

No. 72644-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EAGLEVIEW TECHNOLOGIES, INC., a Washington corporation,

Respondent,

v.

YURI PIKOVER, an individual; and 37 TECHNOLOGY VENTURES,
LLC, a Delaware limited liability corporation,

Appellants.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court's valuation of EagleView's shares is reviewed for abuse of discretion. Appellants Yuri Pikover and 37 Technology Ventures, LLC (together "Dissenters") ignore this governing legal standard and attempt to re-argue credibility and evidentiary issues that were considered, and rejected, by the trial court. Almost all of the alleged "errors" that Dissenters ask this Court to review *de novo* are factual findings and credibility findings. Because the trial court is in the unique position of being able to assess witnesses and weigh their testimony, factual and credibility findings are accorded a high level of deference on appeal. The trial court's valuation should only be reversed if this Court finds that it lacks evidentiary support or was not the result of an orderly and logical deductive process. Here, the trial court's findings are amply supported, and Dissenters cannot carry their heavy burden of showing that the trial court's valuation should be reversed.

As made apparent throughout the trial, Dissenters' valuation position was critically flawed because it relied on outdated information that did not account for the significant increase to EagleView's risk profile during the latter half of 2012, after Pikover was ousted from the EagleView board of directors. These risks included (1) the near-certainty

that EagleView would lose its sole source for aerial images if its merger with Pictometry International Corp. (“Pictometry”) did not close, and (2) the imminent threat that one of EagleView’s key business partners, Xactware Solutions, Inc., planned to terminate their agreement, which would cause EagleView to lose 30% of its total revenue, and (3) that two of EagleView’s key patents were under re-examination. The trial court heard testimony relating to this sea change in risk over the course of a 12-day bench trial and, after deliberating for three months, ultimately agreed with EagleView’s expert’s valuation analysis.

Perhaps recognizing the difficulty in obtaining a reversal on the valuation decision, Dissenters devote a significant portion of their brief to argue that the trial court erred by not awarding them fees. But a fees award under the dissenters’ rights statute is discretionary, not mandatory, and is also reviewed for abuse of discretion. Dissenters’ argument for fees hinges on their contention that EagleView’s initial valuation *estimate* was too low, given that EagleView’s expert later assessed fair value at a slightly higher amount. But in determining whether fees should be awarded, courts place little weight on the amount by which a company’s initial estimate undervalued its shares. If undervaluing shares were sufficient to show that EagleView acted in bad faith, then Dissenters could

likewise be said to have acted in bad faith by significantly overvaluing their shares.

The trial court's determination that EagleView complied with the applicable provisions of the dissenters' rights statute, and that it acted in good faith, is amply supported by the record. The trial court did not abuse its discretion in deciding not to award Dissenters their fees. In sum, EagleView respectfully requests that this Court affirm the trial court's valuation and fees decision should be affirmed.

II. STATEMENT OF ISSUES

1. Did the trial court act within its discretion by agreeing with the EagleView's expert's valuation, after considering all of the evidence presented during a 12-day bench trial, weighing the credibility of witnesses, and deliberating for three months, given that expert testimony is standard practice and the best method for valuing a company's shares and the trial court was specifically informed by counsel for each of the parties that it did not have to adopt one expert's valuation?

2. Did the trial court act within its discretion by allowing evidence relating to a dissenter's motivation for invoking his statutory rights where such evidence is directly relevant to a request for attorneys' fees under RCW 23B.13.310, which requires a showing that the dissenter

acted “arbitrarily, vexatiously, or not in good faith in demanding payment,” even though the trial court ultimately declined to award fees after considering the evidence.

3. Did the trial court act within its discretion by declining to award attorneys’ fees to Dissenters, where EagleView made a good faith estimate in determining the fair value of the Dissenters’ shares and its initial fair value estimate was significantly closer to the judicially–determined fair value Dissenters’ valuation analysis?

III. STATEMENT OF THE CASE

A. The Parties

EagleView is a Washington corporation founded in 2007 as the innovator and provider of the first aerial roof measurement service in the country. (CP 61:17–21) EagleView sells its customers reports that detail accurate roof measurements that are used for estimating the cost to repair or replace rooftops across the country. (CP 62:23–24; RP 103–105)

Dissenters are former EagleView shareholders who dissented from EagleView’s decision to merge with Pictometry, a merger that closed on January 7, 2013.¹ (CP 61:22–62:11, 90:18–91:6) Pikover was on

¹ As of January 6, 2013 (just prior to the merger) (the “Valuation Date”), Pikover owned 106,485 shares of EagleView common stock, and 37 TV owned (1) 425,000 shares of common stock; (2) 148,665 shares of Series A preferred stock; and (3) 250,000 shares of Series A-1 preferred stock. (CP 61:26–62:8; Exs. 38–39)

EagleView's Board of Directors from 2008 until he was removed by EagleView's shareholders in July 2012. (CP 61:22–25) Pikover is the managing director of 37 TV, an LLC he uses for making investments in startup companies. (CP 61:26–62:8)

B. EagleView's Reliance on Pictometry's Imagery and Pictometry's Threat to Terminate EagleView's Access

EagleView's primary product is its roof report, which requires specially-formatted, high-quality aerial imagery and an extensive, nationwide image library to produce. (CP 63:11–18) To create its reports, EagleView needs recent, high resolution aerial photographs of the rooftops taken in the “leaf off” season from top-down (orthogonal) and side-angled (oblique) views. (*Id.*) EagleView then applies its proprietary, trade secret technology and techniques to those images to derive accurate measurements of roof dimensions. (CP 62:22–63:14; RP 752:12–753:15) As of June 2012, EagleView obtained four patents covering its aerial roof measurement technology. (CP 66:7–17) (As of the Valuation Date, two of these four patents were under re-examination.) (*Id.*)

Since 2008, EagleView has primarily, and almost exclusively, sourced its images from the only company that has the types of images and library that EagleView requires: Pictometry. (CP 62:9–11) From EagleView's inception through the Valuation Date, no other company

could match Pictometry's image quality or its library. (CP 76:2-9)

In late 2011 and early 2012 Pictometry increasingly threatened to terminate the parties' agreement. (CP 72:1-10; RP 157:24-158:22)² The parties' contract allowed either party to terminate the agreement on 30-days' notice. (CP 72:22-23) Pictometry also possessed the unilateral right to increase fees for its images. (CP 72:25-26) In mid-2012, Pictometry stopped providing EagleView with its latest imagery, reserving such imagery for its own business. (CP 73:20-23, 74:6-8; RP 182:21-186:24; Ex. 54, 55, 88) Indeed, EagleView learned that Pictometry was telling EagleView's customers that it was not providing EagleView with up-to-date imagery and was positioning itself to compete with EagleView. (CP 74:13-17, 75:6-10; RP 173:5-174:20; Ex. 87)

C. EagleView Was Ultimately Unable to Identify a Viable Alternative to Pictometry's Images, Which Were Poised to Be Cut Off Absent the Merger

Given the deteriorating relationship in 2011 and 2012, and the extreme risk involved with relying on Pictometry as its sole source for aerial imagery, EagleView scoured the market for alternate image providers. (CP 75:12-17) During the first half of 2012, while Pikoover still served on EagleView's board, EagleView's search for alternative image

² In May 2011, Pictometry purchased EagleView's competitor, GeoEstimator. It was believed that Pictometry planned to cut off EagleView's supply of images in order to seize the market with its own roof measurement reports. (CP 72:1-17; Ex. 324)

providers looked quite promising. (CP 75:25–76:1) This all changed, however, shortly after Pikover’s removal from the board. As the Valuation Date approached, EagleView realized that none of the alternative image providers, either alone or in concert, matched Pictometry’s capabilities at that time and that it would remain completely dependent on Pictometry’s images to produce its reports for a few years. (CP 76:2–9, 79:19–20)

By the Valuation Date, EagleView’s primary product was at risk; its search for an alternative image provider had failed and Pictometry was poised to terminate the parties’ agreement. (CP 72:1–73:18, 75:12–17, 76:2–80:5) Importantly, Pikover was unaware that the once-promising image alternatives he learned about while on EagleView’s board were no longer viable. (CP 87:12–88:2, 88:5–6) Ultimately, EagleView eliminated this image-supply risk by merging with Pictometry on January 7, 2013. (CP 90:23–24; RP 241:14–18, 905:9–21)

D. Xactware Threatens to Terminate a Key Contractual Relationship

By the Valuation Date, the vast majority of EagleView’s insurance revenue—and over 30% of its total revenue—was derived from its key contract with Xactware, which is the dominant player in the insurance-claims-estimation industry and whose network and software is used by almost all of EagleView’s insurance-related customers. (CP 66:19–21,

80:20–21) Nine of the top ten insurance companies, which form a large segment of EagleView’s main customer base, use Xactware’s network and claims-estimation software to process property insurance claims. (CP 80:7–11, 16–18) Since 2008, EagleView’s contract with Xactware allowed EagleView’s customers to seamlessly access EagleView’s reports through Xactware’s software. (CP 80:12–15)

EagleView’s relationship with Xactware deteriorated throughout 2012. In late October 2012, Xactware attempted to improperly terminate the parties’ contract, forcing EagleView to protect itself by filing a declaratory judgment action and seeking a preliminary injunction to block Xactware from terminating the agreement. (CP 81:4–9; RP 268:1–268:25; Ex. 15) As of the Valuation Date, EagleView was partially successful, but its relief was fleeting: in December 2012, EagleView obtained a preliminary injunction that prevented Xactware from terminating its agreement with EagleView, but only for 60 days. (CP 81:15–16) At the end of December 2012, Xactware notified EagleView that it intended to terminate the contract upon the injunction’s expiration in mid-February. (CP 81:17–19; RP 274:5–7) Thus, as of the Valuation Date, there was a near-certain risk that Xactware would terminate its contract with EagleView, irreparably harming EagleView’s goodwill with its key

insurance customers and eliminating over 30% of its total revenue.

