Court Case No. A10-252

STATE OF MINNESOTA
IN SUPREME COURT

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,

Appellants,

v.

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

Respondents.

APPELLANTS' BRIEF

Date of Filing of Decision of Court of Appeals: September 14, 2010

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STATEMENT OF THE ISSUE

> Whether, under Minnesota Statutes sections 302A.751 and/or 302A.471, subdivisions 1(a)(2), (4) and (5), a targeted minority shareholder in a Minnesota closely held/non-public corporation may be squeezed out of the Company pursuant to a reverse stock split and stock redemption undertaken for the sole purpose of a corporate freeze out, and where the reverse stock split/redemption was undertaken only after a minority shareholder—the company CEO, and his family trust, upon the advice and counsel of corporate counsel, first transferred their minority common shares to a newly-formed holding company for the purpose of avoiding fractionalization of their common shares, and where the Board's determination of the value of the fractionalized shares was at least approximately 16% less than the judicially determined fair value of the shares.

The District Court found that the fair value of Appellants' common shares in Respondent Cold Spring Granite Company were $1,142.92 per share, not the $986.50 per share determined by the Board. Nonetheless the District Court denied Appellants the fair value of their shares. The District Court arrived at this result based on a holding that Minnesota Statutes section 302A.423, subdivision 2 precludes a minority shareholder whose shares have been fractionalized in a reverse stock split and redeemed from asserting claims under section 302A.751 absent a showing of fraud in the valuation process under *Sifferle v. Micom Corp.*, 384 N.W.2d 503 (Minn. Ct. App. 1986) and even though, with the advice of corporate counsel, the common shares of the CEO and his family trust were insulated from the fractionalization.

The District Court further found that the Board's determination of fair value was conclusive under Minnesota Statutes section 302A.423, subdivision 2 despite the fact that the Board was never made privy to management projections prepared in connection with the reverse stock split or a 2006 operating budget provided by the Company to its bank just prior to the Board's vote on the reverse stock split and redemption.

The District Court also held that Appellants were not entitled to assert dissenters' rights under Minnesota Statutes section 302A.471.

The Court of Appeals affirmed the District Court. However, in affirming the District Court, the majority of the Court of Appeals implicitly held that Minnesota Statutes section 302A.423, subdivision 2 does not preclude a minority shareholder who has been squeezed out of a company through a reverse stock split and redemption of the stockholder's fractional shares from asserting claims under section 302A.751. In a special concurrence, Judge Lansing expressly recognized that claims under section 751 are not foreclosed by section 423, subdivision 2. Nevertheless and despite the District Court's failure to make any findings, the Court of Appeals found as a matter of law that Respondents had not violated section 751.

Apposite Legal Authority:

Minn. Stat. § 302A.471, subd. 1

Minn. Stat. § 302A.751, subd. 2

Whetstone v. Hossfeld Mfg. Co., 457 N.W.2d 380 (Minn. 1990)

STATEMENT OF THE FACTS

A. THE RESPONDENTS' COURSE OF DEALINGS AND MISREPRESENTATIONS.

1. The Parties.

Appellants Tom Moore, his sister, Ann McCabe, and U.S. Bank N.A. ("Moores") 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 Respondent Cold Spring Granite Company ("CSG" or the "Company"). (APP297.) The shares had been in the Moore family for three generations. (Tr. 359:2-8, 360:7-25; 235:8-236:19.) The Moores were squeezed out of CSG through a 1-for-7,132.23 reverse stock split ("RSS") of CSG's Class A common stock. The RSS fractionalized the Moores' 5,067 shares to less than 1. The sole and express purpose of the RSS was to force the Moores, among other common shareholders, from CSG and to deny them their right to exercise dissenters' rights.

