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BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON CLERK

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.

SUPPLEMENTAL BRIEF OF APPELLANT

VANDEBERG JOHNSON &
GANDARA, LLP

Lucy R. Clifthorne, WSBA #27287
Daniel C. Montopoli, WSBA #26217
James A. Krueger, WSBA #3408
Attorneys for Appellant/Cross-
Respondent Afshin Pisheyar

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I. INTRODUCTION

Afshin Pisheyar submits this supplemental brief to bring to the Court's attention recent cases holding that appraisal should not be the exclusive remedy for plaintiffs whose shareholder status is forcibly revoked by majority shareholders after the plaintiffs allege misconduct by the majority. These cases underscore the importance of reversing the Court of Appeals decision in *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 186 P.3d 110 (2008). This brief also summarizes additional reasons why this Court should reverse the *Sound Infiniti* decision.

In an issue of first impression, *Sound Infiniti* held that in the absence of fraud, the appraisal remedy in RCW 23B.13.020 is the sole recourse for a plaintiff and that majority shareholders may remove a minority shareholder even after he has filed a derivative action alleging misconduct by the majority. The *Sound Infiniti* decision even precludes the excluded shareholder from citing his forced removal in support of a claim for oppression of a minority shareholder.

Moreover, by allowing majority shareholders to easily eliminate a complaining shareholder, *Sound Infiniti* effectively overturns long-standing common law protections for minority shareholders. With appraisal as the sole remedy, plaintiffs will no longer be able to effectively pursue claims for minority oppression or breach of fiduciary duty. Minority shareholders who witness misconduct will have to remain silent or risk being forced to sell their shares of stock.

In addition, Pisheyar contends that he has standing to maintain shareholder derivative claims because the Defendants implemented a reverse stock split solely to remove him as a shareholder after he filed derivative claims. However, *Sound Infiniti* held that Pisheyar lost standing to maintain derivative claims after the majority shareholders “froze him out” by means of a reverse stock split. The Court of Appeals then mischaracterized many of Pisheyar’s individual claims as derivative and dismissed them for lack of standing, as well.

The *Sound Infiniti* decision effectively grants majority shareholders immunity from suit. When faced with a minority shareholder who challenges majority misconduct, the majority need only implement a reverse stock split or a force out merger to remove the minority shareholder. Under *Sound Infiniti*, the minority shareholder will be prohibited from pursuing both individual claims, such as breach of fiduciary duty and minority oppression, and derivative claims. Accordingly, Washington’s tradition of protecting minority shareholders from the dishonest or oppressive practices of majority shareholders will be nullified.

For these reasons, Plaintiff Afshin Pisheyar requests that this Court reverse the decision of the Court of Appeals in *Sound Infiniti*.

II. ARGUMENT

A. Recent Case Law Regarding the Non-Exclusivity of the Appraisal Remedy

1. The Supreme Court of Utah Holds that the Appraisal Remedy Does Not Prohibit Breach of Fiduciary Duty Claims.

On November 8, 2008, the Supreme Court of Utah held that a plaintiff could present evidence of a breach of fiduciary duty, unjust enrichment and fraud that challenged the validity of a merger independent of an appraisal action. *Borghetti v. System & Computer Tech, Inc.*, 199 P.3d 907, 916-17. (Utah 2008) (applying Delaware law). Because the plaintiff had the right to bring these claims, the trial court erred when it granted the defendants' motion for summary judgment on this issue. *Id.*

In reaching this conclusion, the *Borghetti* court began by noting the limited nature of an appraisal action under Delaware law:

By statute, shareholders in Delaware corporations are entitled to a judicial determination or appraisal of the fair value of their shares in the event of a merger. . . . Although an appraisal action challenges the adequacy of the price paid for the plaintiff's shares, it does not challenge the validity of the merger transaction itself, and rescission is not an available remedy. The only remedy available is an award for damages for the difference between the court-determined fair value and the price that was actually paid for the plaintiff's shares. . . . Therefore, the court in an appraisal action *assumes the validity of the merger* and focuses exclusively on the fair value of the shareholder's shares.