E. EagleView Initiated “Project Aerial” to Seek Out a Potential Strategic Business Partner or Acquirer

In the spring of 2012, EagleView opened itself up to a third-party solicitation process (internally called “Project Aerial”) after receiving several unsolicited, nonbinding offers for acquisition. (CP 81:21–24) By April 2012, EagleView received nine indications of interest from potential acquirers or investors initially valued EagleView at between \$170 and \$350 million. (CP 65:9–10) By the end of May, six companies remained and their bids dropped to a range of \$150 million (plus a \$100 million potential “earn-out”) and \$225 million (plus a \$75 million potential “earn-out”). (CP 65:11–14) Most bidders eventually dropped out of the process, leaving only the two strategic buyers: (1) Verisk Analytics (“Verisk”)—Xactware’s parent company; and (2) Pictometry. (CP 82:2–3; RP 879:13–22, 880:23–881:3, 1039:11–15, 1272:17–24, 1622:2–9)³

EagleView continued negotiations with Pictometry and Verisk during late spring and early summer of 2012, and provided them with newly–updated financial projections for the remainder of 2012. (CP 82:3–12) These updates indicated that EagleView would significantly miss its

³ Appellants argue that these other bidders did not drop out, but were eliminated by EagleView’s management. App. Br. at 10–11. The trial court considered the parties’ evidence, found that Pikover’s testimony was not based on personal knowledge, and found that the other “bidders dropped out of the process.” (CP 82: 2–7, n. 5)

targets for 2012. There were two primary reasons for this. First, 2012 was a below-average weather year, resulting in decreased demand for its product. (RP 652:7–653:18, 673:2–24) Second, EagleView’s new product offerings (an underwriting report and an estimator tool) did not perform as anticipated; the significant revenue forecasted for these products never materialized. (CP 64:18–23; RP 658:10–660:25) Based on these latest revised projections, in July 2012, Verisk suggested that if it made another bid, it would be “tens of millions below \$200MM,” thus taking itself out of the bidding process. (CP 82:8–12)

F. EagleView and Pictometry Enter Into a Non-Binding Term Sheet in June 2012

This left Pictometry as the last bidder at the table. In June 2012, EagleView and Pictometry entered into a non-binding term sheet, which purported to have a purchase price of \$250 million, \$125 million of which would be paid in cash to certain shareholders and had EagleView’s remaining shareholders owning 55% of the contemplated merged entity. (CP 82:13–19, Ex. 246) As it turned out, Pictometry’s offer was illusory because it could not afford the cash consideration it offered in the June 2012 term sheet. (CP 82:20–21; RP 624:16–625:7) After backing out of the June 2012 term sheet, Pictometry changed the potential deal and proposed financing a potential merger through debt. (CP 82:21–23) This

proposal was also abandoned. (CP 82:23) After several months of further negotiation, on December 18, 2012, EagleView and Pictometry entered into a deal for a purely stock-based merger. (CP 83:2–3)

On January 3, 2013, EagleView sent its shareholders a Consent Solicitation and Information Statement that described in detail the proposed merger with Pictometry and informed the shareholders of their right to dissent. (CP 90:18–20) On January 5, 2013, EagleView notified its shareholders that sufficient consents had been executed by EagleView’s shareholders. (CP 90:21–22) On January 7, 2013, EagleView consummated the merger with Pictometry. (CP 90:23–24) On January 10, 2013, EagleView sent an additional Dissenters’ Rights Notice and included the form of Payment Demand to shareholders along with the additional material required by RCW 23B.13.200. (CP 90:25–91:1)

G. Pikover and 37 TV Assert Dissenters’ Rights

On January 30, 2013, Pikover and 37 TV notified EagleView that they were asserting their dissenters’ rights. (CP 91:2–3) In accordance with RCW 23B.13.250, EagleView timely sent response letters and checks in amounts reflecting its fair-value estimate of their EagleView shares plus accrued interest. (CP 91:4–6) EagleView initially determined that the estimated fair value of its common stock immediately before the

consummation of the merger was \$2.75/share and \$3.65/share for its preferred stock. (CP 91:7–8) EagleView considered several factors in making this determination:

- The common stock’s redemption rights and other restrictions;
- The value of a share of common stock, as determined by the Board of Directors after reviewing what it considered to be all relevant factors in determining the current fair market value of EagleView’s common stock based on the Board’s experience, was \$2.75 as of December 14, 2012;
- The price paid by EagleView for each share of common stock in its repurchase offer, completed in or about November–December 2011, was \$1.35;
- The estimated fair value of a share of common stock for 409A tax purposes as of December 31, 2011, assuming a going concern premise of value, was \$8.17;
- The conclusions of the Board of Directors, which included the fact that oblique imagery is critical to EagleView’s products, but EagleView was substantially dependent on Pictometry for its image supply. If Pictometry terminated the license agreement (or if it was not extended on acceptable terms), EagleView was unlikely to be able to obtain comparable replacement images from other suppliers or generate its own library of images in a timely manner and at an acceptable cost, if at all, and that an interruption in EagleView’s image supply could materially harm its business.

(CP 91:9–92:7)⁴

EagleView sent Pikover a check in the amount of \$292,855.31 and 37 TV a check in the amount of \$2,624,070.40. (CP 92:11–14) On March 29, 2013, Dissenters rejected EagleView’s determination of fair value and

⁴ EagleView’s management did not consider draft schedules prepared by Alvarez & Marsal in calculating EagleView’s fair value because the values reflected in those schedules were draft, preliminary, and subject-to-change. (CP 92:8–10)

provided a report issued by FTI Consulting that opined that the fair value of EagleView's shares as of January 4, 2013, was \$12.14. (CP 93:2–7)

H. EagleView Commences Dissenters' Rights Action

On May 24, 2013, EagleView timely filed this action in accordance with RCW 23B.13.300. (CP 93:10–11) The parties engaged in discovery and exchanged expert reports on December 16, 2013. (CP 93:12–13) EagleView's expert witness, Neil Beaton, determined that, as of January 6, 2013, the fair value of Dissenters' former holdings was \$3.94/share for their common stock and \$4.88/share for their preferred. (CP 93:14–16) After serving the December 16, 2013 report from Mr. Beaton, EagleView voluntarily and promptly delivered checks to Dissenters for the difference between EagleView's original fair value determination and that of Mr. Beaton, plus accrued interest (\$126,778.40 to Pikover and \$996,589.40 to 37 TV). (CP 93:22–94:3)

Dissenters' expert witness, Ellen Larson, updated FTI Consulting's original March 29, 2013 report to increase her firm's initial fair value determination to \$12.31/share for common and \$13.26/share for preferred stock. (CP 94:4–6)

A bench trial ensued that lasted almost three weeks, following which the trial court requested both sides to submit post-trial briefs and

proposed findings of fact and conclusions of law. (RP 1656:23–57:12; CP 60–107, 131, 178–197, 249–269) After weighing all of the evidence and the parties’ post-trial submissions for almost three months, on September 19, 2014, the trial court entered its findings of fact and conclusions of law.⁵ (CP 60) The trial court determined the fair value of EagleView’s stock, as of January 6, 2013, was \$3.94/share for common stock and \$4.88/share for preferred, and declined to award fees under RCW 23B.13.310 to either party. (CP 7)

IV. ARGUMENT

A. **Trial Court Did Not Abuse its Discretion by Agreeing With EagleView’s Expert’s Analysis As the Basis for Its Valuation Decision.**

The trial court found Mr. Beaton’s expert valuation was more reasonable than Ms. Larson’s, and agreed with Mr. Beaton’s analysis. Dissenters contend that by agreeing with Mr. Beaton’s analysis, the trial court did not undertake an “independent” valuation of EagleView’s shares. But the law is clear: it is entirely proper for the trial court to agree with an expert’s analysis, as long as that valuation is supported by credible evidence and withstands a critical judicial analysis on the record. Dissenters have cited no authority to the contrary.

