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No. A10-252
STATE OF MINNESOTA
IN COURT OF APPEALS

U.S. Bank N.A. and Ann McCabe, Trustees of the LaVigne Family Trust, the McCabe Family Trust, the Agustsson Family Trust, the Elizabeth LaVigne Trust, the Ann Marie McCabe Trust, and the Kathleen Agustsson Trust; and Thomas J. Moore and Ann McCabe, Trustees of the Thomas J. Moore Family Trust and the Thomas J. Moore Trust,

Plaintiffs / Appellants,

vs.

Cold Spring Granite Company; Marble Falls Partners, LLC; and Patrick D. Alexander,

Defendants / Respondents.

ON APPEAL FROM
STATE OF MINNESOTA
COUNTY OF STEARNS
NO. CIV C6-06-003510

APPELLANTS' BRIEF

(*Counsel continued on next page*)

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   ii. Minn. Stat. § 302A.471, subd. 1; § 302A.751, subd. 2.

b. Did the District Court err by failing to complete its analysis regarding the fair value of the Moores' interests in Marble Falls?

   i. The District Court failed to complete its analysis regarding the value of the land plus the granite rights in the Marble Falls transaction. This incomplete analysis deprived the Moores of an additional $851,154 of the fair value for their shares.

   ii. Minn. Stat. § 302A.471, subd. 1; § 302A.751, subd. 2.

c. Did the District Court err by failing to award the Moores interest on the amount they were entitled to receive?

   i. The District Court did not award the Moores any interest even though they received no payment until over three years after their shares were involuntarily redeemed. This decision deprived the Moores of an additional amount well in excess of $1,700,000.

   ii. Minn. Stat. §§ 302A.473, subd. 1(d), subd. 5, subd. 6; § 302A.751, subd. 2; § 549.09.

d. Did the District Court err by failing to award the Moores their costs and fees in bringing their suit?

   i. The District Court did not award the Moores their costs and fees.

   ii. Minn. Stat. § 302A.473, subd. 8(b), § 302A.751, subd. 2, and § 302A.467. *Am. Sharecom, Inc. v. LDB Int'l Corp.,* No. C9-94-2419, 1995 WL 321540, at **1, 3 (Minn. Ct. App. May 30, 1995).

e. Did the District Court err by denying the Moores a dissenters' rights valuation proceeding pursuant to § 302A.471?

   i. The District Court denied a proceeding under Minn. Stat. § 302A.471.

ii. Minn. Stat. § 302A.471; § 302A.423; *Whetstone v. Hossfeld Mfg. Co.*, 448 N.W.2d 536, 538 (Minn. Ct. App. 1989), *rev'd in part*, 457 N.W.2d 380 (Minn. 1990).

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i. The District Court denied a proceeding under Minn. Stat. § 302A.751.

ii. Minn. Stat. § 302A.751; § 302A.423.

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i. The District Court did not find that Respondents engaged in *Sifferle* fraud.

ii. Minn. Stat. § 302A.471; § 302A.751; § 302A.423; *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. Ct. App. 1986).

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL BACKGROUND.

Appellants appeal from the December 10, 2009 Order of the Honorable Elizabeth A. Hayden, Judge of the District Court for the Seventh Judicial District, Stearns County, adopting in its entirety Special Master Robert H. Lynn's Recommended Findings Of Fact, Conclusions Of Law And Order For Judgment (the "Recommendation"). Appellants seek reversal and remand for a new trial.

The District Court, over Appellants' objection, appointed a Special Master to try this matter. (ADD016-20.) After trial, the Special Master issued the Recommendation. (ADD032-79.) The District Court issued an Order adopting the Recommendation without addressing Appellants' objections to the Recommendation's substantive findings of fact or conclusions of law. (ADD028-31.) The factual findings and legal conclusions at issue in this appeal are thus set forth in the Recommendation. (ADD032-079.)

II. THE RESPONDENTS' COURSE OF DEALINGS AND MISREPRESENTATIONS.

A. The Parties.

Appellants Tom Moore and Ann McCabe are co-trustees of eight (8) family trusts. (Tr. 234:2-235:11; 237:19-238:13; 356:7-358:6.) Prior to January 31, 2006, the trusts owned approximately 6.7% (5,067 shares) of the Class A common stock in Cold Spring Granite Company ("CSG" or the "Company"). (APP297.) These shares had been in the Moore family for three generations. (Tr. 359:2-8, 360:7-25; 235:8-236:19.)

CSG is a Minnesota corporation that has over 1,000 employees, 33 quarries, and 9 extraction and fabrication facilities. (Tr. 190:4-6, 195:18-22; APP432-433.) As of December 31, 2005, CSG had 11 common stock shareholders. (APP297.) Two shareholders—Respondent Patrick Alexander ("Alexander") and the Alexander Family Trust—owned 93% of the Company's common stock. (*Id.*)

Respondent Marble Falls Partners, LLC ("Marble Falls") is a land holding company created by CSG. In 2003, CSG transferred valuable Texas investment property to Marble Falls for the purpose of development. (APP050-070.)

Respondent Alexander is CSG's Chief Executive Officer and chairman of its Board of Directors. (Tr. 19:21-25, 20:1-6.) Prior to January 31, 2006, Alexander owned approximately 27,722 CSG Class A common shares with one vote per share. (Tr. 20:19-21:1, 103:4-7; APP297.) He also owned 70 Class B common shares with 100 votes per share. (Tr. 101:22-102:17; APP014.)

Prior to January 31, 2006, the Alexander Family Trust owned 43,600 shares of CSG's Class A common stock. (Tr. 21:5-12; APP297.) Alexander is one of five beneficiaries of the Alexander Family Trust. His beneficial interest equated to 8,720 shares. (Tr. 22:1-3.) Alexander was thus a minority shareholder whose combined personal and beneficial ownership interests amounted to 47.4% or 36,442 of CSG's 76,889 Class A common shares. (Tr. 22:10-15; APP297.)

B. CSG's Bylaws.

Section 7.4 of CSG's Bylaws provides that "[t]ransfer of shares on the books of the Corporation may be authorized only by the shareholder named in the certificate . . .

and only upon surrender for cancellation of the certificate for such shares." (ADD003; APP012; Tr. 757:13-24, 758:23-759:6.)

C. 1983-2003: The Respondents' Voluntary Negotiations To Acquire The Moores' Common Stock.

Upon becoming CSG's Chief Executive Officer in 1983, Alexander began a series of voluntary negotiations to eliminate the Moores' common stock ownership interests and voting rights. Early in this process, Alexander received advice on a detailed and aggressive plan to remove CSG's minority shareholders. (APP171-180; Tr. 31:19-21.) The written goal was to eliminate the minority shareholders "and to maximize the ownership and control by Patrick D. Alexander ("PDA") of the common shares of CSG Granite Company." (APP172, Tr. 32:5-13.) Alexander intended to increase his personal common share ownership, voting rights, and control of CSG. (APP172.) He also intended to operate CSG exclusively as a family business. (APP019.)

Alexander offered to voluntarily acquire the Moores' interests on at least four occasions: in 1985, 1990, 1998, and 2003. (Tr. 22:18-26:8, 24:18-25, 37:2-5, 73:3-21; 362:24-363:9, 371:18-372:24, 375:13-21; 243:14-21, 245:1-4, 247:4-7, 248:11-21, 251:16-18, 252:22-253:24; APP017; APP019; APP183; APP413; APP416.) Each offer was at or below book value, and the Moores declined each offer. (Tr. 25:9-15, 41:23-42:11, 82:8-83:1; 362:12-23, 365:1-23; 384:4-18, 377:6-14; 243:14-244:18, 245:12-18, 248:22-23, 253:25-254:9, 255:12-24, 270:19-271:15; APP016; APP181; APP182; APP412.)

The Moores felt that their common stock investment in CSG was a good one, even in the absence of dividends. (Tr. 293:18-294:4; 425:14-426:15.) The Moores and Alexander understood that the Moores would recapture their monetary dividend sacrifice in the form of investment appreciation if they ever volunteered to sell their CSG stock for fair value. (Tr. 293:23-294:4; 515:22-516:22.) The Moores also clearly communicated their position that they expected to be shareholders for a very long time or until Alexander decided to sell, so they were assured they received fair value. (Tr. 517:1-23; 243:14-244:18, 254:24-255:8, 271:14-24; 366:19-367:12.)

D. 2003: The Respondents' Restructuring Scheme and Misrepresentations.

In 2003, Alexander met with Tom Moore and provided him with a September 12, 2003, written proposal that indicated CSG was considering a "restructuring concept." (APP017-018, APP429, APP019.) Alexander again offered to acquire the Moores' common stock, but his offer was declined. (Tr. 87:21-90:18, 92:18-24; Exs. APP017-018, APP429, APP019.)

On November 14, 2003, Alexander and CSG attorney Alan Wilensky ("Wilensky") met with Tom Moore and Ann McCabe to discuss the restructuring proposal in further detail. (Tr. 269:17-25.) During this meeting, Alexander and Wilensky made several false statements.

1. *Shareholders in CSG for at least 15 years.*

Alexander began the meeting by renewing his offer to acquire the Moores' common shares. (Tr. 269:17-25.) Alexander represented it was his last offer, and if the Moores did not accept it, they would be CSG shareholders for a very long time—at least 15 years. (Tr. 383:2-384:3; 269:17-25.) The 15-year duration was tied to a 15-year granite lease agreement Alexander intended to implement between CSG and a company he intended to form known as Marble Falls. (APP031; APP032; Tr. 382:6-384:3.) Alexander intended for CSG to transfer valuable Texas real estate to the new company, and then enter into a 15-year lease agreement for the granite rights. (*Id.*)

Alexander's statements were false. Just two years later, Respondents terminated the Moores' rights and interests. (Tr. 276:3-277:14, 417:3-7; APP166; APP418.)

2. *Rights in Marble Falls would be the same as those in CSG.*

During the meeting, Alexander also assured the Moores that everyone's ownership interests, shareholder rights, and voting rights in the new company would "mirror" and be the "same" as they were in CSG. (Tr. 103:8-13, 106:21-23, 107:14-15, 108:3-10, 109:21-24, 110:12-18; 262:5-263:3, 304:23-305:11; 389:1-10; APP031.)

These statements were also false. Alexander received new ownership interests and voting rights in Marble Falls that he did not have in CSG. (Tr. 220:9-222:20.) As part of the transaction, Alexander received 140 Class C units in Marble Falls, as well as 100 votes for each unit. (APP069; APP049.) Consequently, Alexander received 14,000 votes for his Class C units in Marble Falls. (APP014-15; APP069; APP049.) Alexander had 0 Class C shares in CSG, and 0 Class C votes in CSG. (*Id.*; APP297.)

