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No. 66115-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOPAC PRODUCTS, INC., a Washington corporation,,

Appellant,

v.

LESLIE BLAKEY SPENCER, a single woman; and
TAMMY S. BLAKEY, a single woman,

Respondent.

APPELLANT'S REPLY BRIEF and RESPONSE TO RESPONDENT'S
CROSS-APPEAL

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. REPLY STATEMENT OF FACTS 2

 A. General Response to Respondents’ Statement of Facts 2

 1. Recitation of Facts Concerning Operation of Snopac 3

 2. Recitation of Facts Concerning Process of Redemption 4

 B. Contested Findings of Fact and Conclusions of Law..... 7

III. REPLY IN SUPPORT OF APPEAL 11

 A. Respondents Fail to Explain How the Opinion Testimony of Timothy Vincent Satisfies the Tests for Admissibility Under ER 702 and 703 11

 B. Respondents Fail to Address the Erroneous Facts Which Are Not Supported by the Record 13

 1. Jake Jacobsen’s Opinion of Fair Value Is Supported by the Record..... 13

 2. The Stellar Sea Was Not Sold at Liquidation 15

 C. The Trial Court Failed to Use Customary Valuation Techniques to Value Snopac and Consequently Double-Counted Assets..... 17

 1. The Court’s Failure to Follow Customary Valuation Techniques Resulted in a Double Counting of Assets to Snopac’s Financial Detriment..... 19

 2. The Court’s Failure to Follow Customary Valuation Techniques Resulted in an Overstating of the Value of the Dillingham Plant..... 22

 D. The Trial Court Erred in Awarding Attorney Fees and Costs in the Absence of Arbitrary, Vexatious, or Other Bad Faith Conduct 23

 1. Standard of Review 23

 2. Respondents’ Legal Analysis on the Proper Application of RCW 23B.12.310(b)(2) Is Properly Distinguished..... 23

 3. Application of RCW 23.B.12.310(2)(b) 27

 a. Jacobsen Was Provided a Copy of the Vincent Survey .. 28

b.	Moss Adams Was Aware of the \$9.1 Million Value	28
c.	The Vincent Surveys Were Properly Disclosed During Discovery.....	29
4.	Greg Blakey’s Business Judgment Is Protected by the Business Judgment Rule.....	30
E.	The Court Erred in Awarding Fees and Costs without Assessing the Reasonableness of the Award.....	35
F.	Respondents Do Not Contest That the Trial Court Miscalculated the Appropriate Rate of Interest	36
IV.	RESPONSE ON RESPONDENTS’ CROSS APPEAL.....	36
A.	No Award for the Diminished Value Was Warranted	36
1.	No Breach of Fiduciary Duties Occurred	37
2.	All Inferences Indicated That the Trial Court Already Improperly Included an Award of Diminished Value Based on Alleged “Misconduct”	40
3.	There Is No Evidence in the Record Which Would Support a Diminished Value as Respondents Did Not Offer Evidence of Diminished Value at Trial	42
IV.	CONCLUSION	42

TABLE OF AUTHORITIES

Cases

Bentzen v. Demmons, 68 Wn. App. 339, 842 P.2d 1015 (1993)..... 39

Brehm v. Eisner, 746 A.2d 244 (Del. 2000)..... 35

Eide v. Eide, 1 Wn. App. 440, 462 P.2d 562..... 46

Green v. Normandy Park, 137 Wn. App. 665, 151 P.3d 1038
(2007) 11

In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959
(Del. Ch. 1996)..... 35, 38

In Re Marriage of Parker, 91 Wn. App. 219, 957 P.2d 256
(1998) 13

In re Spokane Concrete Products, Inc., 126 Wn.2d 269, 279,
892 P.2d 98 (1995) 33

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998)..... 38

Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865,
51 P.3d 159 (2002) 2, 15, 16, 45, 47

Miles v. Miles, 128 Wn. App. 64, 114 P. 3d 671 (2005)..... 11

Montclair United Soccer Club v. Count Me In Corp.,
C08-1642-JCC, 2010 WL 2376229 (W.D. Wash. June 9,
2010)..... 35, 36

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d
208 (1987) 39

Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489,
535 P.2d 137 (1975) 35

Petition of Nw. Greyhound Lines, 41 Wn.2d 672, 251 P.2d
607 (1952) 17, 19, 20, 21

Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 60 P.3d
106 (2002) 1

Rhinehart v. Seattle Times, 59 Wn. App. 332, 798 P.2d
1155 (1990) 39

Robblee v. Robblee, 68 Wn. App. 69, 841 P.2d 1289 (1992) 26, 27

Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002)..... 12

Sanders v. E-Z Park, Inc., 57 Wn.2d 474, 358 P.2d 138 (1960)..... 33

Schorzman v. Brown, 64 Wn.2d 398, 391 P.2d 987 (1964)..... 25

Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 64 P.3d 1 (2003) 33

Seig Co. v. Kelly, 568 N.W.2d 794 (Iowa 1997)..... 27, 28

Smith v. Dalton, 58 Wn. App. 876, 795 P.2d 706 (1990) 39

<i>Sound Infiniti, Inc. v. Snyder</i> , 169 Wn.2d 199, 237 P.3d 241 (2010)	27, 41
<i>State v. Davis</i> , 73 Wn.2d 271, 438 P.2d 185 (1968)	46
<i>State v. Hayden</i> , 90 Wn. App. 100, 950 P.2d 1024 (1998)	13
<i>State v. Ward</i> , 125 Wn. App. 138, 144, 104 P.3d 61 (2005).....	14
<i>State v. Wilson</i> , 75 Wn.2d 329, 450 P.2d 971 (1969)	46
<i>Terry v. Employment Sec. Dep't.</i> , 82 Wn. App. 745, 919 P.2d 111 (1996)	12, 25
<i>Washington State Attorney Gen.'s Office v. Washington Utilities & Transp. Comm'n</i> , 128 Wn. App. 818, 116 P.3d 1064, 1069 (2005)	12, 25
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. 1983).....	16, 28
Statutes	
ER 702 and 703	13, 14
RCW 23B.12	2, 26
RCW 23B.13.010(3).....	17
RCW 23B.13.010(4).....	48
RCW 23B.13.300(6).....	3, 48
RCW 23B.13.310(2)(b).....	43
Other Authorities	
H. Henn, <i>Law of Corporations</i> § 242 (1970)	31
W. Fletcher, <i>Private Corporations</i> , § 1039 (perm. ed. 1974)	31
Rules	
RAP 10.3(b).....	14, 40

I. INTRODUCTION

Respondents correctly point out that “appellant courts are not suited for, and therefore not in the business of, weighing and balancing competing evidence.” *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002). The Respondents then spend vast majority of their brief ignoring the legal questions posed in this appeal and inappropriately rearguing the facts to this Court.

