

NO. A04-2338

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State of Minnesota  
**In Court of Appeals**

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John S. Drewitz,

*Appellant,*

v.

MOTORWERKS, Inc., a Minnesota corporation,  
R. Jack Walser, Paul M. Walser and Andrew D. Walser,

*Respondents.*

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**BRIEF AND APPENDIX OF RESPONDENTS  
MOTORWERKS, INC., R. JACK WALSER,  
PAUL M. WALSER & ANDREW D. WALSER**

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## STATEMENT OF LEGAL ISSUES

1. The right to receive tender is waived when the tenderee assumes any position that would make the tender futile. Based on the parties' negotiated shareholder agreement, respondent company immediately offered to tender book value to appellant for his company shares. Appellant responded by filing suit and contending that respondents had to repurchase his shares at market value instead. Did appellant's commencement of litigation waive respondents' obligation to tender book value for his shares?

*This court should hold "yes."*

Apposite authority:

*Wangensteen v. N. Pac. Ry. Co.*, 218 Minn. 318, 324, 16 N.W.2d 50, 52 (1944);  
*Morgan v. Ibberson*, 215 Minn. 293, 295, 10 N.W. 222, 223 (1943)

2. A successful plaintiff in a breach-of-contract case is awarded damages that put him in the same place that he would have been if the contract had been performed. Here, appellant claims that respondents breached their contract with him by failing to properly tender *book value* for his shares in respondent company, but the remedy he seeks is *market value* for those shares and a forfeiture of respondents' contractual right to terminate his shareholder status. Is appellant's remedy limited to book value?

*This court should answer "yes."*

Apposite authority:

*Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 94 (Minn. 1979);  
*Sprangers v. Interactive Tech., Inc.*, 394 N.W.2d 498, 503-04 (Minn. App. 1986) (citing  
*Paine v. Sherwood*, 21 Minn. 225, 232 (1875)).

3. A plaintiff is required to assert all alternative theories of recovery in his initial action. Here appellant brought two successive suits for a market-rate buyout of his shares in respondent company, each asserting a different theory of recovery. Is his second cause of action barred by *res judicata*?

*This court should hold "yes."*

Apposite authority:

*Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004);  
*Hauser v. Mealey*, 263 N.W.2d 803, 806-07 (Minn. 1978).

## STATEMENT OF THE CASE

This is the second time that Appellant John Drewitz has sued respondents for a court-ordered buyout of the shares that he holds in Respondent Motorwerks, his former employer. First, in January 1999, Drewitz sued respondents (collectively referred to as Motorwerks) in Ramsey District Court alleging a (1) right to relief pursuant to Minn. Stat. § 302A.751, subd. 1(b)(3); (2) breach of fiduciary duty; (3) breach of employment contract; and (4) breach of implied covenant of good faith and fair dealing. After filing his complaint, Drewitz immediately brought a motion for a market-value buyout of his Motorwerks stock pursuant to Minn. Stat. § 302A.751 based on Motorwerks' allegedly unfairly prejudicial conduct toward him. The Honorable Kathleen Gearin denied this motion in May 1999. The case was later transferred to the Honorable M. Michael Monahan. In October 1999, Motorwerks brought a motion for summary judgment. Judge Monahan ordered summary judgment on Counts I, II, and IV and denied it as to Count III (breach-of-employment-contract claim). The parties then dismissed Count III by stipulated settlement agreement in August 2000. Drewitz appealed the district court decision on Counts I and II, and the court of appeals affirmed in May 2001. The supreme court denied Drewitz's petition for review in June 2001.

After three years of on-and-off negotiations regarding the proper input numbers to be used in calculating book value for his stock, Drewitz filed this action in Hennepin County District Court in May 2004. He again asked the district court to compel a market-value buyout of his Motorwerks stock, claiming that Motorwerks' alleged failure

to tender book value in 1999 triggered judicial intervention under Section 302A.751. He also requested shareholder distributions until such buyout is completed. In September 2004, the district court, the Honorable Marilyn Brown Rosenbaum presiding, denied his motion and dismissed his complaint in full, concluding that: (1) Drewitz is no longer a Motorwerks shareholder and Motorwerks does not owe him a fiduciary duty; (2) Motorwerks has a continuing right to purchase Drewitz's shares at book value based on *Drewitz v. Walser*, C3-00-1759, 2001 WL 436223 (Minn. App. 2001), *review denied* (Minn. June 27, 2001); (3) Drewitz's motion for a buyout pursuant to Minn. Stat. § 302A.751 is barred by res judicata; and (4) Drewitz should enforce the settlement of his claims in Ramsey County. This appeal follows.

## STATEMENT OF FACTS

### A. Introduction

In the 1990's, Respondents Jack Walser and his sons, Paul and Andrew, variously owned interests in local car dealerships; and they often entered into incentive agreements with the on-site general managers whereby those managers could gradually purchase a stock-ownership interest in the dealership for which they worked. *Drewitz v. Walser*, C3-00-1759, 2001 WL 436223, at \*1-\*2 (Minn. App. May 1, 2001), *review denied* (Minn. June 27, 2001). The purpose of such agreements was to provide their general managers with a vested interest in the success of the dealership while they were employed there. *Id.*

Respondents Motorwerks hired Appellant John S. Drewitz as a car salesman in 1990. *Id.*, at \*1. At that time, Jack Walser was Motorwerks' sole owner. *Drewitz*, 2001