Borghetti, 199 P.3d at 912-13 (footnotes omitted). The court then noted that claims for breach of fiduciary duty, unjust enrichment and fraud

attack the validity of the merger and are intended to provide different remedies than those available in an appraisal action:

Unlike an appraisal action, which assumes the validity of the merger, claims for fraud, breach of fiduciary duty, and unjust enrichment challenge the validity of the merger itself. As the Delaware Supreme Court in *Cede & Co. v. Technicolor* noted, “a statutory appraisal proceeding under section 262 and a rescissory suit for fraud, misrepresentation, self-dealing and other actionable wrongs violative of ‘entire fairness’ to minority shareholders serve different purposes and are designed to provide different, and not interchangeable, remedies.” In contrast to an appraisal action, which limits plaintiffs to recovering the fair value of their shares in the context of a merger that is assumed to be valid, plaintiffs asserting claims for fraud, breach of fiduciary duty, or unjust enrichment can seek rescission.

Borghetti, 199 P.3d at 914 (footnotes omitted). For these reasons, the *Borghetti* court held that the trial court improperly dismissed plaintiffs’ claims for breach of fiduciary duty, unjust enrichment, and fraud.

Thus, the decision in *Borghetti* contradicts that of *Sound Infiniti*, which precluded Pisheyar from presenting evidence of a breach of fiduciary duty even when he was attacking the validity of the reverse stock split itself. Similarly, *Borghetti*’s view of the limitations in the appraisal process, based upon Delaware case law, disagrees with *Sound Infiniti*’s claim that the appraisal process can address breaches of fiduciary duty and minority oppression.

2. The Supreme Court of New Mexico Reaffirms Its Holding in *McMinn*.

In 2007, the Supreme Court of New Mexico held that the statutory appraisal rights were not the exclusive remedy for a minority shareholder who lost his shareholder status pursuant to a “freeze out” merger involving two closely held corporations. *McMinn v. MBF Operating Acquisition Corp.*, 164 P.3d 41, 49-50 (N.M. 2007). As a result, *McMinn* held that the appraisal remedy did not prevent the plaintiff from “seeking compensatory damages for breach of fiduciary duty.” *McMinn*, 164 P.3d at 57.

More recently, the New Mexico Supreme Court reaffirmed *McMinn*'s holding that conflict of interest transactions must be “held up to careful scrutiny under fiduciary duty principles implicating the duty of loyalty.” *Peters Corp. v. New Mexico Banquest Investors Corp.*, 144 N.M. 434, 188 P.3d 1185, 1193 (2008). The *Peters* case, however, distinguished *McMinn* because, unlike the shareholder in *McMinn*, “the Peters Group was not ‘frozen-out’ of anything.” *Id.* Also in contrast to the facts in *McMinn*, the stock redemption in *Peters* “did not involve a conflict of interest that would create a presumption of self-dealing.” *Id.* Neither the defendant corporation nor its controlling shareholder “stood on both sides of the transaction” with the third party purchaser. Rather, it was an arms length transaction between unrelated entities, governed by a shareholders agreement, and motivated by legitimate business concerns for the defendant corporation. *Id.* Thus, appraisal was the appropriate remedy for

the Peters Group's decision not to remain shareholders. *Id.* at 1193-94. In other words:

McMinn II simply allows the shareholder to make a case that, under the exception to exclusivity, (1) the controlling shareholders breached a fiduciary duty, and (2) that breach rose to the level of unlawful or fraudulent, entitling the shareholder to a remedy beyond the fair value of his shares, such as punitive damages or disgorgement of profits. The Peters Group got to make their case; *McMinn II* does not mandate that they win it.