As a general response, there is no debate concerning the acrimony of the Blakey siblings at the time of the redemption of the Respondents’ shares. Finding of Fact No 3 accurately reflects:

The three minority shareholders grew suspicious and began to question [Greg Blakey’s] business practices. The family dynamic escalated into a volatile and emotionally charged relationship between [Greg Blakey] and the respondents. As the respondents’ suspicions grew over [Greg Blakey’s] actions involving Snopac and its lack of profitability, the email exchanges between [Greg Blakey] and respondents illustrate the degree of antipathy that arose between the two sides.

The record reflects that the antipathy between the siblings had reached the point where everyone was in neutral agreement that the Respondents should be fairly bought out of Snopac.

The mechanism used by Snopac to buy out Respondents shares was the stock redemption statute at RCW 23B.12 in which the Company (Snopac) redeems the minority shareholders interest for fair value. The

trial court's role in that process is to ascertain the fair value of Snopac's shares as of the date of redemption using current valuation concepts and techniques generally employed for a similar business in the context of the transaction requiring the appraisal. *See Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002).

The objective of the redemption process is to fairly compensate the minority shareholders for that which has been taken from them. *Id.* Snopac respectfully renews its appeal that the trial court failed in its task when it relied on erroneous facts and inadmissible evidence to arrive at an arbitrary value for Snopac's primary asset, the Snopac Innovator. Snopac further respectfully renews its appeal that the trial court improperly awarded attorney fees, costs, and interest.

Snopac renews its request that this Court reverse the trial court with the following instruction:

1. That this case be remanded for a new trial to determine the value of the Innovator using customary valuation techniques relied upon in the industry;
2. That an award of attorney fees and costs to Respondents be denied; and
3. For a calculation of interest on any award to Respondents at a rate of 5.5% pursuant to RCW 23B.13.300(6).

II. REPLY STATEMENT OF FACTS

A. General Response to Respondents' Statement of Facts.

1. Recitation of Facts Concerning Operation of Snopac.

In their responsive brief, the Respondents focus their recitation of facts on impugning Greg Blakey and his operation of Snopac. In order of the response, Respondents explain how:

- Mr. Blakey unilaterally decided to purchase and upgrade the Innovator without discussing it with Respondents (pp. 5-6);
- Mr. Blakey did not hold regular board meetings with Respondents until December 2006 (p. 6);
- Mr. Blakey paid the wife of a deceased former employee without telling Respondents (p. 6);
- When Respondents complained, Mr. Blakey contacted Moss Adams to find out how he could dilute their interests or redeem their interests (p. 7);
- Mr. Blakey unilaterally decided to purchase and upgrade the Dillingham processing facility (p. 8);

The aforementioned facts are not debated by Snopac, but they are also incomplete. Respondents' recitation of the facts ignores Mr. Blakey's reasonable explanations for his actions, which were in turn accepted by the trial court. For example, with respect to Respondents' complaint that Mr. Blakey paid a salary to the widow of his deceased right hand man, the uncontested Finding of Fact provides:

25. In regard to a business transgression, [Greg Blakey] did have Snopac pay the widow of his deceased right hand man, Charles (Chick) Perkins, a salary for four years up into 2006 to honor a death bed promise he had given. *However, it is noted that the payments to Chick Perkins' widow were effectively offset by reductions made at the time in Greg Blakey's salary.*

CP 274, FF 25 (emphasis added.) Ultimately, the trial court properly concluded that:

Respondents' claims of self dealing and improper diversion of corporate assets by Petitioner are not supported in the record. Greg Blakey acted with good intentions; however, he did so without informing the Respondents in a timely or predictable manner but only after Respondents were forced to make inquiry.

CP 691, CL ("Conclusion of Law") 7. The constant impugning of Mr. Blakey is simply a distraction to the objective of this lawsuit which is to assign fair value to what was taken from Respondents as of the date of redemption on May 26, 2008.

2. Recitation of Facts Concerning Process of Redemption.

In addition to impugning Mr. Blakey's operation of Snopac, Respondents' recitation of the facts also focuses on alleged improprieties in Mr. Blakey's handling of the stock redemption process. These accusations are unsupported by the record and challenged on appeal:

- Mr. Blakey asked Moss Adams to redo a 2007 valuation of Snopac that he did not like (p 3). (Respondents ignore

uncontested FF (“Finding of Fact”) 31 and 32 wherein the trial court found Mr. Blakey’s request was justified because the 2007 valuation was “haphazard, incomplete and inaccurate.”)

- Mr. Blakey retained Captain Jacobsen to provide a 2008 appraisal of the Innovator even though he already possessed a 2005 survey from Vincent, which he had previously warranted as “accurate” for the purposes of obtaining insurance on the vessel (p. 8). (Respondents ignore that Jacobsen was provided a copy of the Vincent survey for the purpose of his appraisal; that the Vincent survey was not performed for appraisal purposes, and that the value in the Vincent survey was not supportable using proper valuation techniques.);
- Mr. Blakey chose a redemption date in May, believing at the time that spring is the worst possible time to value a fish processing company (p. 10). (This statement is not supported anywhere in the record and no effort is made by Respondents to cite to the record. It is an untrue and inappropriate contention which the Respondents artificially impose on this Court.);
- A year after the redemption (in 2009), Mr. Blakey again asked Vincent to survey the vessel for insurance underwriting

purposes instead of asking Jacobsen to survey the vessel (p. 11). (Respondents ignore the fact that Mr. Blakey *did not* represent the \$16.7 million value in Vincent’s 2009 Survey to be “accurate” and FF 52 to the contrary is in error.); and

- Mr. Blakey failed to disclose the existence of the Vincent *appraisals* to Respondents in the course of litigation (p. 11). (As explained in greater detail below, Respondents accusation is unsupported. Respondents acknowledge that Snopac was transparent with the Vincent *surveys* – the appraisals and the surveys are the same document. In short, Respondents were timely provided with the documents and acknowledge so in their Response.)

Respondents’ reliance on the aforementioned challenged facts to call into question Snopac’s good faith in exercising its redemption rights is unsupported and misplaced. As explained in its opening brief, Snopac retained professionals to perform every aspect of the redemption process including (1) attorneys to properly follow the procedures, and (2) valuation experts and a marine surveyor to provide an accurate value for Snopac’s stock. That valuation process was performed a second time during the course of the lawsuit by the trial court’s own independently retained valuation expert and marine surveyor who after 160 hours of

work independently reached the same conclusion that Snopac's stock was worth \$0. These valuation experts were not distracted from their singular objective -- to place a value on Snopac's stock as of May 26, 2008, based on customary valuation techniques. Most importantly, the trial court did not find any impropriety in the manner in which the redemption process was performed by Snopac, and that Mr. Blakey's conduct in handling the redemption is not before this Court on review.

The thrust of Respondents' brief relies on the character assassination of Mr. Blakey. Two lay points repeatedly surface in the Respondents' argument and the trial court's Findings: (1) Snopac failed to produce the Vincent \$9.1 million appraisal; and (2) Snopac acquired debt near the time of redemption for the sole purpose of reducing the value of the company. However, the record and Respondents' brief confirm that both of these allegations are not supported by substantial evidence and more specifically, do not support the trial court's valuation of Snopac's stock or the award of attorney fees and costs.