The Moores did not gain any additional votes or ownership interests in Marble Falls. (APP050-069.) The Moores were left with 5,067 Class A units in Marble Falls with one vote per unit, for a total of 5,067 votes—precisely what they had in CSG. (*Id.*)

3. *Undervalued land and granite rights.*

During the November 14, 2003 meeting, Alexander and Wilensky also stated they planned to move the Texas real estate into the new entity at an "extremely low" value of $1,950,000 because CSG was holding back what they represented was a valuable property right: the 15-year granite rights lease. (Tr. 261:21-262:17; 386:18-387:17; APP031; APP032.)

Alexander subsequently represented exactly the opposite to CSG's appraiser. After the restructuring, Alexander informed CSG's appraiser the retained granite rights had a "minimal value." (Tr. 1212:25-1213:19.) In reliance, the appraiser valued these granite rights at just $41,919 and informed another appraiser that these granite rights had "no real current value." (APP236; Tr. 1211:11-19; 1942:19-1943:4.) Respondents then valued all of the Marble Falls' interests, both the land and the granite rights, at $1,991,919 ($1,950,000 + $41,919 = $1,991,919). (APP080; APP236.)

The District Court found that all of the Marble Falls' interests, both the land and the granite rights, were worth $15,000,000 or approximately $13,000,000 more than the fair value derived by Respondents. (ADD072 ¶ 107.)

At trial, CSG's attorney, Alan Wilensky, testified that he was not aware of any restrictions in the agreement between CSG and Marble Falls that would prevent the same entity from obtaining both the property rights and the granite rights at any time before the

15-year granite rights lease expired. (Tr. 2336:11-2337:23.) In other words, CSG and Marble Falls—which were both controlled by Alexander—may recombine the granite rights with the property rights at any time and move forward with an unencumbered, fee simple interest in the Marble Falls land. The District Court found this interest was worth $15,000,000. (ADD072 ¶ 107.)

4. *Lucrative development value.*

Alexander also represented to the Moores that CSG needed to transfer valuable assets to the new Marble Falls entity to shield the assets from silicosis lawsuits in Texas. (Tr. 99:7-20; 264:10-265:14; 392:9-393:12.) However, Respondents transferred CSG's land to Marble Falls because it was located in a growth retirement area, and the property had the greatest potential for growth in value of all of CSG's real estate holdings. (Tr. 94:15-95:1.) A Board member referred to the Marble Falls property as "prime second home property." (Tr. 2344:19-20.)

5. *Forced agreement that capped appreciation of undervalued land at the rate of inflation.*

CSG's Articles of Incorporation do not contain a buy-out provision. (APP434, APP436-480.) In contrast, the Marble Falls Agreement contains a buy-out provision. (APP060-61.) This provision allows CSG to redeem the Moores' interests in Marble Falls at the artificially low price of $1,950,000. (*Id.*, ADD044 ¶ 37.) This provision also limits—to the rate of inflation—any increase in the artificially low $1,950,000 value. (APP052; APP060-61.) The inflation cap ensures that the land that was transferred into the Marble Falls entity cannot be appraised at fair value in the future. (*Id.*)

Alexander never disclosed these provisions to the Moores before the Marble Falls transaction occurred. (Tr. 263:18-264:3.) Instead, he represented to the Moores that their rights in Marble Falls would "mirror" and be the "same" as they were in CSG. (Tr. 103:8-13, 106:21-23, 107:14-15, 108:3-10, 109:21-24, 110:12-18; 262:5-263:3, 304:23-305:11; 389:1-10; APP031.)

6. *Forced agreement regarding Delaware law.*

In addition, rather than "mirroring" CSG, a Minnesota corporation, Respondents organized Marble Falls under Delaware law. (APP050; APP051; Tr. 127:9-128:7.) At trial, CSG's attorney, Alan Wilensky, testified he was aware that Delaware law was more protective of the Company than was Minnesota law on the issue of minority shareholders' rights, and he communicated this fact to Alexander. (Tr. 2333:4-24.) Alexander and Wilensky, however, never disclosed to the Moores that Marble Falls would be organized pursuant to Delaware law. (Tr. 264:4-9; 390:7-19, 399:24-400:2.)

7. *Denied opportunity to protect shareholder rights.*

The Moores expressed concern about their shareholder rights and requested draft documents of the proposed Marble Falls transaction so they could share them with their lawyers and accountants and ensure that their shareholder rights would be protected. (Tr. 267:2-18; 395:6-13.) In response, Alexander represented and affirmed that the Moores would be given a copy of the draft organizational agreement for the new company before the transaction took place. (Tr. 265:15-267:1, 267:19-23, 272:1-9; 393:24-394:12.) Wilensky also acknowledged that the Moores had made "a fair and reasonable request" to see these draft documents before the transaction was finalized. (Tr. 265:15-267:1, 267:19-23; 396:7-397:7.)

Contrary to Alexander and Wilensky's representations, the Moores did not receive any documents or further details regarding the restructuring until after Marble Falls was formed. (Tr. 267:19-268:10, 272:10-273:9; 397:8-9, 403:20-21.) The Moores thus lost their legal right to seek to enjoin the transfer of CSG's assets to Marble Falls or otherwise protect their rights. (Tr. 477:19-24, 482:10-17.)

III. THE RESPONDENTS' VALUATION PROCESS.

By 2005, Respondents were involved in a dispute with a different group of minority shareholders known as the Kahlerts. Consequently, Respondents retained outside appraiser Art Cobb ("Cobb") to calculate a value for CSG. (APP188.) During the process, Respondents concealed important valuation information from Cobb and from CSG's Board.

A. The Respondents Concealed Their Realistic Financial Projections And Disclosed Only Their Most Pessimistic Projections.

CSG's Chief Financial Officer Greg Flint obtained an undergraduate degree in accounting, passed the CPA exam, and, later in his career, attended Harvard for the equivalent of an MBA program. (Tr. 493:15-17, 594:12-17, 597:7-15, 662:13-16.) While at Harvard, he learned about valuation methodologies. (Tr. 493:21-24.) In June 2005, Flint prepared a set of financial projections. (Tr. 528:18-529:11, 559:10-560:15; APP189.) At the time, Flint knew these projections would be used in a lawsuit to value the company and redeem minority shareholders' interests. He also knew he was not preparing projections for operating purposes. (Tr. 529:7-560:1.)

Flint prepared projections known as Version A and a related valuation summary known as Version A-1. (Tr. 560:4-562:5, 568:3-11; APP195; APP197; APP189; APP107.) He prepared these valuation materials to reflect CSG's liquidation value. (Tr. 569:23-570:4, 636:8-12; APP197.) When Flint discussed Versions A and A-1 at a meeting with Alexander and three other Board members, Flint was told he was "being too pessimistic" and was instructed to prepare a more optimistic set of projections because Version A "wouldn't fly." (Tr. 636:8-15, 637:7-640:1, 667:18-668:4.)

In response, Flint prepared Versions B, C, D, and D-1. (APP193; APP194; APP196; APP198; Tr. 563:23-564:1, 564:20-565:4, 561:12-562:5, 568:12-122.) Version D-1 valued CSG at up to $142.26 million, and valued a 7% share of CSG at approximately $10 million—nearly three times the value in Version A-1. (APP197-198; Tr. 569:13-19.)

Flint testified that all four versions should have been sent to Cobb. (Tr. 570:23-24, 572:2-6.) CSG's outside counsel sent only Version A to Cobb. (APP191-192; APP195; Tr. 1127:2-1128:3, 1135:13-1136:14). Cobb could not recall ever receiving Versions B, C, D, or D-1. (Tr. 1130:7-1131:11, 1139:17-1140:6; ADD006.) Moreover, no one informed Cobb that the only version he received—Version A—was a set of liquidation projections that was "too pessimistic." (Tr. 1155:11-1156:19.) Like Cobb, CSG's Board only received Version A. (Tr. 668:20-671:22; APP119-133; APP147-156.)

B. The Respondents Concealed Their Internal Valuations Of CSG.

1. *Flint's 2005 Possible Valuations Summary.*

In the summer of 2005, Flint prepared a summary valuation to determine the cost of a redemption. (APP186; Tr. 503:18-504:21, 511:15-23, 597:23-598:14, 635:9-13.) Using his most conservative assumptions, Flint valued CSG between $135 million and $209 million based on a multiple of CSG's EBITDA. (APP186; Tr. 604:18-605:24.) Flint's handwritten notes reflect an enterprise value of CSG of $150 million, and a 7% minority interest without a discount of $10.5 million. (APP186; Tr. 514:7-515:9.) This value related only to CSG; it did not include the value of Marble Falls. (APP186.) Adding Marble Falls, the value increases to $165 million, and the Moores' 6.7% interest is worth approximately $11.055 million. (ADD072 ¶ 107; APP311-355.)

Flint discussed his valuation with CSG's executives and with CSG's bankers. (Tr. 504:19-505:1, 506:23-507:1.) This document was not sent to Cobb or the Board, even though Cobb admitted that EBITDA was the best measure of CSG's earnings for purposes of valuation. (Tr. 1145:10-24; 1953:15-25; APP137; APP147-156.)

2. *Mitchell's June 23, 2005 Valuation.*

Former CSG President and current Board member Pat Mitchell earned degrees in accounting and economics and worked for CSG for over 20 years. (Tr. 1010:7-20, 1011:24-1012:8.) Mitchell is "extremely good with financial information" and is "at the top of the list" of Alexander's trusted financial advisors. (Tr. 214:24-215:5.) On June 23, 2005, Mitchell prepared a valuation of CSG. (APP201; Tr. 931:15-933:5.) Like

Flint, he valued the Company at up to $162.7 million using a multiple of CSG's EBITDA. (APP207; Tr. 935:13-939:22.)

Mitchell also valued the Company using a discounted cash flow, with an 11% discount rate he derived and a 4.5% growth rate he recommended. (APP202; APP209; Tr. 940:23-941:4.) Using this methodology, he valued CSG at $125.4 million, exclusive of Marble Falls. (*Id.*; APP209.) Adding Marble Falls, the value increases to $140.4 million, and the Moores' 6.7% interest is worth approximately $9.41 million. (ADD072 ¶ 107; APP311.) Cobb never received Mitchell's analysis, nor did the Board. (Tr. 1132:25-1133:10; APP147.)

3. *Flint's June 23, 2005 Version D-1 Valuation.*

On June 23, 2005, Flint prepared his Version D-1 valuation using a discounted cash flow. (APP198.) Like Mitchell, Flint used a 4.5% growth rate and a 10% discount rate. (*Id.*) Flint valued CSG at up to $142.26 million. (Id.; Tr. 569:13-19; APP209.) Based on this analysis, the Moores' 6.7% ownership interest is worth up to $9.53 million. Flint's analysis was not sent to Cobb or to the Board. (Tr. 1140:2-6; APP147-156.)