Peters, 188 P.3d at 1194. Thus, the *Peters* case upheld the trial court's ruling—*after* a bench trial—that the plaintiff was not entitled to disgorgement. *Peters*, 188 P.3d at 1196.

However, *Peters* left *McMinn*'s holding intact and applicable when minority shareholders are frozen out by a conflict of interest transaction. Here, the Defendants stood on both sides of the reverse stock split that was used to eliminate an unwanted shareholder. Thus, the reverse stock split was a conflict of interest transaction warranting careful scrutiny under fiduciary duty principles implicating the duty of loyalty. Given the similarities between *McMinn* and the case at hand, *McMinn* remains a blueprint for resolving this case. Unlike the plaintiff in *Peters*, Pisheyar has not had the opportunity to make his case at trial.

3. Florida Also Holds that Appraisal Is Not the Exclusive Remedy when Minority Shareholders Allege Breach of Fiduciary Duty.

In an issue of first impression in Florida, its court of appeals recently held that minority shareholders who brought a breach of fiduciary

duty claim against majority shareholders in a closely held corporation were entitled to a hearing beyond an appraisal proceeding. *Williams v. Stanford*, 977 So.2d 722 (Fla. App. 1 Dist. 2008). Under Florida law, the appraisal process is a minority shareholder's exclusive remedy unless "the minority shareholder has alleged that the challenged transaction "[w]as procured as a result of fraud or material misrepresentation." *Id.* at 727 (citing § 607.1302(4)(b), Fla. Stat. (2003)).

The plaintiff in *Williams* argued that "corporate malfeasance" by the majority shareholders satisfied Florida's fraud or material misrepresentation exception. The *Williams* court agreed:

The Williams brothers argue their allegations of corporate malfeasance on the Stanfords' part fall under the ambit of subsection (4)(b) and constitute facially sufficient allegations that raise factual issues for resolution by a finder of fact. **The argument has force.** Pending a fact-finder's determination as to the truth of the Williams brothers' allegations, the brothers suggest they have shown "fraud or material misrepresentation" entitling them, in their shareholder-derivative stance, to rescission or such other curative remedies as might restore the parties to the status quo ante. **We reject the concept, implicit in appellees' argument, that a buy-back at the fair value of the stock immediately before the Stanfords' disposition of corporate assets would suffice as a complete remedy.**

Williams, 977 So.2d at 727 (emphasis added).

The *Williams* court then looked to Delaware for guidance and noted that Delaware holds the appraisal process may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved."

Williams, 977 So.2d at 728 (citations omitted). Next, *Williams* noted a recent Delaware case has interpreted the “fraud and material misrepresentation” exception to be “essentially synonymously with ‘unfair dealing.’” *Id.* at 729 (quoting *Berger v. Intelident Solutions, Inc.*, 911 A.2d 1164, 1171 (Del. Ch. 2006)).

The *Williams* court then held that it was error for the trial court to grant the defendants’ summary judgment motion because:

We interpret the “fraud or material misrepresentation” exception . . . to mean that a minority shareholder who alleges specific acts of “fraud, misrepresentation, self-dealing, [or] deliberate waste of corporate assets,” *Weinberger*, 457 A.2d at 714, may be entitled to equitable remedies beyond an appraisal proceeding if those allegations are proven true and if the alleged acts have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder. . . [W]e reverse summary judgment and remand for factual determinations as to the truth of appellants’ allegations of fraud, misrepresentation, and breaches of fiduciary duty on the Stanfords’ part.

Williams, 977 So.2d at 730.

Thus, *Williams* held that the term fraud incorporates claims for breach of fiduciary duty and other forms of corporate mismanagement and that these claims may be brought outside of the appraisal process when the plaintiff seeks equitable remedies. Like the plaintiffs in *Williams*, Pisheyar is seeking equitable remedies. As *Williams* notes, equitable remedies lie outside the scope of an appraisal proceeding. Nevertheless, the *Sound Infiniti* court applied an inappropriately narrow definition of fraudulent, while ignoring the equitable remedies sought by Pisheyar.