B. Contested Findings of Fact and Conclusions of Law.

Contrary to Respondents' assertion, Snopac contests far more Findings than the 16 Findings of Fact identified by Respondents in their Appendix A. The complete list of contested Findings of Fact is as follows:

- 2: Contrary to FF 2, the record supports that Mr. Blakey acquired 49% ownership in Snopac in 1986 and ran the business since its inception in 1986.
- 18: Contrary to FF 18, the record supports that Snopac's acquisition of debt at the time of redemption did not have commensurate influence in reducing the company's equity.
- 19: Contrary to FF 19, the record supports that Snopac's acquisition of debt at the time of redemption did not have a commensurate influence in reducing the company's equity.
- 33: Contrary to FF 33, Jacobsen's appraisal of the Innovator was based on customary valuation techniques that were explained via testimony during the trial.
- 41: Contrary to FF 41, Snopac contends that Vincent's opinion is inadmissible and consequently not "credible."
- 46: Contrary to FF 46, the record and Respondents' brief demonstrate that Vincent's appraisal of the Innovator was properly and timely disclosed to Respondents.
- 49: Contrary to FF 49, the record and Respondents' brief demonstrate that Vincent's appraisal of the Innovator was properly and timely disclosed to Respondents.
- 50: Contrary to FF 50, the record supports that all three of the valuation experts performed and utilized the income approach.
- 52: Contrary to FF 52, the record supports that Snopac did not ever warrant that fair market value of the Innovator was \$16.7 million.
- 54: Contrary to FF 54, the record supports a clear explanation for how Duffy arrived at zero value for Snopac's shares (*see* Ex. 277). The trial court is free to reject Duffy's conclusion but not on the basis that it is "unclear" how he arrived at zero value for his shares.

- 55: Contrary to FF 55, the record and Respondents' brief demonstrate that Vincent's appraisal of the Innovator was properly and timely disclosed to Respondents.
- 56: Contrary to FF 56, the record and Respondents' brief demonstrate that Vincent's appraisal of the Innovator was properly and timely disclosed to Respondents.
- 57: Contrary to FF 57, the record and Respondents' brief demonstrate that Vincent's appraisal of the Innovator was properly and timely disclosed to Respondents.
- 58: Contrary to FF 61, the Stellar Sea was sold in a "closed bid auction" after a nine month international marketing effort and is not a meaningless comparison.
- 61: Contrary to FF 61, the Stellar Sea was sold in a "closed bid auction" after a nine month international marketing effort and is not a meaningless comparison.
- 63: Contrary to FF 63, Snopac challenges the trial court's reliance on Duffy's testimony that Jacobsen is "clueless" in his appraisal methodology in light of FF 65 in which the trial court found that "[b]y his own admission, Mr. Duffy has no expertise in valuing fish processing vessels and would have no expertise in differentiating between the opinions of the three marine vessel surveyors offered in this case."
- 67: Contrary to FF 67, both Dahl and Duffy utilized the income approach in their respective valuations, but ultimately rejected the income approach in favor of the asset approach.
- 68: Contrary to FF 68, the Stellar Sea was sold in a "closed bid auction" after a nine month international marketing effort and is not a meaningless comparison.

Numerous: Snopac also challenges each and every finding of

fact wherein the trial Court misidentifies the Petitioner in this action as Mr. Blakey rather than the company.

In addition, Snopac properly challenged the following Conclusions of Law:

- 4: Snopac challenged the trial court's conclusions concerning Mr. Duffy and the value of the Innovator.
- 6: Snopac challenged the trial court's conclusions concerning Mr. Grambush and the value of the Innovator.
- 7: Snopac challenged the trial court's conclusions concerning Mr. Blakey's business decisions resulting in a reduced value of Snopac's overall equity.
- 9: Snopac challenged the trial court's conclusions that Respondents proved that misconduct occurred or reduced Snopac's value.
- 10: Snopac challenged the trial court's conclusions that Respondents' claims of oppression of minority shareholders were founded and proper.
- 11: Snopac challenged the trial court's conclusions concerning the apportionment of costs.
- 12: Snopac challenged the trial court's conclusions concerning the apportionment of attorney fees.

It bears reiterating in light of Respondents' misplaced reliance on *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007), that when reviewing Findings of Fact, the Court applies the "substantial evidence" standard, such that a Finding of Fact will be overturned if it is not supported by substantial evidence. *See Miles v. Miles*, 128 Wn. App.

64, 114 P. 3d 671 (2005). Substantial evidence “is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *Id.* Even more, when the Court reviews the application of facts to the law, it applies the de novo standard of review. *Washington State Attorney Gen.'s Office v. Washington Utilities & Transp. Comm'n*, 128 Wn. App. 818, 827, 116 P.3d 1064, 1069 (2005) (We review de novo questions of law and the application of the law to the facts); *see also Terry v. Employment Sec. Dep't.*, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996).

C. Uncontested Findings of Fact and Conclusions of Law.

The Respondents do not contest any of the trial court’s Findings of Fact and Conclusions of Law. Consequently, except as specifically challenged by Snopac, the remainder of the Findings of Fact become verities of this appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). The uncontested Findings of Fact, as detailed in Snopac’s opening brief, should not be disturbed.

III. REPLY IN SUPPORT OF APPEAL

This Reply follows each issue of appeal in the order in which they were presented in Snopac’s Opening Brief.

A. Respondents Fail to Explain How the Opinion Testimony of Timothy Vincent Satisfies the Tests for Admissibility Under ER 702 and 703.

Snopac’s first issue of appeal is that the trial court improperly

admitted and relied upon the opinion testimony of Timothy Vincent in violation of ER 702 and ER 703. Respondents' only response is the bare assertion that "it is not clear that the *Frye*¹ test applies to marine surveyor's" and that the decision of *In Re Marriage of Parker*, 91 Wn. App. 219, 957 P.2d 256 (1998), is "inapplicable and unpersuasive." Respondents fail to articulate any support for their position.

Contrary to Respondents' blind assertion, the *Frye* test is not limited to divorce cases, but is applicable to test all experts who provide the trier of fact with opinion testimony. In *In Re Marriage of Parker*, the court cites with approval the decision *State v. Hayden*, 90 Wn. App. 100, 103, 950 P.2d 1024 (1998). In *Hayden*, the Court of Appeals reaffirmed our Supreme Court's adherence to the *Frye* test to determine admissibility of novel scientific evidence. *Id.* The *Frye* test is not artificially limited in its application, but rather is appropriate to test whether any expert opinion evidence which exceeds the limits of the underlying science or art. In this case, Vincent's attempt to provide an opinion of *market* value of the Innovator based on a database which does not contain any *market* data, exceeds the basic limits of appraisal theory and methodology.