4. *Version C Valuation.*

Using Flint's Version C projections and a discounted cash flow, the Moores' expert also valued CSG. (APP406.) Using the same 10% discount rate that Flint used, he valued CSG's operations at $131.37 million, exclusive of non-operating land. (*Id.*; Tr. 1891:7-1896:9.) Based on this analysis, the Moores' 6.7% ownership interest is worth approximately $8.8 million, plus the value of non-operating land.

5. *CSG's 2006 Budget Provided To U.S. Bank.*

In late December 2005, CSG provided its 2006 budget to U.S. Bank. In this detailed financial document, CSG budgeted for $10.0 million to redeem the minority shareholders. (APP215; Tr. 2438:3-2441:17.) During the subsequent meeting, CSG representatives informed the bank that CSG needed $10 million for a repurchase of the minority shareholders' interests. (APP219; Tr. 2442:3-2444:7.) This information was not considered by Cobb, and was not provided to the Board during the redemption process. (APP281-284; APP147-156.)

C. Cobb's Fundamentally Flawed And Irrationally Low Valuation Opinion.

As mentioned above, Flint was told that his Version A projections were "too pessimistic" and "wouldn't fly." (Tr. 636:8-15, 637:7-640:1, 667:18-668:4; APP191; APP195; APP197; Tr. 1127:2-1128:3, 1135:13-1136:14, 1130:7-1131:11, 1139:17-1140:6.) Yet, Version A was the only set of projections sent to appraiser Cobb. Without the benefit of the four Board members' views about Version A, or any of the other financial projections prepared by CSG's management, Cobb ironically concluded that the projections in Version A were "overly optimistic." (Tr. 1132:10-19.) Consequently, Cobb actually lowered Version A's net income projections and used his lowered projections to value CSG. (Tr. 1132:10-15.) The following table compares Cobb's net income projections with the four sets of CSG's management's projections.

PROJECTED NET INCOME COMPARISON
(In millions)

	2006	2007	2008	2009
Version A (Ex. 165)	$6,694	$7,376	$8,120	$8,930
Version B (Ex. 162A)	$7,954	$8,747	$9,610	$10,546
Version C (Ex. 163)	$8,092	$9,043	$10,083	$11,220
Version D (Ex. 165)	$7,522	$8,415	$9,393	$10,356
Cobb	***$5,137***	***$5,353***	***$5,572***	***$5,801***

(APP428; Tr. 1174:9-1176:12; APP275). By 2008, 2009, and beyond, Cobb's net income projections are nearly 50% below Versions B, C, and D, and nearly 35% below the "pessimistic," liquidation projections in Version A. (APP428; Tr. 1174:9-1176:12; APP275; Tr. 636:8-15, 637:7-640:1, 667:18-668:4.)

Flint found it curious that Cobb rejected Flint's Version A projections because Flint had been preparing projections for CSG for several years, whereas Cobb was working with CSG for the first time. (Tr. 573:1-19.) Moreover, CSG's previous outside appraiser valued the Company using projections prepared by management because management was in a better position to project CSG's financial future. (Tr. 722:21-723:15.)

IV. THE REVERSE STOCK SPLIT AND INVOLUNTARY REDEMPTION.

A. January 30-31, 2006: The Respondents Fractionalized The Moores' Shares Through a 1-for-7,132.23 Reverse Stock Split.

After obtaining Cobb's valuation report, Alexander resorted to an involuntary tactic to acquire the Moores' shares. On January 31, 2006, CSG's Board amended the Company's Articles of Incorporation and approved a 1-for-7,132.23 reverse stock split of CSG's Class A common stock. (APP153-154.) The sole purpose was to eliminate the Company's minority shareholders including the Moores. The Moores were not allowed to vote on the reverse stock split, and they received no prior notice before it received Board approval. (APP147-156; Tr. 409:3-411:10; APP166-167; APP418-419.)

Prior to the reverse stock split, Alexander, the Alexander Family Trust, and the Moores were all minority shareholders. (Tr. 20:19-21:1, 21:5-12, 103:4-7, 150:23-25; APP297.) None of Alexander's minority shares and none of the Family Trust's minority shares were fractionalized or redeemed through the reverse stock split. (Tr. 172:25-173:21.) To avoid fractionalization, Alexander set up a new holding Company, known as CSG Holdings, and transferred his minority interest of 27,722.33 shares and the Alexander Family Trust's minority interest of 43,600.00 shares into the holding Company. (APP295; Tr. 173:17-174:11.) At that point, the holding Company held 71,322.33 shares. (APP297.) The 7,132.23-to-1 reverse stock split left the holding Company with exactly 10 shares and 10 votes. (APP295.)

The reverse stock split also created a super-majority voting power for Alexander's 70 Class B shares. (Tr. 101:22-102:17; APP014-15.) Prior to the reverse stock split, Alexander's 70 Class B shares controlled 7,000 of the 76,889 total votes, or 9.1% of the voting power. (APP004; APP297.) After the reverse stock split, Alexander's 70 Class B shares controlled 7,000 of 7,010 total votes, or more than 99.8% of the votes.

The Moores' 5,067 shares were fractionalized through the 7,132.23-to-1 reverse stock split. They were left with 0.71 of a share and no votes. (Tr. 177:4-11; APP295-297.)

1. *The Respondents Implemented An Involuntary Redemption Of The Moores' Fractional Interests.*

After the Board changed the number of shares the Moores owned from 5,067 shares to 0.71 of a share through the reverse stock split, the Board redeemed the Moores' fractional 0.71 of a share for cash. (APP153-155; APP295.) The purported grounds were that the Moores now held less than 1 share of stock so their fractional interest must be redeemed. (*Id.*) The Moores were not allowed to vote on this forced redemption, and they received no notice of it until after the Board acted. (APP147-156; Tr. 409:3-411:10; APP166-167.)

Alexander benefited greatly from the elimination of the Moores' 6.7% common stock ownership interests and their voting rights. His combined personal ownership interests in CSG increased from a minority 47.4% position to a majority 51.1% position. (APP297; Tr. 184:10-17.) Alexander knew, but did not disclose to the Board, that he would acquire a majority ownership interest in CSG if the Board approved the reverse stock split and involuntary redemption. (Tr. 179:6-180:3, 184:10-185:17.)

2. *The Respondents Withheld Their Projections and Management Committee Materials From Cobb, Vavra, and the Board.*

During the January 30-31, 2006 Board meeting, the Board received a copy of Cobb's preliminary valuation report which valued CSG at $85 million. (APP223; APP147-156.) The Board also received a valuation report from Schmidt Financial, an outside appraiser retained by the Kahlert minority shareholders, which valued CSG at $246.7 million (the "Schmidt Report"). (APP082, 097.)

CSG retained another appraiser, Jason Vavra ("Vavra") of Chartwell Financial, to attend the January 30-31, 2006 Board meeting. During the meeting, Vavra asked about the management committee materials and financial projections referenced in the Schmidt Report that supported the $246.7 million value. (APP152; APP093 at fns. 4, 5; Tr. 1964:1-1966:21.) Cobb inaccurately responded and informed the Board that "Mr. Schmidt came up with a projected value and made sales goals match the projected number." (APP152.)

When asked for the basis for this attack, Cobb testified that, before the Board meeting, he asked Flint to provide him with the projections and management materials referenced in the Schmidt Report. (Tr. 1099:8-1101:10.) According to Cobb, Flint had no idea what the projections and management materials were, and Flint was unable to either identify or produce them. (*Id.*)

Flint's testimony completely contradicts Cobb's testimony. Flint testified that he never spoke with Cobb about these materials. (Tr. 553:23-557:2.) He also testified that he knew exactly where these materials were at all material times. (Tr. 545:12-546:12.)

Flint further testified that CSG's other executives knew he prepared the projections and management materials referenced in the Schmidt Report, but no one ever asked for them until after this lawsuit began. (Tr. 523:8-528:3; 554:16-8.)

3. *The Respondents Attempted To Trivialize Their Concealment of the Projections and Management Committee Materials.*

Vavra asked to see the projections referenced in the Schmidt Report because they were relevant and important to the work he was asked to perform. (Tr. 1966:7-21.) Vavra's work was important, and Board member Pat Mitchell testified it was material with respect to his vote on the valuation issue. (Tr. 959:21-960:6.) At the time the Board accepted Cobb's valuation, however, Vavra's questions about the Schmidt Report's supporting materials remained unanswered.

Immediately after the Board meeting, Respondents tried to rewrite the report Vavra gave to the Board. CSG's outside counsel sent Vavra an e-mail and asked him to rewrite the valuation opinion he had already given to the Board with "preferred language" authored by counsel. (APP304; APP306; Tr. 1970:1-1972:7.) Vavra responded by renewing his request to see the projections referenced in the Schmidt Report. In response, CSG's Chief Financial Officer, George Schnepf, sent a different set of projections to Vavra and characterized them as "wacky." (*Compare* APP158-165 *with* APP035; Tr. 1973:2-1974:10.)

Two weeks later, based on the "wacky" projections fed to him by the Company's CFO, Vavra rewrote his opinion and sent the new opinion letter to CSG's Board. (APP307; Tr. 1974:11-1977:10.) Vavra never knew that the Company's CFO concealed the financial projections the Schmidt Report relied upon (*id.,* APP035) and substituted in their place the "wacky" projections the Schmidt Report did not rely upon (*id.,* APP157-165). As a result, Vavra was misled into offering a final opinion that included the "preferred language" written by CSG's counsel. (APP308; APP301.)

4. *The Respondents Prevented The Moores From Conducting A Full And Fair Appraisal Of CSG And Refused To Make Any Payment To The Moores For Over Three Years.*

On February 6, 2006, Alexander wrote a letter to the Moores that informed them of the reverse stock split and redemption. (APP166; APP418.) Alexander represented that the Cobb Report established the fair value of the Company, and attached a copy. Alexander concluded his letter and stated: "as of January 31, 2006, you are no longer a shareholder of the Company and upon delivery of your shares to US Bank, you will receive payment for your shares." (*Id.*)

In response, the Moores requested: (a) a copy of the Schmidt Report; and (b) CSG's "full cooperation" in providing financial and other relevant information so the Moores could conduct a "complete appraisal" and "complete valuation" of CSG. (APP309-310; Tr. 277:25-279:2; 414:1-13.) CSG rejected the Moores' requests for complete financial information. CSG responded that it would "reserve the right in its sole discretion to limit the information provided to you, your clients or their agents…". (APP169, point 3; Tr. 279:13-284:3; 416:5-19.)

