

(3) Snyder and Hannah improperly used and converted the assets of the Corporations, CP 318-323 ¶¶ 4.4.6, 4.5.6, 5.2.

B. The Reverse Stock Splits and Pisheyar's Efforts to Stop Them

In July 2005, the Corporations informed Pisheyar of proposals to (1) implement reverse stock splits, which would result in Pisheyar owning fractional shares that the Corporations would purchase from him; and (2) advance payments to Snyder and Hannah for their expenses in defending this action. CP 33-36, 48-90. On August 19, Pisheyar moved to enjoin the Corporations from taking these actions. CP 253 ¶ 4. After briefing, CP 953-96, and oral arguments, the trial court temporarily enjoined the Corporations from implementing the reverse stock splits (the "August 31 TRO"). CP 997-99; 252; 253 ¶ 6. In subsequent rulings and consistent with CR 65, the trial court stated that the purpose of the August 31 TRO was to preserve the status quo until an evidentiary hearing (the "Injunction Hearing") to determine whether a preliminary injunction should issue. CP 253-54 ¶¶ 4-7; 1000-07.

The trial court held the Injunction Hearing, with live testimony, over two days in November and December 2005. CP 252; 1008-2068; RP (11/17/05); RP (12/8/05). The central question was whether, by permitting the Corporations to effect statutorily-permitted reverse stock

splits that would result in the Corporations purchasing Pisheyar's shares, the Corporations would possibly be damaged because no one with standing would remain to pursue remedies on behalf of the Corporations and thus possible damage to the Corporations would go unredressed. That is, the trial court was concerned about the Corporations losing their minority shareholder who purported to be seeking redress on behalf of those Corporations. Therefore, the trial court allowed Pisheyar an opportunity to offer testimony as to how the Corporations had been harmed by Snyder's and Hannah's alleged conduct, including his corporate perquisite claims. CP 254-55 ¶¶ 7-14; RP (11/17/05) 53:15-54:14.

Pisheyar failed to offer any evidence of any harm to the Corporations. On December 20, 2005, the trial court dissolved the August 31 TRO, concluding that there was no risk that possible damage to the Corporations would go unredressed by allowing the Corporations to purchase Pisheyar's shares because there was no evidence of damage to the Corporations. CP 251-70, particularly 261 ¶ 54; 262 ¶ 61; 263 ¶¶ 67-68; 264 ¶ 72.¹

Pisheyar filed a motion for discretionary review in March 2006 (Ct. App. # 57803-1) (the "First Appeal"), which this Court denied in May

¹ Contrary to Pisheyar's assertion, Br. App. at 11, most of the attorneys' fees expended by the Corporations through December 2005 related to dissolving the wrongfully issued August 31 TRO and defeating other baseless Pisheyar claims. The trial court sanctioned Pisheyar under Rule 11 for some of those baseless claims and awarded the Corporations more than \$150,000 in attorneys' fees for the wrongfully issued TRO. See Supp. Counter-Designation of Clerk's Papers, Findings of Fact Re: Costs and Findings of Fact Re: Sanctions (both filed 8/22/06).

2006. At oral argument on this motion in this Court, Pisheyar requested for the first time that this Court enter a preliminary injunction to prevent the Corporations from implementing the reverse stock splits. Calling this oral motion "procedurally defective," this Court nonetheless addressed the merits and denied Pisheyar's oral motion by notation ruling on March 24, 2006. Pisheyar thereafter moved to modify, which this Court denied on June 27, 2006.

In January 2006, the shareholders of the Corporations approved amendments to their respective articles of incorporation reducing the number of outstanding shares (from 100 to 4) (the "reverse stock splits"). CP 173 ¶¶ 2, 3; 175-227; 232 ¶ 4. The Corporations thereafter took the steps required by the Act to implement the reverse stock splits, including tendering to Pisheyar a check for the fair value (as defined in RCW 23B.13.250) of his 19% interest. Pisheyar disputed the Corporations' determination of the fair value, made a demand for payment based on his determination of fair value, and tendered his shares. CP 273 ¶ 8. In accordance with RCW 23B.13.300(2), Snyder and Hannah commenced a proceeding in King County Superior Court in which the court will determine the fair value of Pisheyar's shares. That action, Sound Infiniti v. Pisheyar, No. 06-2-19673-2 SEA (Downing, J.), the Appraisal Proceeding, is ongoing but stayed pending this appeal.²

² To be clear, the Appraisal Proceeding relates only to the fair value of Pisheyar's shares in Sound Infiniti. There is no dispute at this time that Pisheyar has received fair value for his shares in Infiniti of Tacoma.

After the Corporations effected the reverse stock splits, Snyder and Hannah moved to dismiss Pisheyar's shareholder claims relating to the Corporations, including his derivative minority oppression claim. CP 2069-90. The trial court granted the motion, CP 309-11, but nonetheless permitted Pisheyar to continue pursuing his claims for personal damages, including his corporate perquisite claims, even though such damages were based on the same operative facts. CP 2124-36; 2269; 2287. The parties thereafter conducted extensive discovery related to Pisheyar's personal claims and personal damages.

C. Pisheyar's "Personal" Claims Also Lack Evidence

On August 11, 2005, before the Injunction Hearing, Snyder and Hannah propounded written discovery requests asking that Pisheyar "specifically explain and quantify how . . . [he had] been damaged as a result of" the alleged actions and produce all documents supporting such damages. CP 2158-74, particularly 2170-71. In his initial response, Pisheyar did not produce any documents or calculations or explanation of how a numerical figure might be calculated. Instead, Pisheyar stated that an explanation of his personal damages would have to wait further discovery and expert analysis. CP 2185-2207, particularly 2201-05.

Nine months passed, and Pisheyar refused to supplement his discovery responses to provide some explanation for his alleged personal damages. CP 2144. In response to a motion to compel by Snyder and Hannah filed in June 2006, a discovery special master ordered Pisheyar to

"fully supplement all of his incomplete answers" including those related to alleged personal damages. CP 2210-11.

At approximately the same time, Pisheyar responded to deposition questions about how he had been personally damaged by the actions alleged in his various complaints. Pisheyar stated that he could not quantify his claimed personal damages but that he and his attorney would soon calculate a number. When pressed on how he planned to calculate his damages, Pisheyar stated under oath that his damages are 19% (his former ownership share) of any damage to the Corporations arising from Snyder's and Hannah's alleged wrongdoing. CP 2213-21; 2817.

On August 25, 2006, 18 months after filing a Complaint in which he alleged personal harm, CP 1-11, three weeks before fact discovery was to close and two weeks before expert reports were due, Pisheyar served his supplemental answers to the damages discovery requests. But Pisheyar listed only naked dollar figures and did not produce a single supporting document. CP 2223-25.

On September 1, 2006, the parties exchanged expert witness reports. Although Pisheyar had promised in his original discovery answers that an expert would opine on his personal damages, CP 2185-2007, he produced only the report of Neil J. Beaton, who opined only on the value of Pisheyar's interest in the Corporations. CP 2227-40. Beaton's report did not explain the bases for any personal damages set forth in Pisheyar's supplemental discovery answers. Indeed, in his deposition, Beaton confirmed that he was not offering any opinions on damage that

Pisheyar might have personally suffered or how to calculate those amounts. CP 2242-65. No other Pisheyar expert witness offered damages-related testimony.

Fact discovery closed on September 8, 2006, and expert discovery closed on September 29. On October 2, Snyder and Hannah moved to strike Pisheyar's damages claims for his failure to comply with both his discovery obligations and the orders compelling compliance. CP 2140-52; 2795-2800. On October 12, the trial court declined to strike Pisheyar's claims but again ordered him to provide complete discovery answers relating to his purported personal damages.³ CP 2801-03. Six weeks after discovery closed, Pisheyar provided his second supplemental discovery answers, in which he stated that his personal damages were based on nothing more than his personal "estimates." CP 2804-19.⁴

Snyder and Hannah moved for partial summary judgment on Pisheyar's personal minority oppression and damages claims, including the corporate perquisite claims, making several arguments for dismissal.⁵ CP 2266-2301. Among them, Snyder and Hannah argued that Pisheyar's claims should be dismissed because he could not prove a necessary element of such claims—personal damages—because the only evidence

³ The trial court also sanctioned Pisheyar \$10,000 for his failure to comply with his damages discovery obligations and court orders and awarded Snyder and Hannah almost \$5,000 in attorneys' fees.

⁴ Supp. Counter-Designation of Clerk's Papers, Decl. of Brendyn P. Ryan (filed 10/26/06 and 12/12/07), Ex. B.

⁵ As required by the case schedule, the summary judgment motions were filed before the trial court ordered Pisheyar to supplement his damages discovery and before Pisheyar supplemented his damages discovery.

that Pisheyar had produced demonstrated that any damage was derivative and not personal and because Pisheyar presented no evidence that either he or the Corporations had in fact been damaged at all. E.g., CP 2281; 2297; see also RP (11/3/06) 27:3–31:22.

On December 5, 2006, the trial court denied the summary judgment motions but expressly limited Pisheyar's damages evidence at trial to that "disclosed to [Snyder and Hannah] in pretrial discovery." CP 523-26. Snyder and Hannah moved for reconsideration. CP 2873-2976. On December 28, the trial court in large part granted Snyder's and Hannah's summary judgment motions, holding that, inter alia, Pisheyar's "claims for damages arising out of his claims that [Snyder's and Hannah's] conduct resulted in reduced corporate profits, or increased corporate expenses, and therefore in reduced dividend distributions" are "derivative in nature, and [Pisheyar] lacks standing to assert them." CP 528. In that ruling, the trial court allowed Pisheyar to continue to pursue his corporate perquisite claims for personal damages, however: Pisheyar "may assert claims for damages arising out of alleged 'minority shareholder oppression' for alleged deprivation of shareholder 'perquisites', such as demo cars, sports tickets, and the like, subject to the court's previous ruling that [Pisheyar] will be limited at trial to presentation of evidence that was disclosed to defendants in pre-trial discovery." CP 528-29.

