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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX SAFRANSKI

Appellant

V.

SULTAN WEATHERSPOON

Respondent.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. David E. Gregerson)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Duma Video, Inc. was a Washington corporation founded by Respondent Sultan Weatherspoon. Duma hired Appellant Alex Safranski, who was given roughly twenty percent of Duma's shares. Weatherspoon remained the majority shareholder, and he had control over Duma.

Thereafter, Duma entered into an Asset Purchase Agreement ("APA") with a company called BMS. Under the APA, Duma transferred all its assets to BMS in exchange for an upfront payment of $900,000 and a later "earnout" payment of $350,000 when Duma delivered a specified software product.

The APA always contemplated that Safranski would go to work for BMS. He and BMS entered into employment contract that would pay Safranski a $160,000 bonus for providing essentially the same software product that Duma had promised to provide in the APA. Safranski did not disclose this bonus to Weatherspoon.

After the asset sale was consummated, Safranski delivered the software product to BMS before Duma did. As a result—according to Weatherspoon—BMS did not make the $350,000 earnout payment to Duma. Duma claimed that BMS still owed the $350,000, but Duma settled its claim against BMS for roughly $139,000, which BMS paid to Duma.

In the subject action, Weatherspoon sued Safranski for fraud. Weatherspoon alleged he would not have allowed Duma to agree to the $350,000 earnout provision if he had known about Safranski's side-deal with BMS. As a result of Safranski's fraud, according to Weatherspoon, Duma received only $139,000 of the $350,000 that was due under the APA. Based on his percentage ownership of Duma's stock, Weatherspoon's proportionate share of the damages to Duma was no more than $167,000. Nevertheless, the jury awarded Weatherspoon roughly $275,000 on this claim.

II. ASSIGNMENTS OF ERROR

Safranski assigns two errors to the trial court.

A. The Trial Court Should Have Dismissed Weatherspoon's Fraud Claim for Lack of Standing

Safranski brought two motions to the court seeking the dismissal of Weatherspoon's fraud claim based on his lack of standing to pursue that claim. First, Safranski brought a summary judgment motion against this claim, which the trial court denied. Subsequently, after the close of evidence at trial, Safranski brought a CR 50 motion for judgment as a matter of law against Weatherspoon's fraud claim, on the same basis. Again, the trial court denied Safranski's motion.

This assignment of error presents the following issue:

Standing. "Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is a separate entity."[1] Moreover, "[e]ven a shareholder who owns

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[1] *Sabey v. Howard Johnson Co.*, 101 Wn. App. 575, 5 P.3d 730, 735 (2000) (citing *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949 (1987))

all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual."[2] Thus, Weatherspoon would ordinarily lack standing to sue Safranski for fraud perpetrated against the corporation. There are some exceptions to this rule, but Weatherspoon's fraud claim does not fit within any of those exceptions. Did Weatherspoon lack standing to bring his fraud claim against Safranski?

B. The Trial Court Should Have Issued a Remittitur

Weatherspoon claims that, but for Safranski's fraud, Duma would have received the full $350,000 earnout payment, which Duma settled for $139,000. As Weatherspoon owned roughly 79% of Duma's stock, his share of this $211,000 loss could be no more than $167,000. Nevertheless, the jury awarded him roughly $275,000.

This assignment of error raises the following issue:

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[2] *Sabey*, *supra*, 5 P.3d at 735

Remittitur. Civil Rule 59(a) calls for a remittitur either when the jury's verdict reflects "[e]rror in the assessment of the amount of recovery" or "there is no evidence or reasonable inference from the evidence to justify the verdict...." Based on the undisputed evidence, the maximum damage Weatherspoon could have suffered as a result of Safranski's alleged fraud would have been $167,000; but the jury awarded him roughly $275,000. Should the trial court have issued a remittitur for $167,000?

III. STATEMENT OF THE CASE

Weatherspoon founded Duma in 2001.[3] Duma was in the business of developing software for video compression.[4] Duma hired Safranski in 2003, and Weatherspoon gave Safranski twenty percent of Duma's stock.[5] In the spring of 2012, the

[3] Clerk's Papers at page 18 ("CP 18")
[4] CP 18
[5] CP 18

relationship between Safranski and Weatherspoon soured.[6] By April of 2012, Safranski had hired an attorney, who made a claim for allegedly improper expense reimbursements that Weatherspoon had taken from Duma.[7] Weatherspoon hired his own attorney, too, and all the parties met.[8] The parties and attorneys agreed that—due to the irreconcilable differences between Safranski and Weatherspoon--Duma's best course of action was to solicit and negotiate a sale of its assets for the highest possible value.[9] Weatherspoon explored the sale of all of Duma's assets to a company called BMS.[10]

In August of 2012, Duma entered into an Asset Purchase Agreement ("APA") with BMS, wherein Duma sold essentially all its assets to BMS.[11] Under the agreement, BMS agreed to pay Duma "900,000 up front, and an additional $350,000 earnout payment if and when Duma delivered" a certain

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[6] CP 21
[7] CP 22
[8] CP 22
[9] CP 22
[10] CP 21
[11] CP 52-53

software product, known as an "i-7 H.264 decoder."[12] BMS made the upfront payment of $900,000 to Duma for its assets.[13]

While Duma was negotiating the APA with BMS, Safranski made his own deal with BMS. In June of 2012, he signed an employment agreement with BMS under which he would receive a "Project Success Bonus" of $160,000 when he "completed the FTGA H.264 Decoder project to the satisfaction of" BMS.[14] Safranski did not tell Weatherspoon about the terms of his employment agreement with BMS.[15]

Roughly a year after the APA was executed, Safranski delivered the decoder to BMS, and BMS paid him the Project Success Bonus of $160,000.[16] BMS then "rejected Duma's i-7 H.264 decoder," and, according to Weatherspoon, "BMS

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[12] CP 65
[13] CP 139
[14] CP 65
[15] CP 66
[16] CP 67

therefore refused to pay the $350,000 earnout" under the APA.[17]

When Weatherspoon found out about Safranski's arrangement with BMS, he counterclaimed against Safranski for fraud, alleging "Weatherspoon suffered economic damages measured by the value of his interest" in Duma before the sale of its assets to BMS less the amount he received from the sale.[18] In the alternative, Weatherspoon claimed he was "entitled to recover his interest in the $350,000 earnout in the amount of $245,000."[19]

Based on these allegations, Safranski brought a motion for summary judgment, arguing—among other things—that Weatherspoon did not have standing to sue Safranski, because the alleged fraud had prevented Duma from receiving the $350,000 earnout payment, and Weatherspoon's damages were

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[17] CP 67
[18] CP 68
[19] CP 68 (At the time of that pleading, Weatherspoon alleged he had a 70% interest in Duma. (CP 67))

derivative of Duma's damages.[20] The trial court denied that motion.[21]

Thereafter, the case was bifurcated for trial. A jury trial was held to determine, *inter alia*, Weatherspoon's claim for fraud. Safranski submitted a trial brief, reiterating the argument he had made in support of his summary judgment motion—that Weatherspoon did not have any standing to bring the fraud claim:

> Duma, not Weatherspoon was the party to the APA. Duma owned the assets sold to BMS, not Weatherspoon. Weatherspoon signed the APA not as an individual but as president of Duma. Weatherspoon, in his individual capacity, has no direct connects [sic] to the transaction; he is only a shareholder of the seller—Duma.[22]

At the conclusion of the evidence, Safranski moved under CR 50 for judgment as a matter of law on the fraud claim, on the grounds that Weatherspoon lacked standing.

> MR. NAITO: And, Your Honor, plaintiff has a CR 50 motion for the court also.

