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A09-1247
STATE OF MINNESOTA
IN COURT OF APPEALS

PeopleNet Communications Corp.,

Respondent,

vs.

Baillon Ventures, LLC,

Appellant.

APPELLANT'S REPLY BRIEF

Wendy J. Wildung (117055)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
Tel. (612) 766-7000

Attorney for Respondent

Donald W. Niles (160684)
NILES LAW OFFICE, PA
121 Colfax Ave. SW
Wadena, MN 56482
Tel. 612-296-7788

Attorney for Appellant

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ARGUMENT

I. THE DISTRICT COURT INCORRECTLY CONSTRUED MINN. STAT. § 302A.473, SUBD. 8(a) WHEN IT CONCLUDED THE STATUTE DOES NOT PROVIDE FOR RECOVERY OF THE FEES AND COSTS OF PARTY-RETAINED APPRAISERS.

Respondent does not dispute this appeal presents an issue of first impression requiring statutory construction of Minn. Stat. § 302A.473, subd. 8(a) along with the provisions of Minn. Stat. § 302A.473, subds. 7 and 8(b). Respondent ignores, however, the requirement of Minn. Stat. § 302A.473, subd. 8(a) that "[t]he court shall determine the costs and expenses of a proceeding under subdivision 7... and shall assess those costs and expenses against the corporation...." Id. (emphasis added); MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388 (Minn. App. 1992). There can be no serious dispute that the expenses and compensation of party-appointed appraisers are "costs and expenses of a proceeding under subdivision 7." Id.

The correct statutory construction is the construction advocated by Baillon Ventures, which is the only construction that gives meaning to all the language of Minn. Stat. § 302A.473, subds. 7 and 8, comports with the case law of this Court and secondary authorities discussing this statutory

provision, and that effectuates the clear legislative purpose of protecting and assuring a means for dissenting shareholders to assert legitimate claims.

A. Minnesota Secondary Authorities Have Concluded the Statute Provides a Bias In Favor of Dissenting Shareholders by Requiring an Award for Appraisers.

The two secondary authorities addressing the application of Minn. Stat. § 302A.473, subd. 8 support drawing the distinction between the term "appraisers" as used in subdivision 8(a) and the term "any experts" as used in subdivision 8(b):

> An apparent bias in favor of dissenting shareholders in the MBCA relates to the costs and expenses of the court proceeding. The MBCA provides that such costs and expenses, <u>including those of appraisers, must be assessed against the corporation unless a dissenting shareholder's supplemental payment demand is found to be 'arbitrary, vexatious, or not in good faith.'</u> The court may not assess the fees and expenses of attorneys or experts for the dissenting shareholders against the corporation, however, unless the corporation has not substantially complied with the dissenters' rights statutory provisions or has acted arbitrarily, vexatiously, or not in good faith, although a court in any event may award fees of attorneys for the dissenting shareholders out of the amounts awarded to the dissenters.

18 John H. Matheson et al., Minnesota Practice *Corporation Law & Practice* § 7.31 (Supp. 2008) (emphasis added). The identical conclusion is repeated by another author in a second volume of the Minnesota Practice series. 20A Brent A. Olson, Minnesota Practice *Business Law Deskbook* § 29:30 (2008)

(same). Neither of these secondary authorities limited their conclusion to just court-appointed appraisers in their publications. Respondent's edited reference to the latter part of this quote (Respondent's Brief at 7) ignores the first part of the commentary.

B. An Award of Party-Appointed Appraiser's Compensation Is Consistent with the Legislature's Use of the Word "Including" in Subdivision 8(a).

The mandatory provision of Minn. Stat. § 302A.473, subd. 8(a) requires that:

> "The court shall determine the costs and expenses of a proceeding under subdivision 7...."

Id. (emphasis added). In interpreting subdivision 8 in its entirety, and giving meaning to all of its provisions as is required under Minn. Stat. § 645.16, the specific requirement that the district court shall determine the costs and expenses of the proceeding and award them against the corporation is paramount. This is the legislative instruction upon which any collateral or limiting language must be evaluated.

Respondent admits (see Respondent's Brief at 9) the term "including" is "usually a term of enlargement, and not of limitation." Burgess v. U.S., 128 S.Ct. 1572, 1578 n.3 (2008) (quoting 2A N. Singer & J. Singer, Statutes and Statutory Construction § 47:7, p. 305 (7th ed. 2007)).

> In conjunction with reading only enumerated exceptions into the statute, the term "including" should not be read as a term of limitation.

Janssen v. Janssen, 331 N.W.2d 752, 755-56 (Minn. 1983); Vanderleest v. Vanderleest, 352 N.W.2d 54, 57 (Minn. App. 1984) (quoting Janssen).

Respondent's contention the legislature must have intended to exclude party-appointed appraisers when it adopted the subdivision 8(b) language prescribing the conditions for the recovery of the "fees and expenses of any experts or attorneys" is unavailing. Respondent's interpretation would ignore the legislature's use of the word "including" in contravention of Minn. Stat. § 645.16. The purpose of the courts is not to add restrictions or limitations not expressly included in legislation. "We will not supply that which the legislature purposefully omits or inadvertently overlooks." Green Giant Co. v. Commr. of Rev., 534 N.W.2d 710, 712 (Minn. 1995); see Hutchinson Technology, Inc. v. Commr. of Rev., 698 N.W.2d 1, 8 (Minn. 2005).