The parties stipulated that the trial court's order on the motion for reconsideration was appropriate for interlocutory review, and the trial court then certified that order and several others pursuant to

RAP 2.3(b)(4). CP 516-18. After extensive briefing and oral argument, this Court (Commissioner Craighead) accepted review of three expressly limited issues: (1) the exclusivity of the Appraisal Proceeding regarding Pisheyar's claims related to the reverse stock splits; (2) whether Pisheyar's derivative claims were properly dismissed; and (3) whether Pisheyar's corporate perquisite claims should also have been dismissed as derivative.

IV. STANDARDS OF REVIEW

"When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court." Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is appropriate "where the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law." DuVon v. Rockwell Int'l, 116 Wn.2d 749, 753, 807 P.2d 876 (1991) (citation omitted). Once the moving party demonstrates entitlement to summary judgment, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The opposing party "may not rely on speculation or argumentative assertions that unresolved factual issues remain." Id. If the evidence is merely colorable or is not significantly probative, summary judgment should be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Thus, if the nonmoving party "fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial', then the court should grant the motion." Young v. Key Pharm., Inc., 112 Wn.2d 216; 225, 770 P.2d 182 (1989) (internal quotation omitted).

This Court reviews de novo a trial court's interpretation of a statute. Cerrillo v. Esparza, 158 Wn.2d 194, 199, 142 P.3d 155 (2006). This Court can "sustain the trial court's judgment upon any theory established in the pleadings and supported by proof." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

V. ARGUMENT

A. **The Trial Court Properly Rejected Pisheyar's Purported Derivative Claims**

This Court should affirm the dismissal of Pisheyar's derivative claims for two related reasons. First, Pisheyar cannot pursue derivative claims on behalf of the Corporations because he is no longer a shareholder of the Corporations. Second, even if he had standing, there is no evidence that the Corporations were in fact harmed by the alleged wrongdoing.

1. **Because Pisheyar Is No Longer a Shareholder of the Corporations, He Lacks Standing to Maintain Derivative Claims**

Relying on one Oregon Court of Appeals opinion, Pisheyar asserts that, even though he is no longer a shareholder of the Corporations, he should retain standing to assert derivative claims. Br. App. at 44-47. Pisheyar's argument is without foundation.

In a shareholder derivative suit, a putative derivative plaintiff seeks to assert rights or remedies belonging to a corporation for the corporation's benefit that the corporation will not pursue on its own. Derivative suits are rare, because courts are reluctant to intervene in a corporation's right to manage its affairs. As such, in Washington, derivative suits are disfavored and may be brought only in exceptional circumstances. Haberman v. Wash. Public Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032 (1987).

In order to commence and maintain a derivative action, a plaintiff must have a proprietary interest, i.e., be a shareholder, of that corporation. Id. at 149; see also Finley v. Curley, 54 Wn. App. 548, 557, 774 P.2d 542 (1989). A plaintiff who ceases to be a shareholder, by reason of any corporate action, loses standing to continue a derivative suit. Lewis v. Anderson, 477 A.2d 1040, 1046-49 (Del. 1984) ("A plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit."); Saito v. McCall, No. Cir. A. 17132-NC2004, 2004 WL 3029876, at *9 (Del. Ch. Dec. 20, 2004) ("[A] derivative shareholder must . . . maintain shareholder status throughout the litigation."); Portnoy v. Kawecki Berylco Indus., Inc., 607 F.2d 765, 767 (7th Cir. 1979) (when plaintiff lost his shareholder interest he lost standing to sue); Schilling v. Belcher, 582 F.2d 995, 999 (5th Cir. 1978) ("the ownership requirement continues throughout the life of the suit"); see also Issen v. GSC Enters., Inc., 538 F. Supp. 745, 752 (N.D. Ill. 1982) ("a plaintiff in a derivative suit must be a shareholder at all relevant times

during the pendency of the litigation"). Here, because Pisheyar is no longer a shareholder, the trial court was correct in dismissing all derivative claims for lack of standing.

In spite of this well-settled law on standing, Pisheyar urges this Court to follow Noakes v. Schoenborn, 116 Or. App. 464, 841 P.2d 682 (1992), which adopts the 2 American Law Institute, Principles of Corporate Governance § 7.02(a) (1994) (the "ALI Principle"). Noakes and the ALI Principle are distinguishable.

The Noakes court and the ALI drafters were primarily concerned that, where a shareholder has been involuntarily eliminated, there might be circumstances in which no entity would remain to represent the best interests of the corporation. Noakes, 841 P.2d at 686; ALI Principle § 7.02(a)(2) cmt. These concerns are not relevant here, where, prior to permitting the reverse stock splits to proceed, the trial court expressly considered whether the proposed corporate actions might leave damage to the Corporations unredressed. The Injunction Hearing lasted two days and included live testimony from both Snyder and Hannah (but not Pisheyar). At its conclusion, the trial court held that there was no risk of allowing damage to the Corporations to go unredressed because there was no evidence of either wrongdoing or damage to the Corporations. CP 251-70. Thus Noakes is entirely unpersuasive because the trial court directly addressed and dismissed any concern that damage to the Corporations would go unredressed.

Moreover, Noakes and the ALI Principle are firmly in the minority. The ALI Principle explicitly states that it departs from the majority approach to the continuous-ownership rule. See ALI Principle § 7.02(a)(2) cmt. a. ("Section 7.02 departs from the majority approach"); see also Romero v. US Unwired, Inc., Civil Action Nos. 04-2312, 04-2436, 2006 WL 2366342, at *5 (E.D. La. Aug. 11, 2006) (rejecting the ALI Principle in light of prevailing Delaware and federal law). The few courts that have preserved a former shareholder's standing to sue derivatively have done so only when the shareholder was unable to seek review of the propriety of the corporate action prior to its occurrence. See, e.g., Arnett v. Gerber Scientific, Inc., 566 F. Supp. 1270, 1273 (D.C.N.Y. 1983) (plaintiff's standing retained where defendants took action without plaintiffs' knowledge and "without any opportunity for plaintiffs to obtain an injunction against it"). Here, the trial court's careful consideration of the issues prior to the Corporations' purchase of Pisheyar's shares protected the Corporations from any possibility that damage would go unredressed.

Pisheyar's argument (and Noakes) also ignores the structure of the Act, which, by its clear operation, transforms a shareholder who dissents from a corporate action to a creditor at the time of the corporate action. Under the Act, a shareholder who dissents and deposits his shares in accordance with RCW 23B.13 "retains all other rights of a shareholder until the proposed corporate action is effected." RCW 23B.13.230(2) (emphasis added). The shareholder is entitled to receive the "fair value"

for his shares, measured by the shares' value immediately before the effective date of the corporate action, RCW 23B.13.010(3), plus "interest from the effective date of the corporate action until the date of payment," RCW 23B.13.010(4). By providing for interest payments to dissenting shareholders from the date of the corporate action, the Act recognizes that dissenting shareholders are creditors, not shareholders, of the corporation as of such date.⁶ And in Washington, "a creditor has no equitable standing to sue derivatively." Haberman, 109 Wn.2d at 149 (citation omitted).

Pisheyar maintains his right to receive full fair value for his shares by way of the Appraisal Proceeding, and the trial court went well beyond what the law requires and gave Pisheyar an opportunity—while he was still a shareholder—to show there was some basis for his claims of harm to the Corporations. But since he came forward with nothing, the trial court correctly determined that it could not stand in the way of the statutorily-permitted corporate actions and allowed the reverse stocks splits to proceed. At that point, Pisheyar was no longer a shareholder and his shareholder-based claims were gone.

⁶ Cases from other jurisdictions also support this conclusion. See, e.g., Stanton v. Republic Bank of S. Chi., 202 Ill. App. Dec. 476, 559 N.E.2d 1064, 1067, 147 Ill. Dec. 724 (1990) (if a dissenter were to continue to enjoy shareholder status during the pendency of the dissenter's rights case, a dissenter would be entitled to "interest on the fair value of his stock as though the dissenter had sold the stock on the date of the merger plus dividends declared after the vote as though the dissenter had retained his stock [which] would grant the dissenter the benefits of stock ownership in the form of dividends for a certain time period, without the dissenter having to bear the corresponding risk of facing a reduction in the value of the shares"); see also 12B Williams Meade Fletcher, Cyclopedia of the Law of Private Corporations § 5906.170 (perm. ed., rev. vol. 2000) (hereinafter "Fletcher").

Thus, because Pisheyar was no longer a shareholder and thus had no standing and because the trial court fully addressed and rejected any concern that damages to the Corporations could go unredressed, this Court should affirm the trial court's dismissal of Pisheyar's derivative claims and his claims that Snyder's and Hannah's conduct resulted in reduced corporate profits, or increased corporate expenses, and therefore in reduced distributions.

2. The Trial Court Thoroughly Examined and Rejected Pisheyar's Claims That Snyder's and Hannah's Acts Damaged the Corporations

Even if this Court concludes that Pisheyar, as a former shareholder, has standing to assert derivative claims, this Court should affirm the trial court's summary judgment because Pisheyar presented no evidence of any damage to the Corporations.

Washington law requires that Pisheyar prove both damages and proximate cause in order to prevail on any of his claims. See, e.g., Miller v. U.S. Bank of Wash., N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994) (damages and proximate cause are elements of breach of fiduciary of duty claim); Dyal v. Fire Comm'r Adjustment Bureau, Inc., 23 Wn.2d 515, 521, 161 P.2d 321 (1945) (same for tort claims generally). Damages "may not be recovered unless they are established with reasonable certainty. Uncertainty as to the fact of damage is a ground for denying liability." McKernan v. Aasheim, 102 Wn.2d 411, 419, 687 P.2d 850

(1984) (citation omitted); Dunseath v. Hallauer, 41 Wn.2d 895, 902, 253 P.2d 408 (1953) (uncertainty "would be fatal to a recovery by a plaintiff").