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[20] CP 74-76
[21] Reporter's Transcript, 4/18/2014 hearing, at p. 38 (RT 4/18/2014 at 38)
[22] CP 259

> THE COURT: Go ahead.
> MR. NAITO: And this is on the -- whether or not Mr. Weatherspoon has standing to bring a fraud claim against plaintiff. And that argument is set forth on page 18 and 19 of my trial memorandum. It is substantially the same argument that was made at summary judgment.
> THE COURT: Thank you. Mr. Seidl, any response?
> MR. SEIDL: Your Honor, unless you need additional argument on that, I think the argument we made at summary judgment, in which you denied that very same motion, I would adopt and incorporate that argument.
> THE COURT: It does seem to be a pure legal issue and I do appreciate counsel cutting to the chase on this. Court previously ruled on that and does find -- well, actually denies any motion based upon lack of standing and affirms.[23]

Weatherspoon's fraud claim was allowed to go to the jury, and the jury awarded Weatherspoon $275,637.50.[24] Safranski made a timely motion under Civil Rule 59, asking the trial court to issue a remittitur for $167,212.45.[25] This motion was based on the undisputed fact that Duma settled its claims

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[23] Supplemental Reporter's Transcript 3/30/2015 at pp. 60:4-25 (Appellant has filed a motion under RAP 9.10 to supplement the record to add this portion of the trial transcript.)
[24] CP 384-385
[25] CP 452-457

against BMS for nonpayment of the $350,000 earnout. "Under the terms of the Settlement Agreement, BMS paid Duma $139,166 in exchange for a settlement" of the claims.[26] Thus, the maximum damage Duma could have suffered as a result of Safranski's alleged fraud was $210,834. Weatherspoon's precise ownership percentage, by the time the case proceeded to trial, was 79.31% of Duma.[27] Accordingly, the maximum loss Weatherspoon could have suffered was $167,212.45. The trial court denied Safranski's motion for a remittitur and left the jury's award intact.[28]

IV. ARGUMENT

A. Even Though He Was the Majority Stockholder, Weatherspoon Lacked Standing to Sue for Harm to Duma

The doctrine of standing prevents one person or entity from suing for harm to a different person or entity. "Though

[26] CP 53
[27] CP 466
[28] CP 419

the doctrine of standing does not implicate subject matter jurisdiction, it does prohibit a plaintiff from asserting another's legal rights."[29] If a plaintiff does not have proper standing, than his claims should be dismissed. "The claims of a plaintiff who lacks standing cannot be resolved on the merits and must fail."[30] Because standing is an inherently legal question, a *de novo* standard of review applies to all such questions. "Whether a party has standing to sue is a question of law reviewed *de novo*."[31]

Washington's court rules codify the standing doctrine in Civil Rule 17(a), which requires that "[e]very action shall be prosecuted in the name of the real party in interest." Subject to certain exceptions not applicable to this case, "the real party in

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[29] *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 199, 312 P.3d 976 (2013) (citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994))

[30] *Ibid.* (citing *Ullery*, 162 Wn. App. 596, 604–05, 256 P.3d 406, *review denied*,173 Wn.2d 1003, 271 P.3d 248 (2011))

[31] *Ibid.* (citing *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009))

interest is 'the person who, if successful, will be entitled to the fruits of the action.'"[32]

The question of standing arises frequently in the context of corporations and their shareholders, where the courts must distinguish between direct claims by the corporation and derivative claims by their shareholders. One of the leading treatises on corporations, by William M. Fletcher, has summarized the rules of standing in the corporate context as follows: "A shareholder has no separate or individual right of action against third persons for wrongs committed against or damaging to the corporation, and this same rule applies even where one person is the sole shareholder."[33]

To determine whether the shareholder or the corporation has standing to bring the claim, Fletcher suggests the following analysis:

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[32] *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995) (quoting 3A Lewis H. Orland & Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE, at 420 (4th ed. 1992))
[33] 1 Fletcher Cyclopedia of Corporations, § 36 (2015)

> ***If the wrong is primarily against the corporation, the redress for it must be sought by the corporation***, except where a derivative action by a shareholder is allowable, and a shareholder cannot sue as an individual. . . . Whether a cause of action is individual or derivative must be determined from the nature of the wrong alleged and the relief, if any, that could result if the plaintiff were to prevail.
>
> In determining the nature of the wrong alleged, the court must look to the body of the complaint, not to the plaintiff's designation or stated intention. ***The action is derivative if the gravamen of the complaint is injury to the corporation***, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent dissipation of its assets. . . . ***If damages to a shareholder result indirectly, as the result of an injury to the corporation, and not directly, the shareholder cannot sue as an individual.***"[34]

Washington's courts have expressly adopted this analysis from Fletcher. In *Sabey v. Howard Johnson Co.*, the court cited Fletcher when it summarized Washington's approach in this regard:

> Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is a separate entity: the shareholder's interest is viewed as too removed to meet the standing requirements. ***Even a***

[34] 12B Fletcher, Cyclopedia of Corporations, § 5911, 421 (perm. ed.) (emphasis added)

shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual.[35]

There are many good reasons for this rule. First, claims arising from alleged harm to the corporation cannot be brought individually because the injuries flow to each individual stockholder in proportion to his or her share of ownership; thus, if each stockholder were allowed to sue for harm to the corporation, then there would be "as many suits against the wrongdoer as there were stockholders in the corporation."[36]

Second, this rule promotes fairness because it prevents a majority stockholder, like Weatherspoon, from having his cake and eating it, too. "An individual who chooses to incorporate and thereby enjoy the benefits of the corporate form must also bear the attendant burdens."[37] In other words, Weatherspoon

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[35] *Sabey v. Howard Johnson Co.*, *supra*, 5 P.3d at 735 (emphasis added) (citing *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949, 952 (1987) and 12B Fletcher, Cyclopedia of Corporations, § 5910 (perm. ed. rev.vol.1993))

[36] Fletcher, *supra*, at § 5911

[37] *Cottringer v. Emp't Sec. Dep't*, 162 Wn. App. 782, 785, 257 P.3d 667, *review denied*, 173 Wn.2d 1005 (2011)

cannot enjoy the separate existence of Duma when it suits his purpose—such as by limiting his liability—but then disregard the existence of Duma when it does not. The individual "'cannot employ the corporate form to his advantage in the business world and then choose to ignore its separate entity when he gets to the courthouse.'"[38]

In sum, under the general rule, there can be little doubt that Weatherspoon lacked standing to bring his fraud claim against Safranski: Duma, not Weatherspoon, entered into the APA with BMS; Duma, not Weatherspoon, owned the assets that were transferred to BMS; Duma, not Weatherspoon, received the payments from BMS; and Duma, not Weatherspoon, suffered the harm when BMS did not make the $350,000 earnout payment. Any harm suffered by Weatherspoon was purely derivative of the harm suffered by Duma, in his proportionate share. Thus, under the general rule, as explained by Fletcher and as adopted by Washington's

[38] *Zimmerman v. Kyte*, 53 Wn. App. 11, 18, 765 P.2d 905 (1988) (quoting 12B W. FLETCHER, Private Corporations, § 5910 (1984))

courts, Weatherspoon lacked standing to for the harm that Safranski allegedly caused to Duma.

B. Weatherspoon's Claim Did Not Fit Within Any Exceptions to the Rule that Shareholders Cannot Sue for Harm to the Corporation

There are three major exceptions to the rule that a shareholder has no standing to sue for harm to the corporation. As shown immediately below, however, Weatherspoon did not and could not fit his claim within any of these three exceptions.

1. Weatherspoon Did Not and Could Not Bring a Shareholder Derivative Claim

One narrow exception is when the plaintiff brings a shareholder derivative on behalf of the corporation. As the court explained in *Gustafson v. Gustafson*:

> Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is viewed as a separate entity, and the shareholder's interest is too remote to meet the standing requirements. However, because of the possibility of abuse by the officers and directors of a corporation, a narrow exception has been

created for shareholders to bring derivative suits on behalf of the corporation.[39]

But Weatherspoon did not bring to trial a derivative suit on behalf of Duma. He brought the claim in his own name, and he did not bring any claim under Civil Rule 23.1, which governs derivative claims. This Court may wonder why Weatherspoon did not avoid his standing problem by simply bringing his claim as a derivative claim. The answer is that Weatherspoon took the position in the trial court that ***Safranski's*** derivative claims against ***Weatherspoon*** had been transferred by Duma to BMS as part of the APA. Weatherspoon's summary judgment motion was granted on that basis on April 4, 2014.[40]

Two weeks later, Weatherspoon argued to the trial court that any derivative claims ***Weatherspoon*** had against ***Safranski*** were not transferred by Duma to BMS as part of the APA. But

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[39] *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987)
[40] RT 4/4/2014 at pp. 1-7; CP 94-95

the trial court rejected that notion. As Judge Gregerson said to Weatherspoon's counsel:

> You brought the same issue here a couple weeks ago and again the momentum of that logic still hangs in the air....and it's—it's difficult for me—to understand how you can get the benefit of that logic with respect to the derivative claims and then not be bound by the same logic...[41]

In sum, Weatherspoon did not pursue a derivative claim for fraud against Safranski, nor could he, and thus, his claim does not fall within the narrow exception for shareholder derivative claims.