In violation of RAP 10.3(b), Respondents fail to address ER 702 and ER 703 and do not attempt to explain how Vincent's opinion

¹ *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

testimony is admissible under ER 702 or ER 703. RAP 10.3(b) provides that the brief of the Respondent should answer the brief of the Appellant or Petitioner. By failing to argue in response to Snopac's claims on appeal, the Court can presume that Respondents concede Snopac's argument because they have offered no argument or case law to rebut Snopac's challenge Vincent's testimony. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005). Snopac's argument that Vincent's opinion testimony on the market value of the Innovator is inadmissible pursuant to ER 702 and ER 703 is simply un-refuted. The trial court erred in its reliance of Vincent's opinion testimony as "credible" in arriving at fair value for the Innovator.

B. Respondents Fail to Address the Erroneous Facts Which Are Not Supported by the Record.

Snopac's second issue on appeal is that the trial court relied on erroneous Findings of Fact in arriving at fair value for the Snopac Innovator.

1. Jake Jacobsen's Opinion of Fair Value Is Supported by the Record.

Snopac respectfully renews its challenge to the trial court's Finding of Fact No. 33 that "from his testimony, it is unclear exactly how he reached his \$3 million conclusion." To the contrary, Jacobsen's testimony is clear that he reached the \$3 million value based on a

comparison of the Innovator against *actual sales* of numerous other vessels. Respondents do not refute Snopac's challenge that the trial court's finding is erroneous.

Instead of responding to Snopac's contention that the Finding is erroneous, Respondents attempt to attack Jacobsen's opinion of value on the basis that it improperly relies on a post-redemption comparator (the Stellar Sea) citing *Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002). First, this argument implicitly acknowledges the erroneous nature of the Finding of Fact. Second, Respondents are mistaken in their argument that "Jacobsen relied on the October, 2008, sale of the Stellar Sea for \$5 million in arriving at his \$3 million value." Respondents' Brief ("RB") 25. To the contrary, as Respondents' explain at p. 8 of their brief:

On February 13, 2008, Mr. Blakey hired Capt. "Jake" Jacobsen to provide a letter of valuation of the Innovator for purposes of redeeming the minority owners' shares. Jacobsen did not survey the ship, but relied on information from Vincent's 2005 survey. One day later, Jacobsen gave Blakey a report showing the Innovator's value was \$3 million.

RB, p. 8. It is impossible that on February 14, 2008, Jacobsen relied on a comparable sale which would not occur for another six months.

Finally, Respondents' reliance on *Matthew G. Norton Co.*, 112 Wn. App. 865, to challenge the validity of Jacobsen's opinions is

unpersuasive and inconsistent with the value process provided by RCW 23B.13.010. *See Matthew*, 112 Wn. App. at 874 (Determining fair value requires consideration of all relevant factors involving the value of a company, and may include elements of future value); *see also Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *accord Petition of Nw. Greyhound Lines*, 41 Wn.2d 672, 680, 251 P.2d 607 (1952). In *Matthew*, the court reasoned that the citation to *Weinberger*, contained in RCW 23B.13.010(3)'s Official Comments reflects the Legislature's intent that courts should consider all "facts [that] were known or which could be ascertained as of the date of the merger and which throw any light on *future prospects* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but *must be considered* by the [court]." *Id.* at 885-86. The holding in *Matthew* is much broader than asserted by Respondents.

Jacobsen based his opinion of value of the Innovator (including the processing equipment onboard) on his specific knowledge of the market for the listing and sale of comparator vessels.

2. The Stellar Sea Was Not Sold at Liquidation.

Snopac also renews its challenge to the trial court's Findings of Fact Nos. 61 and 68, that the October 2008 sale of the Stellar Sea was one of liquidation and therefore a meaningless comparator for the Innovator. The

October sale of the Stellar Sea was not considered as part of Jacobsen's February 14, 2008 appraisal of the Innovator. However, evidence of the October sale of the Stellar Sea was presented to the trial court as additional evidence in support of the fair market value the Innovator. RP 730-740. The trial court ultimately rejected a comparison of the sale of the Stellar Sea on the erroneous finding that "it appears the sale of the Stellar Sea was a forced one or liquidation transaction" and therefore "almost meaningless for purposes of comparing to the valuation of Snopac." Snopac challenges this Finding of Fact as unsupported by the record.

Respondents cannot challenge the record which reflects that the Stellar Sea was sold after a nine month extensive international marketing effort and through a "closed bid auction process" designed to obtain the highest value of the vessel on the open market. Unable to challenge the factual record concerning the procedures for the sale of the Stellar Sea, Respondents fall back on the unsupported *opinion* testimony of their unqualified expert, Vincent, who without factual support, summarily characterized the sale as being "somewhere between a forced liquidation and an orderly liquidation sale." RP 1182. However, Vincent fails to provide evidentiary support for why he believes a sale of this nature would not make a fair comparison. (It may be axiomatic, but as explained above

Vincent does not use any market data or transactions in forming his inflated opinions of value. Consequently, in order to support his opinions he must necessarily distinguish and/or discredit marketplace transactions. To the point, Vincent's opinions of value for the Innovator at \$9.1 million (2005) and \$16.7 million (2009) do not hold up if compared against the 2008 \$5 million sale of the Stellar Sea.

C. The Trial Court Failed to Use Customary Valuation Techniques to Value Snopac and Consequently Double-Counted Assets.

In addition to the fact that the trial court relied on inadmissible and erroneous evidence in arriving at fair value for the Innovator, Snopac's third issue on appeal is that the trial court failed to properly apply the law when it did not use customary and current valuation concepts and techniques.

In response, Respondents rely on the case of the *Greyhound*, 41 Wn.2d at 680, to argue that the responsibility of determining stock valuation is vested in the trial court and not in the appraiser. However, Respondents ignore that the law requires that the court exercise that responsibility consistent with customary and current valuation concepts and techniques. When duly considered, the case of *Greyhound* supports Snopac's position taken in this appeal.

In *Greyhound*, an appeal was taken from a judgment of trial court

that confirmed an appraiser's report and fixed the value of the company's stock of \$80.59 per share. *Id.* The Supreme Court held that the evidence preponderated against the trial court's findings and showed that \$50 per share represented a fair, reasonable and just value of the stock. *Id.* In short, the court found that the trial court's blind reliance on the appraiser's valuation was not supported by substantial evidence. This case supports Snopac's contention that the trial court cannot make an arbitrary determination of value, but instead must make a valuation determination based on customary valuation practice and techniques.

Respondents' citations to *Greyhound* are misplaced. Respondents' cite to dicta offered by *Greyhound* and to points of law that demonstrate that the trial court's determination of value was not supported by substantial evidence. For example, Respondents cite to a portion of the holding where the court was generally analyzing policy considerations when determining value, and within that analysis stated "[g]enerally speaking, we believe that the word 'value' contemplates a consideration of all the facts and circumstances pertinent to a particular case in an effort to arrive at a fair and reasonable compromise or arbitration which may in some degree be lacking in mathematical exactness or certitude." *See* 41 Wn.2d at 680. This is not a point of law. Even more, the court's analysis was used to support a decrease in the trial court/appraiser's valuation

because it was not supported by substantial evidence. *See id.* at 691 (“Our review of the use of the formula by the appraiser and the evidence relative thereto convinces us that the findings of the trial court as to the propriety of the use of the formula and the validity of the stock valuation produced thereby must be overturned”).