WL 436223, at \*1. In June 1993, Walser promoted Drewitz from salesman to general manager for a six-month trial period. *Id.* The parties, each represented by counsel, then negotiated the terms for written employment and shareholder agreements. *Id.* The shareholder agreement allowed Drewitz to purchase stock ownership in Motorwerks. *Id.* In 1996, Paul Walser, who had previously been the sole Motorwerks shareholder, returned to the company as its CEO. *Drewitz*, 2001 WL 436223, at \*1. Upon his return, Paul Walser bought a 15% share of the company. *Id.*

#### **B. Employment agreement**

Under the negotiated employment agreement, Motorwerks hired Drewitz to be its vice-president and general manager from January 1, 1995 until March 31, 1999. (A. 3). In December 1998, Paul Walser and a human-resources department employee investigated employee complaints regarding Drewitz's management of Motorwerks. *Id.* at \*2. After completing the investigation, Paul Walser informed Drewitz that his employment would not continue after his employment agreement expired on March 31, 1999. *Id.* Although Drewitz was relieved of his general manager's duties as of December 31, 1998, Paul Walser told Drewitz that he would continue to receive full compensation through the end of his term of employment on March 31, 1999. *Drewitz*, 2001 WL 436223, at \*2. In a subsequent letter at the end of December 1998, Paul Walser explained the terms for "the severance of our partnership and separation from employment," including paying Drewitz his salary and incentive through March 31, 1999, and repurchasing his shares at book value at a price established by the formula in the shareholder agreement. *Id.*

### C. Shareholder agreement

Based on the negotiated terms of the shareholder agreement, Motorwerks had given Drewitz the opportunity to become a Motorwerks shareholder by purchasing up to half its shares at book value. (A. 13, 20, 33). Generally, book value is the value at which an asset is carried on the balance sheet and is tabulated by subtracting the cost from the accumulated depreciation. *See Black's Law Dictionary* 195 (8th ed. 2004). In this case, the parties agreed to a specific method for determining the purchase and sale price of stock. (A. 20, 24, 26, 35). Final calculations based on this method, however, will vary depending on the actual numbers inserted into the agreed-upon formula. The agreement permitted Drewitz to purchase 20% of the Motorwerks stock immediately. (A. 15). He also received three successive annual options to purchase 10% of the stock until he owned a total of 50%. (A. 20). The purpose of this stock-purchase option was "to promote loyal, dutiful and successful on-site management of the company \* \* \* ." (A. 14).

Although the shareholder agreement required Drewitz to pay for the shares in full at closing, Jack Walser permitted him to purchase the initial 20% and a subsequent 10% with promissory notes to Motorwerks. *Drewitz*, 2001 WL 436223, at \*2; (A. 20). The company determined the sale price, or book value, for these shares by the formula set forth in the shareholder agreement. (A. 20, 35-37). Thus, even though he did not immediately pay for the shares — and Motorwerks was in fact financing his stock ownership — Drewitz still received annual shareholder distributions. In 1997, the company declined Drewitz's request for further stock-purchase financing and asked him

to pay for the shares upon purchase as required by the shareholder agreement. *Drewitz*, 2001 WL 436223, at \*2.

Because the very purpose of his stock-ownership rights was to promote successful management, Drewitz's right to buy and own shares in Motorwerks was premised on his employment at the dealership, i.e., if his employment terminated, his shareholder status terminated as well. The shareholder agreement therefore states that if Drewitz's employment at Motorwerks

is terminated for any reason, whether voluntarily or involuntarily, the Company shall purchase, and the terminated Shareholder shall sell to the Company, all of the Shares of the Company issued to and outstanding in the name of the terminated Shareholder.

(A. 24). Under the agreement, the parties had 90 days from the date employment terminated to finalize this transaction. (A. 28). The agreement further provides that the price for redeemed stock is to be based on the same formula used to calculate the price for which Drewitz originally bought the shares — book value. (A. 24, 26, 35-37). Because he had negotiated the shareholder agreement, Drewitz understood that the benefit of being a Motorwerks shareholder was the opportunity to receive shareholder distributions during the term of his employment, not that he would profit from the sale of shares when his employment ended. (A. 17, 20, 24).

**D. On-going negotiations to tender book value**

In January 1999, while still being paid by Motorwerks, and despite the clear terms of the shareholder agreement, Drewitz filed suit against Motorwerks in Ramsey County District Court seeking a market-value buyout of his shares pursuant to Minn. Stat. §

302A.751. (A. 40-50). Drewitz argued at that time that he had been treated unfairly, unreasonably, and dishonestly by Motorwerks, thereby triggering the judicial intervention allowed under the statute. *Id.*

The suit followed just three weeks on the heels of Paul Walser's December 24, 1998 letter offering to immediately repurchase Drewitz's shares at book value. (A. 40). Despite this suit, on July 1, 1999, Motorwerks made a formal demand for Drewitz's compliance with the shareholder agreement, i.e., selling his shares back to Motorwerks at book value. (A. 51). Drewitz immediately refused, claiming that the shareholder agreement did not require him to do so. (A. 52). Nevertheless, Motorwerks attempted to tender the book value of Drewitz's shares to him in late July 1999. (A. 53). Drewitz refused this tender. (A. 56).