2. Weatherspoon's Claim is Not Based on Any Duty Owed to Him Other Than as a Shareholder of Duma

There is another exception to the general rule that a shareholder has no standing to sue for harm to the corporation. This exception applies "where there is a special duty, such as a contractual duty, between the wrongdoer and the

[41] RT 4/18/2014 at p. 36

shareholder."[42] But there is an important caveat to this exception—it applies "only when that special duty had its origin in circumstances ***independent of the stockholder's status as a stockholder.***"[43]

In the case of Weatherspoon, he did not allege, nor could he, that Safranski owed Weatherspoon any special duty independent of Weatherspoon's status as a stockholder of Duma. Instead, Weatherspoon argued to the trial court that Safranski owed duties to Duma as a Director and employee and that Safranski owed duties to Weatherspoon as a minority stockholder.

Putting aside for purposes of this appeal whether a minority stockholder actually does have fiduciary duties to a majority stockholder, it is important not to lose sight of the fact that any duty Safranski owed directly to Weatherspoon existed

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[42] Sabey, supra, 5 P.3d at 735

[43] *Hunter v. Knight, Vale and Gregory*, 18 Wn. App. 640, 571 P.2d 212 (1977) (emphasis added) (citing *Shaw v. Empire Savings & Loan Ass'n*, 186 Cal.App.2d 401, 9 Cal.Rptr. 204 (1960) and 13 W. Fletcher, Cyclopedia of the Law of Private Corporations, § 5921 (perm. ed. rev. 1970)

only so long as Weatherspoon was a stockholder of Duma. In other words, but for Weatherspoon's ownership of stock in Duma, there is no basis under which Safranski owed any special duty—contractual, fiduciary, or otherwise—to Weatherspoon.

Because Safranski owed no duty to Weatherspoon that was ***independent of Weatherspoon's status as a stockholder,*** Weatherspoon's fraud claim does not fit within this exception to the general rule regarding standing. Weatherspoon may argue—as he did to the trial court—that Safranski owed a duty not to defraud Weatherspoon, just as everyone owes everyone else a general duty not to defraud them. But this argument fails for two reasons. First, it was not Weatherspoon who was allegedly defrauded—it was Duma. And second, if Weatherspoon did not own any stock in Duma at the time of the APA, he could not have suffered any harm—even if Duma had suffered harm—as a result of Safranski's alleged fraud.

In sum, this exception does not apply because Safranski did not owe any special duty to Weatherspoon that was independent of Weatherspoon's status as a stockholder of Duma.

3. Weatherspoon Did Not Suffer any Injury Separate and Distinct From That Suffered by Other Shareholders

The last potential exception to the general rule prohibiting shareholders from suing directly for harm to the corporation is "where the shareholder suffered an injury separate and distinct from that suffered by other shareholders"[44] Weatherspoon's fraud claim against Safranski did not fit within this exception either. Duma, not Weatherspoon, was owed the $350,000 earnout payment. When Duma did not receive the full payment, any harm suffered by Weatherspoon was derivative of the harm suffered by Duma.

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[44] *Sabey*, *supra*, 5 P.3d at 735 (citing 12B William Meade Fletcher, et al., CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5910 (perm. ed. rev.vol.1993))

Because Weatherspoon did not suffer any harm that was separate and distinct from the harm suffered by all the shareholders of Duma, his fraud claim does not fit within this exception either. Weatherspoon may argue that Safranski—who was another shareholder of Duma—should not have been entitled to share in any recovery for his own alleged fraud. But the question is not whether Safranski was entitled to share in the recovery—the question is whether Weatherspoon's harm is different from other shareholders similarly situated. In other words, if Duma had any other shareholders—besides Safranski and Weatherspoon—their harm would have been exactly the same as Weatherspoon, in proportion to their ownership of Duma. Thus, Weatherspoon's argument would be unavailing, and he cannot fit his claim within this exception, either.

The facts of the case at bar are very similar to those presented in a recent decision issued by the District Court for the Western District of Washington. In *Aventa Learning, Inc. v. K12, Inc.*, the plaintiff was Aventa Learning, Inc., a

Washington corporation.[45] Joining Aventa as plaintiffs in the action were six individuals who owned all of Aventa's shares. Like the case at bar, all of the assets of Aventa were sold to a third party, known as KDCL, under an asset purchase agreement ("APA"). And like the current case, the APA called for an upfront payment and an earnout payment. When the earnout payment became due, Aventa and KCDL disagreed as to the proper amount.

The individual shareholders sued KCDL for alleged misrepresentations that induced Aventa to agree to the APA. The defendants moved for summary judgment, arguing, "the claims of the individual plaintiffs – Aventa's shareholders – should be dismissed because the individual plaintiffs lack standing."[46]

Citing *Gustafson*, *Sabey*, and *Hunter*, the court summarized Washington's law as follows:

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[45] 830 F.Supp. 2d 1083 (W.D. Wash., 2011)
[46] *Id.* at 1102-1103

> A plaintiff must have a personal stake in the outcome of the case to bring suit. Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is viewed as a separate entity, and the shareholder's interest is too remote to meet the standing requirements. Even a shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual. There are two exceptions to this rule: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder; and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders. The special duty must have its origin in circumstances independent of the stockholder's status as a stockholder.[47]

The District Court then applied these rules to the facts before it.

> With regard to the first exception, Defendants assert that there is no evidence that they owed any special duty to the individual plaintiffs — independent of their status as stockholders of Aventa, and Plaintiffs have asserted none. With regard to the second exception, Defendants argue that although the individual plaintiffs signed the APA, they did so expressly in their capacity as shareholders of Aventa....Further, Plaintiffs have provided no evidence that the individual plaintiffs suffered any injury separate and distinct from those allegedly suffered by Aventa. The claims they assert are identical to those asserted by Aventa, and any injury they have allegedly incurred

[47] *Id.* at 1103 (citations and quotation marks omitted)

> arises by virtue of their status as an Aventa shareholder.[48]

Based on this analysis, the court agreed that the individual shareholders lacked standing to assert their misrepresentation claim, even though they owned all the shares of the corporation. Accordingly, the court dismissed the claims of the individual plaintiffs.

The same analysis should be applied here, with the same result. The only harm Weatherspoon suffered from Safranski's alleged fraud was as a shareholder of Duma. He did not bring a derivative claim on behalf of Duma. Weatherspoon's claim does not arise from any "special duty" owed to him independent of his status as a shareholder in Duma. Finally, Weatherspoon did not suffer any harm that was separate or distinct from what would have been suffered by any shareholder of Duma. Accordingly, he had no standing to bring this claim, and the court should have dismissed it, either on

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[48] *Id.* at 1103 (citations to record omitted)

Safranski's summary judgment motion or on his motion for judgment as a matter of law.

C. The Trial Court Should have Ordered a Remittitur

If this Court agrees that Weatherspoon lacked standing to pursue his fraud claim against Safranski, then it does not need to reach the second assignment of error regarding the remittitur. But if this Court disagrees, then it should reverse the trial court's refusal to issue a remittitur for approximately $167,000.

Duma negotiated a sale its assets to BMS for the total sum of $1,250,000. Weatherspoon blames Safranski's fraud for BMS not paying the full price. Instead, BMS paid a total of $1,039,166. The difference between these two amounts is $210,834. As Weatherspoon owned 79.31% of Duma, the maximum amount of his fraud damages is $167,212.45. But the jury awarded Weatherspoon $275,637.50.