Although courts cannot deny recovery of damages simply because an amount cannot be precisely ascertained, e.g., Jacqueline's Wash., Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 786, 498 P.2d 870 (1972), a plaintiff must still present evidence sufficient to allow a reasonable basis for estimating an alleged loss, B. & B. Farms, Inc. v. Matlock's Fruit Farms, Inc., 73 Wn.2d 146, 151, 437 P.2d 178 (1968). Competent evidence of damages does not subject the trier of fact to speculation or conjecture. ESCA Corp. v. KPMG Peat Marwick, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), aff'd, 135 Wn.2d 820, 959 P.2d 651 (1998).

Again the trial court undertook a two-day Injunction Hearing to determine whether any of Pisheyar's alleged claims had merit regarding damage to the Corporations. It concluded that Pisheyar failed to present any "credible, admissible evidence that either of the Corporations were harmed" by Snyder's and Hannah's actions. CP 251-70.

Thereafter Pisheyar again failed to present any testimony from any witness or expert report describing alleged harm to the Corporations. To the contrary, all the evidence in the record demonstrates that the Corporations are thriving. CP 2284-2301, generally. Indeed, Pisheyar's own expert witness testified that the Corporations are well managed, financially sound and very successful. CP 2455-2457:19; 2458:22-2461:12; 2462:7-8.

Because Pisheyar has failed to make a showing sufficient to establish either standing or the existence of damages, both of which are essential elements, this Court should affirm the trial court's grant of summary judgment regarding Pisheyar's derivative claims.

B. The Trial Court Properly Rejected Pisheyar's Personal Damages Claims

After the trial court dismissed Pisheyar's derivative claims, Pisheyar continued the litigation asserting that he was individually damaged. CP 2124-39. The trial court eventually dismissed most of Pisheyar's individual claims on the grounds that his claims were essentially derivative because they alleged harm to the Corporations and the Act provided Pisheyar's appropriate remedy for his remaining claims as he was really disputing the fair value of his shares in the Corporations. CP 527-29. Pisheyar now attempts to circumvent the Act, arguing that the Act does not provide adequate compensation. Br. App. at 29.

Pisheyar's arguments are unavailing. Pisheyar's alleged damages do not support direct personal claims because they are all premised on the purported diminution of the value of the Corporations overall and his 19% interest in the Corporations. Such claims must be litigated in the Appraisal Proceeding, because the Appraisal Proceeding is exclusive and plenary regarding claims relating to the value of the Corporations. Pisheyar's attempts to broaden the scope of the Act are equally unpersuasive because the language of the Act is unambiguous and not subject to judicial interpretation. Even if interpretation is appropriate,

Washington cases and the background of the Act demonstrate that any exceptions to its scope are limited to procedural unfairness and actual fraud, neither of which Pisheyar has ever alleged.

1. Pisheyar Failed to Produce Any Evidence of Personal Damages Separate from Alleged Harm to the Corporations

To support an individual claim, Pisheyar must provide evidence of damages distinct from the alleged damages to the Corporations. Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 584-585, 5 P.3d 730 (2000) (a shareholder who suffers damages only indirectly as a shareholder cannot sue as an individual). Where damages are purely derivative in nature they cannot form the basis for recovery of personal damages. See, e.g., Gray v. Bicknell, 86 F.3d 1472, 1488 (8th Cir. 1996) (where loss to shareholders in close corporation resulted from alleged harm to corporation, shareholder's claim was not personal but derivative); Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (holding that a "stockholder's claimed direct injury must be independent of any alleged injury to the corporation").⁷ Thus a plaintiff shareholder is required to sue derivatively unless he can establish that the alleged bad acts injured him personally and distinctly from the injury to

⁷ See also Wingate v. Hajdik, 795 S.W.2d 717, 719 (Tex. 1990) (individual recovery for shareholder in action against fellow shareholder requires proof of a personal cause of action and personal injury); Alario v. Miller, 354 So. 2d 925, 926 (Fla. Dist. Ct. App. 1978) (where "the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual").

the corporation. As discussed supra, the fact of personal damages is an essential element in Pisheyar's claims. Dunseath, 41 Wn.2d at 902.

The record on summary judgment contained absolutely no evidence of any individual damages to Pisheyar because all of Pisheyar's personal damages are in fact premised solely on supposed harm to the Corporations. For example, at the November 3, 2006 hearing on the summary judgment motions, after discovery had closed and after Pisheyar had had multiple court-ordered opportunities to supplement his damages discovery, the Court pressed Pisheyar to identify evidence of personal damages ("Do we have any evidence of damages for any of these particular claims? Because I looked through your responses to the motions for summary judgment . . . for damages from the claims that Mr. Pisheyar was denied fringe benefits . . . And I really didn't find anything."), but Pisheyar repeatedly either failed to cite any evidence of personal damage or simply avoided the question. RP (11/3/06) at 27-29.⁸

Pisheyar's deposition testimony was equally telling. When asked how he would calculate his personal damages related to allegedly being barred from meetings at Infiniti of Tacoma, Pisheyar answered:

When the business gets damaged, I am a shareholder. As an individual I would get damaged, don't you think? I mean, doesn't that seem reasonable to you? . . . If the corporation gets damaged, as a shareholder I personally get damaged . . .

⁸ See also RP (11/17/05) at 19:6-16; 26:5-7.

CP 2340:10-2342:20. When asked regarding his alleged exclusion from meetings whether "the personal damage is really just the same thing as the corporate damage," Pisheyar responded, "My share of it would be, yes." CP 2344:2-18. Similarly, after discussing Pisheyar's damages relating to allegedly being excluded from operational decisions at Sound Infiniti, Pisheyar admitted that the claimed corporate damages and his personal damages were essentially identical. CP 2345:1-2346:11. Finally, with respect to his claims regarding alleged misuse of certain corporate assets, Pisheyar stated that his personal damages were "that the corporation could have used the money in a different way, and therefore [he] as a shareholder would have then received greater benefit." CP 2352:4-14.

There is no other evidence in the record that identifies any personal damages separate and distinct from alleged damages to the Corporations. Not a single document, deposition transcript or percipient witness declaration demonstrates any evidence of any personal injury to Pisheyar. Indeed, Pisheyar admits as much in his appellate brief, identifying "the damages he has suffered as the result of [Snyder's and Hannah's] conduct, . . . as decreased shareholder distributions." Br. App. at 29; see also id. at 19.

Because Pisheyar failed to make a showing sufficient to establish the existence of personal damages, this Court should affirm the trial court's dismissal of Pisheyar's individual damages claims.

2. The Legislature Has Provided the Act to Permit Efficient Corporate Decision Making and Appropriate Recourse for Dissenting Shareholders

Although Pisheyar has availed himself of the statutory appraisal remedy established in the Act, he nevertheless argues that the Act does not adequately compensate him for his damages. Pisheyar wants to litigate in two courts at the same time for exactly the same damages, the difference between what he believes his shares are worth if Snyder and Hannah had not allegedly harmed the Corporations and what the Corporations already tendered. Even if this Court finds that Pisheyar has sufficiently supported his damages claims, this Court should nevertheless reject Pisheyar's attempts to litigate his claims in parallel proceedings.

The right of appraisal for dissenting shareholders has been part of Washington's legal landscape since 1933. Laws of 1933, ch. 185, § 41. The current Act is codified at Chapter 23B.13 RCW and enacts Washington's version of the Revised Model Business Corporation Act ("MBCA"). 1 S.J. 379-380, 51st Leg. (Wash. 1989); 2 S.J. 2983, 51st Leg. (Wash. 1989). The Act entitles shareholders who dissent from certain corporate actions, such as reverse stock splits, to obtain payment for the fair value of their shares. RCW 23B.13.020(1). A dissenting shareholder must demand payment for his shares and deposit his certificates in accordance with the corporations' notice to the shareholder. RCW 23B.13.230. If a shareholder and the corporation cannot agree on the fair value of the shares, the Act requires the corporation to petition the superior court to determine the fair value. RCW 23B.13.300(1). This is

the dissenting shareholders' appraisal remedy, and the jurisdiction of the court in which it is commenced "is plenary and exclusive." RCW 23B.13.300(5) (emphasis added).

The statutory appraisal remedy reflects Washington's long-standing reluctance to insert courts in intra-corporate decision-making and second-guess business decisions.⁹ This Court recognized as much in denying Pisheyar's first motion for discretionary review: "there is no Washington authority supporting Pisheyar's argument that a court could block procedurally correct corporate action [the reverse stock split], perhaps because of the countervailing principle against involving the courts in internal corporate matters." First Appeal (Ct. App. #57803-1), May 16, 2006 order.

Pisheyar misapprehends the purpose of the Act as solely affording protection to shareholders. Br. App. at 28-29. As the legislative history of the Act illustrates, providing dissenters' rights for reverse stock splits has the dual purpose of affording protection to shareholders and "enhancing the majority's freedom to make such changes." 1 S.J. 3087-88, 51st Leg. (Wash. 1989). Rather than expose corporations to extended litigation over the propriety of corporate acts, legislatures have adopted dissenters' rights statutes, like the Act, recognizing that procedurally correct corporate

⁹ See, e.g., McCormick v. Dunn & Black, P.S., 167 P.3d 610, 621 (Wn. App. 2007) ("A corporation's directors are its executive representatives charged with its management and the courts will not interfere with the reasonable and honest exercise of the directors' judgment.") The American Law Institute agrees: "for efficiency reasons, corporate decisionmakers should be permitted to act decisively and with relative freedom from a judge's or jury's subsequent second-guessing." ALI Principle § 4.01(c) cmt c.

actions undertaken by the majority should not be enjoined or delayed by a minority shareholder seeking equitable relief or damages. See Model Bus. Corp. Act Ann. § 13-02, Official Cmt. (2005) ("The theory underlying [exclusivity of appraisal rights] is that 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.").