⁵ The court primarily agreed with EagleView but made substantive changes to EagleView’s proposal and entered its own independent findings. (CP 60–107)

Dissenters' arguments of purported "errors" by the trial court in its valuation decision are essentially requests for this Court to substitute its judgment for the trial court's with respect to issues of credibility or with respect to the weight to be accorded to competing evidence.⁶ But the standard of review for a trial court's determination of fair value in a dissenter's rights action is abuse of discretion—not *de novo*, as Dissenters contend without citation to authority. *See* App. Br. at fn. 34. The trial court's evidentiary determinations are entitled to a high level of deference, and are only disturbed when its factual findings do not have support in the record or its valuation is not the result of an orderly and logical deductive process. Because there is ample support in the record for the trial court's decisions, Dissenters cannot show an abuse of discretion.

1. Trial Court May Agree With an Expert's Analysis on Fair Value

The trial court conducted an independent valuation of EagleView's shares and, after weighing all of the evidence and expert testimony for almost three months, agreed with Mr. Beaton's analysis. In doing so, the trial court did not err: "it is **entirely proper** for the [trial court] to adopt

⁶ Appellants list many findings of fact in their assignments of error without explaining why they believe the findings are in error or why they are covered by any of Dissenters' arguments on appeal. Although appellants may not like these findings, and may disagree with them, they have not shown (or provided any argument) that the court abused its discretion in making these findings. There is thus no basis to reverse the following findings: 23, 24, 29, 30, 31, 45, 48–55, 58–63, 65, 69, 80, 85, 90, 92–94, and 130.

any one expert's model, methodology, and mathematical calculations, *in toto* if that valuation is supported by credible evidence and withstands a critical judicial analysis on the record." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525–26 (Del. 1999) (emphasis added).⁷ Dissenters' contrary contention is not supported by authority, facts, or common sense.

The trial court "makes the ultimate valuation decision in a dissenter's rights action." See *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 142, 331 P.3d 40 (2014). Indeed, as Dissenters concede, our Supreme Court has confirmed that the trial court has "considerable discretion" under RCW 23B.13 in making a valuation determination. App. Br. at 33; *SentinelC3*, 181 Wn.2d at 143. Because the trial court has a duty to conduct an independent valuation, the trial court is prohibited from "adopt[ing] *at the outset* an 'either-or' approach, thereby accepting uncritically the valuation of one party...." *In re Appraisal of Metromedia Int'l Grp., Inc.*, 971 A.2d 893, 899–900 (Del. Ch. 2009) (emphasis added); *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 361 (Del. 1997) (holding trial court erred in "announc[ing] in advance that he

⁷ Washington courts rely on "well developed" Delaware law governing shareholder disputes because of the "lack of applicable Washington case law." See *Schwartzman v. McGavic*, No. C06–1080P, 2007 WL 1174697, *4 (W.D. Wash. April 19, 2007); see also *In re F5 Networks, Inc.*, 166 Wn.2d 229, 239–40, 207 P.3d 433 (2009) (adopting Delaware law, explaining Delaware courts all well-versed in issues of corporate governance).

intended to choose between absolutes” and that such a “hook, line and sinker” approach was at odds with the trial court’s duty to appraise the fair value of shares).

However, “[t]he [trial court’s] role as an independent appraiser does not necessitate a judicial determination that is completely separate and apart from the valuations performed by the parties’ expert witnesses who testify at trial.” *M.G. Bancorporation*, 737 A.2d at 526. Indeed, “***it is entirely proper for the [trial court] to adopt any one expert’s model, methodology, and mathematical calculations, in toto if that valuation is supported by credible evidence and withstands a critical judicial analysis on the record.***” *Id.* at 525–26 (emphasis added); *see also Metromedia*, 971 A.2d at 899–900 (“[A]fter having considered the parties’ legal arguments and the respective experts’ reports and testimony supporting their valuation conclusions, the Court has broad discretion either to select one of the parties’ valuation models or to fashion its own.”).

Gonsalves, upon which Dissenters rely, holds much the same. On remanding for further valuation rulings (because the trial court had adopted at the outset an ‘either–or’ approach), the court stated that “we do not preclude the adoption of the same or similar findings provided they arise from a view of the evidence uninfluenced by the approach found

fatally flawed in *Gonsalves I.*” *Gonsalves v. Straight Arrow Publishers, Inc.*, No. 232, 1998, 1999 WL 87280, at *5 (Del. Jan. 5, 1999). In other words, *Gonsalves* held that it was **completely acceptable** for the trial court to adopt the exact same findings (adoption of one expert’s valuation findings *in toto*), as long as those findings were not arrived at using a predetermined “either–or” approach.⁸

As a practical matter, it makes little sense to impose a bright–line rule barring a trial court from ever agreeing with one expert’s model, methodology, and mathematical calculations *in toto*. Such a rule would have the effect of *requiring* the trial court to deviate from a valuation analysis, even if that the court had critically tested and deemed such analysis to be the best analysis of fair value. There is no reason to force the court to generate an arbitrary valuation purely to avoid agreeing with one expert’s valuation *in toto*.

Here, Dissenters do not—and cannot—contend that the trial court adopted at the outset an “either–or” or “hook–line–and–sinker” approach that was held to be erroneous in *Gonsalves*. Indeed, the record indicates

⁸ See also *Gonsalves*, 701 A.2d at 361 (“This is not to say that the selection of one expert to the total exclusion of another is, in itself, an arbitrary act. The testimony of a thoroughly discredited witness, expert or lay, is subject to rejection under the usual standards which govern receipt of such evidence.”); *In re 75,629 Shares of Common Stock of Trapp Family Lodge, Inc.*, 725 A.2d 927 (Vt. 1999) (not error to adopt one expert’s fair value determination wholesale, distinguishing *Gonsalves* by noting that there was no pretrial decision to adopt an either-or approach).

the very opposite was discussed during the trial court proceeding. *See* RP 23:14–24:10 (EagleView’s counsel informing the trial court that “the expert opinions are offered to assist the Court in reaching its own determination, so even if Ms. Larson’s analysis is excluded...the Court isn’t required to accept Mr. Beaton’s analysis. The Court may still disagree with our expert and come up with the Court’s own determination”). The court was actively engaged throughout the 12 day bench trial, asking many substantive questions, after which the trial court deliberated for three months before issuing its opinion. (CP 60, 178, 249; *see, e.g.*, RP 113:3–18, 134:9–136:24, 587:3–16, 596:10–599:11, 656:12–15, 732:21–23, 816:7–817:6, 1116:3–14, 1325:8–14, 1414:9–1415:16, 1432:8–23, 1453:15–22, 1457:16–22, 1643:9–24, 1790:9–19) The record belies Dissenters’ false mantra on review that the trial court “merely picked” Mr. Beaton’s analysis without independently and critically considering the evidence. *See, e.g.*, App. Br. at 38.⁹

Thus, the mere fact that the trial court agreed with Mr. Beaton’s analysis does not indicate that the trial court failed as a matter of law in its duty to conduct an independent valuation of fair value. Dissenters’ argument on this ground is without merit.

⁹ Although Dissenters’ appellate counsel was not trial counsel, it cannot ignore the extensive record that was developed during trial and afterwards in connection with both parties’ lengthy and detailed post-trial submissions.

2. Trial Court’s Determination of Fair Value Is Accorded a High Level of Deference On Appeal

Dissenters request—without citation to any authority—that this Court conduct a *de novo* review of the trial court’s determination of fair value. *See* Br. App. at fn. 34. The appropriate standard of review, however, is abuse of discretion. A trial court’s determination of fair value in a dissenter’s rights action is entitled to a “high level of deference on appeal.” *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005) (rejecting *de novo* standard of review advocated by dissenting shareholder/appellant, holding abuse of discretion standard governed, stating trial court’s determination of fair value should be “accorded a high level of deference on appeal”); *see Am. Ethanol, Inc. v. Cordillera Fund, L.P.*, 252 P.3d 663, 667–68 (Nev. 2011) (appellate court reviews trial court’s determination of fair value under dissenter’s rights appraisal statute for an abuse of discretion).