Civil Rule 59(a) allows the trial court to grant a party's motion for a new trial on all or some of the issues when it is shown that any of several grounds exist. As the rule states:

> On the motion of the party aggrieved, a verdict may be vacated and a new trial granted ... on some of the issues when such issues are clearly and fairly separable and distinct, ... for any one of the following causes materially affecting the substantial rights of such parties:
>
> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is... for the injury or detention of property; [or]
>
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.

Moreover, RCW 4.76.030 grants a trial court the authority to issue a remittitur under which the prevailing party either accepts a reduction in the amount of damages or is required to re-try all or some of the case.

> If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party

> adversely affected shall consent to a reduction or increase of such verdict....

These rules have been applied and analyzed extensively by Washington's appellate courts. While the courts do "strongly presume that the jury's verdict is correct," the courts will disturb a jury's damage award when "it is outside the range of substantial evidence in the record...."[49] Thus, the courts have held under RCW 4.76.030, "if the verdict is unsupported by substantial evidence [then] the statute calls for the court to order a new trial unless the plaintiff consents to the reduced award."[50] Moreover, while the appellate courts "review the denial of a new trial or remittitur for abuse of discretion," the Washington Supreme Court has held that "[a] court abuses its discretion when the jury award is contrary to the evidence."[51] As the Supreme Court held in another leading case on the issue of

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[49] *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 231 P.3d 1211, 1229 (2010) (quotation marks and citations omitted)
[50] *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795, 801 (2000) (citations omitted) (bracketed material added)
[51] *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705, 711 (2007) (citations omitted)

remittitur, "there must be evidence upon which the award is based."[52]

The underlying evidence adduced at trial provides a straightforward calculation that sets an upper limit on the amount of damages that Weatherspoon could have possibly suffered as a result of Safranski's alleged fraud. Weatherspoon agreed to sell Duma to BMS for a total price of $1,250,000, but the payment was to split into two types—an upfront payment of $900,000 and a deferred earnout payment of $350,000.

BMS paid Duma the upfront payment of $900,000, but BMS did not pay the deferred earnout payment of $350,000. After the earnout payments were withheld, Duma eventually settled its claim against BMS. As part of that settlement, BMS agreed to pay $139,166 in lieu of the $350,000 originally specified in the APA.

In summary, Duma was supposed to receive a total of $1,250,000 in the sale of its assets to BMS. As a result of

---

[52] *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 116 P.3d 381, 389 (2005)

Safranski's alleged fraud, according to Weatherspoon, Duma ultimately received only $1,039,166. Thus, the difference between what Duma was promised and what it received was $210,834. It is undisputed that Weatherspoon owned 79.31% of Duma. In other words, for every hundred dollars that Duma lost in payment from BMS, Weatherspoon lost $79.31. Therefore, Weatherspoon's proportionate share of the $210,834 total loss was $167,212.45. This number represents the upper limit on Weatherspoon's fraud damages.

In sum, in light of these undisputed facts, the jury's awarded exceeded the maximum amount of damages that could be supported by the evidence, and the trial court should have issued a remittitur for $167,212.45.

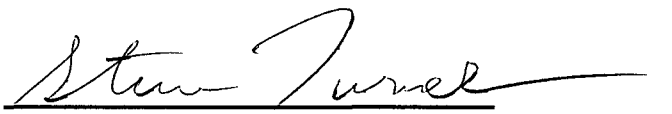
V. CONCLUSION

For the forgoing reasons, Appellant Alex Safranski respectfully requests that the jury award in favor of Weatherspoon be vacated. In the alternative, Safranski

respectfully requests that this Court issue a remittitur to plaintiff in the amount of $167,212.45.

Dated: December 21, 2015

Respectfully Submitted,



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APPENDIX TO BRIEF

12

FILED
2013 FEB 27 AM 11:21
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

ALEX SAFRANSKI, an individual Plaintiff, v. DUMA VIDEO, INC., a Washington Corporation, and SULTAN WEATHERSPOON, an Individual, Defendants.	**Case No. 12-2-02882-0** **DEFENDANTS' ANSWER AND COUNTERCLAIMS TO PLAINTIFF'S FIRST AMENDED COMPLAINT** (Amended)

Defendants Duma Video, Inc. ("Duma") and Sultan Weatherspoon ("Weatherspoon") answer Plaintiff's First Amended Complaint as follows:

1.

Defendants admit paragraph 1.

2.

Defendants admit paragraph 2.

3.

Defendants admit that this Court has subject matter jurisdiction but otherwise denies paragraph 3.

4.

Defendants admit paragraph 4.

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5.

Defendants admit that Defendant Weatherspoon is currently the sole director of Duma, and that Plaintiff's First Claim for Relief may be alleged solely as a derivative claim for relief, but Defendants deny the remainder of paragraph 5.

6.

Defendants deny paragraph 6.

7.

Defendants deny paragraph 7.

8.

Defendants deny paragraph 8.

9.

Defendants deny Paragraph 9.

10.

Defendants deny paragraph 10.

11.

Defendants restate their responses to paragraphs 1-10.

12.

Defendants admit paragraph 12.

13.

Defendants deny paragraph 13.

14.

Defendants deny paragraph 14.

15.

Defendants admit that Plaintiff was employed by Duma. Defendants deny the balance of paragraph 15.

/////

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16.

Defendants deny paragraph 16.

17.

Defendants deny paragraph 17.

18.

Defendants deny paragraph 18.

19.

Defendants restate their responses to paragraphs 1-18.

20.

Defendants admit that Duma has paid the attorney fees incurred by Defendants in this action.

21.

Defendants deny paragraph 21.

22.

Defendants deny paragraph 22.

23.

Defendants deny paragraph 23.

FACTS RELATING TO DEFENDANTS' COUNTERCLAIMS

24.

In 2001, Defendant Weatherspoon started Duma Video and developed a unique video compression technology for which a U.S. patent was issued to Defendant Weatherspoon.

25.

In approximately 2003, Duma hired Plaintiff, first as an independent contractor, and then as a W-2 employee. Defendant Weatherspoon agreed to give Plaintiff 20% of the stock in Duma Video, for which Plaintiff paid nothing.

/////

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26.

Duma was a startup company operated in a very informal manner. Plaintiff knew and understood the informality, and benefitted from it.

27.

Defendant Weatherspoon owned 70% of the Duma stock, and 10% of the Duma stock was owned by Andrea McAdam and Ralph Gillespie, who were not employed or otherwise involved in the operations of Duma.

28.

Plaintiff was a young computer programmer who had not made more than $65,000 in annual wages. Plaintiff was assigned by Defendant Weatherspoon to work as a programmer on Duma's computer code.

29.

From the outset of Plaintiff's employment, Plaintiff agreed that the amount of his W-2 wages each month would depend upon the company's monthly net income. Each month, Plaintiff knew and agreed that Defendant Weatherspoon would assess Duma's financial circumstances, and issue Plaintiff and Defendant Weatherspoon W-2 wage payments in amounts that Defendant Weatherspoon deemed financially prudent for Duma.

30.

Plaintiff believed that his W-2 wages were and should be substantially the same amount as the W-2 wages Defendant Weatherspoon was paid.

31.

Plaintiff flourished under this salary arrangement. He earned W-2 wages far exceeding his previous salary, and far above his market value as a computer programmer. At no time did Plaintiff complain or otherwise object to this salary arrangement, as implemented by Defendant Weatherspoon.

/////

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32.

Defendant Weatherspoon elected to authorize Duma to make W-2 wage payments to Plaintiff in amounts that exceeded Weatherspoon's W-2 wages. Defendant authorized these higher wages not as a contractual requirement but rather to incentivize Plaintiff to continue to devote his entire loyalty and efforts to the success of Duma. Weatherspoon also recognized that he was earning higher dividends from Duma than Plaintiff due to his larger share ownership.

33.

From 2006 to 2012, W-2 wages paid to Plaintiff exceeded the W-2 wages paid to Defendant Weatherspoon by $117,580. The annual breakdown was as follows:

YEAR	DEFENDANT	PLAINTIFF
2006	192,912	189,549
2007	120,347	126,359
2008	74,411	92,281
2009	60,589	78,207
2010	21,862	82,125
2011	150,000	181,168
[Jan.-June] 2012	33,755	21,767
TOTAL	653,876	771,456

34.