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 common stock shareholders, Respondent Patrick Alexander ("Alexander") and the Alexander Family Trust, of which Alexander is a trustee, 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 was a minority shareholder in CSG. He owned approximately 27,722 CSG Class A common shares with one vote per share. (Tr. 20:19-21:1, 103:4-7; APP297.) He was also the only owner of any Class B common shares, of which he 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 was also a minority shareholder in CSG. It owned 43,600 shares of CSG's Class A common stock. (Tr. 21:5-12; APP297.) Alexander is a trustee and one of five beneficiaries of the Alexander Family Trust. His beneficial interest equated to 8,720 shares. (Tr. 22:1-3.) Thus, Alexander's 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.)

None of the common shares of Alexander or the Alexander Family Trust were fractionalized by the RSS. These shareholders avoided any fractionalization and redemption as a result of the counsel they received from CSG's corporate Counsel that they transfer their stock to a newly-formed holding company to avoid fractionalization and assure themselves that once the RSS and redemption had been completed, they would be the only common shareholders in CSG. (APP295; APP297; Tr. 173:17-174:11.)

2. 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.)

3. 1983-2003: The Respondents' Voluntary Negotiations To Acquire The Moores' Common Stock.

Alexander became CSG's Chief Executive Officer in 1983. At that time, he embarked on a course of action to increase his personal common share ownership and control of CSG. (APP172.) In connection therewith, Alexander received advice on a detailed and aggressive plan 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." (APP171-180, Tr. 31:19-21, 32:5-13.)

Alexander attempted to accomplish his goal by offering on behalf of CSG to acquire the Moores' interests. He approached the Moores on at least four occasions—in 1985, 1990, 1998, and 2003—with offers for CSG to buy their shares. (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.) The Moores declined the offers because each was below fair value. (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.) In declining Alexander's offers, the Moores clearly communicated their expectation they would remain 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.)

4. <u>2003: The Respondents' Restructuring Scheme and Misrepresentations</u>.

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 have CSG acquire the Moores' common stock. His offer was again 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.

(a) Shareholders in CSG for at least 15 years.

Alexander began the meeting by renewing his offer to have CSG 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 said he intended to implement between CSG and a company he intended to form known as Marble Falls and to which Alexander intended to have CSG transfer valuable Texas real estate. (APP031; APP032; Tr. 382:6-384:3.)

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

(b) 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. First, 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 no Class C shares in CSG, and no Class C votes in CSG. (*Id.*; APP297.) On the other hand, 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.*)

(c) Undervalued land and granite rights.

During the November 14, 2003 meeting, Alexander and Wilensky 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: a 15-year mineral rights lease. (Tr. 261:21-262:17; 386:18-387:17; APP031; APP032.)

In connection with the RSS, Alexander represented exactly the opposite to CSG's appraiser. After the restructuring and in connection with the fair valuation of CSG, Alexander informed CSG's appraiser that the retained mineral rights had a "minimal value." (Tr. 1212:25-1213:19.) In reliance, the appraiser valued these granite rights at just $41,919 in connection with the Board's determination of fair value. (APP080; APP236; Tr. 1211:11-19; 1942:19-1943:4.)

At trial, CSG's attorney and the architect of the restructuring, 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—could easily 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.)

The District Court also found that the Respondents represented to the Moores that the granite rights withheld by CSG represented the greater value in the transaction. (ADD044 ¶ 37.)

Despite these findings, the District Court found, and the Court of Appeals upheld, the finding that the fair value of the granite rights was only $41,919. The Court of Appeals affirmed this holding based on statements of CSG's management that the granite rights were of "minimal" value to CSG. (ADD158.)

(d) 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 forced buy-out provision. (APP060-61.) This provision allows the redemption of the Moores' interests in Marble Falls at the artificially low price of $1,950,000 if they ceased to be shareholders in CSG. (*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 to Marble Falls 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.)

(e) 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.[1] (Tr. 267:2-18; 395:6-13.) In response, Alexander told the Moores they 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 the 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.)