Indeed, it is typically the province of the trial court to weigh competing expert testimony, rather than this Court. *See In re Matter of Marriage of Sedlock*, 69 Wn. App. 484, 498, 849 P.2d 143 (1993) (deferring to trial court’s valuation of homes); *see also Johnston–Forbes v. Matsunaga*, 177 Wn. App. 402, 408, 311 P.3d 1260 (2013) (“Washington appellate courts generally do not weigh expert testimony.”).

This is particularly important in appraisal proceedings, which frequently become “a battle of experts.” *See Cede & Co.*, 884 A.2d at 35. The trial court “enjoys the unique opportunity to examine the record and assess the demeanor and credibility of witnesses.” *Id.* Thus “[a] factual finding made by the [trial court] based on a weighing of expert opinion may be overturned only if arbitrary or lacking evidential support.” *Id.*

The trial court likewise has discretion with respect to the acceptability and weight of the evidence. *See Matter of Shell Oil Co.*, 607 A.2d 1213, 1221 (Del. 1992) (holding that even if the appellate court were to have concluded that the trial court should have favored one expert over another, the appellate court “would not reverse the trial court on that ground alone because the initial choice is not [the appellate court’s] to make. ... Valuation is an art rather than a science. So too is the weighing of evidence in the appraisal process”). *See also In re 75,629 Shares*, 725 A.2d at 931 (“The weight to be given to particular evidence is a matter within the sound discretion of the trial court.”). Appellate courts defer to trial courts’ factual findings so long as they are supported by the record, even if the appellate court might independently reach an opposite conclusion. *Cede & Co.*, 884 A.2d at 35.

Dissenters do not argue that the valuation was “not the result of an

orderly and logical deductive process,” or that the trial court’s factual findings are without evidentiary support. Instead, Dissenters attempt to re–argue credibility and evidentiary issues that were considered, and rejected, by the trial court. There is no basis or support for Dissenters’ request for a *de novo* review of the trial court’s fair value determination. The trial court’s fair value determination should only be overturned if its factual findings do not have evidentiary support, or if Dissenters can show that the valuation was not the result of an orderly and logical deductive process. As discussed below, Dissenters do neither here.

3. The Trial Court Did Not Abuse Its Discretion in Determining Fair Value

Dissenters have not met their burden of showing that the trial court’s valuation lacks evidentiary support or was not the result of an orderly and logical deductive process. Dissenters’ attempt to re–argue credibility and evidentiary issues that were considered, and rejected, by the trial court is insufficient. In arriving at its ultimate valuation decision, the trial court carefully considered each expert’s various valuation methodologies and the supporting evidence. The key difference between the expert valuations is that Dissenters’ expert relied predominantly on Mr. Pikover’s information about the company, which was not current after shareholders ousted him from the board in June 2012. (CP 1698:7–

1699:10, 1711:9–1712:4, 1714:3–8, 1717:8–1728:17) Between June 2012 and the Valuation Date, EagleView’s risk profile had significantly increased. As Ms. Larson conceded, a valuation expert’s analysis is only as good as its inputs. (RP 1711:9–11) The trial court’s valuation is well-supported by the evidence and should be affirmed.

a. Trial Court Did Not Abuse Its Discretion in Considering And Adopting Valuation Utilizing Subject Company Transaction Method

Dissenters cannot show that the trial court’s use of the Subject Company Transaction Method was an abuse of discretion. In Washington, courts “may accept proof of value by any techniques and methods which are generally accepted in the financial community.” Senate Journal 51st Legis. 3086–87 (1989) Section 13.01 Definitions for Chapter 13 *reprinted in* Washington Business Corporation Act (RCW 23B): Sourcebook (2d ed. 2007) at 13.010–2.

Here, Dissenters object to Mr. Beaton’s use of the Subject Company Transaction Method. This methodology works on the assumption that if Pictometry terminated its contract with EagleView, EagleView would not have any suitable alternative sources of imagery and would be forced to develop its own image library. (RP 1395:24–1396:6) EagleView’s management calculated that developing its own image

library would require about \$30 million in initial capital and would be funded by issuing a new class of preferred stock at about \$2.75 per share. (CP 98:24–99:1)

The trial court considered Dissenters’ objections to the Subject Company Transaction Method, but ultimately found that such method was “commonly used in the valuation industry, especially for early stage technology companies, and has been peer-reviewed” as well as accepted and approved by the Securities & Exchange Commission and Deloitte, PriceWaterhouseCoopers, KPMG, and Ernst & Young. (CP 98:12–17; RP 1376:2–19)¹⁰ The trial court also correctly found, that “[t]here is no requirement that the valuation be based on a recent transaction” and that such method could consider a future, anticipated round of financing. (CP 98:16–18) There is ample support in the record for such finding. (CP 2819:3–12; RP 1374:4–79:18) (citing Neil Beaton, *Valuing Early Stage and Venture-Backed Companies* 128 (2010)). It was not an abuse of discretion to rely upon the Subject Company Transaction Method.

Dissenters also mistakenly assert that this anticipated future round of financing to create an image library was not supported by any *reliable* evidence but was instead improperly based on management’s calculations

¹⁰ Mr. Beaton uses the Subject Company Transaction Method 90% of the time, and performs 340–350 valuations per year. (RP 1343:21–1344:4, 1373:18–25). Ms. Larson performs only 35-50 valuations per year. (RP 1549:22–25)

of what funding was needed, relying on *Prescott Group Small Cap, L.P. v. Coleman Co.*, Civ. A. 17802, 2004 WL 2059515, *21 (Del. Ch. 2004). The court in *Prescott* did not rely on management’s representations regarding EBITDA in that case because it found the representations were “self-serving and incorrect”—*i.e.*, not credible. *Id.* Here, in contrast, the trial court found the evidence and testimony supporting management’s calculations, and Mr. Beaton’s reliance upon management’s calculations, to be credible, reliable, and adequately supported. (CP 99:3–5 (finding that because Mr. Beaton “employed a widely-accepted methodology and used known and knowable facts adduced by EagleView’s management in this methodology, his analysis is reliable and helpful to the Court.”)) Dissenters thus cannot show that it was an abuse of discretion for the trial court to find EagleView’s evidence on this issue credible. *See Cede*, 884 A.2d at 35 (appellate court “will accept the [trial court’s] factual determinations if they turn on a question of credibility”). Likewise, Dissenters cannot show that Mr. Beaton’s analysis under the Subject Company Transaction Method was arbitrary or lacked evidentiary support. *Id.* (“factual finding made by the [trial court] based on a weighing of expert opinion may be overturned only if arbitrary or lacking evidential support.”).

In sum, Dissenters fail to show that the trial court's consideration of the Subject Company Transaction Method was an abuse of discretion.

b. Trial Court Did Not Abuse Its Discretion In Considering and Adopting Valuation Utilizing Guideline Public Company Method

Dissenters also dispute Mr. Beaton's valuation analysis under the Guideline Public Company Method, which generally involves identifying publicly-traded companies having similar operational and financial characteristics to the subject company, deriving valuation multiples for each company, adjusting these multiples for comparability, and applying the adjusted multiples to the subject company's economic basis to estimate value. Both parties' experts utilized this approach.

The fair value statute looks at the value of a company without regard to discounts. *See* RCW 23B.13.010(3). When using public companies as a guideline for comparison, experts may take into account the fact that the public company shares are traded on a minority basis (i.e., shareholder does not have control over the company) and add a control premium to shares they are valuing under certain circumstances. *See* RP 1464:20–1465:7; 1598:11–18.

Here, to increase her valuation of EagleView, Ms. Larson applied a control premium of 15% to Dissenters' shares. Mr. Beaton, however,

determined that a control premium was not necessary in this instance because EagleView's cash flow was already optimal. (RP 1465:13–1466:10) Specifically, Mr. Beaton found that there were no above market salaries or rents and the company was being run at an optimal level of efficiency, in part because external shareholders and outside directors were keeping such a close watch on EagleView's cash flows. (RP 1465:13–1466:10) In such situation, where cash flows are already at an optimal level, there is no additional value to having a controlling share of the company and thus no control premium needs to be added to properly compare shares. (RP 1465:13–1466:10) The trial court did not abuse its discretion by adopting Mr. Beaton's analysis under the Guideline Public Company Method. Mr. Beaton's decision not to utilize a control premium is supported by evidence in the record, and Dissenters fail to show that Mr. Beaton's reasoning and decision not to apply a control premium under these circumstances is not acceptable in the financial community. *See* Senate Journal 51st Legis. 3086–87 (1989) Section 13.01 Definitions for Chapter 13 *reprinted in* WASHINGTON BUSINESS CORPORATION ACT (RCW 23B): SOURCEBOOK (2d ed. 2007) at 13.010–2 (courts “may accept proof of value by any techniques and methods which are generally accepted in the financial community.”).

