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Court of Appeals No. 59477-0-I  
King County Superior Court No. 05-2-08240-2 KNT

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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

Appellant/Cross-Respondent,

v.

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

Respondents/Cross-Appellants.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT**

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## TABLE OF CONTENTS

I.	APPELLANT’S REPLY BRIEF .....	1
A.	Introduction.....	1
B.	This Court’s Ruling Granting Review Highlights the Key Issue: Whether RCW 23B.13.020 Provides the Exclusive Remedy for a Minority Shareholder When a Closely Held Corporation Implements a Reverse Stock Split Under the Circumstances of this Case. ....	3
C.	Defendants’ “Double Recovery” Argument Is Without Merit.....	4
D.	RCW 23B.13.020 Is Not the Exclusive Remedy When a Minority Shareholder’s Challenge to the Improper Actions of the Majority Does Not Involve the Appraisal Price of the Shares. ....	5
E.	A Shareholder Who Has Standing When Commencing a Derivative Action Should Not Be Forced To Litigate the Derivative Claims in a Preliminary Injunction Hearing. ....	12
F.	The Issue of Whether the Implementation of a Reverse Stock Split May Constitute Minority Oppression Is Properly Before This Court.....	14
G.	Pisheyar Has Presented Evidence of His Damages and Should Be Permitted To Establish Them at Trial.....	15
II.	PISHEYAR’S RESPONSE TO DEFENDANTS’ CROSS APPEAL.....	21

## TABLE OF AUTHORITIES

### CASES

<u>Alpert v. 28 Williams Street Corp.</u> , 63 N.Y.2d 557 (N.Y. 1984).....	7
<u>China Products North America, Inc. v. Manewal</u> , 69 Wn. App. 767, 850 P.2d 565 (1993).....	6
<u>Gunderson v. Alliance of Computer Professionals, Inc.</u> , 628 N.W.2d 173 (Minn. App. 2001).....	16
<u>Haberman v. Washington Pub. Power Supply Sys.</u> , 109 Wn.2d 107, 744 P.2d 1032 (1987).....	22
<u>Hay v. Big Bend Land Co.</u> , 32 Wn.2d 887, 204 P.2d 488 (1949).....	12
<u>Hayes Oyster Co. v. Keypoint Oyster Co.</u> , 64 Wn.2d 375, 391 P.2d 979 (1964).....	12
<u>Hendrick v. Hendrick</u> , 755 A.2d 784 (R.I. 2000).....	16
<u>Masinter v. WEBCO Co.</u> , 262 S.E.2d 433 (W.Va. 1980).....	16
<u>Matteson v. Ziebarth</u> , 40 Wn.2d 286, 242 P.2d 1025 (1952).....	10, 11
<u>Matthews v. Wenatchee Heights Water</u> , 92 Wn. App. 541 (1998).....	10
<u>McLean v. Smith</u> , 4 Wn. App. 394, 482 P.2d 798 (1971).....	13
<u>McMinn v. MBF Operating Acquisition Corp.</u> , 164 P.3d 41 (N.M. 2007).....	7, 9, 10
<u>Noakes v. Schoenborn</u> , 841 P.2d 682 (Or. Ct. App. 1992).....	12
<u>Rabon v. City of Seattle</u> , 135 Wn.2d 278, 957 P.2d 621 (1998).....	13
<u>Rales v. Blasband</u> , 634 A.2d 927 (Del. 1993).....	22
<u>Scott v. Trans-System, Inc.</u> , 148 Wn.2d 701, 64 P.3d 1 (2003).....	11
<u>Seattle Western Industries, Inc. v. David A. Mowat Co.</u> , 110 Wn.2d 1, 750 P.2d 245 (1988).....	18

<u>Shermer v. Baker</u> , 2 Wn. App. 845, 472 P.2d 589 (1970).....	11
<u>Szaloczi v. John R. Behrmann Revocable Trust</u> , 90 P.3d 835 (Colo. 2004).....	6
<u>Tankersley v. Albright</u> , 80 F.R.D. 441 (N.D. Ill. 1978) .....	22
<u>Tooley v. Donaldson, Lufkin &amp; Jenrette, Inc.</u> , 845 A.2d 1031 (Del. 2004) .....	22
<u>Versuslaw, Inc. v. Stoel Rives, LLP</u> , 127 Wn. App. 309, 111 P.3d 866 (2005).....	19
<u>Wool Growers v. Simcoe Sheep Co.</u> , 18 Wn.2d 655, 140 P.2d 512 (1943).....	12

**STATUTES**

RCW 23B.13.020.....	passim
RCW 23B.13.300.....	5, 11

**OTHER AUTHORITIES**

“Briefly Speaking”, Brief Writing—Best Practices, Washington State Court of Appeals, Division I, <a href="http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.display_divs&amp;folderID=div1&amp;fileID=briefWriting">http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.display_divs&amp;folderID=div1&amp;fileID=briefWriting</a> .....	19
Standing to Commence and Maintain A Derivative Action, <u>Principles of Corporate Governance</u> § 7.02 (ALI 1994).....	13

## **I. APPELLANT'S REPLY BRIEF**

### **A. Introduction**

Afshin Pisheyar filed suit alleging breach of fiduciary duty, oppression of a minority shareholder and other acts of misconduct by the majority shareholders of two closely held corporations. Approximately five months after the suit was filed, the majority shareholders instituted reverse stock splits to forcibly remove Pisheyar as a shareholder of both corporations. After initially granting Pisheyar a preliminary injunction preventing his removal, the trial court dissolved the injunction. Shortly thereafter, Pisheyar was removed as a shareholder of both corporations.