Tom Moore subsequently met with a CSG Board member to discuss when the Moores would be paid and in what amount. The Board member informed him that if the Moores did not accept the amount set forth in the Cobb Report, then they would receive nothing until the year 2010 because CSG would litigate this dispute all the way to the Minnesota Supreme Court before making any payment. (Tr. 286:21-287:25.) During this entire time, the Moores never authorized the transfer of their shares or surrendered them for cancellation.

After trial began, Respondents changed their position. On May 5, 2009—over three years after the involuntary redemption—Respondents entered into a Stipulation and Order and tendered a $4,998,595.50 payment to the Moores. (ADD021-23.) The payment was limited to the $986.50 per share value set forth in the Cobb Report, multiplied by the Moores' 5,067 shares. The Moores did not receive any interest on the $4,998,595.50. (*Id.*)

V. THE DISTRICT COURT'S FINDINGS.

A. The District Court Found That The Moores Did *Not* Receive Fair Value For Their Shares.

The District Court found that the Class A and Class B common shares had a fair value of $87,879,240 or $1,142.92 per share as of January 31, 2006. (ADD071 ¶ 105.) Instead of awarding the fair value of $1,142.92 per share, the District Court held that the Moores would recover nothing beyond the $986.50 per share value set by the Board. (ADD053 ¶ 64; ADD060 ¶ 79; ADD064 ¶ 87; ADD071 ¶ 106; ADD079 ¶ 1.) The nearly 16% difference in these two values is substantial.[1] It deprived the Moores of nearly

[1] The Recommendation characterized the difference between these two values as an "8.8% difference." (ADD071 ¶ 106.) That is incorrect. The difference is 15.86%, or nearly twice the difference found in the Recommendation. ($1,142.92 minus $986.50 divided by $986.50 = 15.86%.)

$800,000 ($156.42 per share x 5,067 shares = $792,580). (ADD034 ¶ 6; ADD050 ¶ 56; ADD061 ¶ 79; ADD064 ¶ 87; ADD071 ¶ 106.)

B. The District Court Did Not Complete Its Findings Regarding The Fair Value Of Marble Falls.

The District Court found that as of 2003, CSG owned a large parcel of land and a quarry in Marble Falls, Burnett County, Texas. (ADD036 ¶ 12.) The land was not necessary for quarry operations. Nevertheless, it was extremely valuable. (*Id.*) On December 26, 2003, the CSG Board approved a resolution to transfer this Texas real estate to a wholly-owned subsidiary of CSG called Marble Falls Partners, LLC. (ADD041 ¶ 27; ADD042 ¶ 29.) As part of the transaction, CSG retained the mineral rights in the land for 15 years. (ADD042 ¶ 29.)

There are three components of the Marble Falls transaction that must be valued: (1) the value of the land and the mineral rights combined; (2) the value of the land only, which was transferred to the Marble Falls subsidiary; and (3) the value of the mineral rights only, which were retained by CSG. The District Court's findings are incomplete because there is no finding regarding the value of the third component.

The District Court found that the first component, the value of the land and the mineral rights combined, was worth $15,000,000 as of January 31, 2006. (ADD072 ¶ 107.)

The District Court found Respondents expressly informed the Moores that the second component, the value of the land without the mineral rights, was valued at $1,950,000. (ADD044 ¶ 37.)

Regarding the third component, the District Court found the Respondents represented that "the granite rights withheld by CSG represented the greater value in the transaction." (*Id.*) The District Court failed, however, to make an express finding regarding the value of these granite/mineral rights, a value easily derived from the Court's other findings. The value of the mineral rights is the difference between the $15,000,000 value of the land combined with the mineral rights and the $1,950,000 value of the land alone. (ADD044 ¶ 37; ADD072 ¶ 107.) The difference is $13,050,000 and this value was not accounted for by the District Court.

When the $13,050,000 value for the mineral rights is properly accounted for, the District Court's finding concerning the fair value of CSG's common shares increases from $87,879,240 (ADD071 ¶ 105) to $100,887,321, or to $1,310.90 per common share.

SUMMARY OF THE ARGUMENT

The Minnesota Business Corporation Act mandates that minority shareholders must be paid "fair value" for their shares. *See, e.g.,* Minn. Stat. § 302A.423, subd. 1(b) (corporation must pay fair value to shareholder for fractions of a share); § 302A.471, subd. 1 (shareholder to obtain fair value of shareholder's shares); § 302A.751 (purchase price of shares sold shall be fair value). Here, the District Court found that the Moores did *not* receive fair value for their shares.

The District Court found that the Class A and Class B common shares had a fair value of $87,879,240 or $1,142.92 per share as of January 31, 2006. (ADD071 ¶ 105.) This finding, coupled with the District Court's implicit finding that CSG's mineral rights were worth an additional $13,050,000, brings the fair value of CSG's common stock to $100,887,321, or $1,310.90 per share.

CSG's Board, however, valued the common shares at only $75,916,240, or $986.50 per share. (ADD050 ¶ 56; ADD053 ¶ 64; ADD060 ¶ 79.) The Board thus undervalued the common shares by at least $24,971,081, or $324.40 per share. Consequently, the Board deprived the Moores of over $1,640,000 of fair value. In percentage terms, the fair value of CSG is approximately 33% higher than the value set by CSG's Board.

The District Court erred by ruling the Moores were entitled to recover nothing beyond the value set by CSG's Board, which the District Court expressly found was below fair value. If the District Court's ruling is not overturned, a dangerous precedent will be set. Majority shareholders in non-publicly held companies will be allowed—and encouraged—to eliminate minority shareholders through reverse stock splits followed by involuntary redemptions, and unfairly deprive them of at least 33% of the fair value of their shares.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING THE MOORES THE FAIR VALUE OF THEIR SHARES PURSUANT TO § 302A.751 AND § 302A.467.

Minnesota Statutes § 302A.751 provides that a court may grant any equitable relief, including a Court-supervised valuation and buy-out proceeding, when it is established that:

> the directors or those in control of the corporation have acted fraudulently or illegally. . . or in a manner *unfairly prejudicial* toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation.

Minn. Stat. § 302A.751, subd. 1(b)(2), (3), subd. 2. (italics added). "Honest and fair" dealing and the "reasonable expectations" of the minority shareholders are paramount in determining unfairly prejudicial conduct.

> The court shall take into consideration *the duty* which all shareholders in a closely held corporation owe one another *to act in an honest, fair, and reasonable manner* in the operation of the corporation *and the reasonable expectations of all shareholders* as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other.

Minn. Stat. § 302A.751, subd. 3a (italics added); *see also Sawyer v. Curt & Co.,* Nos. C7-90-2040, C9-90-2041, 1991 WL 65320, at *2 (Minn. Ct. App. Feb. 12, 1991) ("Unfairly prejudicial conduct may be found if a shareholder's reasonable expectations with respect to the shareholder's relationship to the corporation are defeated.") *order of publication vacated by Minnesota Supreme Court* (Aug. 2, 1991); *Gunderson v. Alliance of Computer Prof'ls,* 628 N.W.2d 173, 184 (Minn. Ct. App. 2001) ("unfairly prejudicial" means conduct that frustrates the reasonable expectations of shareholders); *Berreman v.*

West Publ'g Co., 615 N.W.2d 362, 374 (Minn. Ct. App. 2000) (same); *Swanson v. Upper Midwest Indus., Inc.*, 2002 WL 857744, at *8 (Minn. Ct. App. 2002) (unfairly prejudicial conduct found where majority shareholder made false representations and omitted material facts in communications with minority shareholder).

A. The District Court Erred When It Omitted Any Analysis Of Whether CSG Is A Closely Held Corporation.

The District Court erred by omitting any analysis of whether CSG was a closely held company. At the time of the involuntary redemption, CSG satisfied the common law definition of a closely held corporation. *See Berreman*, 615 N.W.2d at 367-68 (§ 302A.011, subd. 6(a) does not abrogate common law definition of closely held corporation). *See also Westland Capitol Corp. v. Lucht Eng'g, Inc.*, 308 N.W.2d 709, 712 (Minn. 1981); *Sundberg v. Lampert Lumber Co.*, 390 N.W.2d 352, 354, 357 (Minn. Ct. App. 1986), *superseded by statute on other grounds*; *Syed Ahmed Hussain v. Paak, Inc.*, No. CT 02-00087, 2004 WL 948596, at *6 n.8 (D. Minn. Jan. 23, 2004).

When the involuntary redemption occurred, CSG had 11 common shareholders, two of which owned 93% of the Company. (APP297.) There was no ready market for CSG's common stock. (Tr. 1333:2-20; 2606:4-10.) Moreover, Alexander and other shareholders actively participated in the business. (Tr. 19:21-25, 20:1-6.) Furthermore, dividends for common shareholders were not distributed. (Tr. 293:18-294:4; 425:14-426:15.) Finally, the largest shareholder, Alexander, received a salary and perquisites. (Tr. 19:21-25, 20:1-6.) The District Court erred when it failed to consider whether these facts satisfied the common law definition of a closely-held corporation.

B. The District Court Erred When It Omitted Any Analysis Of Whether The Respondents' Frustrated The Moores' Reasonable Expectations.

Before trial, the District Court stated that an important issue in this case was whether Respondents breached their fiduciary duties through conduct which frustrated Appellants' reasonable expectations as shareholders in a closely held company. (APP559, APP567.) After trial, the District Court erred when it failed to address this issue.

1. *The Respondents Violated CSG's Bylaws.*

Courts may rely on agreements among shareholders in determining whether shareholder expectations are reasonable. *Gunderson,* 628 N.W.2d at 185. Courts "may also look to a course of dealing that implies an agreement." *Id.* (citing Minn. Stat. § 51A.02, subd. 3 (2000) (stating that "agreement" means bargain of parties found in contractual language or by implication from other circumstances including course of dealing)).

Section 7.4 of CSG's Bylaws provides that no one can "transfer" the Moores' shares or have them "surrendered for cancellation" without the Moores' consent. (ADD003; APP012.) CSG's involuntary redemption of the Moores' shares violated § 7.4 of CSG's Bylaws because the Moores did not authorize the transfer of their shares or surrender them for cancellation. This bylaw reflects the shareholders' long-standing and reasonable expectation that the Moores' shares could not be taken unless the Moores agreed to surrender their shares for fair value in response to a voluntary negotiation effort. This bylaw is a "written agreement" that is "presumed to reflect the parties' reasonable expectations." *See* Minn. Stat. § 302A.751, subd. 3(a). The District Court erred when it failed to find CSG violated its Bylaws and the Moores' reasonable expectations by transferring the Moores' shares without their consent. The District Court further erred when it denied the Moores the fair value of their shares pursuant to Minn. Stat. § 302A.751, subd. 2 and § 302A.467.