B. The Court of Appeals Incorrectly Interpreted “Fraudulent.”

Washington's dissenters' rights statute allows dissenting shareholders to object to corporate actions outside of the appraisal remedy when there are allegations of fraudulent activity:

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title . . . , or is fraudulent with respect to the shareholder or the corporation.

RCW 23B.13.020(2).

The Court of Appeals narrowly construed this exception, asserting that "fraudulent" requires proof of "actual fraud related to the corporate action," rather than the commonly understood meaning of the word. *Sound Infiniti*, at 343. In other words, plaintiffs who fail to allege the nine elements of legal fraud may not pursue remedies other than share appraisal, even when they allege conduct that amounts to “deceit, trickery, . . . breach of confidence, [or] used to gain some unfair or dishonest advantage.”¹ Washington has not generally applied such a narrow construction to the word “fraudulent.”²

The Court of Appeals attempts to justify its limited view of fraudulent by referring to Washington’s omission of “unlawful or” before

¹ Random House Dictionary of the English Language at 564 (1969) (defining fraud).

² See, e.g., definition of a “fraudulent transfer” in RCW 19.40.041. See also *Green v. McAllister*, 103 Wn. App. 452, 467-68, 14 P.3d 795 (2000) (defining constructive fraud in context of breach of a fiduciary duty).

“fraudulent” when the Legislature adopted RCW 23B.13.020. *Sound Infiniti*, at 346. This assertion does not survive scrutiny.

Indeed, a Minnesota court reached the opposite conclusion in *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. App. 1986). In construing Minnesota’s appraisal remedy—which also omitted “unlawful”—the *Sifferle* court noted that this omission, combined with a legislative history similar to Washington’s, meant that the term “fraudulent” includes claims for breach of fiduciary duty:

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

Sifferle, 384 N.W.2d at 507 (footnote omitted). *See also Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 728-29 (Nev. 2003) (“‘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”).

If the term fraudulent includes claims for breach of fiduciary duty or minority oppression, then this Court need not consider whether appraisal is Pisheyar’s exclusive remedy. Nor need this Court consider whether Pisheyar may present claims for breach of fiduciary duty and minority oppression within the scope of the appraisal hearing. For if this Court concludes that the term fraudulent incorporates breaches of fiduciary duty and oppression claims, then Pisheyar may pursue equitable remedies for such claims outside the scope of the appraisal process.

C. The Legislative History to RCW 23B.13.020 Indicates that Appraisal Is Not the Exclusive Remedy.

To support its ruling that absent actual fraud, appraisal is a dissenting shareholder's sole remedy, the Court of Appeals cites the legislative history to the Act. *Sound Infiniti*, at 347. When read as a whole, however, the legislative history supports Pisheyar's view that the appraisal process may not be appropriate when a minority shareholder has alleged misconduct by the majority.

Indeed, the legislative history states specifically "If the corporation attempts an action . . . in violation of a fiduciary duty" then "the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights." The Official Legislative History to RCW 23B.13.020, Senate Journal 51st Legis. 3087-88 (1989), at 13.020-3 to 13.020-4. The legislative history then cites *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) for the principle that appraisal may not be adequate where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved.

Weinberger held that the decisions made by individuals on both sides of a transaction, without full disclosure to minority shareholders, constituted a breach of duty to those shareholders. 457 A.2d at 710. The Delaware court further held that the minority shareholders in *Weinberger* could pursue a claim for either rescissory or monetary damages, outside the scope of the dissenters' rights statute. *Id.* at 714. Subsequent decisions, applying *Weinberger*, have held that "claims for unfair dealing cannot be

litigated in the context of a statutory appraisal.” *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 257 (Del. 1991).