The trial court appropriately weighed competing expert opinion. Its decision not to apply a control premium to EagleView's shares was neither arbitrary nor lacked support. Thus, this Court should defer to the trial court's decision. *Cede & Co.*, 884 A.2d at 35 (“[a] factual finding made by the [trial court] based on a weighing of expert opinion may be overturned only if arbitrary or lacking evidential support.”).

c. Trial Court Did Not Abuse Its Discretion By Considering the Substantial Risks that Faced EagleView

The chief disagreement at trial between the parties' experts was how significant the risks were that EagleView faced with respect to Pictometry and Xactware as of the Valuation Date.¹¹ These risks are supported by substantial evidence in the record, thus the trial court did not abuse its discretion when it agreed with Beaton's analysis of these risks.

In short, as of the Valuation Date, Pictometry was poised to terminate its contract with EagleView based on the plan it had in place prior to the merger negotiations. (CP 74:18–19; RP 456:10–457:7) No

¹¹ It is no surprise that the parties disagreed about these risks, given that EagleView was still optimistic about its ability to deal with these risks when Pikover was on its board. It was not until after the shareholders ousted Pikover that the profile of these risks became an extremely serious threat to EagleView's business. *See supra* § III(B)–(E). Adding to these risks is the fact that two of EagleView's patents were under re-examination as of the Valuation Date, that EagleView missed its forecast in 2012 due, in part, to the poor performance of its underwriting product and failure to penetrate insurance carriers #4–10. (CP 15:22–23, 66:9–11, 68:25–69:1)

image provider, either alone or in concert, could substitute for Pictometry. (CP 76:2–9; RP 144:25–145:5) And it would cost too much and take too long to develop an image library that could match Pictometry’s. (CP 79:4–20) In addition, the Xactware litigation put 30% of EagleView’s total revenues at risk.

The trial court did not abuse its discretion in evaluating the evidence and finding that Mr. Beaton had correctly analyzed these risks. The trial court’s decisions regarding the weight to be accorded to the evidence of these risks, and the weighing of expert testimony, are accorded a high level of deference. *See Matter of Shell Oil Co.*, 607 A.2d at 1221; *In re 75,629 Shares*, 725 A.2d at 931; *see also Cede & Co.*, 884 A.2d at 35 (“[a] factual finding made by the [trial court] based on a weighing of expert opinion may be overturned only if arbitrary or lacking evidential support.”). Dissenters’ argument is without merit.

d. Trial Court Did Not Abuse its Discretion in Rejecting Dissenters’ Other “Indicia” of Value

Dissenters also erroneously argue that the trial court erred by “ignoring” other potential indicia of EagleView’s value, including: (i) the 409A valuation which valued EagleView as of December 31, 2011 at \$198.2 million, (ii) initial indications of interest made by nine private equity firms and potential strategic partners during the first half of 2012,

(iii) the June 2012 non-binding term sheet, (iv) Houlihan Lokey's valuation in its fairness opinion to Pictometry, and (v) Verisk's proposed acquisition of the combined EagleView/Pictometry business one year after the Valuation Date.

As the record demonstrates, far from ignoring these points, the trial court considered each of these indicia at length, and rejected each for various reasons. Dissenters cannot show that such consideration and rejection was an abuse of discretion.¹²

- **The December 31, 2011 409A Valuation**

The trial court did not “ignore” the December 31, 2011 409A Valuation, but instead considered it along with the other 409A valuations, including the December 31, 2012 409A Valuation issued in June 2013, which is the closest 409A valuation report to the Valuation Date. (CP 67:22–23 (finding that as of December 31, 2011, EagleView's value for 409A purposes was \$198.2 million)) The trial court did not give the December 31, 2011 409A Valuation significant weight, because that valuation was outdated and—like Ms. Larson's expert opinions—did not account for six important risk factors that occurred after December 31,

¹² See *Matter of Shell Oil Co.*, 607 A.2d at 1221 (declining to disturb trial court's conclusions “as to the acceptability and weight of all the evidence presented” because such conclusions were “amply supported by the record and the product of an orderly and logical deductive process”).

2011, but prior to the January 6, 2013 Valuation Date, which caused EagleView's share price to materially decrease:

First, the December 31, 2011 409A Valuation and Ms. Larson's opinions did not adequately account for the risk from Pictometry acquiring (1) GeoEstimator (one of EagleView's competitors), (2) no longer providing EagleView with newer imagery, and (3) planning to terminate the parties' contract if the merger transaction did not close. (RP 457:11–458:13, 1490:5–8)¹³ But by the Valuation Date, EagleView's risk from its reliance on Pictometry was far greater than it had been in December 2011. (RP 1490:5–14) And although GeoEstimator was not a material risk in December 2011—and was therefore not factored into Ms. Larson's expert opinions at all (RP 1489:20–23)—by January 2013, GeoEstimator's revenue had increased to \$6 million, far greater than the \$1.8 million Pictometry received from EagleView in 2012. (RP 450:2–6)

Second, EagleView's once-promising push to develop alternative image sources ran its course by the Valuation Date. EagleView began to develop a company called Atlas GSI to provide EagleView with an image supply. (RP 204:17–205: 6) But by January 6, 2013 it was clear that Atlas GSI was not a viable alternative image source. (RP 1436:25–1437:3

¹³ When asked how EagleView's reliance on Pictometry affected her opinions, Ms. Larson explained, "I considered the risk to be consistent with what it had been in the past. I guess I would characterize it as an average level of risk." (RP 1678:19–25)

(Mr. Beaton explained: “Atlas GSI was going to take a lot of time, a lot of effort and a lot of money.”)) Thus, the risk of EagleView solely relying on Pictometry for its image supply in 2013 was considerably greater than it was in 2011 when it thought it could develop its own company to provide an alternative image source.

Third, the December 31, 2011 409A Valuation (and Ms. Larson’s expert opinions) did not take into account the risk from the Xactware litigation, which occurred well after the 409A Valuation (but before Ms. Larson issued her flawed expert report). The short-term preliminary injunction EagleView secured in December 2012 to block Xactware from terminating their agreement was set to expire shortly after the Valuation Date, and Xactware had already provided notice that it intended to terminate the contract at that time. This threatened over 30% of EagleView’s total revenue. (CP 66:19–21; RP 270:4–17, 274:3–7) This risk was so significant that EagleView’s customers were monitoring the litigation and expressing significant concern about what the lawsuit might mean for their businesses. (RP 273: 14–274: 2)

Fourth, EagleView’s newly-launched underwriting product was promising when the December 31, 2011 409A Valuation was prepared but had failed to materialize by the end of 2012 (i.e., the date of the December

31, 2012 409A Valuation that Dissenters try to discredit as litigation-driven). EagleView began working on the underwriting product in 2011 and in early 2012 had forecast enormous revenue from the new product in the next three years. (RP 590:11–13) For example, in year two, the underwriting project was predicted to generate \$41,633,338 in revenue—a third of EagleView’s projected revenue for the year. (CR 590: 24–591:2) That number was projected to leap to 77 million by year three. (CR 591:8–10) But when the underwriting project failed to deliver the forecasted results by the end of 2012, the projected revenue for 2013 was reduced to a disappointing \$2 million (the actual 2013 revenue turned out to be only \$70,000). (CR 660: 18–25) Of course, the December 31, 2011 409A Valuation could not have considered this critical revenue forecast miss because it had not yet materialized. (Ms. Larson’s opinions offered at trial could have considered the forecast miss, but did not.)

Fifth, EagleView did not penetrate the insurance carriers #4–10 in 2012, contrary to its plans. In 2011 Eagleview projected \$15.9 million in revenue from Carriers 4 through 10 in 2013, but by the end of 2012 had to “recast” that figure to only \$6.9 million based on its 2012 shortfall. (Ex. 18 at 37, Ex. 20 at 7)

Finally, as a result of EagleView’s patent infringement suit against

Aerialogics, LLC, two of its key patents were in re-examination, rendering them unenforceable and at-risk for invalidation. (CP 780:4–781:15)

Taken together, these six factors resulted in a significant change in EagleView’s risk and financial profile between December 31, 2011 and January 6, 2013, which resulted in a natural decline in the EagleView’s share price. The trial court did not abuse its discretion in declining to give weight to the outdated December 31, 2011 409A Valuation (or Ms. Larson’s expert opinions, which minimized or ignored these factors).