With tender at book value for Drewitz's shares at an impasse, Motorwerks moved for summary judgment. The district court granted the motion on three of the four counts. Following this decision, the parties settled the breach-of-employment-contract claim. *Drewitz*, 2001 WL 436223, at \*3. Although the court's order was filed in December 1999, judgment was not entered until August 2000. (A. 58-59). Accordingly, Drewitz did not file his appeal of the district court's first decision until October 2000. In the interim, Motorwerks once again attempted to end the matter by arranging a tender to Drewitz of book value for the redemption of his shares. (A. 66-69). While never finalized, the parties' correspondence shows that they had, at least briefly, reached a resolution regarding share valuation, but not regarding the applicable interest rate. (A. 70, 75-76). Then, seemingly retreating from the item on which they had agreement —

book value — Drewitz requested that information regarding the book valuation be forwarded to his accountant, and Motorwerks immediately complied. (A. 78, 79). Over the next two years, all negotiations were between the parties' accountants. (A. 78-79; 81-92).

**E. Drewitz's first appeal to the court of appeals**

In the midst of these negotiations, in October 2000, Drewitz appealed the district court decision, and the Minnesota Court of Appeals affirmed. *See Drewitz*, 2001 WL 436223. Specifically, the court of appeals found that Drewitz's employment agreement and the shareholder agreement were valid. *Id.* at \* 3-\*6. The appellate court further confirmed that there was no evidence that Motorwerks acted in an unfairly prejudicial manner toward Drewitz or breached any fiduciary duty owed him. *Id.* Simply, Drewitz did not establish circumstances triggering judicial intervention under Minn. Stat. § 302A.751. *Id.* at \*5. Moreover, the court rejected Drewitz's argument that Motorwerks should be required to buy back his shares at market value rather than book value as negotiated in the shareholder agreement:

The Shareholder Agreement clearly provides that termination of employment *for any reason* triggers the buy-back. As the district court noted, there is no doubt that once the contract expired, and employment ended, respondents had the obligation to purchase Drewitz's shares and he had the obligation to sell his shares to the corporation. Under all of the circumstances of this case, the district court did not err in concluding that the buy-back provision was triggered when the employment contract expired and the terms negotiated by Drewitz and Jack Walser for the price of shares at the buy-back controlled. Drewitz has received everything that he bargained for under the terms of the agreement with respondents.

*Drewitz*, 2001 WL 436223, at \*5 (emphasis in original). The supreme court denied Drewitz's petition for review. (A. 80).

**F. Renewed negotiations**

With Drewitz's appellate options exhausted, the parties renewed their efforts to finally resolve the matter. The parties' accountants met and agreed upon the book value. This was a highly negotiated issue because while the parties agreed on the applicability of book value, they did not agree on the numbers used to generate the final calculation. *Id.* Both parties compromised to reach a final number for the book value of Drewitz's shares. In contrast, however, the parties were unable to resolve their dispute with regard to the interest Drewitz was to receive pursuant to the buy-back. (A. 84-89). That is because the contract did not specify an interest rate and the parties differed over both the proper rate and the time period to which that interest applied. *Id.* Notably, however, all negotiations with respect to the applicable period for interest assume that it began to accrue on March 31, 1999 — Drewitz's last day as a Motorwerks shareholder. Ultimately, however, the parties' accountants could not reach a final settlement and Drewitz's counsel re-entered the negotiations in January 2003. (A. 93).

Still unable to resolve the issue of interest, but based on the agreement as to the book value of the shares, Motorwerks' counsel tendered payment of the agreed-upon share value to Drewitz's counsel in August 2003 with an accompanying letter:

Enclosed please find Motorwerks BMW check no. 93928 in the amount of \$355,862.00, forwarded in payment for the principal amount owed to Mr. Drewitz for the redemption of his stock. It is my understanding that while our clients have agreed upon this amount for the redemption of stock, they have not yet resolved their dispute as to the interest that may be payable.

Notwithstanding, the enclosed is forwarded in payment of the agreed upon redemption price. *Mr. Drewitz' cashing or negotiation of the enclosed check will not be construed as a waiver of his right to claim interest on the payment.*

(A. 102) (emphasis added)<sup>1</sup>.

Motorwerks' counsel also continued to attempt to negotiate a settlement with Drewitz regarding his claim for interest and made numerous attempts to obtain a response from Drewitz as to whether he intended to accept the share value tendered and Motorwerks' settlement offer on the interest. (A. 112-14). Drewitz never responded and instead returned the tendered check and commenced this litigation in Hennepin County.

## ARGUMENT

### I. Standard of review

On appeal from the dismissal of a complaint under Minn. R. Civ. P. 12.02, this court accepts the factual allegations in the complaint as true, views them in the light most favorable to the appellant, and reviews the district court's legal conclusions de novo. *See Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 668 N.W.2d 227, 229-30 (Minn. App. 2003).

Contract interpretation is a question of law that this court reviews de novo. *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998). The primary goal of contract interpretation is to determine and enforce the intent of the

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<sup>1</sup> The book value of Drewitz's shares as agreed by the accountants failed to account for \$9,115 Drewitz's still owed to Motorwerks on a promissory note relating to his purchase of the shares. Thus, this amount should have been subtracted from the book value previously agreed upon, which was \$355,862. Accordingly, the net book value for Drewitz's shares is actually \$346,747.

parties. *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself. *Metro. Sports Facilities Comm'n v. General Mills*, 470 N.W.2d 118, 123 (Minn. 1991). The appellate courts, however, read contract terms in the context of the entire contract and will not construe the terms so as to lead to an absurd result. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

Additionally, the application of res judicata to preclude a claim is a question of law that this court reviews de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

**II. Drewitz's status as a shareholder ended when his employment contract ended.**

**A. Drewitz's refusal to accept tender of book value for his shares did not extend his shareholder status.**

- 1. Drewitz's commencement of the first litigation demanding a buyout at market value waived Motorwerks' responsibility to tender book value because it demonstrated that any attempt to do so would be futile.**