Weatherspoon was responsible for business development, and establishing and maintaining markets for Duma's products. Weatherspoon was successful in developing a strong customer relationship with BMS, a large company based in San Diego, California.

35.

In late 2011, Plaintiff's quality and amount of work Plaintiff completed for Duma declined. Weatherspoon told Plaintiff that if his performance, attitude and communications with Duma did not improve, Plaintiff should consider resigning his position, which Plaintiff told

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Weatherspoon he did not wish to do.

36.

In late 2011, Plaintiff expressed a desire to have a W-2 paycheck in the same amount each month, which was a departure from the past arrangement of fluctuating monthly amounts.

37.

Weatherspoon agreed that it would be preferable to have regular monthly paychecks, and so Weatherspoon asked the company's accountant to calculate payroll withholdings projecting assuming a salary of $9,000 per month for both Plaintiff and Defendant Weatherspoon.

38.

From January to May, 2012, Duma paid $9,000 each to Plaintiff and Weatherspoon in gross wages for the months of February and April.

39.

In the months of January, March and May, Duma could not afford to make the $9,000 gross wage payments to Plaintiff and Weatherspoon. Accordingly, and in keeping with the past salary arrangement, Duma made no wage payments to either Plaintiff or Weatherspoon. Plaintiff did not complain about this arrangement, or claim any alleged unpaid wages, until after he had secretly made his agreement with BMS alleged below.

40.

In the spring of 2012, the business relationship between Plaintiff and Duma deteriorated, and Duma's financial performance in 2012 plummeted.

41.

At a national trade show, Weatherspoon asked a representative from BMS, whether BMS would be interested in purchasing the technology and other business assets of Duma. Weatherspoon told the BMS representative he believed the business assets of Duma were worth at least $1.5 million.

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42.

Unbeknownst to Weatherspoon, Plaintiff began having secret conversations with BMS about Plaintiff leaving Duma and becoming employed by BMS.

43.

At the time of these conversations, Plaintiff had fiduciary duties to Duma, as an employee, shareholder and director.

44.

On April 9, 2012, Plaintiff's attorney made a claim against Duma for alleged improper business expense reimbursements made by Duma to Weatherspoon.

45.

On April 26, 2012, at the request of Weatherspoon's attorney, all parties met. Plaintiff, Weatherspoon, their two attorneys, and Duma's corporate attorney were present. The meeting involved an overall discussion of Duma's status and future, the ongoing working relationship between Plaintiff and Weatherspoon, the potential sale of Duma's assets, and Plaintiff's expense reimbursement claim.

46.

The parties, and the attorneys, agreed that due to the irreconcilable differences between Plaintiff and Weatherspoon, Duma's best course of action was to solicit and negotiate a sale of Duma's assets for the highest possible value. The parties agreed that BMS was the most likely purchaser of Duma's assets. The parties agreed that Weatherspoon would be the only representative of Duma to have any contact with BMS. The parties further agreed that Plaintiff and Weatherspoon would each discuss their potential employment with BMS after a deal had been be made between Duma and BMS for the asset sale.

47.

Duma retained a business valuation expert who supported Weatherspoon's opinion that the business assets were worth approximately $1.5 million.

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48.

On May 23, 2012, Plaintiff had made a financial offer to BMS to leave Duma and work for BMS.

49.

On June 6, 2012, Plaintiff abruptly, and without explanation, resigned his position as a director of Duma. Plaintiff did so because Plaintiff knew that he had already breached his fiduciary duty to Duma and by resigning he wanted to attempt to cover up that fact.

50.

On June 14, 2012, after securing a promise of employment with BMS, Plaintiff abruptly, and without explanation, resigned his employment with Duma.

51.

By June 26, 2012, if not earlier, Plaintiff had made a secret deal to receive a "signing bonus" of $80,000 from BMS, along with a second payment for $160,000, as well as a salary of $125,000 from BMS. Plaintiff knew that his secret dealings with BMS were substantially altering and diminishing Duma's negotiating position with BMS.

52.

Although Duma's assets were valued at a $1.5 million purchase price, BMS reduced the purchase price to $1.25 million, a loss of $250,000 to Duma. Plaintiff's conduct in secretly negotiating his own deal with BMS significantly harmed Duma's bargaining position. Plaintiff put his own personal financial interests ahead of Duma's financial interest, which breached his fiduciary duties as an employee, shareholder, and director.

53.

After Plaintiff resigned his employment, Duma demanded that Plaintiff return the company's laptop computer, desk top computer, hard drives and all associated electronic data and software. Plaintiff intentionally stalled, and made up excuses for his failure to deliver company property. After returning the company's password-protected computer, Plaintiff

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refused to provide the password to Duma.

54.

During the time that Plaintiff stalled, and made up excuses, he intentionally deleted Duma files and emails from the company's computers, and transferred some computer data to his personal computer. Plaintiff's attorney admitted that Plaintiff "scrubbed" the company's computers.

FIRST COUNTERCLAIM

Fraud and Misrepresentation

55.

Defendants reallege paragraphs 1 through 54 above as if fully set forth herein.

56.

Plaintiff engaged in fraudulent conduct by intentionally keeping his contacts with BMS secret during a time period in which he promised and agreed not to have such contacts. His secret negotiations with BMS substantially altered and diminished Duma's bargaining position with BMS.

57.

Plaintiff also defrauded Duma by intentionally misrepresenting and making excuses for his refusal to deliver the company's computers after his resignation, and deleting computer files and emails.

58.

Duma sustained economic damages in the amount of at least $250,000.

PLAINTIFF'S SECOND COUNTERCLAIM

Breach of Fiduciary Duties

59.

Defendants reallege paragraphs 1 through 54 above as if fully set forth herein.

/////

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60.

At all times, Plaintiff owed fiduciary duties to Duma as an employee, shareholder and director. Those fiduciary duties were not terminated or affected by Plaintiff's fraudulent conduct, attempting to resign his position as a director or resign his position as an employee.

61.

Plaintiff breached his fiduciary duties to Duma by secretly negotiating a deal with BMS and fraudulently deleting company computer data. Duma sustained economic damages in the amount of $250,000.

THIRD COUNTERCLAIM

Breach of Contract

62.

Defendants reallege paragraphs 1 through 54 above as if fully set forth herein.

63.

Plaintiff breached his employment agreement with Duma by failing and refusing to perform his duties from approximately November, 2011 until his resignation. Plaintiff also breached his employment agreement by his conduct in secretly dealing with BMS.

64.

Duma's obligation to pay Plaintiff any wages was conditioned on Plaintiff's performance of his regular job duties and his agreement not to have contact with BMS.

65.

Plaintiff's breach discharged Duma from any alleged contractual obligations to pay Plaintiff's wages from November, 2011, or pay wages in the amounts claimed by Plaintiff.

66.

In addition, Plaintiff's breach caused Duma to sustain damages of $250,000.

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FOURTH COUNTERCLAIM

Equitable Offset

67.

Defendants reallege paragraphs 1 through 54 above as if fully set forth herein.

68.

During his employment, Plaintiff was paid W-2 wages in the total amount of $771,456. At all times, Plaintiff agreed that he should be paid W-2 wages in the same amount as Defendant Weatherspoon. Defendant Weatherspoon was paid W-2 wages in the amount of $653,876 during the same time, a difference of $117,580.

69.

Plaintiff now claims that Defendant Weatherspoon should re-pay some undetermined amount of expense reimbursements to Duma. In equity, any amount of expense reimbursement recoverable by Plaintiff should be offset by the excess wage amounts he was paid

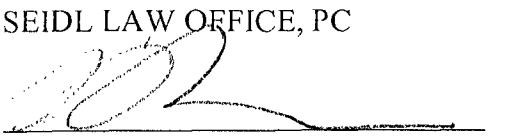
70.

If the jury or Court determines that Duma should recover against Weatherspoon any amount of expense reimbursements, such amount should be offset against the $117,580 excess amount of wages paid to Plaintiff.