- **Nine private equity firms and partners’ valuations during the first half of 2012**

The trial court found no evidence that the bids from the nine private equity firms and potential strategic partners reflected EagleView’s fair value and thus (correctly) gave no weight to the bids. (CP 104:7–105:3) The bids were outdated, unconsummated, and did not incorporate the risks to EagleView’s business that materialized months later. *Id.* Indeed, Dissenters’ expert did not use these bids to develop her fair value estimate. (Ex. 333; CP 105:2–3)

- **Outdated June 2012 Term Sheet with Pictometry**

The trial court found also correctly decided not to give any weight to the June 2012 term sheet from Pictometry because it was similarly

“outdated[,].... unconsummated[,].... and...did not incorporate the risks to EagleView's business that materialized months later, including EagleView's failure to secure a suitable alternative to Pictometry for aerial imagery, Pictometry's threats to terminate the contract, and EagleView's litigation with Xactware.” (CP 104:7–105:3) This finding was well–reasoned and, as discussed above, well–supported by the evidence.

- **Houlihan Lokey's fairness opinion to Pictometry**

The trial court correctly discounted the Houlihan Lokey materials¹⁴—after receiving much evidence and testimony about them—because they were created with no material input from EagleView, the three–year forecast within was not generated or created by EagleView, and they did not use EagleView's subsequent revised 2013 operating budget, which had to be dramatically revised in light of material changes.¹⁵ (See CP 100:8–18, fn. 10) *See S. Muolo & Co. v. Hallmark Entm't Investments Co.*, 2011 WL 841040 (Del. Ch. Mar. 9, 2011) (“Valuations that have ignored or

¹⁴ As part of Pictometry's due diligence for the merger, Pictometry's board of directors retained Houlihan Lokey to issue a fairness opinion, which was presented to Pictometry on December 11, 2012. (Ex. 306, 344, 345). As Mr. Beaton explained at trial, “[A] fairness opinion isn't even a valuation...[when issuing fairness opinions to a company's board] I'm not valuing the company. I'm providing an opinion that this transaction is going to be fair to the parties to whom has hired me.” (CP 1732:7–12)

¹⁵ Houlihan Lokey presentation contained a disclaimer stating the presentation's materials do not constitute a valuation opinion. (Ex. 345; RP 1732:7–8 (testifying that “a fairness opinion isn't even a valuation”). And the record is devoid of evidence regarding how the Houlihan Lokey forecast was prepared, including what assumptions were used to generate the forecast. *Id.*

altered management's contemporaneous projections are sometimes completely discounted.") (citations omitted).

- **Verisk's proposed acquisition of EagleView**

The trial court correctly decided not to give any weight to the proposed acquisition of the combined EagleView/Pictometry business one year after the Valuation Date. (CP 105:4–14, RP 1471:2–11) Dissenters' own expert attributed zero weight to the Verisk acquisition in her own analysis of fair value. (CP 2678) ("the Verisk acquisition received a weight of zero percent in the methodologies that Ms. Larson actually employed in developing her opinion of the fair value"); CP 2682 ("Ms. Larson does not use the Verisk transaction to calculate the fair value of EagleView's shares of common and preferred stock").

- e. **Trial Court Did Not Abuse Its Discretion in Considering Mr. Beaton's Testimony Credible**

Dissenters also argue that the trial court should not have considered Mr. Beaton's testimony credible, because he and his colleagues performed valuation work for EagleView prior to and after the merger with Pictometry, relying on *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, *6–7 (Del. Ch. 2002), a case in which the trial court questioned the credibility of the company's expert. First, Dissenters did not raise this credibility objection before the trial court, and this lack-of-

independence objection should be deemed waived. RAP 2.5(a).

Second, *Gray* is factually distinguishable in many respects, including that the company's expert in *Gray* had received substantial monthly cash payments and warrants to purchase company stock, and had never before served as an expert witness but had only agreed to do so due to his relationship with the company. *Gray*, 2002 WL 953540, *7. Here, in contrast, there is ample support for Mr. Beaton's credibility as an expert witness. *See, e.g.*, RP 1343:22–1344:8 (he performs over 300 valuations a year, and approximately 5,000 valuations in the last ten years).

Third, and most importantly, Dissenters' objection regarding the credibility of Mr. Beaton essentially asks this Court to substitute its own judgment as to Mr. Beaton's credibility for the trial court's, even though the trial court "enjoys the unique opportunity to examine the record and assess the demeanor and credibility of witnesses." *See Cede & Co.*, 884 A.2d at 35; *see also Johnston–Forbes*, 177 Wn. App. at 408 ("Washington appellate courts generally do not weigh expert testimony."). Here the trial court repeatedly found Mr. Beaton's analysis "reliable and helpful" and ultimately determined his testimony and opinion to be credible. (CP 99:3–5) This Court should not disturb the trial court's judgment with respect to the credibility of witnesses. It was not an abuse of discretion for the trial

court to find Mr. Beaton's testimony credible or reliable.

B. Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Pikover's Bad Faith Motives for Asserting Dissenters' Rights Because Such Evidence Directly Related to Eagle View's Request for Attorneys' Fees

Dissenters argue that the trial court's assessment of fair value was prejudiced by its admission of evidence relating to Pikover's misconduct while a board member, his ouster as a director, his net worth, and his motive in invoking his dissenters' rights.¹⁶ Because such evidence is directly relevant to EagleView's request for fees under RCW 23B.13.310, which requires a showing that the dissenter acted in "bad faith," Dissenters argue that the fees determination should have been conducted as a separate proceeding, apart from the valuation proceeding. But not only is there no authority to support Dissenters' contention that fees must be determined in a separate proceeding, Dissenters never asked the trial court to separate the fees determination from the valuation proceeding.

1. Evidence Regarding Pikover's Conduct Pertinent to EagleView's Fees Request

The court may allow a company to recover its attorneys' fees in an appraisal proceeding "to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment[.]"

¹⁶ The trial court's decision to admit evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn. 2d 645, 654, 201 P.3d 315 (2009).

RCW 23B.13.310. To support its fees request, EagleView provided evidence of Pikover’s conduct towards EagleView and its CEO and his intent to seek revenge against EagleView for being dismissed from its board by having it “waste a lot of money” litigating this dissenters’ rights matter. (RP 1318:16–1319:2; Ex. 95) The trial court did not abuse its discretion in admitting EagleView’s proffered evidence of Pikover’s conduct and bad faith intent because such evidence was directly relevant to EagleView’s fees request, even if the request was unsuccessful.

2. Fees Request May Be Heard in Same Proceeding

Nothing in RCW 23B.13 provides that matters relevant to a fees request under RCW 23B.13.310 cannot be heard in the same proceeding as the trial court’s valuation decision. Dissenters did not object to matters related to the fee request being heard at trial—indeed, they also request their fees before, during, and after the trial. (CP 174–75, 191–195, 2749–50, 2752; RP 92:11–20, 1852:4–6, 1859:11–13, 1862:6–10) Moreover, they never requested that the trial court hear EagleView’s fees request separately from the valuation hearing or bifurcate the proceeding. Thus, they have waived their ability to raise this new argument here. RAP 2.5.

In addition, the cases upon which Dissenters rely do not support their new argument on appeal. Neither *Cede and Co. v. Technicolor, Inc.*,

542 A.2d 1182, 1187 (Del. 1988) nor *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 256–57 (Del. 1991) involve the issue of whether a fees request (and evidence pertinent to a fee request) may be heard in the same proceeding as the valuation determination. Nor do they point to any Washington authority that hearing fees in the same proceeding as the merits is inappropriate in this context (i.e., a bench trial in a dissenters’ rights appraisal proceeding).

3. Assuming Arguendo That the Trial Court Abused Its Discretion By Admitting Such Evidence, It Is Harmless Error

Even if this Court determines that the trial court abused its discretion in admitting evidence of Pikover’s conduct, such error was harmless, and does not warrant reversal. *See Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728–29, 315 P.3d 1143 (2013). “An error will be considered not prejudicial and harmless unless it affects the outcome of the case.” *Id.*; *see Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99 (2011) (“An error is harmless if it is ‘trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.’”).

The valuation hearing proceeded as a bench trial. Whereas a jury

may have difficulty segregating what evidence could be considered for what purpose, the trial judge is fully capable of attributing evidence regarding Pikover's alleged arbitrary, bad faith and vexatious conduct solely to EagleView's fees request. There is zero evidence in the trial court's decision that suggests that the trial court considered the evidence of Pikover's arbitrary, bad faith and vexatious manner in pursuing his dissenters' rights for any purpose other than EagleView's request for fees.

C. The Trial Court Did Not Abuse Its Discretion in Declining to Award Attorneys' Fees to Dissenters

The trial court did not abuse its discretion in declining to award attorneys' fees to Dissenters pursuant to RCW 23B.13.310, which authorizes the trial court to award fees but does not require an award.¹⁷ Moreover, the trial court can only award fees under RCW 23B.13.310 if one of two conditions is met: either the corporation failed to comply with certain provisions of the dissenters' rights statute or the corporation acted "arbitrarily, vexatiously, or not in good faith." The record shows that neither of these conditions applies to EagleView.