Drewitz contends that he is still a shareholder because Motorwerks never "unconditionally" tendered book value to him. (Appellant's br. at 2). But this argument ignores the fact that Drewitz made it clear from the time Motorwerks first offered to tender book value that he would not accept such a tender and would not transfer his shares. Once Drewitz took that legal position, Motorwerks had no obligation to tender book value to him because it would have been a meaningless exercise. *Wangensteen v.*

*N. Pac. Ry. Co.*, 218 Minn. 318, 324, 16 N.W.2d 50, 52 (1944) (“In complying with the formalities of a tender, one is not required to do the useless and futile thing”). The futility of any tender was obvious to Motorwerks after it offered, in a December 24, 1998 letter, to repurchase Drewitz’s shares at book value and Drewitz responded by immediately commencing the first round of this meritless litigation demanding a market-rate buyout. *Drewitz*, 2001 WL 436223, at \*2; (see A. 40-50). Making this demand — in direct contradiction to the parties’ negotiated shareholder agreement — fully obviated Motorwerks’ obligation to tender book value, as it most obviously would not have been accepted. See, e.g., *Morgan v. Ibberson*, 215 Minn. 293, 295, 10 N.W. 222, 223 (1943) (“A tender is waived when the teree assumes any position which would render it, so long as such a position is maintained, a vain and idle ceremony”) (citations omitted); see also *Country Club Oil v. Lee*, 239 Minn. 148, 155, 58 N.W.2d 247, 251 (1953) (“The law is well settled that a tender is unnecessary where it would be idle ceremony”). Thus, to argue, as Drewitz does, that the “burden to tender was always on the Respondents,” ignores the fact that Motorwerks had no such obligation once Drewitz commenced the first suit in this on-going litigation, thereby demonstrating that tender would be nothing more than idle ceremony. (Appellant’s br. at 15).

Drewitz also points to a Third Circuit case, *Coleman v. Taub*, as supportive of his argument that he is still a shareholder because Motorwerks has allegedly failed to properly tender book value to him. (Appellant’s br. at 12) (citing *Coleman v. Taub*, 638 F.2d 628, 637 (3d Cir. 1981)). In particular, Drewitz relies on the *Coleman* court’s general statement that the plaintiff shareholder there would have no right to hold his

shares beyond the time that a value was placed on them in accordance with the parties' negotiated buy-back clause and the purchase price was tendered. *Id.* But the *Coleman* case did not examine the issue of proper tender and hence it has no application here. In fact, the Third Circuit explicitly refused to consider "whether failure to tender any required performance was excused for any reason," stating that the issue was not before the court. *Id.* at 637-38. Thus, the issue of whether Drewitz's demand for market value and immediate commencement of suit excused Motorwerks' obligation to tender book value is one that the *Coleman* court specifically refused to analyze. *See id.* Accordingly, its statement that the defendant company could terminate shareholder status by tendering purchase price — something Motorwerks offered to do as early as December 1998 — was merely a general statement that does not address the dispositive facts.

The *Coleman* court, however, did make several observations that are applicable to this case because, there too, the parties had entered into a shareholder agreement that included a share buyback provision that was triggered when the shareholder's employment was terminated. For example, while noting that the buy-back process broke down and became acrimonious, the court nonetheless concluded that "\* \* \* we can hardly infer from this failure that the parties wanted, contrary to their earlier intent, to remain as fellow shareholders in the same closely held business." *Id.* Further, the court pointed out that "to infer an intent to lock [plaintiff] in as a shareholder at the same time he was being locked out as an employee," simply did not make sense. *Id.* In sum, the *Coleman* court stated that the plaintiff "bargained for the right to be a shareholder only while he remained an employee. He did not bargain for the privilege of being a dissident,

litigious, outside minority stockholder and the obvious purpose of the buy-back clause was undoubtedly to avoid such a situation.” *Id.* at 637. Likewise here, Drewitz’s litigation subverted the intent of the parties’ shareholder agreement and waived Motorwerks’ obligation to tender book value. It did not, however, extend Drewitz’s shareholder status past the expiration of his employment contract because he bargained for the right to be a shareholder only so long as he remained an employee. Were it otherwise, a dissident shareholder/employee like Drewitz could unilaterally extend his shareholder status indefinitely — in direct contravention of the parties’ contract and their intent — by commencing serial (and meritless) litigation that prevents the buy-out called for in the contract. This court should affirm the district court’s decision that Drewitz is no longer a shareholder and that Motorwerks has the right and obligation to buy back his shares only at book value.

**2. Motorwerks remained willing and able to tender book value throughout the share-redemption period.**

It is also important that Motorwerks made this offer to tender long before the redemption period expired, i.e., more than 90 days before Drewitz’s contract expired and more than 180 days before the share redemption period ended. *Drewitz*, 2001 WL 436223, at \*2. In doing so, Motorwerks demonstrated that it was willing and able to tender book value within 90 days of the expiration of Drewitz’s employment contract as it was obligated to do under the parties’ negotiated shareholder agreement. *See Dunn v. Hunt*, 63 Minn. 484, 485, 65 N.W 948, 948 (1896) (explaining that it is cardinal principle of doctrine of tender that it must be continuing and must be kept good). Because

Motorwerks met its obligation by offering to tender book value in December 1998 and by remaining willing and able to do so throughout the 90-day redemption period, Drewitz's shareholder status expired at the end his employment. Drewitz's meritless litigation and attendant rejection of tender at book value did not eradicate the contractual provision ending his shareholder status after his employment contract expired.