More troubling is Respondents’ effort to compare this case with *Greyhound*. Respondents assert that this Court should be persuaded by the decision in *Greyhound* because of the statement “[W]e regard the tax appraisal figure as highly significant against the validity of the \$80.59 valuation of the stock.” *Id.* at 691. However, what Respondents neglect to inform that Court is that the “tax appraisal” arose out of a probate where the stock owned by the deceased was appraised for inheritance tax purposes by the tax commission of the State of Washington. *Id.* Such a fact scenario is distinguishable and has no relation to the facts in this case. Further, such reliance on *Greyhound* does not support Respondents’ position that the insurance Snopac obtained for the Innovator represented an accurate determiner of its value.

1. The Court’s Failure to Follow Customary Valuation Techniques Resulted in a Double Counting of Assets to Snopac’s Financial Detriment.

The issue of double-counting of Snopac’s processing equipment highlights a fundamental problem with the trial court’s valuation of

Snopac's stock. There can be no real debate that a double-counting has occurred because the only processing equipment which Snopac possessed was that equipment on board the Innovator. There simply is no other processing equipment for the trial court to separately value at an additional \$790,818.

The error in this case occurred because on Snopac's balance sheet there are separate line items for (1) "the vessel" and (2) the "seafood processing equipment." See Ex. 196. However, *all* of the testimony concerning the fair market value of the Innovator was inclusive of both the vessel itself and the seafood processing equipment on board, thereby combining the balance sheet line items into a single asset the purposes of assessing value. See Exs. 15, 168, 277. (The marine surveyors were not tasked with separately valuing the vessel and the equipment.) Consequently, in calculating the total assets for the Company, the proper accounting was to combine (1) the "vessel" and (2) the "seafood processing equipment" into a single line item. This is exactly what both Snopac's Appraiser (Dahl) and the Court's Independent Appraiser (Duffy) did in their accounting of Snopac assets. Exs. 173, 277. However, when the trial court asked Respondents' Expert Grambush to perform the same accounting, Grambush created a line item for "the vessel and processing equipment" and then also separately double-counted the same "machinery

and equipment” as a separate line item. Snopac is not concerned with whether the accounting error was intentional or negligent, only that the trial court’s final award reflects this double counting of \$790,818 in processing equipment that was already once valued as part vessel.

Even though *all* of the testimony relating to the valuation of the Innovator included both the vessel and its processing equipment on board, one might still contend that the trial court intended that \$6.25 million be just for the vessel itself.² However, even Respondents do not make such a claim. To the contrary, Respondents surmise that because the Innovator had 120% of the *processing power* of the Stellar Sea³ “it would not take a ‘rocket scientist’ to do the math necessary to get to a \$6.25 million value for the Innovator.”⁴ There is nothing anywhere in the record that would support the conclusion that the trial court attempted to value the “vessel” and “processing equipment” separately so as to justify the final accounting at Ex. A.

2. The Court’s Failure to Follow Customary Valuation Techniques Resulted in an Overstating of the Value of the

² As explained in Snopac’s Opening Brief, if the trial court did so, that would be reversible error on the basis that the trial court failed to follow proper valuation technique in arriving at fair value.

³ As a matter of the record on appeal, the trial court concentrated on the value of the Innovator inclusive of both its hull and processing equipment, comparing the processing capacity between the Innovator and the Stellar Sea for purposes of assessing value. *See* FF 41 and FF 60.

⁴ Because the trial court failed to articulate how it arrived at value, the parties are left to speculate. Snopac notes that the math does not line up as claimed by Respondents because 120% of \$5 million is \$6 million, not \$6.25 million.

Dillingham Plant.

Respondents do not contest that there is an irreconcilable conflict between uncontested Finding of Fact No. 39 in which the trial court held that “the total amount spent by Snopac on the Dillingham plant in the five months prior to the May 26, 2008, redemption of the minority owners shares was approximately \$2.8 million” and CP 694 wherein the exact same asset is valued in excess of \$3.23 million. Instead, Respondents correctly point out that there are two separate sources of information in the record to support either of the alternative values at \$2.8 million or \$3.23 million. *See* CP 680 vs. CP 694. However, that leaves unresolved the question of which value the trial court intended as the correct value? The written Findings suggest that the trial court was operating off of Snopac’s balance sheet as of April 31, 2008, but in CP 694 it appears that the trial court accepts values based on Snopac’s balance sheet as of May 31, 2008.

In response to Snopac’s contention that the accounting discrepancy resulted in a \$43,000 windfall to each Respondent, Respondents acknowledge a fundamental premise of Snopac’s appeal which is that acquisition and build-out of the Dillingham plant in the 5 months leading up the redemption did not have a “commensurate influence reducing its equity” (FF No. 18), but rather for accounting purposes the acquisition of the Dillingham plant should have been a zero sum gain. Unfortunately, it

The case law relied upon by Respondents to support the trial court's award of attorney fees is inapposite. Respondents' citation to *Robblee v. Robblee*, 68 Wn. App. 69, 841 P.2d 1289 (1992), for support on the issue of attorney fees is confusing because the *Roblee* court did not even address this issue. In *Robblee*, a closely held corporation and its majority shareholder and partnership and its controlling partner brought actions seeking division of assets pursuant to a letter of intent between the parties. *Id.* The trial court applied a minority discount to the value of partner's shares in the corporation, and the partner appealed. *Id.* Upon review, the court held that: (1) partner, as minority shareholder in corporation, was not oppressed by majority shareholder; (2) minority fair market value discount should not have been applied to partner's shares which were sold to majority shareholder; and (3) prejudgment interest was properly calculated on the balance, rather than on the entire claim. *Id.* Nothing in *Robblee* supports Respondents' position that they were entitled to attorney fees because of conduct by Mr. Blakey.

Respondents' reliance on *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 237 P.3d 241 (2010), for the position that RCW 23B.13.020's appraisal proceeding is generally the exclusive remedy available to minority shareholders who dissent from fundamental corporate changes,

does not call into question the analysis performed in *Seig Co. v. Kelly*, 568 N.W.2d 794, 804-805 (Iowa 1997) (Analysis of when an award of attorney fee is appropriate). The analysis in *Seig* is instructive because it provides a clear definition of the words “arbitrary, vexatious, or not in good faith” within the contexts of a dissenter’s rights’ actions and a test for apply those terms to the facts of a case. Nothing in *Sound Infiniti* would challenge the logical and reasonable methods of interpretation set forth in *Seig*.