Consistent with these touchstone corporate governance principles, the Washington Supreme Court has explained that the Act permits corporate actions removing shareholders by affording the shareholders an appropriate remedy: "[T]hough, in the end, [stockholders] may be forced out of the particular corporation or business activity, an unconscionable financial loss is not their lot because their stock is purchased (by the corporation) . . . at a fair, equitable, or just figure." In re Nw. Greyhound Lines Inc., 41 Wn.2d 672, 677, 251 P.2d 607 (1952); see also Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865, 873, 51 P.3d 159 (2002).

3. The Appraisal Proceeding Is the Exclusive Forum for Litigating Pisheyar's Claims the Damages for Which Relate to the Value of the Corporations

The Act provides a special framework and procedures for determining the fair value of a dissenter's shares, and it is in this forum, the Appraisal Proceeding, that Pisheyar must pursue any claims relating to the value of the Corporations.

Where, as here, a plaintiff's alleged damages relate to a diminution in corporate value, courts have consistently held that, in order to avoid unnecessary duplication, the prosecution of such claims is prohibited where the appraisal remedy is available. Breed v. Barton, 54 N.Y.2d 82, 429 N.E.2d 128, 130, 444 N.Y.S.2d 609 (1981) ("Allowing the prosecution of a legal action for damages after the exercise of the right of appraisal would be unnecessarily duplicative in that full and proper monetary recovery of the fair value of the dissenters' shares may be obtained in the appraisal proceeding."); Szaloczi v. John R. Behrmann Revocable Trust, 90 P.3d 835, 840-42 (Colo. 2004) ("A dissenting shareholder may not seek compensatory damages in addition to the appraisal remedy when the complaint 'boils down to nothing more than a complaint about stock price.'") (quoting Grace Bros., Ltd. v. Farley Indus., Inc., 264 Ga. 817, 450 S.E.2d 814, 817 (1994)).¹⁰

The Supreme Court of Colorado's opinion in Szaloczi is directly on point. The court, concerned with the prospect of a plaintiff's double recovery for simultaneous actions, conducted a detailed examination of the

¹⁰ See also Bingham Consol. Co. v. Groesbeck, 105 P.3d 365, 374 (Utah Ct. App. 2004); Steinberg v. Amplica, Inc., 42 Cal. 3d 1198, 729 P.2d 683, 693, 233 Cal. Rptr. 249 (1986) (noting that courts have included claims in appraisal proceedings when dissenting shareholders "prayed . . . for the value their shares would have realized absent the breach of fiduciary duty—a remedy which would be available . . . by way of appraisal") (citation omitted); Werner v. Alexander, 130 N.C. App. 435, 502 S.E.2d 897, 901 (1998) (noting that even with claims of fraud "a remedy beyond [appraisal] is not available where the shareholder's objection is essentially a complaint regarding the price which he received for his shares" (quotations and citation omitted)); Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 278, 106 N.E.2d 848, 855 (1952) ("the dissenters' rights statute provides an adequate remedy where the dissenting stockholders' only complaint is the inadequacy of the price received and whose only claim is for money damages the fair value of his shares").

background of the MBCA, New York and Delaware law. Id. at 840-41. The court held that Colorado's exclusivity provision, similar to Washington's, did not permit a dissenting shareholder to bring an action for damages in addition to the appraisal remedy in order to prevent double recovery. Id. ("only an equitable action may be brought under the exception to the exclusivity provision of the appraisal statute, not an additional claim for compensatory damages to supplement the appraisal remedy").

Here, all of Pisheyar's claims for personal damages involve alleged losses as a proportion of the Corporations' alleged losses and can only be appropriately assessed in the ongoing statutory Appraisal Proceeding. Pisheyar seeks exactly what the law prevents—alleged damages in the Appraisal Proceeding and the same damages in the trial court in this case. As numerous courts have determined, permitting litigation of Pisheyar's claims in this case would raise the specter of both double recovery and inconsistent judgments.

Thus, under the Washington statutory scheme, anything and everything to do with value of the Corporations is within the exclusive purview of the Appraisal Proceeding, and it would be contrary to the language and the intent of the Act, and without precedent, to allow two valuation-related cases to proceed simultaneously in two different fora. This Court should therefore affirm the trial court's dismissal of Pisheyar's claims on grounds that the Appraisal Proceeding is the exclusive venue for

litigating Pisheyar's claims for personal damages tied to the value of the Corporations.

4. Pisheyar's Attempts to Circumvent the Appraisal Proceeding are Unsupported by Law or Policy

a. Washington Case Law Supports a Finding that Appraisal Is the Exclusive Remedy

Pisheyar argues that his remedies should not be limited by the Act. This Court should reject these arguments, because the Act expressly precludes damages litigation in two separate fora.

RCW 23B.13.020(2) provides that, absent failure "to comply with procedural requirements" or fraud, the statutory appraisal remedy is the exclusive remedy for dissenting shareholders challenging a corporate action, here the reverse stock splits. Washington courts have followed this plain language, holding that appraisal rights are the exclusive remedy for dissenting shareholders challenging a corporate action absent fraud or procedural irregularity. Matteson v. Ziebarth, 40 Wn.2d 286, 242 P.2d 1025 (1952); Matthews v. Wenatchee Heights Water Co., 92 Wn. App. 541, 963 P.2d 958 (1998).

In Matteson, the minority shareholder, Matteson, blocked a proposed sale of all of the stock of the corporation unless the majority shareholder, Ziebarth, gave him one-quarter of his compensation under Ziebarth's employment contract with the buyer. 40 Wn.2d at 291. To eliminate Matteson and enable the sale, Ziebarth set up a new corporation, whose stock was made available pro rata to all the old corporation's

stockholders except Matteson. Matteson dissented from the merger but did not demand payment for his shares. Ziebarth then merged the old corporation into the new, and the sale went forward. Matteson sued to set aside the merger, claiming it was "illegal, unfair, and fraudulent." Id. at 288. The court first examined the Act and concluded that it supported the merger "even though it may result in the ultimate ouster" of the minority shareholder. Id. at 295. The court then considered the appraisal provisions in particular, which bind a shareholder to the corporate action (the merger) where the shareholder dissented but did not demand payment. The court dismissed Matteson's claims, holding that: "under our . . . act, the statutory remedy [of appraisal] is . . . exclusive as to unfairness or breach of fiduciary duty short of actual fraud." Id. at 297 (emphasis added).

Similarly, in Matthews, the plaintiff sued to set aside the dissolution of two companies in which he was a shareholder, but did not demand payment. 92 Wn. App. 541. The Court of Appeals affirmed the trial court's ruling:

The remedy provided under the dissenter's right statute to a minority shareholder that opposes any corporate decision or action is "exclusive as to unfairness or breach of fiduciary duty short of actual fraud." [citation omitted]. Here, Mr. Matthews has not alleged the District acted fraudulently. He therefore was limited to relief provided by RCW 23B.13.020. There was no error.

Id. at 555. See also Van Buren v. Highway Ranch, 46 Wn.2d 582, 586, 283 P.2d 132 (1955) ("In Matteson, it was held that, where the statutory

remedy was available, if properly invoked, a minority stockholder could not obtain relief in equity on a claim based upon unfairness rather than fraud.").

Although Matteson and Matthews involved binding the shareholders to the corporate act in the absence of a demand for payment for their shares, the principle is identical to the issue presented here: absent procedural irregularities or actual fraud, the legislature has provided an exclusive remedy for shareholders who dissent from corporate acts—the remedy of appraisal. RCW 23B.13.020.¹¹

Pisheyar claims that this outcome is unduly harsh because appraisal will not redress all his claims. Br. App. at 29. But, aside from the fact that appraisal will address all of Pisheyar's damages because they all relate to the value of the Corporations, Matteson and Matthews demonstrate that Washington courts must look only to the statutory remedy where one is provided, even if adherence to the statute forecloses a plaintiff's only claims for relief. Indeed, in both Matteson and Matthews, the courts' rulings, which strictly adhered to the Act, left the plaintiffs without either an appraisal remedy or an equitable remedy. Washington courts are thus obliged to give the plain language of a statute

¹¹ These rulings are consistent with the general rule in Washington that a statutory remedy will bar a common law tort claim if the statutory remedy is mandatory and exclusive. See, e.g., Wolf v. Scott Wetzel Servs. Inc., 113 Wn.2d 665, 668, 782 P.2d 203 (1989); Korslund v. DynCorp Tri-Cities Servs. Inc., 121 Wn. App. 295, 321, 88 P.3d 966 (2004), affd., 156 Wn.2d 168, 125 P.3d 119 (2005).

its full effect, "even when its results may seem unduly harsh."

Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

b. Because the Act Is Unambiguous, Resort to Legislative History Is Unnecessary

Pisheyar further argues that RCW 23B.13.020 is not exclusive by urging this court to examine the Act's legislative history. Br. App. at 27-29, 41-42. Because the Act is unambiguous, however, resort to legislative history is neither appropriate nor required. Even if this Court were to look outside the Act, the legislative history and other sources compel the conclusion that the Act is exclusive regarding Pisheyar's claims.

In order to ascertain the meaning of a statute, Washington courts "must look first to its language." Cerrillo, 158 Wn.2d at 201. If the language is not ambiguous, the court must give effect to its plain meaning. Id. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citation omitted) (emphasis added). "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Id. at 21 (footnote omitted).

In Cerrillo, for example, the Washington Supreme Court reversed the Court of Appeals, holding that the Court of Appeals had improperly looked beyond the plain language of the statute where the statute was unambiguous, stating that "resort to aids to construction, such as legislative history, is appropriate only after a determination that a statute is ambiguous." Cerrillo, 158 Wn.2d at 202 (internal quotations and citation

omitted). Similarly in Geschwind, the Washington Supreme Court rejected an argument that uncertainty as to the legislative intent raises the possibility of ambiguity. 121 Wn.2d at 840. The court held that a showing of actual ambiguity in the statute was a "threshold" inquiry and thus held that if a statute was "unambiguous, it is unnecessary to examine legislative history in order to interpret the statute." Id. at 841.

There is no ambiguity in RCW 23B.13.020(2):

a shareholder entitled to dissent . . . may not challenge the corporate action . . . 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.