**3. Drewitz cannot take advantage of the alleged breach of tender because he caused it.**

Despite repeatedly taking a legal position that evinced an unwillingness to accept tender at book value, Drewitz now complains that Motorwerks never properly tendered book value to him. As the Minnesota Supreme Court aptly observed, however, a party "cannot prevent the formalities of a tender and decline it, only to assert those unfinished formalities after an adverse recovery has been had." *Wangensteen*, 218 Minn. at 325, 16 N.W.2d at 52. Yet that is exactly what Drewitz is trying to do here. Although the facts that Drewitz relies on to support his contention that Motorwerks did not properly tender book value existed at the time of his first appeal, he failed to raise the issue. It is only now, after failing to prevail in the first action, that he has conveniently raised this new theory. Moreover, Drewitz cannot rely on this alleged failure to support his claim for breach of tender because he is the sole cause of it. *See, e.g., Craigmile v. Sorenson*, 248 Minn. 286, 292, 80 N.W.2d 45, 49 (1956) (quoting 3 Williston Contracts (rev. ed.) § 677) ("It is a principle of fundamental justice that if a promisor is himself the cause of failure of performance, either of an obligation due him \* \* \*, he cannot take advantage of the failure."); *see also, Nodland v. Chirpich*, 307 Minn. 360, 367, 240 N.W.2d 513, 516-

17(1976) (“Where a promisor prevents or hinders the occurrence, happening, or fulfillment of a condition in a contract, and the condition would have occurred except for such hindrance or prevention, the performance of the condition is excused \* \* \*”). As a result, Drewitz’s status as a shareholder expired after his employment contract ended, at all times during which Motorwerks was willing and able to tender book value to Drewitz’s for his shares. Drewitz’s commencement of litigation waived Motorwerks’ obligation to tender book value but did not extend Drewitz’s shareholder status past the expiration of his employment contract because he was the cause of the failure of tender.

**4. Drewitz’s litigation explicitly rejected the concept of tender at book value and waived any later objections he might have relating to the manner in which Motorwerks attempted to tender book value.**

Drewitz acknowledges that Motorwerks attempted to tender book value to Drewitz on three separate occasions — in July 1999, in July 2000, and in August 2003. (Appellant’s br. at 5, 10). Motorwerks made the July 1999 and July 2000 attempts despite having no obligation to do so after Drewitz commenced litigation demonstrating that any attempt to tender book value would be unavailing. *Country Club Oil*, 239 Minn. at 155, 58 N.W.2d at 251. Motorwerks made the August 2003 tender after Drewitz abandoned his opposition to tender at book value. Drewitz complains, however, that none was “unconditional.” (*Id.* at 4). Specifically, he claims that each of the tenders was defective on one or more of the following bases: (1) tender was untimely, i.e., more than 90 days after the expiration of his employment contract; (2) the amount tendered was incorrect even assuming a valuation based on book value; (3) the tender by check

included a statement that endorsement would constitute a full and final payment or requested the signing of an attached release; (4) the amount tendered did not include interest; or (5) the tender was made in the form of a business check rather than a certified or bank cashier's check as required by the shareholder agreement. (*Id.* at 4-5; 14-15). But once a party objects to tender on specific grounds, any other specific grounds not specified at that time are waived. *Sellwood v. Equitable Ins. Co.*, 230 Minn. 529, 539, 42 N.W.2d 346, 353 (1950).

In rejecting Motorwerks' July 1999 tender, Drewitz specifically objected to the concept of book value itself but said nothing of the other issues he now raises: "Section 4.04 of the Shareholder Agreement does not require Mr. Drewitz to sell his shares for book value under circumstances where he did not voluntarily quit." (A. 52). Furthermore, "\* \* \* this is not an acceptable settlement. As you know, we do not agree with your interpretation of the Shareholder Agreement." (A. 57). Because Drewitz specifically rejected the concept of book value when he first filed suit and when he objected to Motorwerks' first tender, he waived all other objections that were not made at that time, namely the five outlined above. *Id.* Drewitz's claim that he would have accepted book value if only one or more of the claimed deficiencies had been cured is utter nonsense as proved by the fact that he unequivocally rejected the concept of tender at book value from the moment he filed suit until after this court ruled against him in *Drewitz I*. Accordingly, he long ago waived the right to raise these secondary objections.

Furthermore, Drewitz's assertion that Motorwerks tendered the "admittedly wrong amount," in July 1999 and that its proposed settlement agreement required Drewitz to

“accept less than the interest rate and amount required by the Shareholder Agreement,” misstates the application of the shareholder agreement’s provisions. (Appellant’s br. at 9-10). First, while the parties’ negotiated shareholder agreement set book value as the formula by which the share buyback would occur, the resulting calculation can vary depending on the numbers used to generate it. (*See, e.g.*, A. 54). As a result, the parties reached the final agreed-upon calculation for book value of Drewitz’s shares after a great deal of negotiation, in which both parties made concessions. (*See generally* A. 66-102). It is therefore entirely disingenuous to describe the book-value purchase price that Motorwerks initially attempted to tender as the “wrong amount.” Rather, applying book value as the valuation can, and did, result in more than one correct final calculation.

Likewise, although the agreement specified that interest would be paid for share buyback, it did not indicate a rate or applicable time period. (A. 28). Consequently, this too, was part of the parties’ negotiation process, although a settlement was never reached.