In this Court's ruling granting review, Commissioner Craighead noted that the pivotal issue is the extent of remedies available to a minority shareholder after the majority shareholders have orchestrated his removal. In an issue of first impression, the trial court held that the appraisal remedy provided in RCW 23B.13.020 is the sole recourse for a minority shareholder who has been forcibly removed as a shareholder after he has alleged breach of fiduciary duty and minority oppression.

As discussed in Pisheyar's opening brief, the trial court's ruling fails to properly acknowledge that Washington courts have traditionally protected minority shareholders from the misconduct of the majority by recognizing common law claims for breach of fiduciary duty and oppression of minority shareholders. The trial court's order also fails to acknowledge that the primary purpose behind the appraisal remedy in

RCW 23B.13.020 is to protect minority shareholders and not to facilitate the misconduct of the majority by limiting the remedies available to minority shareholders. In addition, the legislative history behind the act, decisions from other jurisdictions, and the leading treatises on corporate law all support the position that a minority shareholder retains the right to pursue common law claims independent of the statutory appraisal remedy.

Respondent's Brief largely ignores the key issue of whether RCW 23B.13.020 provides the exclusive remedy. Instead, the Defendants focus primarily on damages. Not only is the issue of Pisheyar's damages not addressed in the Commissioner's ruling granting review, the trial court has never held that Pisheyar failed to establish the existence of his damages as a matter of law. The Defendants also fail to acknowledge that genuine issues of material fact exist that preclude summary judgment on the issue of damages.

In addition, Defendants argue repeatedly that Pisheyar should not be able to pursue an appraisal action in one court while also pursuing his common law claims in this case. This "double recovery" argument ignores the fact that the appraisal action only involves one of the two corporations at issue and that the corporation, not Pisheyar, initiated the appraisal action. The double recovery argument also fails because Pisheyar is pursuing damages in this action that stem from his common law claims and that are independent of the appraised fair value of his shares.

For these reasons, Defendants' obsession with damages should not distract this Court from the key issue: whether a minority shareholder who

has been forcibly eliminated as a shareholder after alleging misconduct by the majority is limited to the appraisal remedy in RCW 23B.13.020. If the trial court's decision is allowed to stand, it will have a chilling effect on all minority shareholders who have witnessed misconduct by the majority. If appraisal of shares is the sole remedy, no minority shareholder will be able to effectively challenge misconduct by the majority.

**B. This Court's Ruling Granting Review Highlights the Key Issue: Whether RCW 23B.13.020 Provides the Exclusive Remedy for a Minority Shareholder When a Closely Held Corporation Implements a Reverse Stock Split Under the Circumstances of this Case.**

In this Court's order granting review, Commissioner Craighead wrote:

The pivotal issue in this litigation is whether [RCW 23B.13.020] provides the exclusive remedy for a minority shareholder when a closely-held corporation implements a reverse stock split. A related issue is whether the trial court properly characterized various claims as direct or derivative and, based on those characterizations, properly either dismissed or denied dismissal of those claims. Discretionary review of these issues is granted. . . .

...

It is plain from the trial court's oral comments that it viewed the central issue in the litigation to be whether RCW 23B.13.020 provides an exclusive remedy in the circumstances of this case. Both parties argue that this court should grant discretionary review of this issue. Although the statute appears to be clear on its face, there is no published case law analyzing this provision. I agree with the trial court and the parties that discretionary review of this issue is appropriate because the issue is pivotal to the litigation and, in the absence of modern case law, there is

substantial ground for a difference of opinion.  
Discretionary review of this issue is granted.

...

There are three inter-related issues that appear to me to be suitable for discretionary review. The first is whether RCW 23B.13.020 provides Pisheyar's exclusive remedy. As noted above, this is the pivotal issue in the litigation. Second, related to this issue, is whether all of Pisheyar's derivative claims were properly dismissed. Third, there is the issue of whether the perquisite claims should also have been dismissed. These three issues all relate to the remedies available to Pisheyar following a reverse stock split that deprived him of his shareholder status. Discretionary review of these issues is granted.

Commissioner's Ruling [Granting Review], June 19, 2007 (footnote omitted).

As Commissioner Craighead noted, the issue of whether RCW 23B.13.020 provides the exclusive remedy for a minority shareholder when a closely held corporation implements a reverse stock split is key to this case. As the Commissioner also noted, both parties agreed that this Court should review this pivotal issue.

**C. Defendants' "Double Recovery" Argument Is Without Merit.**

Defendants argue that Pisheyar should not be allowed to pursue an appraisal action in one court while advancing common law claims in the case at hand. See, e.g., Resp. Br. at pp. 1-2, 24, 28-29, 39. Defendants' "double recovery" argument fails for two reasons.

First, Respondents imply that Pisheyar filed a separate appraisal action: "[Pisheyar] is seeking double recovery," Resp. Br. at 1; "Pisheyar

... seeks two bites of the apple,” Resp. Br. at 2; “Pisheyar wants to litigate in two courts as the same time,” Resp. Br. at 24; and “[Pisheyar] attempts to double-up his alleged damages in the Appraisal Proceeding and the trial court,” Resp. Br. at 39. This implication, however, is misleading.

Under Washington law, it is the corporation and not the shareholder that files the appraisal action. RCW 23B.13.300. Indeed, that is what happened here when Sound Infiniti, Inc. filed suit naming Pisheyar as a defendant in King County Case No. 06-2-19673-2SEA (the “Appraisal Proceeding”) (the Complaint filed by the Defendants in the Appraisal Proceeding is attached, without exhibits, as Appendix A.)