To prevail on their fees argument, Dissenters must show that the trial court (i) abused its discretion in finding that EagleView substantially

¹⁷ Appellate courts review attorney fee awards made pursuant to statutes for abuse of discretion. *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010).

complied with the requirements of the dissenters' rights statute or in finding that EagleView did not act "arbitrarily, vexatiously, or not in good faith," **and** (ii) abused its discretion by making its discretionary determination to not award fees to Dissenters. Dissenters have shown neither. This Court should affirm.

1. Trial Court's Decision to Award Fees Is Discretionary, Not Mandatory

An award of attorneys' fees under the dissenters' rights statute is discretionary, not mandatory. RCW 23B.13.310(2) provides: "The court **may** also assess the fees and expenses of counsel and experts for the respective parties..." (emphasis added). Our Supreme Court recognized the discretionary nature of a fees award under the similar LLC dissenter statute in *Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010). *Humphrey* noted the LLC dissenter statute's similar use of "may" and held that "even if Clay Street *did* fail to substantially comply...or if Humphrey did act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically *entitled* to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court." *Id.* (italics in original).

Furthermore, the court can only award fees if one of two conditions is met: (a) "if the court finds the corporation did not

substantially comply with the requirements of RCW 23B.13.200 through 23B.13.280” or (b) “if the court finds that [the corporation] acted arbitrarily, vexatiously, or not in good faith[.]” RCW 23B.13.310(2). Thus, if a corporation substantially complies with the requirements of the dissenters’ rights statute, and if a corporation did not act “arbitrarily, vexatiously, or not in good faith,” then a court *cannot* award fees.

2. Trial Court Is Not Required to Provide Specific Findings of Fact and Conclusions of Law When Denying Fees

Dissenters’ argument that the trial court’s fee decision warrants reversal because it failed to make findings of fact or conclusions of law explaining why it denied an award of fees to Dissenters is without basis in fact or law. Courts are not required to provide findings of fact or conclusions of law when denying fees.

SentinelC3, on which Dissenters rely, is inapposite. The trial court in *SentinelC3* failed to enter findings of fact and conclusions of law when *awarding* fees, which the court ruled was error. 181 Wn.2d at 144 (citing *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632 (1998)). *SentinelC3* says nothing about the requirements for *denying* fees.

Indeed, our Supreme Court noted this very distinction in *AllianceOne Receiveables Management, Inc. v. Lewis*, 180 Wn.2d 389,

325 P.3d 904 (2014). In *AllianceOne*, Dissenters similarly argued that the trial court “erred in failing to enter findings of fact and conclusions of law with respect to its order denying fees,” relying upon *Mahler v. Szucs* (the same decision upon which *SentinelC3* relied). *AllianceOne*, 180 Wn.2d at 393, n.1. The Supreme Court in *AllianceOne* rejected this argument:

But *Mahler* is about appellate review of a trial court’s fee award decision, not all fee decisions....It requires findings of fact and conclusions of law to establish ‘an adequate record on review to support a fee award.’... In other words, *Mahler* affects decisions in which attorney fees were granted, not denied.

Id. at n. 1 (internal citations omitted).¹⁸ The trial court was not required to enter findings of fact or conclusions of law to support its denial of fees.

Even if the trial court had been required to enter findings to support its denial of fees, Dissenters have not shown reversible error because the trial court entered sufficient findings to support its denial of fees, as discussed in more detail in the following sections.

3. Trial Court Did Not Abuse Its Discretion in Finding EagleView Substantially Complied With RCW 23B.13 or in Finding That EagleView Did Not Act “Vexatiously, Arbitrarily, or Not in Good Faith”

Dissenters cannot show that the trial court abused its discretion in

¹⁸ Other authority similarly states that denials of fee awards do not require findings of fact and conclusions of law. *See* 20 C.J.S. Costs § 170 (“Some authority requires that a court make express findings to support an award of costs and fees... The trial court is not however, required to make findings of fact in support of its denial of an award of attorney’s fees.”).

finding that EagleView substantially complied with RCW 23B.13.250(1) or RCW 23B.13.280(1), or abused its discretion in finding that EagleView did not act “vexatiously, arbitrarily, or not in good faith.”

Dissenters argue that EagleView did not substantially comply with RCW 23B.13 and also acted “vexatiously, arbitrarily, or not in good faith” because EagleView’s initial estimate of fair value was (from Dissenters’ perspective) too low. Dissenters rely on the fact that: (i) the board chose not consider at the time it made its initial fair value estimate a draft Alvarez & Marsal 409A valuation, the Houlihan Lokey fairness valuation, the 409A valuation as of December 31, 2011; (ii) EagleView later revised its estimate based on its expert witness’ valuation; (iii) failed to pay the demanded \$12.14 per share in response to the dissenters’ March 29, 2013 payment demand letter; and (iv) EagleView utilized a 0.05% interest rate rather than the 5.75% interest rate applied by the trial court.

None of Dissenters’ contentions, however, show that EagleView’s initial fair value estimate and payment was not in substantial compliance with RCW 23B.13 or was made “arbitrarily, vexatiously, or not in good faith.” Each of Dissenters’ contentions are belied by the record, as discussed in more detail below. Dissenters cannot show the trial court abused its discretion in denying fees to Dissenters.

a. EagleView Substantially Complied With RCW 23B.13 and Did Not Act Arbitrarily, Vexatiously, or Not In Good Faith

RCW 23.B.13.250(1) simply requires that the corporation pay the dissenter “the amount the corporation estimates to be the fair value of the shareholder’s shares, plus accrued interest,” which is precisely what the record shows EagleView did here.¹⁹ RCW 23B.13.250 (emphasis added); CP 91:4–92:14; Petition (Dkt. 2) ¶ 13; RP 693:8–694:4, 700:7–701:2, 954:18–57:3, 1428:12–15; Ex. 38, 39.

“A party substantially complies with a statutory directive when it satisfies the substance essential to the purpose of the statute.” *Humphrey*, 170 Wn.2d at 504. “[T]his requires ‘actual compliance in respect to the substance essential to the statute’s reasonable objectives,’ such that ‘the purpose of the [statutory] requirement is generally satisfied.’” *Id.* “The party attempting to comply with the statute must ‘make a bona fide attempt to comply with the law’ and...‘must actually accomplish its purpose.’” *Id.*

¹⁹ This is likely because fair value is amorphous and extremely difficult to calculate with any certainty. See *In re Dole Food Co., Inc.*, 2014 WL 6906134, at *8, fn. 7 (Del. Ch. Dec. 9, 2014) (unpublished) (“Indeed, both Delaware decisions and those knowledgeable about valuation recognize that the field is as much art as science”); *Prescott Grp. Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at *31 (Del. Ch. Sept. 8, 2004) (unpublished) (stating that a corporation’s value is not a point on a line, but a range of reasonable values, and that “valuation decisions are impossible to make with anything approaching complete confidence”). “[T]he task of enterprise valuation, even for a finance expert, is fraught with uncertainty.” *Id.*

Likewise, a party does not act “arbitrarily, vexatiously, or not in good faith” simply because its fair value estimate later turns out to be in error. *See SentinelC3, Inc. v. Hunt*, 181 Wn.2d at 145–46 (“dissenter does not act arbitrarily, vexatiously or in bad faith” “simply because his or her initial payment demand is higher than that ultimately supported by the evidence”); *see also Sieg Co. v. Kelly*, 568 N.W.2d 794, 805 (Iowa 1997) (concluding that “arbitrarily, vexatiously, or not in good faith” meant the dissenter had to show the corporation “***had no factual or legal basis for its fair–value determination*** or acted for a purpose other than to honestly pay the dissenters the fair value of their shares,” such as intent to defraud or harass the investors) (emphasis added).²⁰

Here, EagleView’s original estimate of fair value was \$2.75/share for common stock and \$3.65/share for preferred stock. The record shows that EagleView made a well–reasoned attempt, based on numerous guideposts, to comply with the statute in estimating fair value in good faith. (CP 91:4–92:10; RP 691:2–17, 693:2–694:9, 700:7–701:2, 954:18–956:19; Exs. 38, 39) EagleView articulated credible reasons for how it arrived at its valuation estimate, the data points supporting its valuation estimate, and how each of the higher “valuations” that Dissenters note that

²⁰ Iowa’s dissenters’ rights statute, like Washington’s, is based on the Model Business Corporation Act. *See Sieg Co.*, 568 N.W.2d at 798; Iowa Code § 490.1331(2)

EagleView chose not to rely upon were problematic and unreliable. (CP 92:8–10, Ex. 211, and RP 953–55 (explaining EagleView considered, but did not rely upon, draft schedules because they were draft, preliminary, and subject-to-change, and given the existence of other recent data points on which to base the valuation estimate); RP 944:15–952:23 (EagleView’s management had not seen the Houlihan Lokey report before trial and has no idea where Houlihan came up with their numbers).) Dissenters thus cannot show that EagleView’s fair value estimate “had no factual or legal basis” or that EagleView “acted for a purpose other than to honestly pay” Dissenters the fair value of their shares. *See Sieg Co.*, 568 N.W.2d at 805.