Even more, neither *Robblee* nor *Sound Infiniti* defined oppressive behavior. In fact, Respondents citation to *Robblee* is misplaced because the Court did not even discuss oppressive behavior. Respondents’ citation to *Sound Infiniti* to argue that the court defined oppressive behavior is a significant overstatement of the holding. The court in *Sound Infiniti* simply confirmed that Washington cases had **not** addressed the question of what constituted “oppressive” action against a shareholder. 169 Wn.2d at 76. The court reviewed definitions from other jurisdictions, and ultimately concluded that any of the definitions would have supported the trial court’s conclusion that there was no oppressive behavior. *Id.* No definition was adopted by the court, and significant here, nothing in *Sound Infiniti* would limit this court from relying on *Seig* to review the trial court’s decision concerning attorney fees.

Finally, Respondents’ reliance on *Weinberger*, 457 A.2d 701, is

misplaced. Respondents fail to explain how the holding in *Weinberger* is applicable here. Respondents' assertion that the *Weinberger* court "found that the majority owner engaged in bad faith" is a misstatement of the case. *See* RB, p. 32. The *Weinberger* court made no such finding and the words "bad faith" are found nowhere in the holding. Even more, the facts in *Weinberger* are distinguishable from those here. In *Weinberger*, a corporation (Signal) which was the majority shareholder of a subsidiary (UOP), sought and acquired, the remaining shares of the UOP by merger transaction including payment of cash to UOP minority shareholders for their minority shares. 457 A.2d 701. The problem with the merger was that two UOP directors prepared a feasibility study for the exclusive use and benefit of Signal. This document was of obvious significance to both Signal and UOP. An issue of fiduciary obligations arose because there were common Signal-UOP directors participating, at least to some extent, in the UOP board's decision-making processes without full disclosure of the conflicts they faced or disclosure of the feasibility study. The court ultimately reasoned that given the absence of any attempt to structure the transaction on an arm's length basis, Signal could not escape the effects of the conflicts it faced, particularly when its designees on UOP's board did not totally abstain from participation in the matter. 457 A.2d at 710. The court concluded that when directors of a Delaware corporation are on both

sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. *Id.* Here, the facts in *Weinberger* are distinguishable and do not provide guidance for determining whether attorney fees should be awarded to Respondents pursuant to RCW 23B.13.310 (2)(b).

3. Application of RCW 23.B.12.310(2)(b).

Respondents do not challenge Snopac's assertion that the trial court failed to make a Finding of arbitrary, vexatious, or bad faith conduct in connection with the redemption of Respondents' shares. Instead, Respondents argue to this Court their own analysis of the record and explain that "[h]ere, there was substantial evidence that Blakey tried to manipulate the Innovator's value and hence the company's value for purposes of redeeming the minority owners' shares at a fraction of their fair value." This is not a finding of the trial court to be reviewed for substantial evidence. Respondents are doing here what they condone at the outset of the brief which is re-arguing the facts and asking this Court to draw conclusions.

While Snopac respectfully submits that it is not appropriate for this Court to make new findings on appeal, Snopac feels compelled here to correct Respondents' mischaracterization of the record to

support their claim that a “manipulation” occurred. The gist of Respondents’ claim is that Snopac somehow attempted to hide a 2005 Vincent Survey (which contains a value of \$9.1 million) and substitute it with the Jacobsen Appraisal at \$3 million. The record simply does not support any arbitrary, vexatious, or bad faith conduct in Snopac’s decision to hire and rely upon an independent marine surveyor to value the Innovator for the purposes of stock redemption.

a. Jacobsen Was Provided a Copy of the Vincent Survey.

In their brief, Respondents acknowledge that Jacobsen was provided a copy of the Vincent Survey when he performed his Appraisal, and yet just three sentences later suggest claim that “there is no indication [Jacobsen] knew Vincent had valued the ship at \$9.1 million...” That is nonsensical since the \$9.1 million value came straight out of the Vincent Survey.

b. Moss Adams Was Aware of the \$9.1 Million Value.

Respondents state that Snopac did not supply Moss Adams with a copy of the Vincent Survey which showed a value of \$9.1 million. Respondents are technically correct that the record does not reflect that Moss Adams was provided a copy of the Vincent Survey, but this

ignores the uncontested Finding of Fact No. 32, which shows that at the time Moss Adams knew of and was carrying the ship at a book value of \$9.1 million.

c. The Vincent Surveys Were Properly Disclosed During Discovery.

In the course of discovery, Mr. Blakey identified the Vincent Surveys at deposition and Snopac produced copies of the Surveys in responses to Respondents' Requests for Production. Even so, Respondents argue that Finding of Fact No. 57 is not in error because Ms. Spenser testified that she first became aware of the Vincent Survey through Snopac's insurance broker. That testimony may be believed, but it cannot reasonably be used to support a claim that Snopac hid the Surveys because Snopac had already, in fact, produced them to Respondents as part of the case.

Snopac asks the Court to carefully consider Respondents' argument at p. 41, and independently assess what party is committing a "sleight of hand." When carefully considered, Respondents' claim is not that Snopac failed to disclose the Vincent Surveys, but merely that Snopac was not totally transparent because it referred to them as "surveys" instead of "appraisals." However, in both substance and form the documents are in fact detailed surveys of the Innovator, and

Snopac's referral to them as such (instead of characterizing them as "appraisals") is not a basis for alleging bad faith. These are the same documents.

4. Greg Blakey's Business Judgment Is Protected by the Business Judgment Rule.

Mr. Blakey's business decisions on behalf of Snopac are protected by the Business Judgment Rule. *See Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Under the "business judgment rule," corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors. *See Sanders v. E-Z Park, Inc.*, 57 Wn.2d 474, 358 P.2d 138 (1960); *In re Spokane Concrete Products, Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995) (Unless there is evidence of fraud, dishonesty, or incompetence -- *i.e.*, failure to exercise proper care, skill, and diligence -- courts generally refuse to substitute their judgment for that of the directors). The 'business judgment rule' immunizes

management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith. *Id.* An excellent statement of the ‘business judgment rule’ is found in W. Fletcher, *Private Corporations*, § 1039 at pp. 621-25 (perm. ed. 1974):

It is too well settled to admit of controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact. In other words, directors of a commercial corporation may take chances, the same kind of chances that a man would take in his own business. Because they are given this wide latitude, the law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes. And that is true even though the errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs. This rule is commonly referred to as the business judgment rule. [Footnotes omitted.]

See also H. Henn, *Law of Corporations* § 242 (1970); *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498-99, 535 P.2d 137 (1975); *see, e.g., Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (“Courts do not measure, weigh or quantify directors' judgments. . . . Due care in the decision-making context is process due care only.”); *see also In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch.

1996) (“[W]hether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.”).