B. 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

[1] 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.)

outside appraiser Art Cobb ("Cobb") to evaluate the fair value of CSG. (APP188.) During the fair valuation process, Respondents concealed material valuation information.

1. <u>The Respondents Concealed CSG's Management Financial Projections And Disclosed Only Their Most Pessimistic Projections.</u>

In June 2005, CSG's Chief Financial Officer Greg Flint prepared four different sets of financial projections.[2] (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 thus knew he was not preparing the projections for operating purposes. (Tr. 529:7-560:1.)

Flint first prepared a set of projections known as Version A and a related valuation ("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 another set of projections. (Tr. 636:8-15, 637:7-640:1, 667:18-668:4.)

Flint then prepared three additional sets of financial projections, Versions B, C and D, and a fair market valuation based on the Version D projections he designated as D-1. (APP193; APP194; APP196; APP198; Tr. 563:23-564:1, 564:20-565:4, 561:12-

[2] 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.)

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 disclosed. (Tr. 570:23-24, 572:2-6.) Yet, without any explanation at trial, CSG's outside counsel sent only Version A to Cobb. (APP191-192; APP195; Tr. 1127:2-1128:3, 1135:13-1136:14). Nor could Cobb recall ever receiving Versions B, C, D, or D-1. (Tr. 1130:7-1131:11, 1139:17-1140:6; ADD006.) Notably, no one informed Cobb that the only version he received—Version A—was a set of liquidation projections that management had recognized were "too pessimistic." (Tr. 1155:11-1156:19.)

More importantly, CSG's Board only received Version A and was similarly never told that Version A constituted a set of liquidation projections. (Tr. 668:20-671:22; APP119-133; APP147-156.)

2. The Respondents Concealed Their Internal Valuations Of CSG.

(a) Flint's 2005 valuations summary.

In the summer of 2005, Flint also 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 the Board or Cobb, 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.)[3]

(b) CSG's 2006 budget provided to U.S. Bank.

In late December 2005 prior to the Board's vote on the RSS, CSG provided its 2006 budget to U.S. Bank. In this detailed financial document prepared by management for operating purposes, CSG budgeted for $10 million to redeem the minority shareholders. (APP215; Tr. 2438:3-2441:17.) During a 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 provided to the Board during the redemption process. (APP281-284; APP147-156.)

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[3] Former CSG President and Board member Pat Mitchell also 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 and a 4.5% growth rate. (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 at approximately $9.41 million. (ADD072 ¶ 107; APP311.) Neither the Board nor Cobb ever received Mitchell's analysis. (Tr. 1132:25-1133:10; APP147.)

3. **Cobb's Fundamentally Flawed And Irrationally Low Valuation Opinion.**

As mentioned, Flint was told that his Version A projections were "too pessimistic." (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 shared with the Board and sent to appraiser Cobb. 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.) Unlike Cobb, 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.)

C. THE REVERSE STOCK SPLIT AND INVOLUNTARY REDEMPTION.

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

After obtaining Cobb's preliminary valuation, Alexander, with the advice and counsel of CSG's attorneys, set in motion a freeze-out of all of CSG's minority common stock shareholders except Alexander and the Alexander Family Trust. On January 3, 2006, Alexander introduced the concept of the RSS and redemption to his board. (APP584.) 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 purpose was to eliminate a targeted group of the Company's minority shareholders including the Moores, and deny those shareholders the right to assert dissenters' rights. (APP147-156; APP166-167; APP418-419.)

Orchestrated by CSG's counsel to assure that none of the common shares owned by Alexander or his Family Trust were fractionalized, they transferred their collective 71,322.23 Class A common shares to a newly formed holding company. (APP144-145, APP295, APP297; Tr. 173:17-174:11.) The 7,132.23-to-1 reverse stock split thus fractionalized to less than one share all of the Class A common shares of CSG except those in the newly formed holding company that was left with exactly 10 shares and 10 votes. (APP295.)