Second, only one of the two corporations at issue is a party to the Appraisal Proceeding. The other corporation, Infiniti of Tacoma at Fife, Inc., is not a party to the Appraisal Proceeding.

**D. RCW 23B.13.020 Is Not the Exclusive Remedy When a Minority Shareholder’s Challenge to the Improper Actions of the Majority Does Not Involve the Appraisal Price of the Shares.**

As discussed in Pisheyar’s opening brief, the dissenter’s rights found in RCW 23B.13.020 were intended to protect minority shareholders and complement the longstanding common law protections for shareholders. Indeed, this Court in discussing RCW 23B.13.020 has stated that “the purpose of dissenters rights statutes” is to protect “minority stockholders against oppressive action by the majority.” China Products North America, Inc. v. Manewal, 69 Wn. App. 767, 771 n.3, 850 P.2d 565

(1993) (holding that reincorporation of a Washington corporation in Delaware did not trigger dissenter's rights in RCW 23B.13.020).

Furthermore, the Official Legislative History to RCW 23B.13.020 recognizes that the statute does not limit a court's freedom to act if the corporation has violated a fiduciary duty and notes that the appraisal remedy may not be adequate in the presence of self dealing. The Defendants' quotation of a single phrase, Resp. Br. at p. 33, does not accurately reflect the legislative intent behind RCW 23B.13.020. See, Appellant's Br. at pp. 27-29 for a more thorough discussion of the Act's legislative history.

In discussing RCW 23B.13.020, Defendants state that disputes regarding the appraisal price must be litigated in an appraisal proceeding. Resp. Br. at pp. 26-27. In support of this position, the Defendants quote from Szaloczi v. John R. Behrmann Revocable Trust, 90 P.3d 835, 842 (Colo. 2004) ("A dissenting shareholder may not seek compensatory damages in addition to the appraisal remedy when the complaint 'boils down to nothing more than a complaint about stock price.'")

Pisheyar agrees with Szaloczi and the Defendants; a plaintiff who only complains about the stock price should be limited to the appraisal remedy. But that is not the case here.

First, as discussed above, the Appraisal Proceeding initiated by the Defendants concerns only one of the two corporations involved in this case.

Second, Pisheyar has advanced claims for minority oppression and breach of fiduciary duty that do not involve the stock price for either corporation. As the New York Court of Appeals has stated, an appraisal action may co-exist with suits involving other claims:

The appraisal action should not be dismissed on the ground that there is "another action pending" [citation omitted] because the other action is not "for the same cause of action" [citation omitted.] The two claims are not identical -- one seeks to enforce appraisal rights and the other, equitable relief from the merger [citation omitted]. The appraisal action may be stayed until the equitable action is resolved.

Alpert v. 28 Williams Street Corp., 63 N.Y.2d 557, 568 n.4 (N.Y. 1984).

Indeed, numerous jurisdictions have held that dissenter's rights were never intended to foreclose common law claims for breach of fiduciary duty or minority shareholder oppression. See pages 30-42 of Appellant's brief (discussing the McMinn, Mullen, Wienberger, Perl, Stepak, Bayberry Associates, Coggins, Lazar, Cohen, Sifferle, and Stringer cases.)

The most recent and relevant case is McMinn v. MBF Operating Acquisition Corp., 164 P.3d 41 (N.M. 2007), discussed on pages 30-37 of Appellant's Brief. Defendants attempt to distinguish this important case by citing a provision of New Mexico law that allows a shareholder's status to be restored if the shareholder fails to make a demand for fair value of his shares. Resp. Br. at 35. Noting that the McMinn court found this provision

to conflict with the appraisal remedy, the Defendants called this conflict the “foundation” to the McMinn opinion. Resp. Br. at 35.

Labeling this conflict the foundation to the McMinn opinion ignores the basis for the holding in that case. As the following excerpts from McMinn illustrate, the court was primarily concerned with preventing majority shareholders from using the appraisal process to oppress minority shareholders and to cover up misconduct by the majority:

[C]ontrolling shareholders in close corporations potentially could engage in oppressive tactics in breach of their fiduciary duties, and then escape liability for those actions simply by instituting an appraisal-triggering transaction to relegate minority shareholders to an appraisal proceeding for their shares.

...

Perhaps even more troubling than the prospect that exclusivity of appraisal will undermine the strict scrutiny of conflict of interest transactions is the possibility that appraisal will be used to extinguish legitimate claims based on director misconduct that occurred prior to the appraisal-triggering event. . . .

...

In a case like this, where controlling directors are alerted to allegations of a breach of fiduciary duty prior to considering a plan of merger, the institution of a merger transaction with no other purpose than to eliminate the non-controlling shareholder could be devised to relegate the complaining shareholder to an appraisal remedy in order to extinguish such claims. In such circumstances, the directors' conduct in designing the merger can itself be seen as a breach of fiduciary duty. Such conduct should not be permitted to go unscrutinized, and, if proven to breach a fiduciary duty, unredressed. . . . As the court in Kademian v. Ladish Co., 792 F.2d 614, 630 (7th Cir.1986) observed,

“the prospect that all shareholders will be paid off does not justify the corporation or its officers in acting unlawfully. The appraisal remedy cannot substitute for a suit for breach of fiduciary duty or other torts.” . . .

. . .