Respondents’ reliance on the unpublished opinion *Montclair United Soccer Club v. Count Me In Corp.*, C08-1642-JCC, 2010 WL 2376229 (W.D. Wash. June 9, 2010), is yet another example of their failure to provide relevant or applicable authority. In *Montclair*, the court initially reaffirmed the basic rule that in Washington, “a court will not substitute its judgment for that of corporate directors unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence).” *Id.* at *3. To secure the protection of the business judgment rule, “[g]ood faith is insufficient because a director must also act with such care as a reasonably prudent person in a like position would use under similar circumstances.” *Id.*

With a completely distinguishable set of facts from the instant matter and on a motion for summary judgment, the *Montclair* court concluded that the chief executive of the company failed to

demonstrate a genuine issue of material fact as to whether he should be entitled to the protection of the business judgment rule when no reasonable finder of fact could determine that he acted reasonably when he: a) combined client and company money without adequate accounting systems in place, b) failed to disclose to clients what had happened to their money, and c) used that money to develop a profitable software program. *Id.* at *4.

While Snopac does not challenge the above principles, they simply do not apply here. There are no Findings or Conclusions that Mr. Blakey failed to act as an ordinarily prudent person in a like position would use under similar circumstances. To the contrary, the trial court determined that Mr. Blakey's business decisions were adequately explained to the satisfaction of the trial court, and the trial court concluded:

Respondents' claims of self dealing and improper diversion of corporate assets by Petitioner are not supported in the record. Greg Blakey acted with good intentions; however, he did so without informing the Respondents in a timely or predictable manner but only after Respondents were forced to make inquiry.

CP 691, CL 7.

Respondents claim that Mr. Blakey is not protected by the Business Judgment Rule because:

When the evidence and all reasonable inferences are viewed in a light most favorable to Spencer, there is substantial evidence that Mr. Blakey not only made bad business decisions and squandered the minority owner's investment in Snopac, but he made those decisions in a way that violated basic rules for proper corporate governance. It was his unilateral decisions without informing the minority owner, his insistence that he did not have to obtain their approval, and his failure to conduct regular board meetings that permitted him to borrow large sums of money and invest it with no check on his conduct.

Brief, pp. 37-39. First, there is no Finding of Fact in the record that Mr. Blakey somehow "made decisions in a way that violated basic rules for proper corporate governance" to be upheld by substantial evidence. Second, "bad" business decisions are protected by the business judgment rule unless they are not honest business judgment decisions. Finally, as the 70% shareholder of Snopac, Mr. Blakey was allowed to make unilateral decisions without informing the minority owner or obtaining their approval "so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). This is exactly what the Court found in Conclusion of Law No. 7.⁵

⁵ The record is clear that Mr. Blakey was keeping Snopac afloat by investing his own money into Snopac (without financial support from Respondents). The idea that Mr.

E. The Court Erred in Awarding Fees and Costs without Assessing the Reasonableness of the Award.

Contrary to Respondents' unsupported assertion, the law is clear that an award of attorney fees and costs cannot be sustained in the absence of an adequate record. *See Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). In *Mahler*, the Supreme Court clearly stated that trial courts **must** take an **active** role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. *Id.* at 434. Courts should not simply accept unquestioningly fee affidavits from counsel. *Id.* at 435; *see also Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). The *Mahler* court went on to state that “[C]onsistent with such an admonition is the need for an adequate record on fee award decisions.” *Id.* Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Id.*; *see also Smith v. Dalton*, 58 Wn. App. 876, 795 P.2d 706 (1990); *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990); *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P.2d 1015 (1993). The *Mahler* court not only reaffirmed the rule regarding an adequate record on review to support

Blakey would lend his own money to Snopac and then invest that money inconsistent with Snopac's best interests is illogical and there is good reason for the trial court's conclusion that Mr. Blakey was acting in "good faith" with respect to his business decisions.

a fee award, but held findings of fact and conclusions of law are **required** to establish such a record. *Id.*

The trial court awarded attorney fees and costs in favor of Respondents without a single Finding of Fact or Conclusion of Law to support such an award. Snopac respectfully request that this Court reverse the trial court's un-supported award of attorney fees and costs in favor of Respondents and remand this matter.

F. Respondents Do Not Contest That the Trial Court Miscalculated the Appropriate Rate of Interest.

Again, in violation of RAP 10.3(b), Respondents fail to address the trial court's miscalculation of the interest rate. By failing to argue in response to Snopac's claims on appeal, the Court can presume that Respondents concede this argument because they have offered no argument or case law to rebut Snopac's evidence. *Ward*, 125 Wn. App. at 144. Snopac renews its request that this Court reverse the trial court's award of prejudgment and post-judgment interest at 12%.

IV. RESPONSE ON RESPONDENTS' CROSS APPEAL

A. No Award for the Diminished Value Was Warranted.

Respondents' assertion that the trial court erred by not accounting for the alleged diminished value of the stock fails because (1) there were no Findings or Conclusions that Mr. Blakey breached a fiduciary duty that

caused an actual reduction in the value of Snopac's stock and (2) the trial court already improperly included an award of diminished value in its calculation of value.

1. No Breach of Fiduciary Duties Occurred.

Respondents recognize that their exclusive remedy for Snopac's alleged misconduct is through the trial court's assessment under the Dissenter's Rights statute of the "fair value" of their shares. *See* Respondents' brief citing *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 186 P.3d 1107 (2008), *aff'd but criticized*, 169 Wn.2d 199. The trial court expressly noted this exclusive remedy in its Conclusion No. 9.

In *Sound Infiniti, Inc.*, 14 Wn. App. 33, the court determined that valuing the shares of an ousted shareholder, the court overseeing an appraisal action brought pursuant to chapter 23B.13 RCW may account for all prior reductions in the value of those shares **caused by actual breaches of fiduciary duty**, including the extraction of unreasonable salaries, misuse of corporate funds, or other self-dealing.

The record in this case does not support an award of diminished value. In its Findings, the trial court specifically identified four unilateral business decisions by Mr. Blakey:

- (a) Mr. Blakey's decision to purchase the Innovator without seeking the minority owners' approval - FF 13;

(b) Mr. Blakey's decision to modify and upgrade systems on the Innovator without seeking the minority owners' approval - FF 14, 6, and 20;

(c) Mr. Blakey's decision to purchase the Dillingham plant in January 2008 without the minority owners' approval - FF 38; and finally

(d) Mr. Blakey's decision to invest upgrades into the Dillingham plant - FF 39.

Based primarily on these Findings, the trial court made the following pertinent Conclusions of Law:

Conclusion of Law No. 7. Respondents' claims of self dealing and of improper diversion of corporate assets by Petitioner are not supported in the record. Greg Blakey acted with good intentions; however, he did so without informing the Respondents in a timely or predictable manner but only after Respondents were forced to make inquiry. Sometimes Petitioner responded imprudently to Respondents, this only added to their suspicions. Moreover, the result of some of the Petitioner's unilateral business decisions cost Snopac significant sums of money, whereby the debt-load for these purchase, modifications and increased capacity pushed Snopac to the brink of bankruptcy. These poor business decisions reduced the value of Snopac's overall equity. Finally, these unilateral business decisions furthered the lack of trust among minority shareholders.