2. *The Respondents Frustrated The Moores' Reasonable Expectations That They Would Receive Fair Value For Their Shares Based On The Parties' Course of Dealings.*

Reasonable expectations may also be determined by reference to the understandings "that would normally be expected to result from associative bargaining." *Gunderson*, 628 N.W.2d at 185 (citing *Berreman,* 615 N.W.2d at 374 (quoting Advisory Task Report, *reprinted in* Minn. Stat. § 302A.001 (West 2004))). These imputed understandings "envision or make assumptions about the understandings objectively reasonable close-corporation shareholders would have reached if, at the venture's inception, they had bargained over how their investments should be protected." *Gunderson*, 628 N.W.2d at 185 (citing Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 798 (2000)). Additionally, § 302A.751 makes it clear that reasonable expectations can be developed over time. Minn. Stat. § 302A.751, subd. 3a.

CSG's shareholders' bargaining reflects their reasonable expectations that the Moores' shares could not be taken involuntarily and without paying fair value. Minn. Stat. § 302A.751, subd. 3a. From 1983–2003, Alexander approached the Moores on at least four separate occasions and offered to voluntarily acquire their ownership interests.

(ADD035 ¶¶ 9-10.) The Moores rejected these offers because they were below fair value. (ADD035 ¶ 9.) Respondents' involuntary reverse stock-split and forced redemption violated the parties' reasonable expectations for two reasons. First, unlike all of the prior dealings between the parties, the redemption was not voluntary or negotiated.

Second, the involuntary purchase price set by CSG's Board was below fair value, just like all the other offers which were rejected. (ADD035 ¶ 9.) The District Court expressly found that the Moores received at least $792,580 less than the fair value of their shares. (ADD053 ¶ 64; ADD060 ¶ 79; ADD064 ¶ 87; ADD071 ¶¶ 105-106; ADD079 ¶ 1.) Being involuntarily forced out of CSG at less than fair value violated the Moores' reasonable expectations as shareholders. The District Court erred when it failed to make any findings on this issue. The District Court further erred when it denied the Moores the fair value of their shares pursuant to Minn. Stat. § 302A.751, subd. 2 and § 302A.467.

3. *The Respondents' Representations And Subsequent Actions Frustrated The Moores' Reasonable Expectations.*

In addition, each of the actions set forth below violated the Moores' reasonable expectations as shareholders.

1. Alexander stated that the Moores would be shareholders in CSG for at least 15 years. Approximately 2 years later, Respondents terminated the Moores' voting rights and ownership interests in CSG. (Tr. 276:3-277:14; 417:3-7; APP166; APP418.)

2. Alexander represented to the Moores that the ownership interests, shareholder rights, and voting rights in the new Marble Falls company would "mirror" and be the "same" as they were in CSG. (Tr. 103:8-13, 106:21-23, 107:14-15, 108:3-10, 109:21-24, 110:12-18; 262:4-263:3, 304:23-305:11; 389:1-10.) Alexander subsequently received new ownership interests and new voting rights in Marble Falls that he did not have in CSG. (Tr. 220:9-222:20; APP069; APP049; APP297.)

3. Alexander's and Wilensky's statements to the Moores that CSG would move the Texas real estate into a new company at an "extremely low" value of $1,950,000 because CSG was holding back what they represented was a very valuable property right: e.g., a 15-year granite rights lease. (Tr. 261:21-262:17; 386:18-387:17; APP031, APP032.) Alexander subsequently informed CSG's appraiser that the retained granite rights had a "minimal value," and the appraiser then valued the granite rights at just $41,919. (Tr. 1211:11-19, 1212:25-1213:19; APP236 at fn.5.)

4. Unlike CSG's organizational documents, the Marble Falls Agreement contained a buy-out provision that allowed CSG to purchase the Moores' ownership interests in Marble Falls at a predetermined price. (APP434; APP436-482; APP060-61 at § 7.4(c).) Moreover, the Marble Falls buyout provision limited—to the rate of inflation—any increase in the artificially low $1,950,000 value that was placed on the real estate when it was transferred to Marble Falls. (ADD044 ¶ 37; APP052 at § 1.12; APP060-61 at § 7.4(b),(c); APP313; APP355.)

5. CSG was organized under Minnesota law, but Respondents organized Marble Falls under Delaware law. (APP467; APP051; Tr. 127:9-128:7.) Delaware law was more protective of the Company than was Minnesota law on the issue of minority shareholders' rights and Alexander was aware of this fact. (Tr. 2333:4-24.)

6. The Moores were to be given a copy of the draft organizational agreement for the new company before the Marble Falls transaction took place so they could protect their shareholder rights. (Tr. 265:15-267:1, 267:19-23, 272:1-9; 393:24-394:7; 265:15-267:1, 267:19-23; 396:7-397:7.) The Moores did not receive any documents until after Marble Falls was formed. (Tr. 267:19-268:10, 272:10-273:9; 397:8-9, 403:20-21.)

7. CSG's CFO testified that all of the projections, Versions A-D, that he prepared should have been sent to outside appraiser Cobb. (Tr. 570:23-24, 572:2-6.) However, only Version A, the most pessimistic set of projections, was sent to Cobb and shared with the Board. (APP191; APP195; APP197; Tr. 1127:2-1128:3, 1135:13-1136:14, 1130:7-1131:11, 1139:17-1140:6; APP119; Tr. 669:3-671:16; APP147-156.)

8. CSG's CFO also prepared Version D-1 using a discounted cash flow analysis. (APP198.) This document was not sent to Cobb or the Board. (Tr. 1140:2-6; APP147-156.)

9. CSG's CFO also prepared a summary valuation document that represented his attempt at what a redemption might cost. This document was not sent to Cobb.

10. CSG's former President and Board member prepared a handwritten valuation analysis of CSG. (APP207; Tr. 931:15-933:5.) Cobb never received this valuation analysis nor did the Board. (Tr. 1132:25-1133:10; APP147-156.)

11. In late December 2005, CSG provided its bank with a 2006 budget and represented that it needed $10.0 million to redeem the minority shareholders' interests. (APP215; Tr. 2438:3-2441:17; APP219; Tr. 2442:3-2444:7.) This information was not considered by Cobb or the Board. (APP281-284; APP147-156.)

12. CSG also concealed the following crucial financial and valuation information from Cobb and the Board: February 15, 2005 projections and documents (APP104); February 10, 2005 pro-forma financial analyses (APP187); December 15, 2004 management committee materials (APP081); October 25, 2004 financial projections (APP075); November 21, 2003 five-year projections (APP071); September 15, 2003 financial projections (APP035); Chartwell December 12, 2001 Valuation Report (APP021); and other information. (Tr. 1097-1122, 1134:3-8, 1145:10-24, 1193:12-22; APP147-156.)

13. The Moores requested: (a) a copy of the Schmidt Report; and (b) CSG's "full cooperation" in providing financial and other relevant information so the Moores could conduct a "complete appraisal" and "complete valuation" of CSG. (APP309; Tr. 277:25-279:2; 414:1-13.) CSG rejected the Moores' requests and responded that the Company would "reserve the right in its sole discretion to limit the information provided to you, your clients or their agents . . . ." (APP169, point 3; Tr. 279:13-284:3; 416:5-19.)

These actions violate the Moores reasonable expectations as shareholders in a closely held corporation. Minn. Stat. § 302A.751, subd. 3a. The District Court further erred when it denied the Moores the fair value of their shares pursuant to Minn. Stat. § 302A.751, subd. 2 and § 302A.467.

C. The Respondents Breached Their Fiduciary Duties To The Moores.

In addition to violating the Moores' reasonable expectations as shareholders, each of the foregoing acts also constitutes a breach of Respondents' duty to act in an honest, fair and reasonable manner. Minn. Stat. § 302A.751, subd. 3a.

Furthermore, Respondents breached their fiduciary duties because they "appropriated overmuch of the enterprise's economic benefits." *Gunderson*, 628 N.W.2d 173, 185 ("It is substantively unfair and a breach of fiduciary duty for a controlling shareholder or group of shareholders to appropriate overmuch of the enterprise's economic benefits.") (quoting Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations,* 16 Wm. Mitchell L. Rev. 1143, 1157 (1990)). The District Court found that the fair value of the Moores' shares was at least $1,142.92 per share, but the Moores received only $986.50 per share. (ADD053 ¶ 64; ADD060 ¶ 79; ADD064 ¶ 87; ADD071 ¶¶ 105-106; ADD079 ¶ 1.)

The other acts listed above also constitute breaches of fiduciary duties. *See Berreman*, 615 N.W.2d at 371 (quoting *Jordan v. Duff & Phelps, Inc.,* 815 F.2d 429, 435 (7th Cir. 1987) ("[c]lose corporations buying their stock, like knowledgeable insiders of closely held firms buying from outsiders, have a fiduciary duty to disclose material facts")); *Fewell v. Tappan*, 223 Minn. 483, 27 N.W.2d 648, 654 (1947) (co-owners of a close corporation owe each other "the highest standard of integrity and good faith in their dealings with each other"; duty breached when co-owner induced to sell his shares for a fraction of their value); *Evans v. Blesi*, 345 N.W.2d 775, 779-80 (Minn. Ct. App. 1984) (partner in closely held corporation breached fiduciary duty by using intimidating tactics to gain majority share of stock and forcing Appellant's resignation).

The District Court erred when it failed to address whether the heightened fiduciary duties in closely held corporations were violated. The District Court further erred when it denied the Moores a valuation and buy-out proceeding pursuant to § 302A.751 based on these breaches of fiduciary duty.

D. The Respondents Engaged In Unfairly Prejudicial Conduct Towards The Moores.

Each of the acts set forth above also amounts to unfairly prejudicial conduct. Minn. Stat. § 302A.751, subd. 1(b)(3). The "unfairly prejudicial" standard must be construed liberally: "only one instance is required." Minn. Stat. § 302A.751 Subdivision 1 Reporter's Notes – 1982 to 1984; *see also Sawyer,* 1991 WL 65320, at **2-3 (one incident of unfairly prejudicial conduct—lack of good faith effort to buy-out terminated shareholder at a fair price or adjust income mechanism to insure equitable investment return—was enough to warrant a buy-out under Minn. Stat. § 302A.751), *vacated on other grounds,* 1991 WL 160333 (Minn. Aug. 2, 1991).

The District Court erred when it failed to address whether any of the acts set forth above were unfairly prejudicial. Minn. Stat. § 302A.751, subd. 1(b)(3). The District Court further erred when it denied the Moores the fair value of their shares pursuant to Minn. Stat. § 302A.751, subd. 2 and § 302A.467.