Nothing in the appraisal statute indicates that cashed-out shareholders cannot pursue claims based on conduct antecedent or unrelated to the appraisal-triggering transaction itself. Further, the express exception in the statute for unlawful actions encompasses claims based on director misconduct that breaches a fiduciary duty. As we have said, if appraisal were the exclusive remedy for shareholders of closely-held corporations whose interests are cashed out in conflict of interest mergers, then the remedy would no longer serve its original purpose: to protect dissenting shareholders. What was designed as a shield to benefit minority shareholders who had lost their power to veto fundamental corporate transactions, would be transformed into a sword for majority oppression of the minority. Such a result is contrary to longstanding common law principles of fiduciary duty.

McMinn, 164 P.3d at 51-53.

Defendants also attempt to distinguish McMinn because New Mexico’s statute allows an exception for “unlawful and fraudulent” acts while Washington’s statute only applies to fraudulent actions. Resp. Br. at 35. Defendants’ argument fails, however, because McMinn makes no distinction between “unlawful” or “fraudulent” actions and cites cases holding that a breach of fiduciary duty amounts to either unlawful or fraudulent conduct:

Oppressive conduct that breaches such fiduciary duties is unlawful . . . and therefore falls within the exception in the exclusivity provision for unlawful actions. See Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 62 P.3d 720, 729 (2003) (noting that “the term ‘fraudulent,’ as used in the Model

Act, has not been limited to the elements of common-law fraud; it encompasses a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders”); Smith v. N.C. Motor Speedway, Inc., 1997 WL 33463603, \*6 (N.C.Super.Ct.1997) (“[T]he dissent and appraisal procedure does not provide the exclusive remedy where a transaction is determined to be ‘unlawful or fraudulent,’ and ... a breach of fiduciary duty is subsumed within these terms.”).

McMinn, 164 P.3d at 51. Thus, Defendants’ attempt at distinguishing McMinn fails.

McMinn remains a thorough and well-reasoned decision that provides an excellent blueprint for resolving this case.

Defendants, however, rely upon two Washington cases, Matthews v. Wenatchee Heights Water, 92 Wn. App. 541 (1998) and Matteson v. Ziebarth, 40 Wn.2d 286, 297, 242 P.2d 1025 (1952), that provide little assistance in analyzing the exclusivity of RCW 23B.13.020. See Resp. Br. at 29-31.

The Matthews case, for example, simply states without analysis that the statute provides the exclusive remedy absent fraud, citing Matteson. Matthews, 92 Wn. App. at 555. The Matteson case was decided long before RCW 23B.13.020 was enacted; thus neither Matthews nor Matteson is helpful. In addition, Matteson did not involve a reverse stock split but rather an attempt to avoid a merger to which the shareholder failed to dissent. Matteson, 40 Wn.2d at 296. Under the statute in effect at that time, a shareholder who failed to dissent was bound by the corporate action. Id. The Matteson court concluded that: “Where a stockholder

consents to the corporate action, he is bound, under principles of estoppel, as to any claim of unfairness concerning which he had knowledge at that time.” Id. at 298.

As Commissioner Craighead noted, the Matteson case is not helpful:

An old Washington case, Matteson v. Ziebarth, 40 Wn. 2d 286, 242 P.2d 1025 (1952), held that the then applicable appraisal statute provided an exclusive remedy when a minority shareholder alleged unfairness short of fraud. The facts are significantly different, however, from this case.

Commissioner’s Ruling, June 19, 2007 at p. 6 n.3.

Defendants also argue that Pisheyar’s failure to request corporate dissolution under RCW 23B.14.300 undermines his minority oppression claim. Resp. Br. at 46. This argument also fails, however, because the Washington Supreme Court has held that courts retain the authority to fashion alternative remedies short of dissolution to redress oppressive conduct by those in control of a corporation. Scott v. Trans-System, Inc., 148 Wn.2d 701, 717-18, 64 P.3d 1 (2003). Thus, there is no requirement that a plaintiff request dissolution.

Defendants also suggest that no Washington case applies a heightened duty standard among shareholders in closely held corporations. Resp. Br. at 46. This suggestion is incorrect. See Shermer v. Baker, 2 Wn. App. 845, 472 P.2d 589 (1970) (majority shareholders stand in a fiduciary relation to corporation and its shareholders and owe a duty to minority not to profit at their expense); Hayes Oyster Co. v. Keypoint Oyster Co., 64

Wn.2d 375, 381, 391 P.2d 979 (1964) (officers and directors occupy fiduciary relation to corporation and shareholders akin to that of a trustee, and owe undivided loyalty and standard of behavior above that of the work world); Hay v. Big Bend Land Co., 32 Wn.2d 887, 897, 204 P.2d 488 (1949) (majority shareholders stand in a fiduciary relation to and must at all times exercise good faith toward minority shareholders); Wool Growers v. Simcoe Sheep Co., 18 Wn.2d 655, 691, 140 P.2d 512 (1943) (same).

As discussed in Appellant's brief, the protective purpose of appraisal statutes, the Official Legislative History to RCW 23B.13.020, McMinn and the numerous cases from other jurisdictions, and the leading treatises on corporate law all support the position that dissenter's rights statutes were never intended to foreclose common law claims for breach of fiduciary duty or minority shareholder oppression.