The RSS also created a super-majority voting power in 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 RSS fractionalized the Moores' 5,067 shares to 0.71 of a share and no votes. (Tr. 177:4-11; APP295-297.)

(a) The Respondents implemented an involuntary redemption of the Moores' fractional interests.

After the Board fractionalized to less than one all of the Class A common shares except those transferred to the newly formed Alexander holding company, the Board redeemed the Moores' fractional 0.71 of a share for cash. (APP153-155; APP295.) 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 was the primary beneficiary of 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.)

(b) The Respondents withheld their projections and management committee materials from the Board, Cobb and a Second Appraiser.

During the January 30-31, 2006 Board meeting, the Board received a copy of Cobb's preliminary valuation report that 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 nn.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 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.)

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.) At the time the Board accepted Cobb's valuation, however, Vavra's questions about the Schmidt Report's supporting materials remained unanswered.

In response to Vavra's request to see the Schmidt projections, CSG's then Chief Financial Officer, George Schnepf, sent a different set of projections to Vavra he characterized as "wacky." (*Compare* APP158-165 *with* APP035; Tr. 1973:2-1974:10.)

Two weeks later, based on the "wacky" projections fed to him, 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 "preferred language" written by CSG's counsel. (APP304; APP306; APP308; APP301; Tr. 1970:1-1972:7.)

(c) 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 informing 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 stating: "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.)

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.*)

D. THE DISTRICT COURT'S FINDINGS.

1. <u>The District Court Found That The Moores Did Not Receive Fair Value For Their Shares</u>.

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 were entitled to 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.[4] It deprived the Moores of nearly $800,000 ($156.42 per share x 5,067 shares = $792,580). (ADD034 ¶ 6; ADD050 ¶ 56; ADD061 ¶ 79; ADD064 ¶ 87; ADD071 ¶ 106.)

2. <u>The Fair Value Of Marble Falls</u>.

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 but 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.)

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[4] 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%.)

There are three components of the Marble Falls transaction that required valuation: (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. Neither the District Court nor the Court of Appeals made any 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.) Additionally, the District Court found Respondents represented to 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. At a minimum, and based on the representation that the granite rights represented the greater value, those rights necessarily had to be worth more than $1,950,000. However, the value of the mineral rights is more properly calculated as 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. This value was not accounted for by the District Court.

Nor did the Court of Appeals properly account for the mineral rights. Rather, the Court of Appeals upheld the District Court's failure to make a finding of the fair value of the mineral rights by ignoring the testimony that the mineral rights represented a greater value of the components of the Marble Falls property.

ARGUMENT

I. THE COURT REVIEWS THE COURT OF APPEALS DECISION DE NOVO.

This Court does not give deference to the Court of Appeals' rulings made as a matter of law. Rather, these conclusions are reviewed *de novo*. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000); *Cornberg v. Cornberg*, 542 N.W.2d 379, 384 (Minn. 1996). The Court of Appeals' rulings concerning the conclusiveness of the determination of fair value under Minnesota Statutes section 302A.423, subd. 2, the denial of the Moores' dissenters' rights under Minnesota Statutes section 302A.471 and the failure to afford the Moores relief under section 302A.751 should thus be reviewed *de novo*.

II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT A TARGETED MINORITY SHAREHOLDER IN A MINNESOTA CLOSELY HELD/NONPUBLIC CORPORATION THAT IS SQUEEZED OUT OF THE COMPANY PURSUANT TO A REVERSE STOCK SPLIT AND REDEMPTION WHERE THE BOARD DETERMINATION OF THE VALUE OF THE MINORITY SHAREHOLDERS' FRACTIONALIZED SHARES WAS AT LEAST APPROXIMATELY 16% LESS THAN THE JUDICIALLY DETERMINED FAIR VALUE OF THE SHARES IS ENTITLED TO A JUDICIALLY DETERMINED BUYOUT PURSUANT TO MINNESOTA STATUTES SECTION 302A.751, SUBDIVISION 2.