The Court of Appeals attempts to discount later cases applying *Weinberger* on the grounds that the New York court no longer follows Delaware. *Sound Infiniti*, at 346. In a somewhat strained argument, the court of appeals asserts that because the comment to the Model Act (reproduced in the 1989 Legislative History) states that it “basically adopts the New York formula,” then only cases applying New York law should be persuasive in Washington. *Sound Infiniti*, at 346-47.

Setting aside the validity of this argument, it does not support the Court of Appeals’ holding. New York actually preserves a shareholder’s right to a separate damages action for breach of fiduciary duty when “a remedy *other than damages* is warranted.” *Sound Infiniti*, at 347 (citing *Walter J. Schloss Assocs. v. Arkwin Indus., Inc.*, 90 A.D.2d 149, 162, 455 N.Y.S.2d 844 (1982) (Mangano, J. dissenting)). In other words, *Walter J. Schloss* adopted a remedies-based test for determining whether a plaintiff shareholder is limited to an appraisal remedy. Applying this test to Pisheyar would allow him to pursue a separate claim, since Pisheyar sought non-monetary remedies: He sought to remain a shareholder of the corporations he co-founded, and he sought to become a shareholder in a third corporation, pursuant to an agreement with the majority shareholders.

In *Walter J. Schloss*, the court held that money damages were also available in a separate action when they were “ancillary to a grant of

traditionally equitable relief.” *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851. The purpose was to avoid lawsuits which were duplicative of the appraisal action. This decision would not preclude Pisheyar from seeking remedies for Snyder and Hannah's oppressive conduct, including their exclusion of his interest in the companies he co-founded.

D. The Scope of the Appraisal Process

The Court of Appeals asserts, without citation, that the court in a Washington appraisal action may consider "misconduct *affecting the minority shareholder's interest* that occurred *before* the appraisal-triggering transaction occurred." *Sound Infiniti*, at 349 (emphasis added). In other words, it argues that any potential harm to the minority shareholder can be accounted for by not limiting the appraisal to the fixed point in time when he or she was frozen out.

The express language of Washington's appraisal statute is to the contrary. The statute provides that a shareholder "is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of" certain specified actions, which "effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation." RCW 23B.13.020(1). The Act then defines "fair value" as "the value of the shares *immediately* before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the

corporate action unless exclusion would be inequitable.” RCW 23B.13.010(3) (emphasis added).

Nothing in the statute allows a court to disregard the statutory definition of fair value as the value of the shares *immediately before* the effective date of the corporate action to which the dissenter objects. *See, e.g., In re West Waterway Lumber Company*, 59 Wn.2d 310, 314, 367 P.2d 807 (1962) (“To effect the purpose of the statute, ‘value’ must be taken to mean what the shares would be worth if the proposed change in the corporation had not occurred.”)

Under *Sound Infiniti*, plaintiffs in Pisheyar’s position have no remedy other than payment of fair value for their shares, regardless of the presence of oppressive or wrongful conduct by the controlling shareholders, and regardless of whether they asserted their claims before they were “squeezed out.” Under the rule stated in *Sound Infiniti*, shareholders whose damages are not based on the value of their shares are precluded from seeking either equitable or separate monetary damages for breach of fiduciary duty or oppression of a minority shareholder.

E. The Court of Appeals Erred by Allowing the Trial Court To Rule on the Merits at a Preliminary Injunction Hearing.

The Court of Appeals relied on the adequacy of the preliminary injunction hearing to affirm the dismissal of Pisheyar’s derivative claims for lack of standing. *Sound Infiniti*, at 351. Remarkably, the court asserted that “Pisheyar *could* have maintained his status as a shareholder” by

enjoining the reverse stock split action after he had filed suit, but he “decidedly failed to do so.” *Id.* (emphasis in original).

The Court of Appeals’ assertion requires an assumption that a preliminary injunction hearing provides a “full and fair” hearing of a plaintiff’s case. However, a party “is not required to prove his case in full at a preliminary-injunction hearing, . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L.Ed.2d 175 (1982). The primary purpose of such hearings “is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Id.* The trial court “may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial.” *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (citations omitted).