**E. A Shareholder Who Has Standing When Commencing a Derivative Action Should Not Be Forced To Litigate the Derivative Claims in a Preliminary Injunction Hearing.**

The Oregon Court of Appeals and the principals of corporate governance published by the American Law Institute provide that an ex-shareholder has standing throughout the course of a derivative action if that shareholder objected to the corporate action that stripped the shareholder of his or her shares in the corporation. Noakes v. Schoenborn, 841 P.2d 682 (Or. Ct. App. 1992); Standing to Commence and Maintain A

Derivative Action, Principles of Corporate Governance § 7.02 (ALI 1994).  
Pisheyar urges this Court to adopt the Noakes rule.

Defendants attempt to distinguish Noakes by arguing that Pisheyar had the opportunity to contest the implementation of the reverse stock splits by seeking a preliminary injunction. Resp. Br. at 15. Defendants argue that the interests of the corporations were protected in the injunction hearing because the trial court concluded that the Defendants had not harmed the corporations. Defendants' argument, however, mischaracterizes the purpose of a preliminary injunction.

The purpose of a preliminary injunction is "to preserve the status quo of the subject matter of a suit until a trial can be had on the merits." McLean v. Smith, 4 Wn. App. 394, 399, 482 P.2d 798 (1971). In granting or denying a preliminary injunction, the trial court may reach the merits of only purely legal questions and it may not adjudicate the ultimate merits of the case. Rabon v. City of Seattle, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). As the Rabon court stated:

We hold that in ruling on a request for a preliminary injunction the trial court must reach the merits of purely legal issues for purposes of deciding whether to grant or deny the preliminary injunction, and a reviewing court must similarly evaluate purely legal issues in assessing the propriety of a decision to grant or deny a preliminary injunction. However, in accord with well-settled principles, a court is not to adjudicate the ultimate merits of the case.

Rabon, 135 Wn.2d at 286.

A shareholder who has filed a derivative action should not be limited to an injunction hearing to determine the ultimate merits of his or her case. Nor should a shareholder be forced to resort to seeking a preliminary injunction to maintain his or her shareholder status. Rather, a shareholder who had standing when the derivative suit commenced, has standing to have these derivative claims resolved at trial, where the ultimate merits of the plaintiffs' case will be properly adjudicated. Because Pisheyar had standing when he commenced his suit, and because he did not agree with the corporate acts that stripped him of his shareholder status, this Court should hold that he has standing to maintain his derivative claims.

**F. The Issue of Whether the Implementation of a Reverse Stock Split May Constitute Minority Oppression Is Properly Before This Court.**

Without citation to the record, Defendants curiously argue that the issue of whether the implementation of a reverse stock split may constitute minority oppression is not properly before this Court. Resp. Br. at 45. Moreover, Defendants actually state that "Commissioner Craighead specifically considered and rejected" this argument. *Id.* Defendants' failure to cite to the page in the ruling where Commissioner Craighead allegedly "rejected" this argument is understandable given that the alleged rejection never appears in the ruling.

Furthermore, Defendants' incorrectly state that "[t]he trial court never certified the issue for review." Resp. Br. at 45. In reality, the trial

court has certified this issue for review. The trial court's December 28, 2006 order states:

A. The following claims for "minority shareholder oppression" are dismissed:

- 1) Plaintiff's claim for damages arising from Defendant's implementation of the reverse stock split . . .

CP 509.

The trial court subsequently certified the December 28 order for discretionary review. CP 535. Thus, the Defendants' unsupported assertion is without merit.

**G. Pisheyar Has Presented Evidence of His Damages and Should Be Permitted To Establish Them at Trial.**

The trial court's December 28 order severely impeded Pisheyar's oppression claim by limiting the scope of his evidence and his remedy for damages to only those arising from the "alleged deprivation of shareholder 'perquisites,' such as demo cars, sports tickets, and the like." CP 509. In addition, the trial court's December 28 order effectively eviscerated his individual claims for breach of fiduciary duty, conversion of corporate assets, and breach of shareholder agreement. At trial, Pisheyar should be allowed to prove all damages resulting from the majority shareholders' conduct, rather than being limited to damages for only the loss of benefits such as the use of "demo" cars and tickets to sporting events.

Throughout their brief, Defendants argue that Pisheyar has failed to prove he has been damaged by Defendants' actions. The trial court,

however, has never held that, as a matter of law, Pisheyar failed to establish the existence of his damages.

In addition, at the summary judgment stage Pisheyar need only show that genuine issues of material fact exist as to the existence of any damages. The record is replete with descriptions of Pisheyar's damages. CP 12-29, 94-102, 233, 271-73, 410-62, 481-90, 557-74, 2640-61. The assessment of that evidence is the task of the ultimate finder of fact.

Indeed, a plaintiff's minority oppression claim is not suitable for summary judgment "[b]ecause whether a shareholder's reasonable expectations have been frustrated is essentially a fact issue." Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173, 186 (Minn. App. 2001); Hendrick v. Hendrick, 755 A.2d 784 (R.I. 2000) (summary judgment precluded because material fact issue existed as to whether minority shareholder in close corporation had been subject of oppressive conduct by majority shareholder); Masinter v. WEBCO Co., 262 S.E.2d 433 (W.Va. 1980) (same).

In holding that summary judgment was inappropriate, the Hendrick court noted that the trier of fact must consider whether the cumulative effect of a defendant's actions constituted oppression:

[O]ppression within a closely held corporation can manifest itself as a series of acts or a pattern of conduct by majority shareholders that can have the cumulative, overall effect of freezing out or depriving the minority shareholder of a voice in the corporation, as well as manifesting itself in more distinct, identifiable actions.

Hendrick, 755 A.2d at 792.