In sum, Drewitz rejected book value outright in favor of suit. In doing so, he waived the secondary objections he now makes but did nothing to stop the expiration of his shareholder status after his employment contract terminated.

**5. Once Drewitz abandoned his demand for market value for his shares, Motorwerks tendered unconditionally.**

When, after this court rejected his demand for a market-rate buyout of his shares in *Drewitz I*, and Drewitz finally indicated that he would accept book value for his shares, Motorwerks tendered it unconditionally. *See Drewitz*, 2001 WL 436223, at \*5; (A. 102). Tender is unconditional and therefore proper when it is not coupled with such conditions

that the acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due. *Balder v. Haley*, 441 N.W.2d 539, 542 (Minn. App. 1989) (citing *Moore v. Norman*, 52 Minn. 83, 86, 53 N.W. 809, 810 (1892)), *review denied* (July 27, 1989). When the first litigation ended, the parties' accountants discussed an acceptable book valuation. The discussions occurred only periodically, in fits and starts. Eventually, the two sides reached a negotiated book value. Although the parties could not reach a settlement regarding a rate of interest and the time period to which it applied, Motorwerks nonetheless tendered the negotiated book value to Drewitz, acknowledging that the dispute regarding interest had not yet been resolved and stating that "negotiation of the enclosed check *will not be construed as a waiver* of [Drewitz's] right to claim interest on the payment." (A. 90-95; 102) (emphasis added). Drewitz, however, rejected that tender and filed this suit, pleading his old cause of action under an alternative theory. This satisfied any obligation to tender book value because Drewitz's legal position establishes that it would have been nothing more than idle ceremony.

In sum, Drewitz waived Motorwerks' obligation to tender book value within 90 days of the expiration of his employment contract by commencing the first round of this litigation demanding a market-value buyout. Motorwerks nonetheless remained willing and able to tender at all times and did so unconditionally once Drewitz finally indicated that he would accept an agreed-upon book value. Drewitz's litigation, however, did not extend his shareholder status, which ended in 1999, after his employment contract expired in accordance with the shareholder agreement that he negotiated. This court should therefore affirm the district court's order — and reaffirm its own decision in

*Drewitz I* — that Drewitz is not a Motorwerks shareholder and that he has an obligation under the shareholder agreement to sell his shares to Motorwerks at book value.

**B. An alleged breach of contract by Motorwerks cannot eradicate the contractual provisions ending Drewitz’s status as a shareholder when his employment contract expired and providing for a book-value buy-out.**

Drewitz claims that because Motorwerks allegedly breached the parties’ shareholder agreement by failing to properly tender book value for his Motorwerks shares, it has somehow forfeited its right under the agreement to purchase his shares at book value and to have his shareholder status terminated upon expiration of his employment contract. (Appellant’s br. at 15, 17; *see also* A. 28). Accordingly, he contends, he is still a Motorwerks shareholder and is entitled to a buy-back at market value. (*Id.*). But Drewitz provides no support for the proposition that when a party allegedly breaches a contract, the nonbreaching party is entitled to some performance different from what the contract specifies. *See id.* The lack of support is explained by the black-letter law that a successful plaintiff in a breach-of-contract case is only entitled to performance sufficient to place him in the same situation as if the contract had been performed. *See, e.g., Sprangers v. Interactive Tech., Inc.*, 394 N.W.2d 498, 503-04 (Minn. App. 1986) (quoting *Paine v. Sherwood*, 21 Minn. 225, 232 (1875), *review denied* (Minn. Nov. 19, 1986)). Here, Drewitz was never entitled to receive market value for his Motorwerks shares. Nor was he ever entitled to shareholder status and shareholder distributions after his employment terminated. Under the law, therefore, he cannot be entitled to those remedies as a “damage” for an alleged breach of contract in a dispute

over the book value of his Motorwerks shares. Thus, if Drewitz were to establish that his accountant's view of book value is the "correct" one, his remedy is to receive that amount, not some completely different amount as determined by a valuation method that contradicts the parties' contract. (A. 28). The fact that Drewitz refused Motorwerks' offer of tender and commenced the first meritless suit neither converts his right to a book-value buyout into a right to a market-value buyout nor hinders the expiration of his shareholder status after his employment contract terminated. Consequently, the district court properly rejected Drewitz's claim that he is still a shareholder and that he had a right to buyout of his shares at market value rather than book value. (A. 244-45).

Moreover, Motorwerks is only required to make distributions to *shareholders*, and Drewitz has not been a shareholder since 1999 when his employment contract terminated. (See A. 17) (providing for distributions only to shareholders). The very purpose of allowing Drewitz to advance from car salesman to general manager and shareholder was to provide incentive for him to perform *as an employee*. Once his employment terminated, that purpose ended. Not surprisingly, the contract provides that termination of employment is an "event of purchase" that ends Drewitz's shareholder status. (A.28). True, the purchase itself could not be consummated, but that occurred because Drewitz refused to accept book value for his shares and instead commenced litigation. But Drewitz cannot frustrate the parties' contractual intent by unilaterally extending his status as shareholder by commencing meritless litigation and then using that self-created status to obtain the very relief — market-value buy-back — this court denied him in that litigation. As the Third Circuit put it in *Coleman*, Drewitz "bargained for the right to be a

shareholder only while he remained an employee. He did not bargain for the privilege of being a dissident, litigious, outside minority stockholder and the obvious purpose of the buy-back clause was undoubtedly to avoid such a situation ” *Coleman, 638 F.2d at 637.* *Drewitz’s* circular attempt to create rights through his previous litigation should be rejected. This court should affirm the district court decision, which denied *Drewitz’s* motion to compel shareholder distributions to him. (A. 244-45).