II. THE DISTRICT COURT ERRED BY DENYING THE MOORES THE FAIR VALUE OF THEIR SHARES PURSUANT TO § 302A.471.

Minnesota Statutes § 302A.471 reads, in relevant part, as follows:

> Subdivision 1. Actions creating rights. A shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of, any of the following corporate actions:
>
> > (a) . . . , an amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it:
> >
> > > (4) *excludes or limits the right of a shareholder to vote* on a matter.

Minn. Stat. § 302A.471, subd. 1(a)(4) (emphasis added).

The Minnesota Supreme Court has broadly interpreted § 302A.471, subd. 1(a). *See Whetstone v. Hossfeld Mfg. Co.,* 457 N.W.2d 380 (Minn. 1990).

A. The Moores Are Entitled To A Dissenters' Rights Proceeding Under The Minnesota Supreme Court's *Whetstone* Decision.

Whetstone involved an amendment to a company's Articles of Incorporation that eliminated the minority shareholder's veto power. *Id.* at 380-82. The minority shareholder argued he was entitled to a dissenters' rights proceeding under § 471, subd. 1(a)(4) because his veto power was eliminated. *Id.* at 383. The issue was whether "veto power" fell within subd. 1(a)(4), even though it was not specifically referenced in the language expressed in the statute. *Id.*

The Court of Appeals held that elimination of "veto power" did not violate § 471, subd. 1(a)(4) because the statutory language specifically referenced "right to vote" but did not explicitly reference "veto power." 448 N.W.2d 536, 538-39 (Minn. Ct. App. 1989). The Minnesota Supreme Court reversed. 457 N.W.2d 380. According to the

Minnesota Supreme Court, eliminating a minority shareholder's veto power "unquestionably limits the voting rights of the minority shareholder." *Id.* at 384.

Here, the case for dissenters' rights is much clearer. Respondents did not just *limit* the Moores' voting power, they *eliminated* the Moores' voting power as well as their ownership interests in CSG. Like the plaintiff in *Whetstone,* the Moores are entitled to a dissenters' rights proceeding under Minn. Stat. § 302A. 471, subd. 1(a)(4). *See also* O'Neal and Thompson, *Oppression of Minority Shareholders and LLC Members,* § 5.11 at fn.20 (West 2007) (statutes such as § 471, subd. 1(a)(4) apply to reverse stock-split/redemptions and provide appraisal rights for amendments that diminish voting rights.)

Furthermore, in *Whetstone,* the Minnesota Court of Appeals issued an important ruling concerning § 471, subd. 1(a)(4) that was not altered on appeal. The Court of Appeals referenced a comment to § 471, which provides that "[t]he grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered." Minn. Stat. § 302A.471 General Comment. *See Whetstone,* 448 N.W.2d at 538, fn.1, *rev'd on other grounds,* 457 N.W.2d 380. The Court of Appeals then ruled that one of these "investment rights" is the right "to maintain a percentage of ownership," and that termination of a minority shareholder's ownership percentage would give rise to a dissenter's rights proceeding under Minn. Stat. § 302A.471, subd. 1(a)(1), (4). *Id.* This part of the Court of Appeals' decision remains binding precedent. 457 N.W.2d 380.

Respondents do not dispute that they terminated the Moores' ownership interests. (APP166; APP418.) The termination of the Moores' ownership rights entitles them to a Court-supervised valuation proceeding pursuant to Minn. Stat. § 471, subd. 1(a)(1),(4). *Whetstone,* 448 N.W.2d at 538, fn.1. Respondents also violated §§ 471, subd. 1(a)(2) and 1(a)(5).

The District Court erred when it omitted any analysis of the *Whetstone* decisions and failed to follow them. Moreover, the District Court's post-trial decision is irreconcilable with a prior, legal decision it made. In its January 25, 2007 Order and Memorandum, the District Court ruled:

> [The *Whetstone*] court found that eliminating a shareholder's veto power 'excludes or limits the right of a shareholder to vote' in violation of § 302A.471. . . . In the same vein, Plaintiffs have pleaded that the reverse stock split in this case excluded or limited their rights to vote in violation of § 302A.471, subd. 1(a)(4).
>
> Defendants also argue that Plaintiffs will receive a fair value for their shares under Minn. Stat. § 302A.423 and, as such, dissenter's rights are unnecessary. However, this Court notes that the "fair value" under that statute is conclusively determined by the Board, whereas with dissenter's rights, Plaintiffs and the court will be involved in establishing "fair value."

(APP559, APP566.)

The District Court erred when it failed to follow its own January 25, 2007 decision correctly interpreting *Whetstone* to permit the Moores to proceed with a dissenters' rights proceeding pursuant to § 302A.471, subd. 1(a)(4), irrespective of the statutory language found in § 302A.423.

B. The Moores Are Entitled To A Dissenters' Rights Proceeding Because CSG Violated Its Bylaws.

Section 7.4 of CSG's Bylaws provides that no one can transfer the Moores' shares or have them surrendered for cancellation without the Moores' consent. (ADD003; APP012.) Shortly after the involuntary redemption, Alexander informed the Moores that they were "no longer shareholder[s] of the Company." (APP166-167; APP418-419.) CSG's involuntary redemption of the Moores' shares violated § 7.4 of CSG's Bylaws because the Moores did not authorize the transfer of their shares or surrender them for cancellation.

"Bylaws have the same force and effect as provisions of a corporation's charter or articles of incorporation and must be obeyed by the corporation and its directors, officers, and shareholders." *Isaacs v. Am. Iron & Steel Co.,* 690 N.W.2d 373, 376 (Minn. Ct. App. 2004) (citing *Diedrick v. Helm,* 14 N.W.2d 913, 921 (Minn. 1944)); Minn. Stat. § 302A.181, subd. 1. The District Court erroneously failed to address this law, and erroneously denied the Moores a dissenters' rights proceeding that arose when CSG violated § 7.4 of its Bylaws. (ADD003; APP012; Tr. 757:13-24, 758:23-759:6.) Minn. Stat. §§ 471, subd. (1)(a)(2)-(5).

III. THE DISTRICT COURT ERRED IN ITS RULING THAT § 302A.423 FORECLOSED ANY RECOVERY UNDER §§ 302A.471, 302A.467, And 302A.751.

The District Court erroneously ruled that Minn. Stat. § 302A.423 controls over §§ 302A.471, 302A.467, and 302A.751. (ADD073-076 ¶¶ 1-14.) In doing so, the Court referenced Minn. Stat. § 302A.621, which is not at issue in this case. Meanwhile, the Court omitted any analysis of the specific language found in Minn. Stat. § 302A.471.

Pursuant to § 302A.471, subd. 1, minority shareholders have a legal right to a Court-supervised dissenters' rights proceeding unless it is prohibited by one of the four explicit exceptions set forth in § 302A.471, subd. 3.

- The first exception relates to shareholders with nonvoting shares that are involved in a merger. Minn. Stat. § 302A.471, subd. 3(a)(1).
- The second exception involves shareholders with nonvoting shares that are involved in an acquisition and plan of exchange. Minn. Stat. § 302A.471, subd. 3(a)(2).
- The third exception concerns shareholders who are not shareholders of record as of a fixed date for voting purposes. Minn. Stat. § 302A.471, subd. 3(b).
- The fourth exception relates to shareholders who hold shares that are listed on the New York Stock Exchange, the American Stock Exchange, or a national market system security designated by the National Association of Securities Dealers, Inc. Minn. Stat. § 302A.471, subd. 3(c)(1).

There are no other exceptions that prohibit dissenters' rights. According to the General Comment: "[s]ubdivision 1 lists all of the events upon which dissenters' rights may arise; the word 'may' is used because subdivision 3 and section 302A.473 may operate to negate dissenters' rights." Minn. Stat. § 302A.471 Reporters Notes – 1981, General Comment.

The Minnesota legislature did not list § 302A.423 as one of the specific and explicit exceptions in § 302A.471, subd. 3, that would prohibit dissenters' rights. Nor did it reference § 423 in the General Comment as a provision that may operate to negate dissenters' rights. Accordingly, § 423 cannot prevent a dissenters' rights proceeding under § 471. *See* Minn. Stat. § 645.19 (2004) ("Exceptions expressed in a law shall be construed to exclude all others."); *Nelson v. Comm'r of Employment and Econ. Dev.*, 698 N.W.2d 443, 448 (Minn. Ct. App. 2005); *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 5-6 (Minn. 2006); *Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004) (same); *BCBSM, Inc. v. Minn. Comprehensive Health Ass'n*, 713 N.W.2d 41, 44-45 (Minn. Ct. App. 2006).

This is particularly true in cases that involve non-publicly traded corporations such as CSG. The fourth exception found in § 471, subd. 3(c)(1) prohibits dissenters' rights proceedings for shareholders of shares listed on specific public stock exchanges. When a company listed on one of these public exchanges performs a reverse stock split and involuntary redemption under § 302A.423, the affected shareholders are not provided with dissenters' rights. In closely-held and non-publicly traded corporations such as CSG, however, the minority shareholders are provided with dissenters' rights. Just as minority shareholders in closely-held and non-publicly traded corporations are provided with heightened protections under § 302A.751, the fourth exception found in § 371, subd. 3(c)(1) provides them with more protection from a reverse stock split and involuntary redemption than what exists for shareholders in publicly traded corporations. The District Court erroneously failed to address the specific exception language set forth in § 302A.471, subd. 3.

A. The Board's Determination Of Value Under § 302A.423 Is Not Conclusive Because The Moores Established *Sifferle* Fraud.

Even if § 302A.423 did apply (and it does not), it still does not preclude a valuation proceeding under either § 302A.471 or § 302A.751. Section 302A.423 simply provides that "[a] determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud." Minn. Stat. § 302A.423, subd. 2. The District Court erred by failing to find the Respondents' actions and the valuation process were tainted by *Sifferle* fraud, which led to a value for the Moores' shares that was below fair value.

Normally, a fraud claim requires a high threshold of proof. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000). However, the definition of fraud under the MBCA—§ 302A.423, subd. 2, § 302A.471, subd. 4, and § 302A.751 subd. 1(b)(2)—must be construed more broadly than strict common law fraud. *See Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. Ct. App. 1986) (broadly defining "fraudulent" in § 302A.471, subd. 4 to include "conduct involving . . . deception, misrepresentation, actual fraud, or in violation of applicable statutes or articles of incorporation, or in violation of fiduciary duty").[2]

Before trial, the District Court noted: "the court in *Sifferle v. Micom Corporation* has found that, under Minn. Stat. § 302A.471, subd. 4, the term 'fraudulent' was intended

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[2] *See also Broin v. Nat'l Computer Sys., Inc.*, No. C9-91-235, 1991 WL 204460, at *1 (Minn. Ct. App. Oct. 15, 1991) (interpreting *Sifferle* broadly); *Krieger,* 122 F. Supp. 2d 836, 846 (same); *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 729 (Nev. 2003) ("[T]he term 'fraudulent,' as used in the Model Act, has not been limited to the elements of common-law fraud; it encompasses a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders.")

to be construed more broadly than strict common-law fraud, and that such a fraud claim can be sustained despite not containing all the required elements under common-law." (APP574, APP580.) On page 7 of its August 13, 2008 pre-trial Order and Memorandum, the District Court noted that "[w]here minority shareholders are eliminated, fraud should be construed broadly." (citing *Sifferle,* 384 N.W.2d 503, 507).