The only exceptions to the exclusive nature of a dissenter's appraisal remedy are procedural violations or where the action was fraudulent as to the corporation or shareholder. There is no exception based on an alleged breach of fiduciary duty, and under Washington law, this Court may not use the legislative history to create one.

Even if this Court were to look to the legislative history, the legislature's analysis supports exclusivity of the appraisal remedy where, as here, damages are sought and there are no allegations of fraud or procedural irregularity. The Washington legislature adopted verbatim the official comment to the MBCA, which explains that the Act "basically adopts the New York formula as to exclusivity of the dissenters' remedy." 2 S.J. 3088, ¶ 4, 51st Leg. (Wash. 1989); Model Bus. Corp. Act § 13.02 cmt. at 324 (1984).

The "New York formula" provides that appraisal is the exclusive remedy, except that an individual may bring a proceeding in equity when corporate action is alleged to be fraudulent or illegal. Walter J. Schloss Assocs. v. Arkwin Indus., Inc., 90 A.D.2d 149, 455 N.Y.S.2d 844, 851-52 (N.Y. App. Div. 1982) (Mangano, J., dissenting), rev'd, adopting dissenting opinion, 61 N.Y.2d 700, 460 N.E.2d 1090, 472 N.Y.S.2d 605 (1984) (limiting dissenting shareholder's right to seek relief outside of appraisal when there is an "identical relief available to him in appraisal proceedings"); Theodore Trust U/A Dated December v. Smadbeck, 277 A.D.2d 67, 717 N.Y.S.2d 7, 8 (2000). Dissenting shareholders cannot obtain relief in the form of compensatory damages outside the appraisal remedy. Breed, 429 N.E.2d at 130.

Thus, contrary to Pisheyar's assertions, the legislative history¹² plainly supports the conclusion that Pisheyar's claims are properly and solely to be brought in the Appraisal Proceeding.

Pisheyar next urges this Court to adopt the reasoning of the New Mexico Supreme Court in McMinn v. MBF Operating Acquisition Corp., 142 N.M. 160, 164 P.3d 41 (2007). But McMinn is distinguishable on multiple levels because the New Mexico statutory language¹³ is distinct

¹² For a discussion of Delaware law cited in the legislative history, see infra at 36.

¹³ As an initial matter, New Mexico's rules of statutory construction differ markedly from Washington's. The McMinn court, for example, determined that the statutory appraisal language was unambiguous but nonetheless searched the legislative "history and background" for any "lurking" provisions giving rise to "genuine uncertainty." 164 P.3d at 47. Where statutory language is unambiguous, Washington courts do not search for what might be lurking.

and the concerns guiding the court in McMinn do not apply here. First, the court there looked to a provision of the statute that allows for a shareholder's shares to be restored if the shareholder fails to make a demand for determination of fair value. Id. at 48 (citing N.M. Corp. Act § 53-15-4(B)). The court then found this provision to be in conflict with the exclusivity language, and it was this conflict that provided the foundation for the court's opinion. Id. at 48. There is no such provision in the Washington Act. The court then held that a breach of fiduciary duty claim could stand because it was encompassed in the term "unlawful," a term that the Washington legislature specifically removed from the Washington version of the Act.¹⁴ Id. at 52, 53.

The McMinn court was expressly concerned with protecting the plaintiff's rights as a dissenting shareholder. Id. at 52. Unlike Pisheyar, the plaintiff in McMinn had not been afforded the protection of the Injunction Hearing assessing his claims prior to the actual corporate action, and had not availed himself of appraisal. The McMinn court was concerned that adherence to the exclusivity provision would extinguish plaintiff's claims made prior to the corporate action. There is no such impact on Pisheyar's claims. Here, the exclusivity provision of the Act refers only to acts challenging the corporate action. RCW 23B.13.020(2). Therefore Pisheyar's claims brought prior to and independent of, the reverse stock splits are not barred by the Act. But these claims are

¹⁴ See infra at 38.

nevertheless limited to the Appraisal Proceeding because Pisheyar's alleged damages relate only to the value of the Corporations. See discussion supra at 21.

Pisheyar next relies on the cases cited in McMinn to support his argument that this Court should revive his fiduciary duty claims. Br. App. at 38-39, citing Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Mullen v. Academy Life Ins. Co., 705 F.2d 971 (8th Cir. 1983). Like McMinn, however, these cases do not support Pisheyar's assertions.

Pisheyar's reliance on Weinberger is misplaced because that court held that Delaware law, like New York law, prevents a dissenting shareholder from maintaining an action for compensatory damages in addition to the statutory appraisal remedy. 457 A.2d at 715. In Weinberger, the minority shareholder sought to rescind the merger, or in the alternative, rescissory damages. Thus the question of whether the shareholder could recover both the appraisal remedy and damages was not before the court. The court held that outside the specific circumstances of the case before it, Delaware law "mandate[s] a stockholder's recourse to the basic remedy of an appraisal." Id. (citing well-settled Delaware law). Thus in Delaware, if a plaintiff seeks damages related to the value of the corporation, as here, appraisal is the exclusive remedy.

Finally Mullen, a Missouri case applying New Jersey law, was decided prior to the publication of the MBCA and the Washington Act.¹⁵

¹⁵ Perl v. IU Intern. Corp., 61 Haw. 622, 607 P.2d 1036, 1046 (Haw. 1980), is distinguishable on similar grounds.

705 F.2d at 978. The case turned on a New Jersey statute wholly different from Washington's, and the plaintiff had not availed himself of the appraisal remedy. *Id.* Mullen is simply not on point.

Because Pisheyar has entirely failed to support his assertions with persuasive authority, this Court should hold that Pisheyar must litigate his claims for personal damages in the Appraisal Proceeding.

c. Pisheyar's Argument That the Term "Fraudulent" Encompasses Breach of Fiduciary Duty Is Without Merit

Pisheyar argues that the term "fraudulent" in the Act encompasses breach of fiduciary duty. Br. App. at 41.¹⁶ Pisheyar cites no Washington authority for this assertion, because there is none.

As discussed supra, the Washington Supreme Court in Matteson made clear the distinction between claims based on breach of fiduciary duty and claims based on fraud, holding that the Act is "exclusive as to unfairness or breach of fiduciary duty short of actual fraud." 40 Wn.2d at 297 (emphasis added). In enacting legislation upon a particular subject, "the legislature is not only presumed to be familiar with its previous legislation relating thereto, but also with the court decisions, if any, construing such former enactments." In re Levy, 23 Wn.2d 607, 616, 161 P.2d 651 (1945).

¹⁶ Pisheyar never made this argument in the trial court. See Supp. Counter-Designation of Clerk's Papers, Pl.'s Response to Defs.' Motion in Limine (filed 12/15/06), at 6-7, and Pl.'s Response to Defs.' Motion for Reconsideration (filed 12/26/06), at 4-7.

Although Pisheyar argues otherwise, the Washington legislature did not adopt wholesale the MBCA.¹⁷ Instead, the legislature removed the MBCA exception of "unlawful" and replaced it with specific language regarding failure to comply with procedural requirements of the statute and the corporation's articles of incorporation and bylaws. Compare Model Bus. Corp. Act § 13.02(b) (1984) with RCW 23B.13.020(2). Had the legislature intended "fraudulent" to encompass claims of breach of fiduciary duty, the legislature could have specified as much in the language of the statute, as other legislatures have, but it did not do so. See, e.g., Ill. Bus. Corp. Act § 11.65(b).

Pisheyar also relies on Cohen v. Mirage Resorts, Inc., 62 P.3d 720 (Nev. 2003), for the proposition that "fraudulent" encompasses breach of fiduciary duty. But the comments to the MBCA demonstrate unequivocally that the fraud exception does not and cannot encompass Pisheyar's claims for breach of fiduciary duty and oppression:

There may be exceptional circumstances where the process by which the corporate action approved was so flawed that it is appropriate to provide more general relief on behalf of all affected shareholders. Thus [RCW 23B.13.020(2)] . . . creates an exception for cases where fraud or material misrepresentation have affected the shareholder vote to such an extent as to have caused the corporate action to be approved mistakenly.

¹⁷ The MBCA text read:

A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

MBCA § 13.02(b) (1984) (emphasis added).

MBCA § 13.02(b) cmt. (2005). Thus the fraud exception is intended to encompass only fraud as it relates to the shareholder vote approving the corporate transaction, essentially procedural fraud. Pisheyar has never and can never make a claim of fraud regarding the procedure of the reverse stock splits, which the Corporations implemented to the letter of the Act.

Pisheyar's reliance on case law from other jurisdictions is also completely unavailing given the unambiguous statutory language and Washington cases addressing the requirement of actual procedural fraud to trigger an exception to the appraisal remedy, case law that Pisheyar chooses to relegate to a mere footnote. Br. App. at 27.

All of Pisheyar's claims for personal damages involve alleged losses as a proportion of the Corporations' alleged losses. The Act, Washington cases and cases from the majority of other states to have considered the issue dictate that such damages can only be appropriately assessed in the ongoing statutory Appraisal Proceeding. This Court should affirm the trial court's dismissal of Pisheyar's claims for personal damages and finally foreclose his multiple attempts to double-up his alleged damages in the Appraisal Proceeding and the trial court.

C. This Court Should Reverse the Trial Court's Decision With Respect to the Corporate Perquisite Claims¹⁸

The trial court held that Pisheyar could pursue personal damages on his corporate perquisites claims involving the alleged denial of such things as free gasoline and tickets to sports events. The trial court's ruling was error because all of Pisheyar's personal damages relate to alleged loss to the Corporations and as such should have been dismissed as derivative. Further, Pisheyar failed to make a showing sufficient to establish the existence of damages, an element of Pisheyar's claim and one on which he bears the burden at trial.

1. The Corporate Perquisite Claims Fail Because Pisheyar's Alleged Damages Are Derivative

As discussed supra at 21, a shareholder who suffers damages only indirectly as a shareholder cannot sue as an individual. Sabey, 101 Wn. App. at 584-585. This Court should reverse the trial court because Pisheyar's personal damages relate only to alleged loss as a percentage of the Corporations' increased expenses for the perquisites. Pisheyar is therefore attempting a second bite of the derivative claims apple, but, as discussed supra, Pisheyar lacks standing to assert derivative claims.