**2. Drewitz has no standing to bring a claim under Section 302A.751 because he is not a Motorwerks shareholder.**

For the same reason, *Drewitz* has no further rights under Minn. Stat. § 302A.75. An individual can only bring an action under Section 302A.751 when he is a shareholder in the company against which he seeks relief. Minn. Stat. § 302A.751, subd. 1(b) (2004). But *Drewitz* is not a Motorwerks shareholder. Rather, his status as a shareholder expired in 1999, thereby leaving him no basis to proceed under Section 302A.751 beyond what this court already rejected. Consequently, *Drewitz’s* argument that if Motorwerks wanted to terminate his shareholder status, it could have posted a bond pursuant to Section 302A.751 misses the point. (Appellant’s br. at 12). Motorwerks did not have to do anything to terminate *Drewitz’s* shareholder status because it terminated of its own accord after his employment terminated. Furthermore, Section 302A.751 only contemplates the possibility of posting a bond after the plaintiff has “*established*” that those in control of the corporation have acted in a manner unfairly prejudicial towards the moving shareholder. *See* Minn. Stat. § 302A.751, subds. 1, 2. This court, however, has already soundly rejected the contention that Motorwerks acted in an unfair and

prejudicial manner toward Drewitz, holding that “Drewitz was required to abide by the terms of a contract that he negotiated, and no reasonable factfinder could conclude that requiring Drewitz to do so was unfairly prejudicial to Drewitz.” *See Drewitz*, 2001 WL 436223, \*\*4-5. Further, “\* \* \* no evidence demonstrates that respondent acted in a manner unfairly prejudicial to Drewitz.” *Id.* at \*5. Accordingly, Section 302A.751 has no application to this case and cannot be used to extend Drewitz’s shareholder status, which already expired according to the provisions of the shareholder agreement that he negotiated.

Drewitz’s reliance on the unpublished case of *Thompson v. Northern Realty*, is off the mark for the same reason, i.e., it analyzes the application of Section 302A.751 to a shareholder. 1997 WL 161854, at \*1 (Minn. App. Apr. 8, 1997). Furthermore, even assuming Section 302A.751 applied here, *Thompson* would not be apposite because, in contrast to the facts of this case, the parties in *Thompson* had no contractual provision that controlled the buy-back process. *Id.* Here, however, the parties had a clear provision requiring share repurchase for book value and that Drewitz’s shareholder status would expire after his employment contract terminated. Again, while Drewitz’s litigation frustrated that process, it did not unilaterally extend his shareholder status beyond what he has already asserted and lost in prior litigation. Finally, the case has no precedential value in any event because it is unpublished. *See id.*

In sum, this court should affirm the district court’s conclusion that Drewitz cannot proceed under Section 302A.751 and reject any attempt by Drewitz to apply the statute to any facet of this case. (*See A. 244-45*).

**III. Res judicata bars this claim in its entirety because it seeks relief that was or could have been sought in Drewitz's initial action.**

The basis of the doctrine of res judicata is that a “right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction \* \* \* cannot be disputed in a subsequent suit between the same parties or their privies \* \* \*.” *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984) (quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). In essence, res judicata is “a finality doctrine that mandates that there be an end to litigation.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (citations omitted). “It concerns circumstances giving rise to a claim and precludes subsequent litigation — regardless of whether a particular issue or legal theory was actually litigated.” *Id.* As a result, a party is “required to assert all alternative theories of recovery in the initial action.” *Id.* (citation omitted). That is because “[r]es judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action.” *Hauschildt*, 686 N.W.2d at 840 (citing *Hauser v. Mealey*, 263 N.W.2d 803, 806-07 (Minn. 1978)). Because Drewitz's second action is based on an alternative theory of recovery that could have been asserted in his first action, it is barred by res judicata. Or, put another way, Drewitz cannot resurrect his old claims for a market-value buyout of his shares under a new theory. While Drewitz has every right to sue for what he claims to be book value and interest, he has no right to relitigate his claim for market value. Moreover, if Drewitz remains a shareholder now — as he contends — he surely remained a shareholder when he commenced suit in 1999. Therefore, his claim for ongoing

shareholder distributions beyond the end of his employment was one that had to be litigated, if at all, in the first action. As a result, this court should affirm the district court's order concluding that res judicata bars this action in full.

Drewitz contends that this cause of action has not been litigated, nor could it have been. (Appellant's br. at 22). He is wrong. A review of the history of this case shows that this failure-to-tender claim is simply an alternative theory for his old cause of action and hence it could have been litigated in his initial action. Drewitz initially sued Motorwerks in 1999 claiming that it had treated him in an unfairly prejudicial manner thereby triggering a right to a buyout of his shares at market value pursuant to Minn. Stat. § 302A.751. (See A. 40-50). The allegedly unfair conduct was that contrary to his expectations: (1) he was not able to continue using promissory notes to exercise his options to buy shares; (2) his employment did not continue beyond the expiration of his employment contract; and (3) the expiration of his employment contract triggered the buy-back provision in the shareholder agreement. *Drewitz*, 2001 WL 436223, at \*4. Based on that same conduct, his complaint also included counts for breach of fiduciary duty, breach of an implied covenant of fair dealing, and breach of employment contract. (*Id.*). The district court granted summary judgment on all counts except breach of employment contract, but the parties subsequently settled that claim. (A. 59). This court subsequently affirmed the district court. (R.A. 1). Then, in 2004, Drewitz sued again asserting the same cause of action under an alternative theory, namely, that he had — despite this court's decision holding otherwise — a right to a market-rate buyout for his shares based on the theory that Motorwerks' alleged failure to tender triggered judicial