Respondent's general character attack on the use of party-appointed experts in complex litigation is without merit on its face. The use of experts is necessary and, in some instances such as medical malpractice cases, even required by statute. See Minn. Stat. § 145.682. The primary case relied

upon by Respondent, Peterka v. Dennis, 764 N.W.2d 829 (Minn. 2006), was not the general indictment of party-appointed experts erroneously indicated by Respondent. Instead, Peterka reflects only the Minnesota Supreme Court's evaluation and determination that an accountant appointed as a neutral evaluator was entitled to immunity from suit by one of the parties. Peterka, 764 N.W.2d at 836. Respondent's reference (Respondent's Brief at 11) to Staloch v. Holm, 111 N.W. 264, 268 (Minn. 1907), is similarly misplaced as the "disinterested witnesses" in that medical malpractice case included "Defendants ... experts who answered hypothetical questions...." Id.

Subdivision 8(a)'s requirement that the court "shall determine the costs and expenses of a proceeding under subdivision 7" is not limited by the phrase "including the reasonable expenses and compensation of any appraisers appointed by the court." The latter language is but an example of the types of costs and expenses to be included. See Janssen, 331 N.W.2d at 755-56; Vanderleest, 352 N.W.2d at 57. Subdivisions 8(a) and 8(b) can be easily read together and harmonized with 8(a) applying to "appraisers" and 8(b) applying to "any experts" other than appraisers.

C. The Legislative Purpose of Assuring a Meaningful Dissent Opportunity Will Be Severely Chilled If Dissenting Minority Shareholders Cannot Recover the Expenses and Compensation of Their Expert Appraiser.

Respondent's argument the district court may appoint a neutral appraiser does not negate the chilling effect that would be caused by a ruling that "reasonable expenses and compensation" of party-appointed appraisers are excluded from subdivision 8(a).

First, in order to avoid an allegation of bad faith by the corporation against the dissenting shareholder, it is imperative for the dissenting shareholder to make an informed demand for payment under Minn. Stat. § 302A.473, subd. 6. Under subdivision 6, the dissenting shareholder's demand for supplemental payment is required to be made "within 30 days after the corporation mails the remittance under subdivision 5...." Id. Thus, the dissenting shareholder's demand for supplemental payment under subdivision 6 occurs long before the valuation proceeding is initiated by the corporation. In turn, the valuation proceeding would be the shareholder's first opportunity to bring a motion to have the court appoint an appraiser. See Minn. Stat. § 302A.473, subd. 7 (corporation must initiate appraisal proceeding within 60 days of receipt of shareholder's supplemental demand under subdivision 6).

Under Respondent's construction of subdivision 8, a shareholder would have to either (1) hire an appraiser to enable them to make a good faith and informed demand under subdivision 6 knowing that cost would not be reimbursed; or (2) make an uninformed demand without the assistance of an appraiser and risk the accusation of being "a dissenter whose action in demanding payment under subdivision 6 is found to be arbitrary, vexatious, or not in good faith." Minn. Stat. § 302A.473, subd. 8.

Secondly, Minn. Stat. § 302A.473, subd. 7, permits but does not mandate that the district court appoint appraisers. Thus, under Respondent's construction, a dissenting shareholder would still not be assured that an appraiser would be appointed by the court. Baillon Ventures' hired their own expert in this litigation, John Wagner, who is a CPA with certifications in Accredited Business Valuation and in Financial Forensics from the American Institute of Certified Public Accountants ("AICPA"). (Wagner Trial Test. p.3, lines 9-14). Respondent produced over 45,000 pages of documents in discovery, and the capital structure of the corporation was extremely complex. The district court acknowledged "this is not a simple calculation." (A-7 (¶41)). Wagner studied this information and then prepared his expert report in accordance with AICPA standards. (Wagner Trial Test. p.5, lines 4-25).

Despite Wagner's credentials and expertise, Respondent still made a claim that Baillon Ventures acted in "bad faith" and sought an award of attorneys' fees under subdivision 8(a). See Plaintiff's Proposed Post-Trial Findings of Fact, Conclusions of Law, and Order for Judgment, Conc. of Law ¶ 9 (Jan. 30, 2009)). Although the district court concluded that Baillon Ventures did not act in bad faith (A-9 (Conclusion of Law ¶10)), one can only imagine the accusations of bad faith to be made against a dissenting shareholder who attempts to "go it alone" without an appraiser.

Respondent speculates that allowing recovery of the expenses and compensation of party-appointed appraisers would lead to abuse. (Respondent's Brief at 14, n.2). This argument is wholly unfounded as the district court may only award "reasonable expenses and compensation" under the statute, and because the statute already contains safeguards against arbitrary, vexatious or bad faith conduct. Minn. Stat. § 302A.473, subd. 8(a).