WHEREFORE, Defendants pray that Plaintiff's take nothing by his complaint, and that Defendants recover against Plaintiff a judgment in the amount of $250,000, plus Defendants' reasonable costs and attorney fees incurred herein.

DATED: February 25, 2013.

SEIDL LAW OFFICE, PC

By: 

Michael R. Seidl, WSBA No. 14142
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Tel: 503.224.7840 / Fax: 503.224.9721
Of Attorneys for Defendants

DECLARATION OF SERVICE

I hereby certify that I served the attached **DEFENDANTS ANSWER AND COUNTERCLAIMS TO PLAINTIFF'S FIRST AMENDED COMPLAINT** on the following person(s) on the date indicated below:

Steve L. Naito
Tarlow Naito & Summers, LLP
150 SW Harrison Street, Suite 200
Portland, OR 97201
Steve.naito@tnslaw.net
Attorney for Plaintiff

by the following indicated method(s):

☐ by **faxing** full, true, and correct copies thereof to said attorney to the fax number noted above, which is the last known fax number for said attorney, on the date set forth below.

☒ by **emailing** full, true, and correct copies thereof to said attorney to the email address noted above, which is the last known email address for said attorney, on the date set forth below.

☐ by notice of electronic filing using the E-filing system (LGR 30).

☒ by causing full, true and correct copies thereof to be **mailed** to the attorney(s) at the attorney(s) last-known office address(es) listed above on the date set forth below.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: February 25, 2013.

SEIDL LAW OFFICE, PC

By: _____
Tanya A. Mox, Paralegal to
Michael R. Seidl, WSBA No. 14142
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Of Attorneys for Defendants

FILED

2014 MAR -6 AM 11:25

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

ALEX SAFRANSKI, an individual Plaintiff, v. DUMA VIDEO, INC., a Washington Corporation; and SULTAN WEATHERSPOON, an individual, Defendants.	**Case No. 12-2-02882-0** **DEFENDANT WEATHERSPOON'S MOTION FOR SUMMARY JUDGMENT RE: DERIVATIVE CLAIMS** **Hearing Date: April 4, 2014** **(Judge David E. Gregerson)**

I. RELIEF REQUESTED

Pursuant to CR 56, defendant Sultan Weatherspoon ("Weatherspoon") moves the Court for an order entering summary judgment dismissing Plaintiff's First, Second, Third, and Fifth Claims for Relief. All of these claims for relief are alleged by plaintiff as derivative claims on behalf of defendant Duma Video, Inc. For the reasons set forth below, these claims are not owned by Duma, and they have been settled.

II. UNDISPUTED FACTS RELIED UPON

There are only two undisputed material facts that are necessary for the Court to dismiss the derivative claims.

1. Asset Purchase Agreement

On August 17, 2012, Duma Video, Inc. entered into an Asset Purchase Agreement ("APA") with Broadcast Microwave Services, Inc. ("BMS"). Under that APA, Duma sold all of

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its assets to BMS, except for certain enumerated "excluded assets" that are not relevant here. The relevant pages of the APA are attached as Exhibit "A" to the Seidl Declaration. At page 9 of the APA, the "Purchased Assets" are defined in Section 2.01 to include:

> (g) all rights to any Actions of any nature available to or being pursued by Seller to the extent related to the Business, the Purchased Assets or the Assumed Liabilities, whether arising by way of counterclaim or otherwise;

The defined term "Action" means:

> "Action" means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation,... whether at law or in equity.

The term "Business" is defined as the "business of video, audio and data compression, including encoding and decoding... "

In his Third Amended Complaint, plaintiff Safranski alleges four derivative claims for relief. The First Claim for Relief is a derivative fraud claim on behalf of Duma against Weatherspoon. The Second Claim for Relief is a derivative breach of fiduciary duty claim on behalf of Duma against Weatherspoon. The Third Claim for Relief is a derivative claim for an accounting. The Fifth Claim for Relief is a derivative claim on behalf of Duma for reimbursement of attorney fees against Weatherspoon. A copy of the Third Amended Complaint is attached to the Seidl Declaration as Exhibit "B."

On January 23, 2014, defendant Duma entered into a Settlement Agreement with BMS. A copy of the Settlement Agreement is attached to the Seidl Declaration as Exhibit "C." Under the terms of the Settlement Agreement, BMS paid Duma $139,166 in exchange for settlement of certain claims asserted by Duma against BMS. As additional consideration for the settlement, BMS agreed to release Weatherspoon of any and all liability for any claims that BMS had or owned against Weatherspoon.

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Under the Settlement Agreement, BMS agreed to the following release:

> **4. Release by BMS of All Claims:** BMS agrees to fully and forever discharge and release Weatherspoon and Duma, and all of its respective insurance carriers, attorneys, successors, heirs, and assigns, past and present, and each of them singularly and collectively, from any and all claims, rights, accounts, suits, causes of action, obligations, debts, demands or liabilities of any kind or nature, whether known or unknown, arising out of or related to the APA, License Agreement, Consulting Agreement, and all other agreements between Duma and BMS.

That release included the claims that BMS acquired under Section 2.01 of the APA described above. Because the derivative claims that plaintiff Safranski now purports to allege on behalf of Duma against Weatherspoon were transferred to BMS under Section 2.01(g), Safranski has no right or standing to allege these derivative claims.

III. DISCUSSION

After two failed attempts, Plaintiff Safranski finally alleges his own direct claim for relief against Defendant Weatherspoon relating to Safranski's contention that Weatherspoon was paid an excessive amount of money from Duma for business expense reimbursement. Safranski now alleges in his Third Amended Complaint that the Court should assume jurisdiction over the corporate entity Duma Video, Inc. and dissolve the corporation, under RCW 23B.130. In the context of that court-supervised dissolution, Safranski seeks to have the Court determine that Weatherspoon, as the majority shareholder, owes money to Safranski because Weatherspoon's conduct "oppressed" the rights of Safranski as a minority shareholder. While defendants dispute the merits of Safranski's claim, at least Safranski has properly pled the right claim.

However, Safranski continues to include in his Third Amended Complaint the derivative claim he asserts on behalf of Duma against Weatherspoon.

A derivative suit is filed by a shareholder on behalf of the corporation, alleging a claim the corporation owns. Any judgment obtained is in favor of the corporation. *LaHue v. Keystone, Inv. Co.*, 6 Wash. App. 765, 496 F.2d 343 (Div. II 1972). "[T]he cause of action accrues to the corporation itself and the stockholders' rights therein are merely of a derivative character and

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therefore can be enforced or asserted only through the corporation." *Goodwin v. Castleton*, 19 Wash.2d 748, 144 P.2d 725 (1944).

> As frequently expressed judicially, a stockholder bringing a derivative action occupies a strictly fiduciary relationship to the corporation whose interests he assumes to represent, and his position in the litigation is in a legal sense the precise equivalent of that of a guardian ad litem... *Id.*

Accordingly, each of the derivative claims were sold to BMS under the APA. It was BMS' claim to settle, and it did just that in the January 23, 2014 settlement agreement. That settlement agreement released Weatherspoon of any further liability for the derivative claims.

Whether or not Weatherspoon has liability to Safranski for oppression remain to be decided by the Court in the dissolution context.

IV. CONCLUSION

Defendant Weatherspoon respectfully requests the Court to enter summary judgment on the First, Second, Third, and Fifth Claims for Relief that are alleged derivatively on behalf of Duma.

DATED: March 6, 2014.

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By: _____

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Telephone: 503-224-7840
Attorney for Defendants

DECLARATION OF SERVICE

I hereby certify that I served the attached **DEFENDANT WEATHERSPOON'S MOTION FOR SUMMARY JUDGMENT RE: DERIVATIVE CLAIMS** on the following person(s) on the date indicated below:

Steve L. Naito
Tarlow Naito & Summers, LLP
150 SW Harrison Street, Suite 200
Portland, OR 97201
Steve.naito@tnslaw.net
Attorney for Plaintiff

by the following indicated method(s):

☐ by **faxing** a full, true, and correct copy thereof to said attorney to the fax number noted above, which is the last known fax number for said attorney, on the date set forth below.