The District Court determined that the Moores did not receive fair value for their shares. The District Court valued each common share as of January 31, 2006 at $1,142.92 per share, not the $986.50 per share determined by CSG's Board. Yet the Court of Appeals let stand the holding that although the Moores were deprived of at least approximately 16% of the fair value of their shares, there was no unfair prejudicial conduct under Minnesota Statutes section 302A.751 or equitable fraud under Minnesota Statutes section 302A.423, subdivision 2 and *Sifferle v. Micom Corp.*, 384 N.W.2d 503 (Minn. Ct. App. 1986), *review denied* (Minn. June 13, 1986). The failure on the part of the Court of Appeals to overturn the holding of the District Court in this respect is wrong as a matter of law.

The MBCA defines "fair value" as an absolute term (e.g., "the value"). *See* Minn. Stat. § 302A.473, subd. 1(c). Similarly, fraud in section 302A.423 and interpreted in *Sifferle v. Micom Corp.*, 384 N.W.2d 503 (Minn. Ct. App. 1986), *review denied* (Minn. June 13, 1986) is absolute. Fraud under section 302A.473 and unfairly prejudicial conduct under section 302A.751 are synonymous and but one act of deception, breach of fiduciary duty or unfairly prejudicial conduct entitles a minority shareholder to protection. *Id.* at 506-07. The Court of Appeals' holding to the contrary renders the definition of "fair value" superfluous. The holding also condones a form of investment theft under section 302A.423 and eviscerates the MBCA's remedial protections for minority shareholders.

A. The Court Of Appeals Correctly Concluded That Minnesota Statutes Section 302A.423, Subdivision 2 Does Not Preclude A Shareholder Whose Shares Have Been Fractionalized Through A Reverse Stock Split And Then Redeemed From Asserting Claims Under Minnesota Statutes Section 302A.751.

Section 302A.751 provides that a court may grant any equitable relief to a shareholder in a corporation that is not publicly held, including a Court-supervised valuation and buy-out proceeding, when 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).

The Legislature enacted section 302A.751 in recognition that, given the lack of a ready market for their shares, minority shareholders in closely held/nonpublic corporations require enhanced protections. *See Report to the Senate Advisory Task Force on Corporation Law* (1981) [Advisory Task Force Report] reprinted in Minn. Stat. Ann. § 302A.001 (West Supp. 2000) (noting that the Minnesota Business Corporations Act's provisions applicable to closely held corporations are characterized by "greatly enhanced shareholder protections").

"Honest and fair" dealing and the "reasonable expectations" of the minority shareholders are paramount in determining unfairly prejudicial conduct. *See Gunderson v. Alliance of Computer Prof'ls*, 628 N.W.2d 173, 184 (Minn. Ct. App. 2001).

> 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.[5]

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[5] The Court of Appeals properly analyzed CSG as a closely held corporation. 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 Capital Corp. v. Lucht Eng'g, Inc.*, 308 N.W.2d 709, 712 (Minn. 1981); *Sundberg v. Lampert*

Minn. Stat. § 302A.751, subd. 3(a) (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* 1991 WL 16033 (Minn. 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).

The majority in the Court of Appeals decision appear to have rejected the District Court's holding that a Board's determination of value under section 423, subdivision 2 prevents a court from finding liability under section 751 and from conducting a Court supervised valuation proceeding under the statute. The majority correctly noted that ". . . the language of § 302A.751 does not directly conflict with § 302A.423, subd. 2, and is

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Lumber Co., 390 N.W.2d 352, 354, 357 (Minn. Ct. App. 1986), *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.)