After the trial, the District Court again cited *Sifferle*, but failed to apply its broad definition of fraud and failed to analyze the three most important aspects of the *Sifferle* ruling. (ADD074 ¶¶ 6-8.) First, the *Sifferle* public corporation shareholders received fair value for their shares and the benefit of a Court-supervised valuation proceeding pursuant to Minn. Stat. § 302A.471. 384 N.W.2d at 505. The *Sifferle* court thus ensured that no fiduciary duties were breached with respect to the issue of fair value because it provided the minority shareholders with their right to receive fair value for their shares under 302A.471. *Id.* at 508-09. Here, the District Court expressly found that the Moores did *not* receive fair value for their shares. (ADD050 ¶ 56; ADD053 ¶ 64; ADD060 ¶ 79; ADD071 ¶ 106.) The District Court then erred by depriving the Moores of nearly 33% of the fair value of their shares. (ADD036 ¶ 12; ADD041 ¶ 27; ADD042 ¶ 29; ADD044 ¶ 37; ADD061 ¶ 79; ADD071 ¶ 105; ADD072 ¶ 107; ADD074 ¶ 9; ADD077 ¶ 18.) Under Minnesota law, an absolute standard applies when minority shareholders receive less than fair value. "[T]heft of an investment, or any part of the investment, is intolerable." Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L.Rev. 749, 799-800 (2000) (analysis cited favorably by *Gunderson*, 628 N.W.2d 173, 185).

Second, the *Sifferle* court held that "[i]f a corporation attempts to carry through an action . . . in violation of a fiduciary duty, the Court's freedom to intervene is unaffected." *Id.* at 507. The District Court erred by refusing to intervene here, even though Respondents breached their fiduciary duties and failed to pay what the District Court expressly found was the fair value of the Moores' shares.

Third, and most importantly, the District Court failed to recognize that the minority shareholders in *Sifferle* were shareholders in a publicly traded company, whereas the Moores are shareholders in a closely held company. *Sifferle* addressed a public corporation's freeze-out merger. *Id.* at 505. It did not address the fiduciary duties at issue here which involve a freeze-out in a closely held corporation. The distinction between public and closely held companies is vitally important. In a closely held corporation, the board and the shareholders are held to a heightened standard, and more protective fiduciary duties are afforded to minority shareholders who are particularly vulnerable to abuse.

Under Minnesota law, owners of a close corporation owe each other "the highest standard of integrity and good faith in their dealings with each other." *Evans,* 345 N.W.2d 775, 779 (quoting *Fewell,* 27 N.W.2d 648, 654 (same); *Prince v. Sonnesyn,* 222 Minn. 528, 25 N.W.2d 468, 472 (1946) (same).) *See also Gunderson,* 628 N.W.2d 173, 185 (fiduciary duties in closely held companies embrace "both substantive obligations that focus on the outcomes of shareholder conduct and procedural obligations that focus on process."); *Wenzel v. Mathies,* 542 N.W.2d 634, 641 (Minn. Ct. App. 1996)

("Members of a corporate board owe a fiduciary duty to individual shareholders to treat them fairly and evenly.") (Citations omitted.)

The fiduciary duties of directors and shareholders in a closely held corporation require that they (1) avoid unfair negotiating tactics even if they conform to the rough morals of the marketplace; (2) refrain from the arbitrary exercise of discretion, and (3) act with complete candor. *Gunderson*, 628 N.W.2d at 185-86.

Simply put, the fiduciary duties owed to the Moores of utmost honesty, fair dealing, integrity and good faith are absolute, not relative. The District Court overlooked this fundamental precept of Minnesota law by erroneously applying a materiality standard and trivializing Respondents' breach of their fiduciary duties. For instance, the District Court found that the difference between the Board's valuation of $985.50 per share value and the Recommendation's fair value finding of $1,142.92 per share fell "within a range of values which reasonable business appraisers could reach." (ADD060 ¶ 79; ADD071 ¶¶ 105-106.) The District Court also found that, without shareholder approval, the Respondents engaged in a transaction that gave Respondent Alexander 7,000 additional votes in Marble Falls for his common shares but left the Moores' voting rights unchanged at 5,067 votes. (ADD043 ¶¶ 32-35.) The Court found that this difference was not material. (ADD043 ¶ 35.)[3]

[3] The District Court also disregarded the fact that Alexander's relative voting power for his Class B shares in CSG increased from 9.1% to more than 99.8% of the votes as a result of the reverse stock split. (Tr. 101:22-102:17; APP014; APP004; APP297.)

The foregoing findings eviscerate the well established fiduciary duties owed in a Minnesota closely held corporation. *See Berreman*, 615 N.W.2d at 373 ("[M]ateriality is not an element of unfairly prejudicial conduct under section 302A.751, subd. 1(b)(3).") *See also Wenzel,* 542 N.W.2d at 643 (finding breach of fiduciary duty when director/officer of holding company voted 99.04% of outstanding shares to relinquish controlling interest in Bank: "[t]he issue was not whether [President] had the authority to vote the shares, but whether he violated a fiduciary duty in voting them as he did.")

The underpayment and the unapproved vote tampering constitute breaches of fiduciary duty in a closely held corporation. These actions satisfy the standard of "one incident of unfairly prejudicial conduct" and also constitute breaches of Respondents' "highest standard of integrity and good faith in their dealings with [Plaintiffs]." *Evans,* 345 N.W.2d at 779. These breaches of fiduciary duty also qualify as *Sifferle* fraud and warrant a payment of fair value even under Minn. Stat. § 302A.423. *See Sifferle,* 384 N.W.2d at 507 (violation of fiduciary duty satisfies the "fraudulent" standard set forth in the MBCA). The District Court erred by failing to address this issue.

1. ***The Respondents' Concealment Of Management's Financial Projections And Valuations Constitutes <u>Sifferle</u> Fraud.***

The Respondents concealed the financial information from Cobb and the Board during the valuation process, including the following crucial information: (1) Versions B-D, which CSG's Chief Financial Officer prepared after a meeting with four Board members who told him that Version A was too pessimistic (Tr. 570:23-24, 572:2-6; APP191; APP195, APP197; Tr. 1127:2-1128:3, 1135:13-1136:14, 1130:7-1131:11, 1139:17-1140:6); (2) CSG's Chief Financial Officer's possible valuations summary (APP186; Flint 503:18-504:21, 511:15-23); (3) CSG's Former President's June 23, 2005 valuation (APP207; Tr. 935:13-939:22; APP202, APP209; Tr. 940:23-941:4); (4) CSG's Chief Financial Officer's June 23, 2005 Version D-1 Valuation (APP198; Tr. 569:13-19; APP209); and (5) CSG's 2006 Budget Provided To U.S. Bank (APP215; APP219; Tr. 2494:23-2496:20; 2438:3-2441:17).

The District Court erred when it failed to find that the concealment of this financial information also constituted *Sifferle* fraud. *See Krieger v. Gast,* 122 F. Supp. 2d 836, 850 (W.D. Mich. 2000) (the disclosure of all material financial information validates the appraisal process; when failure to disclose such information occurs, the appraisal remedy afforded becomes meaningless).

2. *The Board's Undervaluation of CSG Constitutes Sifferle Fraud Because It Involved Deceptive Statements That Led To A $41,919 Value For Granite Rights That Are Worth $13,050,000.*

The District found that the Marble Falls real estate plus the mineral rights were collectively worth $15 million as of December 31, 2006. (ADD072 ¶ 107.) The District Court noted the Respondents expressly informed the Moores that the real estate without the mineral rights was worth $1.95 million. (ADD044 ¶ 37.) The District Court also found that Alexander and Wilensky met with the Moores and admitted to them that "the granite rights withheld by CSG represented the greater value in the transaction." (ADD038 ¶ 21; ADD044 ¶ 37.)

The District Court erred by failing to address that Alexander later met with CSG's appraiser and represented the exact opposite: that the granite rights had a "minimal value." (Tr. 1212:25-1213:19.) The "minimal value" statements led Cobb, and, in turn, CSG's Board, to under value CSG's granite rights by over $13 million. These deceptive misrepresentations constitute *Sifferle* fraud. *See Sifferle,* 384 N.W.2d 503, 507 (broadly defining "fraudulent" under the MBCA to include "conduct involving deception, misrepresentation. . . or in violation of fiduciary duty"); *Newell v. Randall,* 19 N.W. 972, 973 (Minn. 1884) (providing that one who speaks must say enough to prevent his words from misleading the other party).

The District Court erred when it failed to address these fraudulent statements about the value of the mineral rights and their material impact on the valuation. The District Court further erred when it failed to acknowledge that these *Sifferle* fraud statements tainted the Board's determination of value under Minn. Stat. § 302A.423.

3. *The Respondents Engaged In Sifferle Fraud When They Combined Interests To Effectuate A 1-for-7,132.23 Reverse Stock Split That Artificially Fractionalized Appellants' Interests.*

The District Court erred when it failed to address the manner in which two minority shareholders—Respondent Alexander and the Alexander Family Trust—consolidated their interests in a new holding company to fractionalize the Moores' shares and involuntarily redeem their ownership interests. This process also constituted *Sifferle* fraud.

Combining Respondent Alexander's personal minority interest with the Alexander Family Trust's minority interest to set up a 1-for-7,123.23 reverse stock split with the sole purpose of fractionalizing the entirety of Appellants' minority interests constitutes a breach of Respondents' duties in a closely held corporation. *See Wenzel,* 542 N.W.2d at

643 (finding breach of fiduciary duty when director/officer of holding company voted 99.04% of outstanding shares to relinquish controlling interest in Bank: "[t]he issue was not whether [President] had the authority to vote the shares, but whether he violated a fiduciary duty in voting them as he did.").

The Respondents further breached their fiduciary duties when Respondent Alexander's ownership of CSG went from a minority 47.4% position to a majority 51.1% position as a direct result of the reverse stock split and involuntary redemption of the Moores' shares. (APP297; Tr. 184:10-17.) Alexander knew he would acquire a majority ownership interest in CSG if the Board approved the reverse stock split and the Company redeemed the Moores' shares, but he concealed this fact from the Board. (Tr. 184:10-185:17, 179:6-180:3.)