☒ by **emailing** a full, true, and correct copy thereof to said attorney to the email address noted above, which is the last known email address for said attorney, on the date set forth below.

☐ by notice of electronic filing using the E-filing system (LGR 30).

☒ by causing a full, true, and correct copy thereof to be **hand delivered** to the attorney at the attorney's last-known office address listed above on the date set forth below.

☐ by causing a full, true, and correct copy thereof to be **mailed** to the attorney at the attorney's last-known office address listed above on the date set forth below.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: March 6, 2014.

SEIDL LAW OFFICE, PC

By: _____
Michael R. Seidl, WSBA No. 14142
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Telephone: 503-224-7840

Attorney for Defendants

ORIGINAL

FILED
MAR 06 2014
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

ALEX SAFRANSKI, an individual Plaintiff, v. DUMA VIDEO, INC., a Washington Corporation; and SULTAN WEATHERSPOON, an individual, Defendants.	**Case No. 12-2-02882-0** **DEFENDANTS' ANSWER TO THIRD AMENDED COMPLAINT, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS** **(Judge David E. Gregerson)**

Defendants' answer Plaintiff's Third Amended Complaint as follows:

1.

Defendants admit paragraph 1.

2.

Defendants admit paragraph 2.

3.

Defendants admit paragraph 3.

4.

Answering paragraph 4, defendants deny that Plaintiff became a shareholder in September 2001, but admit that Plaintiff became a shareholder in approximately 2005 and is presently a shareholder.

///

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5.

Defendants deny paragraph 5.

6.

Defendants deny paragraph 6.

7.

Defendants deny paragraph 7.

8.

Defendants deny paragraph 8.

9.

Defendants deny paragraph 9.

10.

Defendants deny paragraph 10.

11.

Defendants' answers are incorporated.

12.

Defendants admit paragraph 12.

13.

Defendants deny paragraph 13.

14.

Admit that on or about August 17, 2012, defendant Duma entered into an Asset Purchase Agreement ("APA") with Broadcast Microwave Services, Inc. ("BMS"), and the balance of paragraph 14 is denied.

15.

Defendants deny paragraph 15.

16.

Defendants deny paragraph 16.

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0-000000058

17.

Defendants' answers are incorporated herein.

18

Defendants deny paragraph 18.

19.

Defendants deny paragraph 19.

20.

Defendants deny paragraph 20

21.

Defendants deny paragraph 21.

22.

Defendants deny paragraph 22.

23.

Defendants deny paragraph 23.

24.

Defendants deny paragraph 24.

25.

Defendants' answers are incorporated herein.

26

Defendants admit that Duma has paid attorney fees related to this lawsuit and deny the balance of paragraph 26.

27.

Defendants deny paragraph 27.

28.

Defendants deny paragraph 28

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29.

Defendants deny paragraph 29.

30.

Defendants incorporate their answers herein.

31.

Defendants admit paragraph 31.

32

Defendants deny paragraph 32.

33.

Defendants deny paragraph 33.

34.

Defendants deny paragraph 34.

35.

Defendants admit that on or about December 18, 2013, a resolution was approved. The balance of paragraph 35 is denied.

36.

Defendants deny paragraph 36.

37.

Defendants deny paragraph 37.

38.

Defendants deny paragraph 38.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

39.

Plaintiff's allegations fail to state a claim for relief

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SECOND AFFIRMATIVE DEFENSE

(Standing)

40.

In the APA between defendant Duma and BMS, the assets sold by Duma to BMS under that Agreement included:

> Section 2.01(g). All rights of any Actions of any nature available to or being pursued by Seller [Duma] to the extent related to the Business, the Purchased Assets or the Assumed Liabilities, whether arising by way of counterclaim or otherwise;

41.

In this lawsuit, Plaintiff alleges three derivative claims for relief on behalf of defendant Duma against defendant Weatherspoon. Those derivative claims are not brought in Safranski's individual capacity, but rather in the name of Duma.

42.

Pursuant to the Section 2.01(g) of the APA. Duma transferred ownership of the three claims for relief to BMS.

43.

Safranski has no standing to pursue the derivative claims on behalf of Duma.

THIRD AFFIRMATIVE DEFENSE

(Settlement)

44.

On January 23, 2014, BMS entered into a settlement with Duma and Weatherspoon. As part of that settlement, BMS released Weatherspoon of any and all liability for any claims arising out of the APA.

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45.

As a result of this Settlement and Release Agreement, Weatherspoon was released of any liability for any claims that Duma may have had against him. This included the derivative claims on behalf of Duma against Weatherspoon alleged by Safranski in this case.

FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

46.

Safranski's claims are barred by the applicable statute of limitations

FIFTH AFFIRMATIVE DEFENSE

(Laches)

47.

Safranski's claims for relief should be dismissed under the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

(Unclean Hands)

48.

Plaintiff's claims are barred by the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver)

49.

Plaintiff's claims are barred by the doctrine of waiver.

EIGHTH AFFIRMATIVE DEFENSE

(Estoppel)

50.

Plaintiff's claims for relief are barred by the doctrine of estoppel.

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NINTH AFFIRMATIVE DEFENSE

(Failure to Perform)

51.

With respect to Safranski's wage claim, any wages that Safranski alleges to be due and payable, were not earned by Safranski because of his failure to perform his job responsibilities.

FIRST COUNTERCLAIM

(Defendant Weatherspoon vs. Plaintiff Safranski)

(Fraud)

52.

On April 26, 2012, at the request of Safranski, a meeting occurred between Safranski, Weatherspoon, their attorneys, and Duma's corporate attorney.

53.

At this April 26, 2012, meeting, Safranski and Weatherspoon agreed that they would attempt to sell Duma's assets, and that Broadcast Microwave Services, Inc., a customer of Duma's, would be the most likely suiter. The parties agreed that Weatherspoon would be the sole spokesman for Duma in any negotiations for the sale of Duma's assets.

54.

At the April 26, 2012, meeting, Safranski and Weatherspoon also agreed that if a sale occurred with BMS, it was likely that BMS would want both Safranski and Weatherspoon to be employed by BMS after the sale in some capacity The parties agreed that while negotiations were proceeding with BMS, neither Safranski nor Weatherspoon would discuss individual employment agreements with BMS. The parties agreed that doing so could impair Duma's ability to negotiate the most favorable terms of an Asset Purchase Agreement.

55.

On June 5, 2012, BMS sent to Duma a Letter of Intent that set forth the terms and conditions of an offer to purchase Duma's assets. The Letter of Intent included a requirement

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that Safranski and Weatherspoon be employed by BMS following the purchase transaction at an annual salary of $125,000 each. The Letter of Intent offered to pay Duma a total of $1.2 million for its assets, provided that $600,000 would be paid up front, and $600,000 would be paid upon completion of Duma's project to deliver an i-7 H.264 decoder to BMS.

56.

Safranski agreed with Weatherspoon that he would comply with the Letter of Intent and become employed by BMS in order to facilitate the asset sale. Weatherspoon agreed to do the same thing.

57.

On June 5, 2012, Safranski demanded that Weatherspoon agree to increase Safranski's share ownership of Duma from 20 percent to 45 percent. Safranski threatened that if Weatherspoon did not do so, Safranski would renege on his agreement to work for BMS, which Safranski knew was a condition of the BMS offer.

58.

On June 6, 2012, Safranski immediately resigned his position as a Director of Duma

59

On June 11, 2012, Safranski announced that because Weatherspoon would not increase Safranski's share ownership, he would not enter into an employment agreement with BMS.

60.

On June 14, 2012, Safranski abruptly quit his employment with Duma.

61.

On June 19, 2013, as a result of Safranski's announcement that he would not work for BMS, Weatherspoon advised BMS that the asset sale would no longer go through. Weatherspoon reluctantly terminated the negotiations BMS.

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62.