meant to be liberally construed to protect the rights of minority shareholders. *Berreman*, 615 N.W.2d at 373." (ADD163.) The majority's implicit holding, and the express emphasis in the special concurrence that section 302A.423 does not *per se* foreclose an action under section 302A.751 and the protections afforded minority shareholders of nonpublicly/closely held corporation, is correct. Section 423 does not specifically conflict with section 751. As the Court of Appeals apparently recognized, the two statutory sections may be harmonized, and there is nothing in section 423 that indicates that the Legislature intended to dilute the broad remedial nature of section 751 or the liberal construction of the statute to protect minority shareholders of nonpublic/closely corporation. Indeed, the legislature has made it clear that the "unfairly prejudicial" standard is to be liberally construed: "only one instance is required." Minn. Stat. § 302A.751, subd. 1 Reporter's Notes – 1982 to 1984.

However, the Court of Appeals erred as a matter of law in finding that Respondent's did not violate section 751, and that Appellants were not entitled to a judicially determined fair valuation of their shares pursuant to section 751, subdivision 2.

1. The Court of Appeals Erred as a Matter of Law in Holding that the Respondents Did Not Frustrate The Moores' Reasonable Expectations to Receive the Fair Value of Their Shares.

The District Court failed to address the issue of whether Respondents breached their fiduciary duties through conduct that frustrated Appellants' reasonable expectations as shareholders in a closely held company. (APP559, APP567.) However, the Court of Appeals held as a matter of law that Respondent's conduct was not unfairly prejudicial. (ADD164.) This holding is in error.

"A . . . touchstone for identifying reasonable expectations is the standard of conduct identified in the common law as fiduciary duty and referred to in [section 302.751,] subdivision 3(a) as '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'" *Gunderson*, 628 N.W.2d at 185 (citation omitted). This standard of conduct, a standard that is required both by statute and common law ". . . embraces both substantive obligations that focus on the outcomes of shareholder conduct and procedural obligations that focus on process." *Id.* (citing Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 Wm. Mitchell L. Rev. 1143, 1156 (1990). It is thus substantively unfair and a frustration of a minority shareholder's reasonable expectations for a controlling shareholder or a group of shareholders to "appropriate overmuch of the enterprise's economic benefits." *Id.* To do so constitutes a breach of fiduciary duty. *Id.*

Here, 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, approximately 16% less than the judicially determined fair value. (ADD053 ¶ 64; ADD060 ¶ 79; ADD064, ¶ 87; ADD071 ¶¶ 105-106; ADD079 ¶ 1.)

The Court of Appeals failed to address in any respect the investment theft of at least $800,000. Nowhere in its opinion does the Court of Appeals ever note this investment theft. Rather, the Court of Appeals appears to have focused only on the process undertaken by CSG and ignores the outcome. In so doing, the Court of Appeals erred as a matter of law in failing to hold that Respondents violated their fiduciary duties to the Moores. A fundamental reasonable expectation of the Moores was the expectation that they would receive fair value for their shares; the MBCA requires that minority shareholders be paid "fair value" for the shares. *See* Minn. Stat. § 302A.423, subd. 1(b); § 302A.471, subd. 1; § 302A.751. Moreover, the MBCA defines "fair value" as an absolute term (e.g., "the value"), not a relative term (i.e., "a value"). *See* Minn. Stat. § 302A.473, subd. 1(c) ("'Fair' value means *the value* of the shares of a corporation before the effective date of the corporate action.") (emphasis added).

In sum, the Moores' reasonable expectation that they would receive fair value for their shares, a reasonable expectation that is based on Minnesota law and the MBCA, was frustrated by the deprivation of at least $800,000 for their shares. This Court should rule that the Court of Appeals erred as a matter of law in not awarding the Moores at least an additional $800,000 for their shares.

2. By Violating CSG's Bylaws the Respondents Frustrated the Moores' Reasonable Expectation that their Shares Could Only be Transferred or Surrendered for Cancellation with the Moores' Consent.

The Moores' reasonable expectations as shareholders are also reflected in any agreement to the extent the writing covers the subject at issue. *See Gunderson*, 628 N.W.2d at 186; Minn. Stat. § 302A.751, subd. 3(a).