After 18 months of discovery, Pisheyar failed to present any evidence that he was personally harmed in connection with his corporate

¹⁸ Pisheyar misapprehends the issues on appeal. Commissioner Craighead granted Snyder's and Hannah's motion for discretionary review regarding whether Pisheyar's corporate perquisite claims should have been dismissed. See Commissioner's Ruling, ¶ 9. The damages Pisheyar cites in his brief, such as "defendant's billing the corporations for their attorney's fees", "loss of salary as a corporate officer" (Br. App. at 48, ¶ 3) were not the subject of either parties' motions for discretionary review, and Commissioner Craighead could not, and did not, grant review of those issues.

perquisite claims, distinct from any corporate harm. For example, several times during his deposition, Pisheyar expressly admitted that "the personal damage is really just the same thing as the corporate damage." When asked how he planned to calculate his damages, Pisheyar stated his damages would be 19% (his former ownership share) of any damage to the Corporations resulting from Snyder's and Hannah's alleged wrongdoing. CP 2213-21.

Pisheyar's reliance on Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 519-20, 728 P.2d 597 (1986), for the theory that his individual claims stand because individual and corporate damages can "overlap" is completely unavailing. Br. App. at 48. In Interlake, the court's award of damages to the plaintiff shareholders was not for the shareholders' individual claims, as Pisheyar implies, but for the derivative claims where the award of damages to the corporation would have rewarded the defendant majority shareholder.

This Court should reverse the trial court because Pisheyar's alleged personal claims are in fact derivative, Pisheyar has no standing to assert such claims, and Pisheyar has provided no evidence of personal damages required to survive a summary judgment motion.

2. Pisheyar Has Not Presented Competent Evidence as to an Amount of Personal Damages

Even if it were to accept Pisheyar's assertion that alleged losses by the Corporations somehow support his personal claims, this Court should

nevertheless reverse the trial court because the finder of fact could not calculate Pisheyar's damage without speculating.

To survive summary judgment, Pisheyar must provide the best evidence available to establish the amount of his alleged damages with reasonable certainty. Dunseath, 41 Wn.2d at 902; Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 711, 257 P.2d 784 (1953). In Gaasland, for example, the court held that evidence demonstrating the amount of damage must be "reasonably convincing evidence indicating that amount of damage" was "susceptible of ascertainment" in a manner other than by "speculation, conjecture, or surmise and by reference to some definite standard." 42 Wn.2d at 713-14 (citation omitted). The plaintiff met this burden by producing evidence of the cost of replacing goods not delivered in breach of a contract. Id. By contrast, the plaintiff in Burkheimer v. Thrifty Inv. Co., did not produce evidence sufficient to assess damages. 12 Wn. App. 924, 928-29, 533 P.2d 449 (1975). The Burkheimer plaintiff alleged breach of contract and, although he presented two damages theories, the trial court held that the theories did not adequately account for the factual record and that the requested damages were therefore too speculative. This Court affirmed, holding that the record below was insufficient to allow damages to be calculated. Id. at 929.

Here, Pisheyar has not proffered any evidence, let alone reasonably convincing evidence, as to the amount of damages. CP 2140-2265; 2795-2800; 2804-2819. During his deposition, Pisheyar was unable to come up

with any amounts at all as to damages. When asked to quantify the damages he incurred when he was allegedly prevented from attending corporate meetings, Pisheyar responded that he did not have a specific damage figure and that "[he and his attorney] will come up with some sort of numbers that the special master required and we'll give you those numbers." CP 2215, and generally 2212-21. When asked how he had been damaged for not receiving gasoline that was allegedly provided to other shareholders, Pisheyar replied, "I don't know at this time what – what those numbers would be." CP 2347:1-21. When asked how he had been damaged for not receiving a new demo car, Pisheyar replied, "I haven't figured those numbers out" and that he had not given it any thought. CP 2348:3-2349:1. Finally, when asked how he has been damaged for not receiving trips that other dealership owners allegedly received, Pisheyar again replied that he did not know and that he had not given it any thought. CP 2219:4 -2220:3

Pisheyar's supplemental discovery answers merely listed naked dollar figures and he did not produce a single supporting document. Without explanation, Pisheyar claimed \$170,000 in damages for each of the elements of his corporate perquisite claims relating to Sound Infiniti (meetings, keys, tickets, etc.) and \$100,000 for allegedly being excluded from meetings at Infiniti of Tacoma. CP 2223-25. Beaton, Pisheyar's expert, also did not attempt to explain the basis for Pisheyar's damages calculations. CP 2227-40; 2242-65.

Finally, in his second supplemental discovery responses, produced after all discovery was closed and summary judgment motions were filed, Pisheyar meekly explained that the \$170,000 and \$100,000 figures were based on his "best estimate based upon his knowledge of the automobile business in general and this business in particular."¹⁹ Of course, because discovery was closed, Snyder and Hannah could not and cannot explore this murky and indefinite explanation. CP 2804-2819, specifically 2817-19. This is the complete record; the trial court precluded Pisheyar from relying on any other evidence relating to his alleged personal damages. CP 523-26.

Because Pisheyar has not provided any explanation of his damages calculations, nor any supporting documents, there is no way to calculate damages by "reference to some definite standard," as required by Gaasland and Burkheimer. There is simply no evidence from which a fact-finder could reasonably and reliably calculate damages. The best that Pisheyar himself could do was "estimate," and that is not good enough. Under these circumstances, this Court should reverse the trial court's denial of partial summary judgment on the issue of Pisheyar's corporate perquisite claims.

¹⁹ Supp. Counter-Designation of Clerk's Papers, Decl. of Brendyn P. Ryan (filed 10/26/06 and 12/12/07), Ex. B.

D. Whether a Reverse Stock Split Can Constitute Minority Oppression in Washington Is Not Before This Court

Pisheyar argues at length about whether a reverse stock split can constitute minority oppression in Washington. Br. App. at 18-23. This issue is outside the scope of review. The trial court never certified the issue for review; the parties did not stipulate to it; and Commissioner Craighead specifically considered and rejected it.²⁰

Even if the issue were before this Court, Pisheyar's argument is without merit.²¹ Washington law expressly provides that Washington corporations can amend their articles of incorporation to implement a reverse stock split, RCW 23B.10.020(4); In re Nw. Greyhound Lines, 41 Wn.2d at 677, and provides an appropriate recourse to shareholders by means of the appraisal remedy, RCW 23B.13.020(1)(d). Pisheyar's attempt to use the minority oppression claim to "challenge the corporate action," RCW 23B.13.020(2), is barred by the exclusivity provision of the statute. Id. See discussion supra at 33.

No Washington court has held that a permissible corporate action such as a merger or reverse stock split has ever formed the basis for a minority oppression claim, including the two cases on which Pisheyar relies, Scott v. Trans-System, Inc., 148 Wn.2d 701, 64 P.3d 1 (2003), and

²⁰ Pisheyar also assigns error to the trial court's dissolution of the August 31 TRO. Br. App. at 4, 6. Inasmuch as it appears that Pisheyar is attempting to reopen the issue of the propriety of reverse stock splits, this issue is also not before this Court, a fact that Pisheyar, incomprehensibly, ignores. He ignores (1) that this Court three times rejected his arguments on this issue in the First Appeal; (2) that the trial court did not certify the issue for review, CP 516-18; (3) that the parties did not stipulate to the issue; and (4) that Commissioner Craighead did not consider or accept the issue.

²¹ Without waiving objection to this Court's consideration of the issue.

Robblee v. Robblee, 68 Wn. App. 69, 841 P.2d 1289 (1992), neither of which held that minority oppression had occurred despite circumstances that were far more egregious than even the wildest of Pisheyar's allegations. See also McCormick, 167 P.3d at 617 (rejecting plaintiff's claim of minority oppression for exclusion from corporate decision making and shareholder meetings).²²

Pisheyar's argument that the reverse stock splits can form the basis of a claim for oppressive conduct has other fundamental flaws. Pisheyar relies on RCW 23B.14.300(2)(b), Washington's dissolution statute to support his claim of oppression, yet he has never made a claim under the statute for judicial dissolution of the Corporations. CP 1-11; 315-26. Pisheyar next relies on a treatise, but no Washington cases, for the proposition that in Washington, the duty owed between shareholders in a closely-held corporation is heightened, one of "utmost good faith and loyalty." Br. App. at 19. Pisheyar's reliance is misplaced. As Division Two recently noted in rejecting the same argument, "Washington courts have not outlined the scope of the duty owed by a shareholder to his or her fellow shareholders beyond the common sense prohibition against retaining personal profit owing to the corporation." McCormick, 167 P.3d at 621.

²² See also Noble v. Lubrin, 114 Wn. App. 812, 822, 60 P.3d 1224, 1230 (2003) (rejecting an oppressive conduct claim as the basis of a breach of fiduciary duty); see also RP (11/15/05) 39:11-19; 42:19-43:1.

Moreover, Pisheyar's alleged expectation that he would remain a shareholder forever, if indeed he had one, was unjustified. Pisheyar had ample opportunity to bargain for the requirement that he retain his shareholder status in perpetuity when the Corporations were formed, or in the years that followed, but he failed to do so. See Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993) (minority shareholders can make a business judgment regarding the terms of the minority position and can bargain for the terms of the shareholder agreements); 12B Fletcher § 5820.10 n. 25. Finally, as with his other claims, Pisheyar failed to identify any personal damages arising from his minority oppression claim. See supra at 21.