Nor can Dissenters show that EagleView’s estimate was not a bona fide attempt to comply with RCW 23B.13. Dissenters’ reliance on *Humphrey* is misplaced. The issue in *Humphrey* was the *promptness* of the payment, rather than a dispute over the *amount* of payment. 170 Wn.2d at 504–05. The LLC in *Humphrey* did not make *any* timely payment to the dissenter; it did not make any payment until six months later. *Id.* at 505. This delayed payment was contrary to the purpose of the statute, which was to ensure that dissenters had “immediate use of the money to which the corporation agrees it has no further claim.” *Id.* at 504. Here, EagleView timely paid Dissenters its well-reasoned estimation of

fair value within 30 days, satisfying “the substance essential to the purpose of the statute.”

b. EagleView’s Expert Witness Valuation Report Does Not Show That EagleView Acted In Bad Faith

That EagleView later revised its estimate based on its expert witness’ valuation in litigation also does not indicate that EagleView’s management’s initial estimate was not made in good faith or somehow did not constitute substantial compliance with RCW 23B.13.250. (To illustrate how difficult it can be to estimate fair value, Dissenters’ fair value estimation was initially \$12.14/share).

Cases in other jurisdictions, with substantially similar dissenters’ rights statutes based on the Model Business Corporation Act, support the trial court’s finding of substantial compliance and good faith. For example, in *Brooks v. Brooks Furniture Mfgs., Inc.*, 325 S.W.3d 904, 915 (Ky. Ct. App. 2010) (*overruled on other grounds*), the Court held that it was not an abuse of discretion for the trial court to have found the corporation substantially complied with the requirement that the corporation pay the dissenter the estimated fair value of the dissenter’s shares,²¹ even though the trial court ultimately held that fair value was

²¹ The dissenters’ rights statute in Kentucky, similar to Washington, states that “the corporation shall pay each dissenter who complied with KRS 271B.13–230 the amount

more than twice what the corporation had originally estimated and paid the dissenter. *Id.* at 907, 915. “Kentucky’s statute does not require the payment of fees and expenses merely because the fair value of the shares materially exceeds that which the corporation offered to pay.” *Id.* at 915.

Likewise, the court in *Sieg, Co.*, in determining whether the corporation acted in good faith, placed “little reliance” on the amount by which the corporation had initially undervalued the shares, noting that if the difference in value were determinative, dissenters would have difficulty showing their own good faith, given that the dissenters themselves had overvalued their shares by \$121.92 per share. *Sieg, Co.*, 568 N.W.2d at 805, 807 (during litigation the corporation’s expert witness valued the dissenters’ stock at \$40.74, almost twice the fair value initially estimated by the corporation (\$22.60)). The *Sieg* court instead reviewed the process by which the corporation had arrived at its fair value estimate, noted that the record showed that the corporation had “articulated credible reasons for its position” and methodology, and held the trial court had not abused its discretion in denying fees because the corporation’s position was “reasonably supported by the record.” *Id.*

Notably in *Sieg*, even though the corporation (unlike EagleView)

the corporation *estimates* to be the fair value of his shares.” Ky. Rev. Stat. Ann. § 271B.13–250 (emphasis added).

did not increase its offer after receiving its expert report valuing dissenters' stock at almost twice the corporation's estimate, the court still held that it was not an abuse of discretion to not award fees, because there was no indication that an offer at the higher value of \$40.74 would have led to settlement of the case. *Sieg Co.*, 568 N.W.2d at 807 (citing Model Bus. Corp. Act § 13.31 official cmt., at 1441 (Supp.1990), which stated the party seeking fees must show a reasonable possibility that a change in its adversary's position would have avoided continued litigation).

Here, EagleView *did* promptly pay the difference between EagleView's original fair value determination and that of EagleView's expert witness report.²² And there is nothing in the record that indicates that a higher offer at \$3.94/share of common would have led to a pre-suit settlement, given that Dissenters had initially estimated fair value at the far greater value of \$12.14 per share, and at trial estimated fair value *even higher* at \$12.31/share of common and \$13.26/share of preferred.

²² Indeed, Dissenters' argument that bad faith is shown because EagleView's expert witness report later calculated during litigation a slightly higher valuation estimate—after which EagleView immediately paid the difference—is counterintuitive. Perhaps it may have been bad faith if EagleView had received Mr. Beaton's expert report setting fair value at a higher number, and *not* increased its payment to the dissenters. *See Sieg*, 568 N.W.2d at 807. But this did not occur here: EagleView promptly honored its duty to timely pay dissenters. It would set a bad policy if EagleView were penalized for taking this corrective action in good faith.

c. EagleView Substantially Complied With RCW 23B.13.280(1) and Did Not Act Arbitrarily, Vexatiously or Not in Good Faith By Not Paying the Exorbitant Amount Demanded By Dissenters

The trial court also did not abuse its discretion in finding that EagleView substantially complied with RCW 23B.13.280 and did not act in bad faith by not paying the \$12.14/share demanded by dissenters in their March 29, 2013 payment demand letter. EagleView's decision to initiate a dissenters' rights action instead of paying the demanded amount does not constitute an arbitrary or vexatious "refusal to respond" to Dissenters' March 29, 2013 payment demand letter.

Contrary to Dissenters' contention, EagleView was not required "to pay what Pikover/37 TV believed was the appropriate fair value for the shares" within 60 days of Pikover's March 29, 2013 letter. Under RCW 23B.13.300, EagleView was required to pay Dissenters' payment demand *if* EagleView did not commence the dissenters' rights proceeding within sixty days of receiving the payment demand. Because EagleView timely commenced the present action on May 24, 2013, it was not required to pay Dissenters the amount of their payment demand.

There is also no evidence in the record that demonstrates, as Dissenters contend, that EagleView "knew" that the values calculated by its experts were "wrong" and vexatiously "forced" Dissenters to litigate

this matter. Here, the parties exchanged expert reports on December 16, 2013. (CP 93:12–13) EagleView paid the difference in value calculated by its expert at \$3.94/share of common and \$4.88/share of preferred vs. \$2.75/share of common and \$3.65/share of preferred that EagleView initially estimated (without assistance of its expert witness), on December 20, 2013, just a few days later. (Ex. 43)

Dissenters' contention that EagleView refused to respond to the payment demand letter and vexatiously forced Dissenters to litigate this matter is thus without support in the record, especially when the final result was far closer to EagleView's initial estimate than it was to Dissenters' sky-high numbers.

d. Evidence Shows EagleView's Selection of Interest Rate Was Not Made Arbitrarily, Vexatiously, or in Bad Faith

Dissenters also argue that EagleView arbitrarily, vexatiously, or in bad faith selected a low interest rate of 0.05%, rather than the interest rate later set by the trial court at 5.75%. EagleView here does not cross-appeal on the issue of the interest rate. However, there is ample evidence in the record setting forth EagleView's credible reasons for selecting the 0.05% interest rate, including that this rate was consistent with EagleView's policy on investing its cash in U.S.-backed government

securities, which policy had been presented to and approved by EagleView's board, and because EagleView had no outstanding bank loans at the time it made its fair value determination. (CP 92:11-93:1; RP 694-95, 963; Ex. 47, Ex. 5)

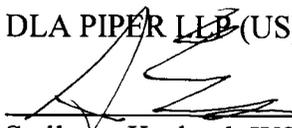
Dissenters cannot show that it was an abuse of discretion for the trial court to not award fees based on this minor issue.²³

V. CONCLUSION

For the foregoing reasons, EagleView respectfully requests that this Court affirm.

Respectfully submitted this 27th day of May, 2015.

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²³ For the same reasons that the trial court declined to award fees, this Court should decline to award fees to appellants under either RCW 23B.13.310 or RAP 18.1. Even if appellants were to prevail on appeal, appellants have not shown that they are entitled to fees, which would require a showing that EagleView failed to substantially comply with the dissenters' rights statute or that EagleView acted arbitrarily, vexatiously, or not in good faith. RCW 23B.13.310. Even if the Court were to so find, it should exercise its discretion and choose not to assess fees against EagleView.