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 section 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).

Contrary to Respondents' earlier asserted arguments, section 7.3 of CSG's Bylaws does not allow CSG to effectuate an involuntary redemption and force the Moores to surrender ownership. In fact, section 7.3 of the Bylaws does not address the issue. On the other hand, section 7.4 expressly states that the shareholder must "authorize" the "surrender" and "transfer" the shareholder's shares (ADD003; APP012). The Court of Appeals erred as a matter of law when it failed to hold that CSG violated its Bylaws and the Moores' reasonable expectations by transferring the Moores' shares without their consent.

3. 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* Minnesota Statutes section 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, section 302A.751 makes it clear that reasonable expectations can be developed over time. Minn. Stat. § 302A.751, subd. 3(a).

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. 3(a). From 1983–2003, Alexander approached the Moores on at least four separate occasions and offered on behalf of CSG 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, 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 Court of Appeals erred when it found as a matter of law that the involuntary freeze-out of the Moores at less than fair value did not violate the reasonable expectation formed after years of a course of dealing between Alexander and the Moores.

Second, unlike all of the prior dealings between the parties, the redemption was not voluntary or negotiated. The fact that the Moores were aware of Alexander's desire to acquire their interest in CSG through his offers does not make their expectation that they would remain shareholders in CSG absent their voluntary decision to sell their shares unreasonable. To the contrary, Alexander's desire manifested itself on each occasion as an opportunity to the Moores to voluntarily sell their shares to CSG. It is this manifestation and course of dealing that is the basis of the Moores' reasonable expectation.

III. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN FAILING TO HOLD THAT RESPONDENTS BREACHED THEIR FIDUCIARY DUTY TO THE MOORES BY TARGETING THEIR SHARES, AMONG OTHERS, IN A CORPORATE FREEZE OUT THROUGH A REVERSE STOCK SPLIT/REDEMPTION THAT WAS UNDERTAKEN AFTER ALEXANDER AND HIS FAMILY TRUST, UPON THE ADVICE AND COUNSEL OF CORPORATE COUNSEL, FIRST TRANSFERRED THEIR MINORITY SHARES TO A NEWLY-FORMED HOLDING COMPANY FOR THE PURPOSE OF AVOIDING FRACTIONALIZATION OF THEIR COMMON SHARES.

The Court of Appeals erred in concluding that the preferential treatment afforded Alexander and the Alexander Family Trust that insulated any of their shares from being fractionalized did not constitute a breach of fiduciary duty and/or unfairly prejudicial conduct. In *Berreman v. West Publishing Co.*, 615 NW.2d 362, 370-71 (Minn. Ct. App. 2000), the Court analyzed the scope of the common law fiduciary duty that those in a closely held corporation owe one another, noting that it had never been well defined. In its analysis, the Court concluded that it is a breach of fiduciary duty for a shareholder or group of shareholders to be afforded preferential treatment as compared to other shareholders. In reaching that conclusion, the Court relied upon cases from other jurisdictions such as *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515-18 (Mass.

1975); *Crosby v. Beam*, 548 N.E.2d 217, 221 (Ohio 1989); *Tillis v. United Parts, Inc.*, 395 So. 2d 618, 619 (Fla. Dist. Ct. App. 1981), and *Comolli v. Comolli*, 246 S.E.2d 278, 281 (Ga. 1978). These cases, and the Court in *Berreman*, all recognize that the "highest standard of integrity and good faith" shareholders in a closely held corporation owe one another prohibit one or a group of shareholders to afford themselves preferential treatment to the detriment of the other shareholders. *See also Fewell v. Tappan*, 27 N.W.2d 648, 654 (Minn. 1947) (co-owners of a close corporation owe each other "the highest standard of integrity and good faith in their dealings with each other.").