Throughout the record, Pisheyar has identified several instances of individual harm, such as:

Defendants' wrongful exclusion of Pisheyar. The Defendants prevented Pisheyar from attending meetings and participating in major decisions affecting Infiniti of Tacoma at Fife, Inc. and Sound Infiniti, Inc. CP 16-20, 563-65. Had Pisheyar been permitted to attend these meetings, he would have become aware of decisions being made by the majority shareholders to benefit themselves to the detriment of the business and the other shareholders. Had Pisheyar known about the majority shareholders' decision to take money from the corporations to benefit their Nissan of the Eastside venture, thereby leaving the corporations undercapitalized, he would have been able to object to it and take action to prevent it from occurring. The money which the majority shareholders took could have been used by the businesses for the benefit of the businesses, thereby generating more profits and increasing the value of the businesses. For example, had Pisheyar been able to use that money to purchase used cars for the benefit of the businesses, he would have been able to generate several hundred thousand dollars of profits for these businesses. He would have been entitled to receive 19% of such profits, and if he ultimately sold his interest he would be entitled to receive 19% of the increased value of the businesses based upon their increased profitability. Pisheyar estimates his damages for this wrongful exclusion at \$270,000. CP 482-87.

Wrongful exclusion from Nissan of Eastside, Inc. The direct consequence of Defendants' decision to exclude Pisheyar from Nissan of

Eastside, Inc. is Pisheyar's loss of a 19% interest in the Nissan dealership and a loss of 33.3% of the associated real property. Pisheyar calculated that his damages from being excluded from Nissan of Eastside, Inc. amount to \$3,902,000, plus 33.33% interest in the real property associated with the Defendant's investment in Nissan of Eastside, Inc. The \$3,902,000 figure is equal to Pisheyar's interest in Sound Infiniti, Inc. CP 487-88. Pisheyar's expert, Neil J. Beaton, has determined these damages to be in the range of \$1,734,000 to \$2,929,000. CP 487.

Wrongful termination. The direct consequence of breach of the written agreement to retain Pisheyar as an employee of Sound Infiniti is the loss of his salary and benefits. For example, from 2001 to 2004, Pisheyar's salary from Sound Infiniti ranged from \$24,000 to \$131,847.49 per year. CP 417-20.

As the Washington Supreme Court has explained, the difficulty of ascertaining the amount of damage should not be confused with the fact of damage:

The difficulty of calculating damages should not be confused with proof of damage as a necessary element of the plaintiff's case. Once the fact of damage has been established by a preponderance, the plaintiff is obligated to produce only the best evidence available which will afford the jury a reasonable basis for estimating the dollar amount of his loss. So long as the jury is not left to speculate or conjecture, it has wide latitude in calculating damages.

Seattle Western Industries, Inc. v. David A. Mowat Co., 110 Wn.2d 1, 6, 750 P.2d 245 (1988) (citing Jacqueline's Wash., Inc. v. Mercantile Stores

Co., 80 Wn.2d 784, 498 P.2d 870 (1972) and Reefer Queen Co. v. Marine Constr. & Design Co., 73 Wn.2d 774, 440 P.2d 448 (1968)). Here, Pisheyar has presented sufficient evidence of the fact of his damages to satisfy his summary judgment burden. See, e.g., Versuslaw, Inc. v. Steel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866 (2005) (because issues of material fact existed, trial court erred when it ruled as a matter of law that plaintiff did not incur any damages).

Defendants' argument regarding damages is further undercut by their frequent citation to legal arguments in the record where Defendants' counsel argued that certain facts were established, instead of citing to evidence supporting Defendants' position. As this Court has explained in its guidelines for appellate briefs:

In summary judgment cases, cite to the places in the record where the disputed facts are arguably established or contradicted. Do not cite to the place in the record where trial counsel argued that certain facts were established or contradicted. In other words, cite to the affidavit or declaration, not the memorandum supporting or opposing the motion.

“Briefly Speaking”, Brief Writing—Best Practices, Washington State Court of Appeals, Division I.<sup>1</sup>

Here, however, Defendants frequently cite to their legal arguments before the trial court. For example:

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<sup>1</sup> Available at:  
[http://www.courts.wa.gov/appellate\\_trial\\_courts/index.cfm?fa=atc.display\\_divs&folderID=div1&fileID=briefWriting](http://www.courts.wa.gov/appellate_trial_courts/index.cfm?fa=atc.display_divs&folderID=div1&fileID=briefWriting)

On page 8 of their brief, Defendants cite to CP 2144 to support a factual assertion. This citation is to Defendants' motion to strike claims.

On page 19, Defendants cite to CP 2284-2301. This citation is to a motion by the Defendants.

On page 42, Defendants cite to CP 2140-2265. Pages 2140 to 2154 of the Clerk's Papers are a motion by the Defendants.

On page 42, Defendants cite to CP 2795-2800. This cite is Defendants' reply in support of a motion.

On pages 42 and 44, Defendants cite to CP 2804-2819. This citation is to another motion filed by Defendants.

Finally, Defendants fail to address the chilling effect upon minority shareholders that will result if the trial court's order is allowed to stand. Few minority shareholders will dare to challenge the misconduct of the majority for fear that the challenge will result in their losing their interest in the corporation, with appraisal as their only remedy. Minority shareholders who do not challenge the majority, but who have invested time, labor or money in the development of a nascent corporation, may find themselves suddenly excluded from the corporation just as the entity begins to make money, with appraisal as their only remedy. This Court should honor Washington's longstanding protections for minority shareholders and hold that a minority shareholder may pursue common law claims independent of the statutory appraisal remedy.