The trial court, in denying Pisheyar's preliminary injunction, recognized the Washington's legislature's careful balancing of corporate governance interests against those of minority shareholders in holding that the Corporations' "reverse stock splits are allowable under Washington law . . . [and that] in other states, with laws similar to Washington, courts have expressly refused to enjoin or rescind reverse stock splits." CP 265 ¶ 5. The trial court further found that, even though they were not required to do so, Snyder and Hannah established a valid business purpose for the reverse stock splits (quoting Lerner v. Lerner Corp., 132 Md. App. 32, 750 A.2d 709, 720 (2000)); CP 266 ¶ 7. The trial court was correct. If this Court reaches the issue of Pisheyar's claim of minority oppression, something it is not required to and should not do, this Court should affirm the trial court's dismissal of Pisheyar's claim.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the order of the King County Superior Court granting partial summary judgment in favor of Snyder and Hannah on the issues of damages and derivative claims, and should reverse the trial court's denial of partial summary judgment as to the corporate perquisite claims and dismiss those claims as well.

DATED: December 13, 2007

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APPENDICES

Appendix A: Revised Model Business Corporation Act, adopted by Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association, Spring 1984, pages 315-324.

Appendix B: Senate Journal, 1989, Vol. 2, Regular Session, First and Second Special Sessions, Fifty-First Legislature, State of Washington at Olympia, the State Capitol, pages 3086-3090.

APPENDIX A

REVISED MODEL BUSINESS CORPORATION ACT

adopted by

**Committee on
Corporate Laws of the
Section of Corporation,
Banking and
Business Law of the
American Bar Association**

Spring 1984

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**With Official Comments and
Statutory Cross-References**

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Dissenters' Rights

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INTRODUCTORY COMMENT

Chapter 13 deals with the tension between the desire of the corporate leadership to be able to enter new fields, acquire new enterprises, and rearrange investor rights and the desire of investors to adhere to the rights and the risks on the basis of which they invested. Most contemporary corporation codes in the United States attempt to resolve this tension through a combination of two devices. On the one hand, the majority is given an almost unlimited power to change the nature and shape of the enterprise and the rights of its members. On the other hand, the members who dissent from these changes are given a right to withdraw their investment at a fair value.

The traditional accommodation has been sharply criticized from two directions. From the viewpoint of dissident investors, the dissent procedure is criticized for providing little help to the ordinary investor because its technicalities make its use difficult, expensive, and risky. From the viewpoint of the corporate leadership, it is criticized because it fails to protect the corporation from suits brought by dissenting shareholders on grounds of unfairness or fraud, and from demands that are motivated by the hope of a nuisance settlement or by fanciful conceptions of value.

Chapter 13 contains a unique compromise between these opposing points of view that was developed in 1976 as an amendment to the 1969 version of the Model Act. It seeks to increase the frequency with which assertion of dissenters' rights leads to economical and satisfying solutions, and to decrease the frequency with which they lead to delay, expense, and dissatisfaction. It seeks this aim primarily by motivating the parties to settle their differences in private negotiations, without resort to judicial appraisal proceedings.

This approach involves a substantial change in the prevailing concept of the dissenters' right in most corporation codes. The right has sometimes been characterized as the "appraisal right," implying that its object is to provide each dissenter with a judicial appraisal. The objective of chapter 13 is to permit each dissenter to receive fair value without the

DISSENTERS' RIGHTS

formality of judicial appraisal, which involves delays and uncertainties and legal expenses that are prohibitive to small investors. Appraisal is the ultimate sanction to be invoked only when the parties fail to reach reasonable terms of settlement. In line with this conception, this chapter completely avoids the term "appraisal right" and refers consistently to "dissenters' rights to obtain payment for their shares."

Subchapter A.

**RIGHT TO DISSENT AND OBTAIN PAYMENT
FOR SHARES**

§ 13.01. DEFINITIONS

In this chapter:

- (1) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.
- (2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under section 13.02 and who exercises that right when and in the manner required by sections 13.20 through 13.28.
- (3) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.
- (4) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.
- (5) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.
- (6) "Beneficial shareholder" means the person who is a beneficial owner of shares held by a nominee as the record shareholder.
- (7) "Shareholder" means the record shareholder or the beneficial shareholder.

CROSS-REFERENCES

Act definitions, see § 1.40.
Merger and share exchange, see ch. 11.

OFFICIAL COMMENT

Section 13.01 contains specialized definitions applicable only to chapter 13.

- (1) The definition of "corporation" in section 13.01(1) includes successor or acquiring corporations in mergers or share exchanges within the scope of that definition. In these transactions, the obligations of the disappearing or acquired corporations must be assumed by the successor or acquiring corporation and they are thus included within the definition of "corporation."
- (2) The definition of "dissenter" in section 13.01(2) is phrased in terms of a "shareholder," a term that is itself specially defined in section 13.01(7). The definition of "shareholder" for purposes of chapter 13 differs from the definition of that term used elsewhere in the Model Act. Section 1.40 defines "shareholder" as used elsewhere in the Act to include only "record shareholders" as defined in section 13.01(5). Section 13.01(7), on the other hand, defines "shareholder" to include not only "record shareholders" but "beneficial shareholders," a term that is itself defined in section 13.01(6). The specially defined terms "record shareholder" and "beneficial shareholder" appear primarily in section 13.03, which establishes the manner in which beneficial shareholders, and record shareholders who are acting as nominees for more than one beneficial shareholder, establish dissenters' rights. The broadest definition of "shareholder" is used generally throughout the balance of Chapter 13 in order to permit beneficial shareholders to take advantage of the provisions of this chapter as provided in section 13.03. The definition of "dissenter" in section 13.01(2) is also limiting, since only a shareholder who has performed all the conditions imposed on him by this chapter in order to obtain payment for his shares is a "dissenter." Under this definition, a shareholder who initially objects but fails to perform any of these conditions within the times specified by this chapter loses his status as "dissenter" under this section.
- (3) The definition of "fair value" in section 13.01(3) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but

permits an exception for equitable considerations. The purpose of this exception ("unless exclusion would be inequitable") is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), a case in which the court found that the transaction did not involve fair dealing or fair price: "In our view this includes the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." Consideration of appreciation or depreciation which might result from other corporate actions is permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.

"Fair value" is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

- (4) The definition of "interest" in section 13.01(4) is included to make interest computations under this chapter more realistic. The right to receive interest is based on the elementary consideration that the corporation has the use of the dissenter's money, and the dissenter has no use of it, from the effective date of the corporate action until the date of payment. The definition also requires the adjustment of rates to accommodate radical changes in prevailing rates like those seen in the late 1970s and early 1980s and that may be seen again in the future. The specification of the rate currently paid by the corporation provides a prima facie standard which should facilitate voluntary settlements. The date from which interest runs has been changed from the date of the shareholders' vote to the effective date of the corporate action, in conformity with the change of the valuation date in section 13.01(3).

§ 13.02. RIGHT TO DISSENT

- (a) A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:
- (1) consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by section 11.03 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 section 11.04;
- (2) 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;
 - (3) 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;
 - (4) an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:
 - (i) alters or abolishes a preferential right of the shares;
 - (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;
 - (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;
 - (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or
 - (v) 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 section 6.04; or
 - (5) 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.
- (b) A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

CROSS-REFERENCES

Amendment of articles of incorporation, see ch. 10A.
Bylaws, see § 2.05, ch. 10B.

Cumulative voting, see § 7.28.
Dissolution, see ch. 14.
Fractional shares, see § 6.04.
Preemptive rights, see § 6.30.
Redemption of shares, see §§ 6.01 & 6.31.
Sale of assets, see ch. 12.
Share dividends, see § 6.23.
Share preferences, see §§ 6.01 & 6.02.
“Voting group” defined, see § 1.40.
Voting rights generally, see § 7.21.

OFFICIAL COMMENT

1. TRANSACTIONS GIVING RISE TO DISSENTERS' RIGHTS

Section 13.02(a) establishes the scope of a shareholder's right to dissent (and his resulting right to obtain payment for his 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 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 section 11.04. The right to vote on a merger under section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporation if the number of its outstanding shares is increased by more than 20 percent as a result of the merger.
- (2) A share exchange under 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 section 12.02 if the shareholder is entitled to vote on the sale or exchange. Section 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 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 his 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) Amendments to articles of incorporation that impair the shareholders' rights as shareholders in any of the enumerated ways. The reasons for granting a right of dissent in these situations are similar to those granting such rights in cases of merger and transfer of assets. The grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered or they are compelled to accept cash for their investment in an amount established by the corporation. The grant also enhances the freedom of the majority to make changes, because the existence of an escape hatch makes fair and reasonable a change that might be unfair if it forced a fundamental change of rights upon unwilling investors without giving them a reasonable alternative.
- (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 Model 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 section 10.04; such a class is entitled to assert dissenters' rights if the transaction also falls within 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 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.

2. EXCLUSIVITY OF DISSENTERS' RIGHTS

Section 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 is "unlawful" or "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 unlawfully 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 unlawfulness 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.") See also Vorenberg, "Exclusiveness of the Dissenting Stockholders' Appraisal Right," 77 HARV. L. REV. 1189 (1964).

APPENDIX B

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FIRST AND SECOND SPECIAL SESSIONS
FIFTY-FIRST LEGISLATURE
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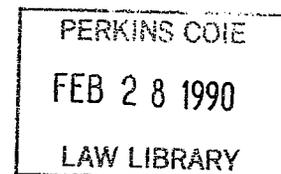
AT
OLYMPIA, the State Capitol

1989 Regular Session Convened January 9, 1989
Adjourned Sine Die April 23, 1989

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**APPENDIX A
COMMENTS**

**WASHINGTON BUSINESS
CORPORATION ACT**

Prepared by

**Corporate Act Revision Committee
of the Washington State Bar Association**

(See Senate Bill No. 5583, page 379)

Proposed subsection 12.02(f) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called "spin offs," "split offs," or "split ups," sometimes involve transactions that may be formally characterized as sales of "all or substantially all" the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Proposed subsection 12.02(g) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to Proposed section 12.02. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 HARV. L. REV. 534 (1966).

CHAPTER 13. DISSENTERS' RIGHTS.

Section 13.01 Definitions For Chapter 13.

Proposed section 13.01 contains specialized definitions applicable only to chapter 13.