On or about June 22, 2012, Safranski entered into an agreement with BMS. Safranski agreed to become employed by BMS at a salary of $125,000, plus a signing bonus of $80,000. The Employment Agreement also contained a Project Success Bonus as follows:

> 3. Signing Bonus: On the first payroll following your start of employment, you will receive a one-time Signing Bonus of $80,000, less all required withholdings.
>
> 4. Project Success Bonus: When you have completed the FTGA H.264 Decoder project to the satisfaction of the Company, you will receive a one-time bonus of $160,000 less all required withholdings. The definition of the terms required to earn the Project Success Bonus will be defined in writing, and mutually agreed upon, after your employment has commenced.

63

The "project success bonus" was based upon an FPGA H.264 decoder. This decoder was based upon source coding developed by Duma. Safranski was familiar with the source code because he had worked on this project while he was employed by Duma.

64.

At the time, Safranski knew that the BMS May 5, 2012 Letter of Intent included an earnout provision whereby 50% of the purchase price, or $600,000 was conditioned on Duma completing an H.264 decoder for BMS. The Letter of Intent described the H.264 decoder as an "i-7 H.264 decoder." An i-7 H.264 decoder is substantially similar to an FPGA H.264 decoder. They differ only in that the i-7 H 264 decoder uses an Intel i-7 processing chip. The i-7 chip can be added to a FPGA H.264 decoder. Safranski knew this.

65.

On June 27, 2012, BMS issued a Second Letter of Intent to Duma describing the terms and conditions of an asset sale. This Second Letter of Intent reduced the earnout payment from $600,000 to $350,000. Therefore, BMS agreed to pay $900,000 up front, and an additional $350,000 if and when Duma delivered an i-7 H.264 decoder.

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66.

Safranski was aware of the June 27, 2012, Letter of Intent. He knew that Weatherspoon was unaware that Safranski has entered into a secret agreement with BMS to deliver an H.264 decoder in exchange for a payment of $160,000. Safranski intentionally concealed this information from Weatherspoon.

67.

Safranski knew that his agreement with BMS significantly increased the risk that Duma would not be paid the $350,000 Earnout under the June 27, 2012, Letter of Intent.

68.

Safranski also knew that BMS only needed one H.264 decoder, whether that decoder was an FPGA H.264 decoder or an i-7 H.264 decoder.

69.

Safranski concealed these facts in order to induce Weatherspoon, as the majority shareholder, to agree to the terms of the BMS Letter of Intent. Safranski would not have been able to secure the $160,000 Project Success Bonus unless Duma transferred its code and other IP related to the decoder. And Safranski also stood to recover 20% of the $900,000 upfront payment under the Letter of Intent if he kept silent.

70.

Before the asset sale transaction was consummated on August 17, 2012, Safranski began his employment with BMS. He began working on the FPGA H.264 decoder using the source code from Duma that he was familiar with.

71.

From July 2012 to April 2013, Safranski worked from his home in Tri-Cities, Washington developing the FPGA H.264 decoder. He did so based upon the source code developed by Duma that had been sold to BMS under the fraudulently induced asset transaction.

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72.

During the same time period that Safranski was working on the FPGA H.264 decoder, Weatherspoon was working on the i-7 H.264 decoder. Neither BMS nor Safranski ever disclosed that Safranski was working on a decoder project for BMS. Nor did BMS offer Safranski's assistance to Weatherspoon, and at no time did Safranski offer any assistance to Weatherspoon in developing the i-7 H.264 decoder.

73.

In April 2013, just prior to a motion to compel being heard by the Court, Safranski's attorney finally produced Safranski's Employment Agreement with BMS. This was the first disclosure of the Project Success Bonus.

74.

In the summer of 2013 after several revisions, Safranski delivered an FPGA H.264 decoder to BMS, BMS paid Safranski the Project Success Bonus of $160,000.

75.

BMS then rejected Duma's i-7 H.264 decoder. BMS therefore refused to pay Duma the $350,000 earnout under the August 17, 2012 Asset Purchase Agreement.

76.

Prior to the August 17, 2012 Asset Purchase Agreement, Duma had an independent business valuation expert value the assets of Duma. Based on that valuation the assets at that time were worth at least $1.5 million. Weatherpoon's 70% interest had a value of at least $1,050,000.

77.

The Asset Purchase Agreement resulted in the payment of $900,000 for Duma's assets. Weatherspoon received $507,000 from the $900,000 up front payment made by BMS under the Asset Purchase Agreement, for his 70% share.

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78.

Weatherspoon suffered economic damages measured by the value of his interest before the sale less the amount he received from the sale This damage amount is approximately $543,000.

79.

Alternatively, Weatherspoon is entitled to recover his interest in the $350,000 earnout in the amount of $245,000

SECOND COUNTERCLAIM

(Defendant Duma vs. Plaintiff Safranski)

(Fraudulent Inducement)

80.

Defendants re-allege paragraphs 1-79 above as if fully set forth herein.

81.

Safranski's fraudulent concealment of the Project Success Bonus agreement with BMS fraudulently induced Duma to enter the Asset Purchase Agreement with BMS.

82

Duma would not have entered the Asset Purchase Agreement if Safranski had disclosed the Project Success Bonus. The Asset Purchase Agreement is there for a legal nullity.

83.

Duma suffered economic damages as a result of Safranski's fraudulent inducement in the amount of $600,000. This amount is the difference between the fair market value of Duma's assets ($1 5 million) less the amount paid by BMS ($900.000).

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THIRD COUNTERCLAIM

(Defendant Duma vs. Plaintiff Safranski)

(Breach of Fiduciary Duties)

84.

Defendants re-allege paragraphs 1-83 as if fully set forth herein.

85.

Safranski's conduct as alleged above breached his fiduciary duties to Duma.

86

As a result of Safranski's breach of fiduciary duties, Duma was induced to enter the Asset Purchase Agreement. Duma would not have entered that agreement but for Safranski's breach of fiduciary duties.

87.

Duma suffered economic damages as a result of Safranski's fraudulent inducement in the amount of $600,000.

WHEREFORE, Defendants pray for judgment against Safranski that Safranski take nothing by his Third Amended Complaint; and that complaint, and judgment be entered in favor of defendant Weatherspoon against Safranski up to the amount of $543,000, and judgment be entered in favor of defendant Duma against Safranski up to the amount of $600,000.

DATED: March 4, 2014.

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By: _____

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Telephone: 503.224.7840

Attorney for Defendants

DECLARATION OF SERVICE

I hereby certify that I served the attached **DEFENDANTS' ANSWER TO THIRD AMENDED COMPLAINT, AFFIRMATIVE DEFENSES, AND COUNTRCLAIMS** on the following person(s) on the date indicated below

Steve L. Naito
Tarlow Naito & Summers, LLP
150 SW Harrison Street, Suite 200
Portland, OR 97201
Steve.naito@tnslaw.net
Attorney for Plaintiff

by the following indicated method(s):

☒ by **mailing** full, true, and correct copies thereof to said attorney to the address noted above, which is the last known address for said attorney, on the date set forth below.

☐ by **emailing** full, true, and correct copies thereof to said attorney to the email address noted above, which is the last known email address for said attorney, on the date set forth below.

☐ by notice of electronic filing using the E-filing system (LGR 30).

☐ by causing a full, true and correct copy thereof to be **hand delivered** to the attorney(s) at the attorney(s) last-known office address(es) listed above on the date set forth below.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: March 4, 2014.

SEIDL LAW OFFICE, PC

By: _____

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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Appellant's Opening Brief** on:

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BY DEPUTY

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by the following indicated method or methods:

☐ **E-mail.** As required by ORCP 9, all attorneys served by e-mail have agreed in writing to e-mail service.

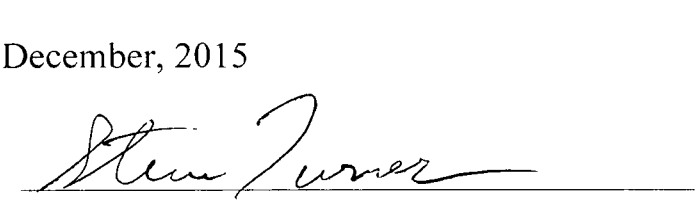
☐ **Facsimile communication device.**

✠ **First-class mail, postage prepaid.**

☐ **Hand-delivery.**

☐ **Overnight courier, delivery prepaid.**

DATED this 21st day of December, 2015



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