## II. PISHEYAR'S RESPONSE TO DEFENDANTS' CROSS APPEAL

This Court granted discretionary review of one of the issues advanced by Defendants, namely whether the trial court erred by failing to dismiss Pisheyar's claim for damages stemming from the deprivation of shareholder perquisites, such as demo cars and sports tickets. The Defendants contend that this claim is derivative.

Ironically, the Defendants previously argued to the trial court that Pisheyar's "fringe benefits" claim was a direct claim and not derivative. In their April 21, 2005 Motion to Dismiss, Defendants contended that Pisheyar's oppression claim should be dismissed because he had alleged only individual harm:

Here, the Complaint alleges harm to and seeks recovery on behalf of Plaintiff individually. The only injuries Pisheyar claims to have suffered are to himself as a shareholder in the corporations or member in the LLCs. He does not even attempt to make a case for any injury to the entities themselves. Simply stated, Pisheyar's claims concern his alleged personal oppression as a shareholder and member, breach of his alleged individual contract rights and denial of this alleged 'fringe benefits' . . . :

**Claims 1 and 2:** These claims relate to the alleged denial of Pisheyar's access to corporate meetings and to "fringe benefits." Both claims thus seek to protect his minority shareholder rights, not rights of all shareholders alike.

. . .

In sum, Pisheyar's claims are classically direct in that they seek individual relief.

Appellant's Second Supplemental Designation of Clerk's Papers at pp. 10-11 (Defendants' Motion to Dismiss, April 21, 2005 (emphasis added)).

Remarkably, defendants now argue that this “fringe benefit” claim is derivative and not individual, and therefore it should have been dismissed when the trial court dismissed Pisheyar’s other derivative claims for lack of standing. Resp. Br. at 40. The Defendants, however, got it right the first time: The deprivation of these perquisites is an individual or direct action and not derivative.

Derivative suits “have been used most frequently as a means of redressing harm to a corporation allegedly resulting from misconduct by its directors.” Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993). In a derivative suit, “a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit.” Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032 (1987) (citations omitted). Thus, a derivative action is one where the corporation suffered the alleged harm and would receive the benefit of the recovery or remedy. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035 (Del. 2004).

Determining whether an action is derivative or direct is “based on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?” Tooley, 845 A.2d at 1035; Tankersley v. Albright, 80 F.R.D. 441, 444 (N.D. Ill. 1978) (“Generally, an action is derivative when the wrong sought to be redressed is primarily against the corporation, the whole body of stock or corporate property. On the other hand, where it appears that the injury is directly suffered by an individual

shareholder or relates directly to an individual's stock ownership, the action is personal.")

Here, Pisheyar alone suffered the loss of fringe benefits, such as not being furnished with a new demo automobile or not being allowed access to sporting events. CP 13, 573-74, 2649-50. Because these damages were suffered personally by Pisheyar, they are individual or direct damages. As a result, the trial court correctly held that these claims are individual and not derivative. Thus, Defendants' appeal is without merit.

DATED this 14<sup>th</sup> day of January, 2008.

VANDEBERG JOHNSON &  
GANDARA, LLP

By   
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Attorneys for Appellant/Cross-  
Respondent Afshin Pisheyar

APPENDIX A: Complaint for Appraisal of Fair Value of Shares,  
Sound Infiniti, Inc. v. Afshin Pisheyar, King County  
Case No. 06-2-19673-2SEA, filed June 16, 2006  
(without exhibits).

# **APPENDIX A**

FILED

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

SOUND INFINITI, INC., d/b/a INFINITI OF  
KIRKLAND, a Washington corporation,

Plaintiff,

v.

AFSHIN PISHEYAR,

Defendant.

NO. **06 - 2 - 19673 - 2SEA**

COMPLAINT FOR APPRAISAL OF  
FAIR VALUE OF SHARES

1. Plaintiff Sound Infiniti, Inc., d/b/a/ Infiniti of Kirkland ("Sound Infiniti" or the "Corporation") is a Washington corporation with its principal place of business in Kirkland, Washington. Sound Infiniti has paid all required fees. Sound Infiniti was incorporated in 1996 and operates an Infiniti automobile dealership in Kirkland, Washington. Plaintiff brings this action pursuant to RCW 23B.13.300, to seek an appraisal of the "fair value", as that term is defined at RCW 23B.13.010(3), of the fractional shares of the Corporation's stock held by a former shareholder of Sound Infiniti who dissented from

COMPLAINT FOR APPRAISAL OF FAIR  
VALUE OF SHARES - 1

[57751-0002/SL061420.037]

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1 amendment of the Articles of Incorporation of Sound Infiniti (the "Articles of  
2 Incorporation") effecting a reverse stock split.  
3

4           2. Defendant Afshin Pisheyar ("Pisheyar") is a resident of King County,  
5 Washington and a former Sound Infiniti shareholder who has dissented from the amendment  
6 of the Articles of Incorporation that effected a reverse stock split.  
7  
8

9           3. This Court has jurisdiction over this matter pursuant to RCW 23B.13.300,  
10 and because Pisheyar resides in Washington state. Venue is proper in King County,  
11 Washington, the location of Sound Infiniti's principal and registered offices.  
12  
13

14           4. Prior to the amendment of the Articles of Incorporation that effected the  
15 reverse stock split, the shareholders of Sound Infiniti were David H. Hannah, Richard M.  
16 Snyder, and Pisheyar. Mr. Snyder owned 30% of the Corporation's shares, Mr. Hannah  
17 owned 51%, and Pisheyar owned 19%.  
18  
19