As a result of the evidentiary constraints at such hearings, the trial court is prohibited from rendering a final determination on the merits at such hearings unless the court expressly states that it is consolidating the injunction hearing and a trial on the merits. *Ameriquest Mortg. Co. v. State Atty. Gen.*, ___ Wn. App. ___, 199 P.3d 468, 471 (2009). The “plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for permanent injunctive relief. *Id.* at 473.

The *Ameriquist Mortgage* court reversed the denial of a preliminary injunction because the trial court had erred by (1) applying the standard for a permanent injunction and (2) entering “what amounted to a final order” on the issue in dispute. *Id.* at 472. The court observed that the purpose of a preliminary injunction was “to preserve the status quo” until a full hearing on the merits, which meant the “last actual, peaceable, noncontested condition which preceded the pending controversy.” *Id.* at 472-73.

Here, the trial and appellate court’s rulings treated the facts “found” at the preliminary injunction hearing as effective for ruling on the merits of the derivative claims brought by Pisheyar. *See, e.g., Sound Infiniti* at 339. For example, the Court of Appeals stated:

Contrary to Pisheyar’s assertions to the contrary, the trial court *found* that the corporations have *always met the financial requirements* imposed by Infiniti of North America, Inc., and complied with their tax obligations.

Sound Infiniti, at 337 (emphasis added). The evidence before the trial court did not support this finding.

This evidence included a letter from Infiniti asserting that the corporation was undercapitalized (a result of the controlling shareholders loan to themselves). CP 732-33. It was undisputed that the undercapitalization was a result of the controlling shareholders loaning themselves money from Sound Infiniti to start a separate dealership from which they intended to exclude Pisheyar. CP 681-86, 732-33.

Because Defendants Snyder and Hannah sought to remove Pisheyar as a shareholder after he brought derivative actions against their jointly-held corporations, the *status quo ante* required Pisheyar to retain shareholder status. Pisheyar sought to enjoin the elimination of his shares pending trial. By allowing Snyder and Hannah to eliminate Pisheyar's shareholder status while the action was pending, and then dismissing the derivative claims on the grounds that he now lacked standing, the trial court effectively issued a final order on the merits of the derivative claims at an injunction hearing.

F. Washington Should Allow Litigants With Derivative Claims to Retain Standing.

The Court of Appeals affirmed the trial court's conclusion that a minority shareholder loses standing to pursue derivative claims when he is removed as a shareholder by the actions of the majority shareholders after the action has been commenced. We should not allow this rule to become the law in Washington.

In support of its holding, the Court of Appeals cited a Delaware case for the rule that a shareholder must maintain shareholder status throughout the litigation. *Sound Infiniti*, at 351 (citing *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984)). What the Court of Appeals failed to state, however, is that there is an exception to this rule when the action that caused the plaintiff to lose shareholder status is itself subject to a claim of fraud. *Lewis*, 477 A.2d at 1046 n.10; *Lewis v. Ward*, 852 A.2d 896, 899 (Del. 2004) (noting exception when merger is "being perpetrated

merely to deprive shareholders of the standing to bring a derivative action”).

In Pisheyar’s case, the reverse stock splits that deprived him of his shareholder status had no purpose other than to deprive him of that status. RP 11/17/05, p. 109, l. 19- p. 110, l. 20; RP 12/8/05, p. 32, l. 1-5, p. 85, l. 14 – p. 87, l. 1, P. 89, l. 5 – p. 92, l. 11. If this Court applies Delaware’s exception, then Pisheyar has standing to maintain his derivative claims because the reverse stock splits were brought solely to deprive him of standing.

In the alternative, this Court could adopt the rule that a shareholder who files a derivative claim must remain a shareholder throughout the litigation unless the loss of shareholder status “is the result of corporate action in which the holder did not acquiesce.” *Standing to Commence and Maintain a Derivative Action*, Principles of Corporate Governance § 7.02 (American Law Institute 1994).