(1) The definition of "corporation" in Proposed subsection 13.01(1) includes successor or acquiring corporations in mergers or share exchanges within the scope of that definition. In these transactions, the obligations of the disappearing or acquired corporations must be assumed by the successor or acquiring corporation and they are thus included within the definition of "corporation."

(2) The definition of "dissenter" in Proposed subsection 13.01(2) is phrased in terms of a "shareholder," a term that is itself specially defined in Proposed subsection 13.01(7). The definition of "shareholder" for purposes of chapter 13 differs from the definition of that term used elsewhere in the Proposed Act. Proposed section 1.40 defines "shareholder" as used elsewhere in the Act to include only "record shareholders" as defined in Proposed subsection 13.01(5). Proposed subsection 13.01(7), on the other hand, defines "shareholder" to include not only "record shareholders" but "beneficial shareholders," a term that is itself defined in Proposed subsection 13.01(6). The specially defined terms "record shareholder" and "beneficial shareholder" appear primarily in Proposed section 13.03, which establishes the manner in which beneficial shareholders, and record shareholders who are acting as nominees for more than one beneficial shareholder, establish dissenters' rights. The broadest definition of "shareholder" is used generally throughout the balance of Chapter 13 in order to permit beneficial shareholders to take advantage of the provisions of this chapter as provided in Proposed section 13.03. The definition of "dissenter" in Proposed subsection 13.01(2) is also limiting, since only a shareholder who has performed all the conditions imposed on shareholders by this chapter in order to obtain payment for the shareholder's shares is a "dissenter." Under this definition, a shareholder who initially objects but fails to perform any of these conditions within the times specified by this chapter loses status as "dissenter" under this section.

(3) The definition of "fair value" in Proposed subsection 13.01(3) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value, and permits courts to accept proof of value by any techniques and methods which are generally accepted in the financial community. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). It specifically preserves the language in the old law excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations. The purpose of this exception ("unless exclusion would be inequitable") is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in Weinberger v. UOP, where the court found that the transaction did not involve fair dealing or fair price: "In our view this includes the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." Consideration of appreciation or depreciation which might result from

other corporate actions has generally been permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.

"Fair value" is to be determined immediately before the effective date of the corporate action, instead of the date of the shareholder's vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving the dissenter in a twilight zone where the dissenter has lost former rights, but has not yet gained new ones.

(4) The definition of "interest" in Proposed subsection 13.01(4) is included to make interest computations under this chapter more realistic. The right to receive interest is based on the elementary consideration that the corporation has the use of the dissenter's money, and the dissenter has no use of it, from the effective date of the corporation action until the date of payment. The definition also requires the adjustment of rates to accommodate radical changes in prevailing rates like those seen in the late 1970's and early 1980's and that may be seen again in the future. The specification of the rate currently paid by the corporation provides a prima facie standard which should facilitate voluntary settlements. The date from which interest runs has been changed from the date of the shareholders' vote to the effective date of the corporate action, in conformity with the change of the valuation date in Proposed subsection 13.01(3).

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 section 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 asset 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.

Section 13.03 Dissent By Nominees and Beneficial Owners.

Proposed section 13.03 addresses the relationship between dissenters' rights and the widespread practice of nominee or street name ownership of publicly held shares. Generally, a shareholder must dissent with respect to all the shares the shareholder owns or over which the shareholder has power to direct the vote. If a record shareholder is a nominee for several beneficial shareholders, however, some of whom wish to dissent and some of whom do not, Proposed subsection 13.03(a) permits the record shareholder to dissent with respect to a portion of the shares owned by the shareholder but only with respect to all the shares beneficially owned by a single person. This limitation is necessary to prevent speculative abuse by a single beneficial shareholder who is not fundamentally opposed to the proposed corporate action but who may wish to gamble, as to some of the beneficial shareholder's shares, on the possibility of a high payment to dissenters.

Proposed subsection 13.03(a) also requires a record shareholder who dissents with respect to a portion of the shares held by the shareholder to notify the corporation of the name and address of the beneficial owner on whose behalf the shareholder has dissented.

Proposed subsection 13.03(b) permits a beneficial shareholder to assert dissenters' rights directly if the beneficial shareholder submits the record shareholder's written consent. Generally, corporations treat the record shareholder as the owner of shares, and a beneficial shareholder is entitled to assert dissenters' rights only as set forth in this section. It would be foreign to the premises underlying nominee and street name ownership to require these record shareholders to forward demands and participate in litigation on behalf of their clients. In order to make dissenters' rights effective without burdening record shareholders, beneficial shareholders should be allowed to assert their own claims as provided in this subsection. The beneficial shareholder is required to submit a written consent by the record shareholder to the beneficial shareholder's assertion of dissenters' rights to verify the beneficial shareholder's entitlement and to permit the protection of any security interest in the shares. In practice, a broker's customer who receives a forwarded notice of proposed corporate action and who wishes to dissent may request the broker to supply the customer with the name of the record shareholder (which may be a house nominee or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder. From that point forward, the corporation must deal with the beneficial shareholder.

Section 13.20 Notice of Dissenters' Rights.

Proposed subsection 13.20(a) requires the corporation to notify record shareholders of the existence of dissenters' rights before the vote is taken on the corporate action. This notice provides the reassurance to investors that the right to dissent is intended to provide because many shareholders have no idea what rights of dissent they may have or how to assert them. If the corporation is uncertain whether or not the shareholders have dissenters' rights, it may comply with this notice requirement by stating that the shareholders "may have" dissenters' rights.

A similar requirement of notice is expressly required by proxy rules, by the dissenters' rights statutes of several states, and possibly under more general disclosure requirements of federal and state securities laws.

Proposed subsection 13.20(b) requires that notice be given within 10 days after the effective date of corporate action in situations where the action is validly taken without a vote of shareholders, e.g., in a merger of a subsidiary into its parent under Proposed section 11.04. This notice may be combined with the dissenters' notice required by Proposed section 13.22.

Section 13.21 Notice of Intent to Demand Payment.

If a shareholder's vote is called for, Proposed subsection 13.21(a) requires the shareholder to give notice of the shareholder's intent to demand payment before the vote on the corporate action is taken. This notice enables other voters to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice, including the technical details of depositing share certificates. This subsection has no application to actions taken without a shareholder vote.

In order to be and remain a dissenter eligible to demand payment for the shareholder's shares, the section requires that a shareholder must not only give the notice required by this section but must also vote against, or abstain from voting on, the proposal.

Section 13.22 Dissenters' Notice.

The basic purpose of Proposed section 13.22 is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent. The requirements of what this notice (called a "dissenters' notice") must contain are spelled out in detail to ensure that this notice serves this basic purpose.

In the case of an action that is submitted to the vote of shareholders, the dissenters' notice must be sent only to those persons who gave notice of their intention to dissent under Proposed section 13.21 and who refrained from voting in favor of the proposed actions. In the case of a transaction not involving a vote by shareholders, the dissenters' notice must be sent to all persons who are eligible to dissent and demand payment. In either case the dissenters' notice must be sent within 10 days after the effective date of the corporate action and must be accompanied by a copy of this chapter.

The notice must contain or be accompanied by a form which a person asserting dissenters' right may use to complete the demand for payment under Proposed section 13.23. The form must specify the date by which it must be received by the corporation, which date must be not less than 30 days nor more than 60 days after the effective date of the notice of how to demand payment.

The dissenters' notice must also specify where and when share certificates must be deposited, or, in the case of uncertificated shares, when restrictions on transfer will become effective under Proposed section 13.24. The date for deposit of share certificates may not be set at a date earlier than the date for receiving the demand for payment.

Proposed subsection 13.22(b)(3) requires the corporation to specify the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action. This is the critical date for determining the rights of shareholder-transferees: persons who became shareholders prior to that date are entitled to the full right to dissent and obtain payment for their shares, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by Proposed section 13.27. It is appropriate for the corporation to furnish this critical date since it knows when information relating to the transaction was publicly released. The date selected should be the date the terms were announced, not the earlier date when consideration of the proposed transaction may have been announced.

Section 13.23 Duty to Demand Payment.

The demand for payment required by Proposed section 13.23 is the definitive statement by the dissenter. In the case of a transaction involving a vote by shareholders, it is a confirmation of the "intention" expressed earlier; in the case of any other transaction, it is the person's first statement of position. In either event, the filing of these demands informs the corporation of the extent of the potential cash drain if it proceeds with the proposed corporate action.

The demand for payment must include a certified statement as to whether the date on which the dissenter acquired ownership of the shares was before (or on or after) the announcement date. See Proposed subsection 13.22(b)(3). This information permits the issuer to detect acquisitions made for speculative or obstructive purposes and to exercise its right under Proposed section 13.27 to defer payment of compensation for these shares.

Proposed subsection 13.23(a) also requires a person who files a demand for payment to deposit the person's share certificates as directed by the corporation in its dissenters' notice. The deposit of share certificates is necessary to prevent dissenters from giving themselves a 30-day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this kind of speculation were possible, all sophisticated investors might be expected to file demands that they would not intend to carry through unless the

Nos. 59477-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AFSHIN PISHEYAR,

Appellant/Cross-Respondent,

v.

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

Respondents/Cross-Appellants.

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STATE OF WASHINGTON

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of December, 2007, I caused to be served copies of the following documents:

- Brief of Respondents/Cross-Appellants
- Copy of Supplemental Counter Designation of Clerk's Papers
- Proof of Service

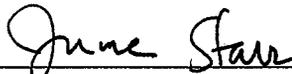
By hand delivery to:

James A. Krueger
Lucy R. Clifthorne
Daniel C. Montopoli
VANDEBERG JOHNSON & GANDARA
1201 Pacific Avenue, Suite 1900
Tacoma, WA 98401

And U.S. mail to:

Boyd F. Buckingham
BOYD F. BUCKINGHAM, INC. P.S.
Evergreen Building, Suite 400
15 South Grady Way
Renton, WA 98055

Dated this 13th day of December, 2007, at Seattle, Washington.



JUNE STARR