While Respondent makes an irrelevant complaint on appeal about the amount of Wagner's fees, as part of the merger transaction Respondent paid one of its witnesses a fee of $150,000 plus reimbursement for legal and other expenses exceeding $10,000 for a Fairness Opinion, prepared in one week's time, stating that the aggregate sale price was fair to Respondent's minority

shareholders. (See Exs. 291, 302). Wagner's fees pale in comparison.

While Respondent argues Baillon could have had a court-appointed appraiser for free, and although a court-appointed appraiser may have been free to Baillon Ventures, the cost of that appraiser wound have been assessed against the corporation. Therefore, ordering Respondent to pay for Baillon Ventures' appraiser leaves PeopleNet no worse off economically than if there had been a court-appointed appraiser.

The Minnesota courts have repeatedly indicated they will not interpret Minn. Stat. § 302A.473 in a manner "which defeats the purpose of the statute, which is to protect minority interests." Rainforest Café, Inc. v. State of Wis. Investment Brd., 677 N.W.2d 443, 454 (Minn. App. 2004); MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388 (Minn. App. 1992). Thus, in addressing the issue of minority discounts under Minn. Stat. § 302A.473, this Court stated:

> [B]ecause the legislature has enacted the statute with the evident aim to protect the dissenting shareholder, we must prohibit application of minority discounts when determining "fair value" in statutory dissenter's rights cases. * * * We proceed with the conviction that if the competing policy is more advantageous as a matter of public law, this issue will be reviewed by the legislature and its determination will be specifically pronounced in the statute.

MT Properties, 481 N.W.2d at 388.

A ruling that Minn. Stat. § 302A.473, subd. 8(a) permits the recovery of the reasonable expenses and compensation of party-appointed appraisers will prevent the chilling effect of Respondent's construction and safeguard the legislative purpose of the statute.

D. Minn. Stat. § 302A.473, subd. 8(b) Does Not Exclude the Possibility of an Award of Compensation for Party-Appointed Appraisers.

MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388 (Minn. App. 1992), inclusion and use of the words "costs" and "fees" in its remand instructions comports more closely with Baillon Ventures' construction of subdivision 8. Respondent's argument contends the specific language of this Court's remand instruction in MT Properties used the term "fees" in a manner not ordinarily used by the courts, which customarily take great effort to keep the distinction between "costs and disbursements" and professional fees distinct.

Respondent's citation of McNeilus Truck & Mfg. v. County of Dodge, 705 N.W.2d 410, 412 (Minn. 2005), for the proposition that a real estate appraiser in a tax appeal proceeding is expert testimony does not at all address the issue presented by the specific statute at hand in this appeal. In addition to the reasons stated previously regarding statutory construction and the purpose of the statute, Respondent's position would require this Court, at

a minimum, to limit or qualify the language used by the Court in MT Properties.

The term "any experts" as used in subdivision 8(b) can be given an appropriate construction consistent with the language or subdivision 8(a) and the legislative purpose of section 302A.473 by construing "any experts" to mean any experts other than appraisers. This would include the many other possible types of experts sometimes used in these proceedings who may be called to address specific business issues, forensic accounting issues, technical issues, etc.

Baillon Ventures' proposed construction is in accord with the remand instruction in MT Properties and in accord with the rule of statutory construction requiring that all the language of subdivisions 8(a) and 8(b) be given meaning. See Minn. Stat. § 645.16.

CONCLUSION

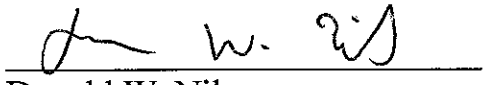
Baillon Ventures respectfully submits that the legislature's wording of subdivisions 8(a) and 8(b) and this Court's ruling in MT Properties warrants an interpretation that all expert appraisers, party-appointed and court-appointed, fall within the ambit of subdivision 8(a). This comports with the legislature's use of the word "including" in referencing appraisers appointed by the court. This interpretation effectuates the legislative purpose of

providing a meaningful mechanism for asserting dissenter's rights. And this interpretation follows the uniform interpretation of this statute by secondary authorities specifically addressing the meaning of subdivision 8(a) and by this Court in MT Properties.

Dated: October 29, 2009

Respectfully submitted,

NILES LAW OFFICE, PA



Donald W. Niles
Attorney Reg. No. 160684
121 Colfax Ave. SW
Wadena, MN 56482
Tel. 612-296-7788
Fax: 888-644-8522
Email: dniles@nilolaw.com

Attorney for Appellant
Baillon Ventures, LLC

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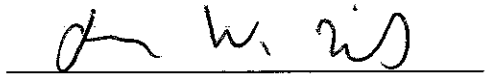
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2307 words. This brief was prepared using Microsoft Word 2003 version word processing software.

NILES LAW OFFICE, PA



Donald W. Niles
Attorney Reg. No. 160684
121 Colfax Ave. SW
Wadena, MN 56482
Tel. 612-296-7788
Fax: 888-644-8522
Email: dniles@nilolaw.com

Attorney for Appellant
Baillon Ventures, LLC