Conclusion of Law No. 9. Respondents' exclusive remedy for the breaches of fiduciary duty, misuse of corporate funds and oppression of minority shareholders is provided within the stock appraisal process of RCW 23B.13.010 et. seq., and in that context the Respondents had to prove that the misconduct reduced the value of their stock as of May 26, 2008, a burden of proof, which they met, in large part because of Petitioner's unilateral business decisions that resulted in the highest debt-load in Snopac's

history one month prior to the redemption date.

Conclusion of Law No. 10. The court finds that Respondents brought their claims of misconduct by Petitioner in good faith. Further, their **claims of oppression of minority shareholders in the cause of this Dissenter's Rights proceeding were both founded and proper.**

Similar to the argument challenging the trial court's award of attorney fees under RCW 23B.13.310(2)(b) because of alleged arbitrary, vexatious, or bad faith conduct, the record is void of any evidence demonstrating an actual breaches of fiduciary duty that caused a reduction in the value of Snopac's shares.

The trial court's Findings and Conclusions provide no guidance, are contrary to one another, and do not support an award of diminished value. On one hand the trial court concluded that Respondents' claims of self dealing and of improper diversion of corporate assets by Petitioner are not supported in the record (CL 7) and on the other hand the trial court concluded that Respondents had to prove that the misconduct reduced the value of their stock as of May 26, 2008, a burden of proof, which they met, in large part because of Petitioner's unilateral business decisions (CL 9). Even more, the trial court included no Findings or Conclusions that establish a record that an actual breach of fiduciary duty that caused a reduction in the value of Snopac's shares actually occurred. There is

simply no evidence before this Court that would warrant an award of diminished value.

2. All Inferences Indicated That the Trial Court Already Improperly Included an Award of Diminished Value Based on Alleged “Misconduct”.

There is no dispute that Respondents have asserted that majority “oppression” caused a diminution in the value of Respondents' shares. Respondents made requests for an award of diminished value in their trial brief, in opening statement, at the outset of the trial of this matter, and in both closing argument as well as in Respondents' proposed Findings of Fact and Conclusions of Law. In the trial court’s final Findings of Fact and Conclusions of Law, it held that Respondents had “proved that the misconduct reduced the value of their stock as of May 26, 2008, a burden of proof, which they met, in large part because of Snopac’s unilateral business decisions that resulted in the highest debt-load in Snopac’s history one month prior to the redemption date.”⁶ FF 9. However, because the trial court failed to articulate how it arrived at fair value, it is unclear as to whether the trial court took “misconduct”⁷ into account in

⁶ This Conclusion of Law No. 9 is challenged on two grounds: (1) that Snopac’s “unilateral business decisions” were made in “good faith” (CL 7) and are therefore protected by the business judgment rule; and (2) that the business decisions made in the months leading up to redemption did not have the effect of reducing Snopac’s equity.

⁷ In its cross-appeal, Respondents consistently refer to Mr. Blakey’s “bad faith” conduct. However, nowhere in the trial court’s Findings or Conclusions does it conclude that Mr. Blakey acted in “bad faith.” To the contrary, Conclusion of Law No. 7 makes clear that Mr. Blakey acted in “good faith.”

setting fair value for Snopac's stock.

On July 15, 2010, Respondents filed a Motion for Award for Diminution in Value of Shares Due to Misconduct. The trial court denied a supplemental award, and held that "[T]he court has already considered all the evidence presented at trial to determine the value of respondents' shares, as reflected in the June 1, 2010, Findings of Fact and Conclusions of Law." CP 778-79. This Order fails to resolve whether the trial court took "misconduct" into account in setting fair value. However, as Snopac has explained in its appeal, the trial court's determination of value for the Innovator is not consistent with customary valuation concepts and techniques as is required by *Matthew G. Norton Co.*, 112 Wn. App. 865. Consequently, it may be inferred from the trial court's order that it already arbitrarily increased its fair value determination of the Innovator based on its determination that Snopac engaged in "misconduct."

If the Court did consider "misconduct" in setting the fair value of the Innovator, then the trial court did so in obvious error. The Findings and Conclusions are void of any evidence that (1) Snopac's majority shareholder (Mr. Blakey) had breached his fiduciary duty to his sisters, and (2) that such unsubstantiated breach of fiduciary duty somehow resulted in a diminution in the value of Snopac's stock.

3. There Is No Evidence in the Record Which Would Support

a Diminished Value as Respondents Did Not Offer Evidence of Diminished Value at Trial.

Evidence not appearing in the record will not be considered when resolving appeal. *State v. Wilson*, 75 Wn.2d 329, 450 P.2d 971 (1969); *see also State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968) (Appeal must be decided on record made in trial court, with consideration given only to evidence presented in record); *Eide v. Eide*, 1 Wn. App. 440, 462 P.2d 562 (1969) (Exhibits which are not made part of record on appeal will not be considered by court in reviewing the case).

No testimony or evidence was offered at trial and there is no evidence in the record on appeal that would quantify a diminished value of Snopac's stock. Without such evidence, this Court is in no position to determine what, if any, diminished value resulted. Further, the trial court would be in the same position if this issue was remanded for a determination of the same. Respondents failed to offer the necessary proofs to demonstrate diminished value, and contrary to the Respondents' position, such a value cannot be pulled from thin air.

IV. CONCLUSION

The objective of the redemption statute is to provide minority shareholders fair value for their stock which is being redeemed. *See Matthew G. Norton Co.*, 112 Wn. App. at 876 ("the stockholder is

entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern.”) The trial court’s role in this case was to establish the fair value for Respondents’ redeemed interest in Snopac Products, Inc.

Snopac appeals to this Court on the basis that the trial court failed to properly assess fair value of Snopac’s primary asset (the Innovator), and consequently, Respondents were unjustly awarded far more than the value of what was taken from them. Snopac respectfully requests:

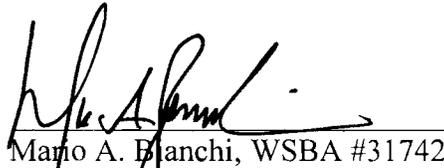
(1) A new trial on the issue of fair value of the Snopac Innovator based on admissible evidence and using “customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring the appraisal”;

(2) Reversal of the trial court’s award of attorney fees and costs in the absence of a finding of arbitrary, vexatious, or bad faith conduct; and

(3) Reversal of the trial court’s award of 12% pre-judgment and post-judgment interest with instructions that interest be given on any award in favor of Respondents at 5.5% from the effective date of

the corporate action until paid as required by RCW 23B.13.300(6) and
RCW 23B.13.010(4).

Respectfully submitted this 16 day of September, 2011.

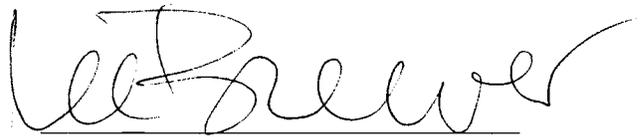


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CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2011, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record:

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Lee Brewer

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