This exception was adopted by the Supreme Courts of Pennsylvania and Alabama, as well as courts of appeal in Oregon and North Carolina. *Cuker v. Mikalauskas*, 547 Pa. 600, 692 A.2d 1042 (1997); *Warden v. McLelland*, 288 F.3d 105, 111 (3d Cir. 2002); *Shelton v. Thompson*, 544 So.2d 845 (Ala. 1989) (adopting exception without reference to ALI Principles); *Noakes v. Schoenborn*, 841 P.2d 682 (Or. Ct. App. 1992); *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (N.C. 1990). Washington should adopt this rule.

G. The Court of Appeals Allowed the Trial Court to Mischaracterize Pisheyar's Claims.

The trial court first allowed the majority shareholders to proceed with a reverse stock split which they acknowledged had no purpose other than to eliminate Pisheyar as a shareholder. Next, the trial court dismissed Pisheyar's derivative claims by holding that he lost standing when his shares were eliminated. Finally, the court eviscerated his individual claims for minority oppression by mischaracterizing everything that had been done to him before the reverse stock splits as "derivative."

However, the self-interested transactions at the base of the derivative claims (such as the majority shareholders loaning themselves money to start a separate automobile dealership) are intrinsically related to Pisheyar's separate individual damages (such as the breach of the parties' agreement that in return for investing in the plaintiff corporations, Pisheyar would share in the opportunity to participate in future automobile dealerships). The majority shareholders' decision to loan themselves money was, on the one hand, a derivative action in that it left the corporations undercapitalized. It was also an individual action, in that it was made with no formal meeting and no shareholder vote, leaving Pisheyar no opportunity to object or take preventive action and delaying receipt of money due him.

The *Sound Infiniti* decision, if left standing, will seriously impair the right of a minority shareholder in a closely-held corporation to seek redress for breaches of fiduciary duty by the controlling shareholders.

History has shown that when a profit-making enterprise is in the hands of a limited number of persons, those with power may seek to take advantage of the minority. Washington has a long history of providing protection for the minority shareholders in these situations.

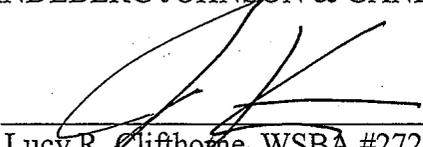
In this case, after allowing the reverse stock splits to proceed based on preliminary findings, and then finding Pisheyar lost standing to maintain derivative claims, the court then broadly re-characterized many of his individual damage claims as derivative and held that he could no longer assert them. Not only has Pisheyar lost the claims when he was frozen out of the corporations, but he cannot even assert his exclusion in support of his individual claim for minority oppression. Yet, the conduct of the controlling shareholders in gradually and then completely excluding Pisheyar was part and parcel of his minority oppression claim.

III. CONCLUSION

For the above reasons, Pisheyar requests that this Court reverse the Court of Appeals decision.

DATED this 4th day of March, 2009.

VANDEBERG JOHNSON & GANDARA, LLP

By 

Lucy R. Clifhorne, WSBA #27287

Daniel C. Montopoli, WSBA #26217

James A. Krueger, WSBA #3408

Attorneys for Afshin Pisheyar

CERTIFICATE OF SERVICE

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

2009 MAR 11 2:51
BY RONALD R. CARPENTER
CLERK

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 4th day of March, 2009, in the manner indicated below, I caused a copy of:

SUPPLEMENTAL BRIEF OF APPELLANT

to be served on Counsel for the Respondents:

Ronald L. Berenstein William C. Rava Perkins Coie LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099	Boyd F. Buckingham Boyd F. Buckingham, Inc., P.S. 321 Burnett Avenue South, Suite 200 Renton, WA 98057-2569
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via Legal Messenger.

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

Dated this 4th day of March, 2009.

Barbara Anderson
Barbara Anderson