20           5. On December 29, 2005, Sound Infiniti sent a Notice of Special Meeting of  
21 Shareholders informing its shareholders of a January 24, 2006 meeting to consider a  
22 proposed reverse stock split and related amendments to the Articles of Incorporation. The  
23 notice also informed shareholders of their right to dissent under RCW 23B.13 as required by  
24 RCW 23B.13.200(1). The notice included a copy of the Dissenters' Rights Statute (RCW  
25 23B.13). A copy of the December 29, 2005 notice sent to shareholders, including Pisheyar,  
26 is attached as *Exhibit A*.  
27  
28

29           6. On January 23, 2006, Pisheyar provided notice of his intent to demand  
30 payment for the fair value of his shares of stock and to dissent from voting any of his shares  
31 of stock in favor of the reverse stock split and related amendment to the Articles of  
32 Incorporation, citing RCW 23B.13.210. A copy of Pisheyar's notice is attached as *Exhibit*  
33 *B*.  
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1           7.       At the January 24, 2006 noticed meeting of shareholders, Sound Infiniti's  
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3 shareholders voted to approve the proposed reverse stock split and proposed amendments to  
4  
5 the Articles of Incorporation. A copy of the January 24 meeting Minutes is attached as  
6  
7 *Exhibit C*.

8  
9           8.       On January 25, 2006, Sound Infiniti filed its Articles of Amendment of  
10  
11 Sound Infiniti (the "Articles of Amendment") with the Secretary of State. A copy of the  
12  
13 Articles of Amendment is attached as *Exhibit D*.

14           9.       Pursuant to RCW 23B.01.230, 23B.10.060 and 23B.01.250, the reverse stock  
15  
16 split became effective on January 25, 2006 with the filing of the Articles of Amendment  
17  
18 with the Secretary of State.

19  
20           10.      On March 24, 2006, pursuant to RCW 23B.13.230, Pisheyar deposited his  
21  
22 Sound Infiniti stock certificate and demanded payment for his shares of capital stock in  
23  
24 Sound Infiniti. A copy of Pisheyar's tendered stock certificate is attached as *Exhibit E* and a  
25  
26 copy of his Demand for Payment is attached as *Exhibit F*.

27  
28           11.      By letter dated April 3, 2006, Sound Infiniti sent to Pisheyar a check for the  
29  
30 amount equal to Sound Infiniti's calculation of the fair value of the Pisheyar's shares in  
31  
32 Sound Infiniti, together with interest from the effective date of the amendment of the  
33  
34 Articles of Incorporation. In compliance with RCW 23B.13.250, Sound Infiniti also  
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36 included with the payment: (a) the Corporation's balance sheets and income statements for  
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38 the calendar years ending December 31, 2004 and December 31, 2005, reflecting the change  
39  
40 in shareholders' equity between 2004 and 2005; (b) an explanation of how Sound Infiniti  
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42 estimated the fair value of Pisheyar's shares; (c) an explanation of how interest was  
43  
44 calculated; and (d) a copy of RCW 23B.13. A copy of all the materials sent to Pisheyar on  
45  
46 April 3, 2006, including a copy of the check, is attached as *Exhibit G*.  
47

1           12.     On April 26, 2006, Pisheyar rejected Sound Infiniti's tender of fair value as  
2 inadequate, and, citing RCW 23B.13.280, he demanded additional payment for his fractional  
3 shares. A copy of Pisheyar's letter and its attachments are attached as *Exhibit H*.  
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6           13.     Sound Infiniti and Pisheyar have not resolved their dispute regarding the fair  
7 value of Pisheyar's fractional shares of stock in Sound Infiniti.  
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10           14.     This action is filed within 60 days of Sound Infiniti's receipt of Pisheyar's  
11 demands for additional payment in order to seek a Court determination of the fair value of  
12 Pisheyar's fractional shares as defined at RCW 23B.13.010(3).  
13  
14

15           WHEREFORE, Sound Infiniti requests that the Court:  
16  
17

18           A.     Determine that the fair value of Pisheyar's fractional shares of Sound Infiniti  
19 stock immediately preceding the effective date of the Articles of Amendment effecting the  
20 reverse stock split, pursuant to RCW 23B.13.300, is equal to no more than the amount  
21 tendered to Pisheyar on April 3, 2006, attributable to the fair value of the fractional shares  
22 and excluding the interest component of that payment, as set forth in *Exhibit G*;  
23  
24

25           B.     Enter a judgment determining that the fair value of Pisheyar's stock is no  
26 more than the amount tendered to Pisheyar on April 3, 2006, attributable to the fair value of  
27 the fractional shares and excluding the interest component of that payment, as set forth in  
28 *Exhibit G*;  
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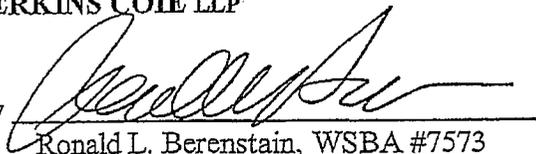
31           C.     Enter a judgment that all of Pisheyar's claims with respect to Sound Infiniti  
32 are fully resolved; and  
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35           D.     Grant such other and further relief as may be appropriate under the  
36 circumstances.  
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DATED: June 15, 2006.

PERKINS COIE LLP

By



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COMPLAINT FOR APPRAISAL OF FAIR  
VALUE OF SHARES - 5

[57751-0002/SL061420.037]

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