In addition to wrongfully acquiring a majority ownership position, Alexander also unlawfully acquired a super-majority voting position. Prior to the reverse stock split, Alexander's 70 Class B shares controlled 7,000 of the 76,889 total votes, or just 9.1% of the voting power. (APP004; APP297.) After the reverse stock split, Alexander's 70 Class B shares controlled 7,000 of 7,010 total votes, or more than 99.8% of the voting power.

The District Court erred by failing to address the fiduciary duties that were breached during this process. *See Gunderson,* 628 N.W.2d at 185 (fiduciary duties in closely held companies "embrace[]. . . procedural obligations that focus on process."). The District Court further erred when it failed to address whether these breaches of Respondents' fiduciary duties constituted *Sifferle* fraud.

IV. THE DISTRICT COURT ERRED WHEN IT REFUSED TO AWARD INTEREST TO THE MOORES.

After the Moores were eliminated as shareholders, Tom Moore had a discussion with a CSG Board member regarding when the Moores would be paid and in what amount. The Board member threatened Tom Moore that if the Moores did not accept the amount in Cobb's Report, they would receive nothing until the year 2010 because CSG would litigate this dispute all the way to the Minnesota Supreme Court before making any payment.[4] (Tr. 286:21-287:25.)

Over three years after the involuntary redemption and after trial began, Respondents changed their position, entered into a Stipulation, and finally tendered a $4,998,595.50 payment to the Moores. (ADD022 ¶ 6.) The payment did not include interest; it was limited to the $986.50 per share value set forth in the Cobb Report, multiplied by the Moores' 5,067 shares. (ADD034 ¶ 6; ADD064 ¶ 87.) The District Court erroneously failed to award interest to the Moores. *See* Minn. Stat. §§ 302A.473, subd. 1(d), subd. 5, subd. 6; § 302A.751, subd. 2; § 549.09.

"'Interest'" means interest commencing five days after the effective date of the corporate action referred to in section 302A.471, subdivision 1, up to and including the date of payment, calculated at the rate provided in section 549.09 for interest on verdicts

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[4] This statement is cited for the purpose of negating the Respondents' incorrect claim that the Moores were responsible for the delay concerning the $4,998,595.50 payment. *See* Minn. R. Evid. 408 ("This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, [or] negativing a contention of undue delay. . ."). The District Court erred when it subsequently excluded this testimony, after initially allowing it. (Tr. 286:21-287:25, 442:21-443:4.)

and judgments." Minn. Stat. § 302A.473, subd. 1(d).[5] The Moores are thus entitled to receive interest at the rate of 10% per annum beginning five days after January 31, 2006 through at least May 11, 2009. (ADD022 ¶ 6.) Minn. Stat. § 549.09.

The District Court found that the Moores owned 5,067 Class A common shares that had a fair value of at least $1,142.92 per share as of January 31, 2006. (ADD034 ¶ 6; ADD071 ¶ 105.) At a minimum, the Moores are entitled to interest at the rate of 10% per annum on $5,791,175 per year for over three years, or total interest of well over $1,700,000. The District Court erred by not awarding this interest to the Moores.

A. The District Court Also Erred When It Failed To Award The Moores Their Costs And Fees.

The District Court erred when it failed to find violations of § 302A.473, subd. 8(b), § 302A.751, subd. 2, and § 302A.467 based on CSG's undervaluation of Appellants' shares. Undervaluing CSG by nearly 33% and depriving the Moores of over $1.64 million, plus interest of at least an additional $1.7 million, is a substantial failure to comply with the MBCA.[6] *See, e.g., Am. Sharecom, Inc. v. LDB Int'l Corp.,* No. C9-94-2419, 1995 WL 321540, at **1, 3 (Minn. Ct. App. May 30, 1995) (finding violation of

[5] Aside from §§ 302A.471, 473, interest may also be awarded independently under Minn. Stat. § 549.09, subd. 1(b). *See N. States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 413 (8th Cir. 1985); *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550 (Minn. Ct. App. 1990).

[6] Even if the District Court's error in valuing the mineral rights mentioned above is not corrected (and it should be corrected), the District Court still expressly found that Cobb and the CSG Board undervalued CSG by at least $11,963,000. (ADD053 ¶ 64; ADD071 ¶ 105.) Even the uncorrected value figure demonstrates the Moores were cheated out of nearly $800,000 when CSG's Board adopted the Cobb valuation. This underpayment still constitutes *Sifferle* fraud and violates the MBCA provisions set forth above.

§ 302A.473, subd. 8(b) and awarding costs and fees to minority shareholder because corporation claimed fair value was $17.5 million and court found it was $25.6 million). *See also Hernando v. Huff*, 609 F. Supp. 1124 (D. Miss. 1985) (awarding expert fees to minority shareholder because actual value was 24% greater than corporation's offer and it "materially exceeded" value offered). Here, the District Court erred when it failed to award the Moores their costs and fees under §§ 302A.473, subd. 8(b), 302A.751, subd. 2, and 302A.467.

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT DISREGARDED CSG'S MANAGEMENT'S FINANCIAL PROJECTIONS.

The District Court found that Cobb "could not have been misled by not having these [Versions B-D] management projections in hand before rendering his opinion because he would not have relied upon them in any event." (ADD053 ¶ 62.) This finding is erroneous as a matter of law. *Gray v. Cytokine Pharmasciences, Inc.*, No. Civ. A. 17451, 2002 WL 853549, at *8 (Del. Ch. Apr. 25, 2002) (refusing to accept opinion of expert who disregarded management projections and formulated his own projections because "any other result would condone allowing a company's management or board of directions to disavow their own data [projections] in order to justify a lower valuation".) (Citation omitted.); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1185 (Del. Ch. 1999) (expert's methodology was too unreliable to be considered because his forecasts were "not supported by the contemporaneous expectations of management").[7]

Furthermore, the Court's focus on Cobb misses the mark. The issue is not what Cobb would or would not have relied upon. The issue is what information CSG's Board should have been provided. CSG's Board set the value of the Moores' shares. The District Court erroneously failed to make any findings in this regard.

Despite the specific request by Alexander and three other Board members that Flint prepare more optimistic projections, Versions B, C, D, and D-1 were never provided to the Board. (Tr. 668:20-671:22; APP119; APP147.) Nor did the Board receive management's 2006 operating budget and its forecasts. Instead, CSG's Board received only the overly pessimistic Version A. (Tr. 668:20-670:22; APP119; APP143-144; APP151-153.) The Board also received Cobb's projections, which were created after the *Kahlert* litigation began, and which actually *lowered* the admittedly overly-pessimistic Version A net income projections. (Tr. 1132:10-19, 1174:9-1176:12; APP275.)

The District Court erred as a matter of law when it condoned Respondents' withholding of management's own financial projections from the Board in order to justify a lower valuation derived by Cobb, who used his own projections. *Gray,* 2002 WL 853549, at *8; *Bomarko,* 794 A.2d at 1185.

The District Court also erroneously disregarded several internal valuations of CSG, and it further erred when it disregarded Appellants' expert's valuation of CSG.

[7] The District Court's finding is also erroneous factually. Cold Spring's CFO testified that all four versions should have been sent to Cobb. (Tr. 570:23-24, 572:2-6.)

(ADD066-68 ¶¶ 93-96, 99.) These other internal valuations included: (1) CSG's Chief Financial Officer's possible valuations summary (APP186; Tr. 503:18-504:21, 511:15-23); (2) CSG's Former President's June 23, 2005 valuation (APP207 and Tr. 935:13-939:22; APP202, APP209 and Tr. 940:23-941:4); (3) CSG's Chief Financial Officer's June 23, 2005 Version D-1 Valuation (APP198; Tr. 569:13-19; APP209); and (4) CSG's 2006 Budget Provided To U.S. Bank (APP215; APP219; Tr. 2494:23-2496:20; 2438:3-2441:17).

CSG called Kristine Johnson as an expert to testify about whether CSG's Board of Directors should have reviewed, and relied upon, a certain set of projections before making their decision regarding the fair value of CSG. On cross-examination, she admitted that the 2006 budget should have been provided to, and reviewed by, CSG's Board prior to the time it set the value of CSG. (Tr. 2828:1-19.) She also admitted that all of the recent forecasts prepared by management that were consistent with performance should have been given to the Board prior to the time when it set the value of CSG. (Tr. 2827:18-25.)

The District Court erred when it failed to make any findings regarding CSG's own expert's admissions regarding the recent forecasts that should have been provided to CSG's Board, and CSG's breach of fiduciary duty in failing to disclose this information to the Board. *See Berreman*, 615 N.W.2d at 371 (quoting *Jordan,* 815 F.2d 429, 435 ("[c]lose corporations buying their stock, like knowledgeable insiders of closely held firms buying from outsiders, have a fiduciary duty to disclose material facts")); *Klein v.*

First Edina Nat'l Bank, 196 N.W.2d 619, 622 (Minn. 1972) (parties in a fiduciary relationship must disclose material facts).

A. Appellants' Expert's Valuation Based On Version C Projections.

Finally, the District Court erred when it rejected the Moore's experts' valuations. Using Flint's Version C projections and employing the discounted cash flow methodology, the Moores' expert valued CSG's operations. (APP406.) He concluded that the value of CSG's operations was $131.37 million, exclusive of non-operating land. (*Id.*; Tr. 1891:7-1896:9.) The set of projections he relied upon—Version C—was selected because it most accurately predicted CSG's subsequent, actual, financial performance. (APP381.) The District Court erred when it excluded CSG's subsequent, actual, financial performance and disregarded the subsequent valuation date expressly set forth in Minn. Stat. § 302A.751, subd. 2. The District Court further erred when it disregarded the Moores' expert's valuation opinions as based upon CSG's "most optimistic projections." (ADD068 ¶ 99.)

Appellants' real estate experts placed a value on CSG's non-operating land and Marble Falls' non-operating land of at least $65.4 million. (Tr. 1633:23-1666:3; 1704:6-1741:19; 2009:5-2057:3.) Accordingly, when the land is added to the $131.7 million value for CSG's operations, the fair value of CSG is at least $196.8 million. Using this value, the Moores' 6.7% ownership interest is worth approximately $13.18 million. The District Court erred by not awarding this fair value to the Moores.

CONCLUSION

The Moores request that this Court reverse the District Court's entry of judgment for Respondents, and remand for a new trial with directions to ensure that the Moores receive fair value for their shares plus interest, costs and fees, and ensure that the value is based on the financial projections and financial information prepared by Cold Spring's management which was never shared with the Board.

Dated: March 5, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01 subd. 3, the undersigned hereby certifies, as counsel for Appellants, that this Brief complies with the type-volume limitation as there are 13,674 words of proportional space type in this brief. This Brief was prepared using Microsoft Word 2003.

Dated: March 5, 2010

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