intervention under Section 302A.751. (A. 124-32). Additionally, Drewitz claimed a right to shareholder distributions until such time as the buyout was complete. (*Id.*). His second complaint again included claims for: (1) breach of fiduciary duty; (2) breach of the implied covenant of fair dealing; and (3) violation of Minn. Stat. § 302A.751. (A. 125-32). He also made a breach-of-contract claim. (A. 130). Plainly, Drewitz is attempting to relitigate his old claim under a new failure-to-tender theory. But *res judicata* bars him from doing so. If he wants to enforce the parties' negotiated shareholder agreement, he can sue for what he claims is the proper book value with accrued interest. But he cannot revive his old claim for market value simply by restyling it under a new failure-to-tender theory. Accordingly, this court should affirm the district's court conclusion that all issues have been litigated and that the bar of *res judicata* applies. (A. 244-45).

Drewitz also contends that *res judicata* does not bar the second round of his litigation because the facts allegedly supporting his second action did not arise until after the first district court and court of appeals decision were issued. (Appellant's br. at 22). But *res judicata* applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt*, 686 N.W.2d at 840. (citations omitted). With regard to the first prong, the supreme court has explained that "a plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances." *Id.* A claim or cause of action is "a

group of operative facts giving rise to one or more bases for suing.” *Id.* (citing *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002) (quoting *Black's Law Dictionary* 214 (7th ed. 1999)). Therefore, the focus of res judicata is whether the second claim “arise[s] out of the same set of factual circumstances” as the first. *Hauschildt*, 686 N.W.2d at 840. (emphasis added).

Here, Drewitz’s second claim absolutely arises out of the same set of factual circumstances as his first, and his attempt to frame his second complaint in a way that suggests otherwise should be rejected. In fact, Drewitz’s brief contends that Motorwerks was in breach of its obligation to tender book value at all times after June 29, 1999, and further, that its July 26, 1999, attempted tender was not proper as to amount. (Appellant’s br. at 5, 9, 12). Therefore, Drewitz defines the “primary issue in this case [as] whether Respondents’ failure to determine the value of Drewitz’s shares means that Drewitz remains a shareholder in Motorwerks.” (Appellant’s br. at 22). The basis of his argument is that “\* \* \* Respondents refused to unconditionally tender book value for Drewitz’s shares within 90 days [of the expiration of his employment contract]\* \* \*,” and thereby did not terminate his shareholder status. (Appellant’s br. at 9).

In short, Drewitz himself concedes that at least by July 1999 all the operative facts necessary to support his alternative breach-of-tender theory existed. The later instances of attempted tenders that he rejected cannot be construed as a new cause of action. Rather, assuming the validity of Drewitz’s argument, Motorwerks’ additional tenders were merely failed attempts to cure the claimed breach of tender that occurred when

Motorwerks allegedly failed to properly tender book value within 90 days of the expiration of Drewitz's employment contract.

The basis for Drewitz's failure-of-tender theory existed at the time of his first action and is now barred. Drewitz could have pursued both of his current theories of recovery — market-share buyout and ongoing shareholder distributions — in the first action. He could have asserted breach of tender immediately. He could have sought ongoing shareholder distributions by contending that he remained a shareholder until the buy-out transaction — a transaction that he alone forestalled by commencing meritless litigation — was completed. And he not only failed to do so, he also failed to ask this court, in the initial appeal, to remand to the district court to determine if any additional unfair conduct had occurred in the time since summary judgment was granted that might trigger judicial intervention under Section 302A.751. *See, e.g., Hoyt v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988) (noting that if party wanted remand to district court for additional factfinding, it had to request that precise relief in its appellate brief). Granted, the parties have a dispute about book valuation under the applicable contract provisions. But that dispute cannot revive theories of recovery that were or could have been litigated to begin with.

Applying the doctrine of res judicata, Drewitz cannot now collaterally attack this court's previous decision with a new piecemeal action. All the facts necessary to support his new theories of recovery existed before the district court heard Motorwerks' argument in favor of summary judgment in the first action. Res judicata mandates an end to this litigation because this new, alternative theory for a buyout at market value could have

been raised and litigated in the initial action. The only remaining issue is the proper amount owing under the parties' contract, a matter that Drewitz should pursue in Ramsey County. This court should affirm the district court's order concluding that res judicata bars the relief sought in this action.

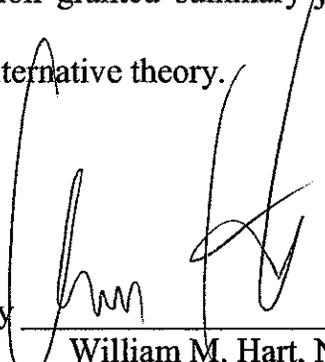
### CONCLUSION

Motorwerks respectfully requests this court to affirm the district court's order dismissing Drewitz's claim in full because he is no longer a shareholder and hence has no right to shareholder distributions and no basis to proceed under Minn. Stat. § 302A.751 for a market-rate buyout of his shares. Furthermore, Drewitz's claims are barred in full by res judicata because all the facts necessary to support this cause of action existed before the district court in the initial action granted summary judgment and Drewitz cannot relitigate the same claim under an alternative theory.

Respectfully submitted,

Dated: 4 April 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).