The same principle has led other courts to find that a reverse stock split and the elimination of fractional shares to eliminate minority stockholders entitles the minority to judicial relief. "The weight of authority indicates that the use of a reverse split and elimination of fractional shares for the purpose of eliminating minority stockholders may raise fairness, business purpose, or reasonable expectation issues justifying judicial intervention." *See* 6A Fletcher Cyc. Corp. § 2857.10 (West 2008) (citations omitted.) *See also Clark v. Pattern Analysis & Recognition Corp.*, 384 N.Y.S.2d 660, 664-65 (Sup. Ct. 1976) (providing relief based on fiduciary duty, even where appraisal was available); *Leader v. Hycor, Inc.*, 479 N.E.2d 173 (Mass. 1985) (upholding a challenge to a reverse stock split after applying the two party enhanced duty test for shareholder disputes in a close corporation); *Lerner v. Lerner*, 511 A.2d 501 (Md. 1986) (enjoining reverse stock split based on the irreparable harm to the minority shareholder); *Edick v. Contran Corp.*, 12 Del. J. Corp. L. 244, 1986 WL 3418 (Del. Ch. 1986); *Kirtz v. Grossman*, 463 S.W.2d 541, 544-45 (Mo. Ct. App. 1971); *Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245 (Mo. 1968); *Sullivan v. First Mass. Fin. Corp.*, 569 N.E.2d 814, 817 (Mass. 1991); *Lebold v. Inland Steel Co.*, 125 F.2d 369, 374-75 (7th Cir. 1941); Elliot M. Kaplan, *Corporate "Eminent Domain": Stock Redemption and Reverse Stock Splits,* 57 U.M.K.C. L. Rev. 67 (1988).

This is precisely what occurred here. The common shareholders were not relatively effected in proportion to their percentage of ownership. Rather, Alexander and the Alexander Family Trust minority interests were afforded preferential treatment to the detriment of the Moores, and the other minority common shareholders, by their receipt of the advice and counsel of corporate counsel to set up the RSS and redemption so that not even one of their shares was fractionalized and they would be left as the sole common shareholders of CSG. In the January 3 and 12, 2006, Board meetings, and again in a Memorandum dated January 24, 2006, CSG's attorneys advised Alexander and the Alexander Family Trust to form a new limited liability company and transfer their Class A Common shares to the newly formed Company. (APP295-300; APP584; APP143-154) It was only once Alexander and his family trust's shares were transferred that the 1-for-7,123.23 reverse stock split ratio was calculated and the entirety of the Moores' minority interest (and the other common shareholders) were fractionalized and subject to redemption. Thus, Alexander and the Alexander Family Trust's share were preferentially insulated from the fractionalization and redemption. This preferential treatment, orchestrated by corporate counsel, constitutes a breach of fiduciary duty. *See Berreman*, 615 N.W.2d at 370-71 and cases cited therein. *See also 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 Court of Appeals neglected to appreciate the illegality of the preferential treatment afforded Alexander and the Alexander Family Trust. Indeed, the Court of Appeals failed to consider in any respect the preferential treatment afforded Alexander and the Alexander Family Trust and the breach of fiduciary duty that treatment constitutes. As such, the Court of Appeals erred as a matter of law in failing to find that Respondent's breached their fiduciary duties to the Moores in affording Alexander and the Alexander Family Trust preferential treatment that resulted in the Moores being squeezed out of CSG and Alexander and the Alexander Family Trust being left as the sole common shareholders.

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

Minnesota Statutes section 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:
> >
> > > ***
> > >
> > > (2) *creates*, alters, or abolishes a right in respect of the redemption of the shares.
> > >
> > > ***
> > >
> > > (4) *excludes or limits the right of a shareholder to vote* on a matter.

> (5) *eliminates the right to obtain payment under this subdivision.*

Minn. Stat. § 302A.471, subds. 1(a), (2), (4) and (5) (emphasis added).

This Court has broadly interpreted section 302A.471. *See Whetstone v. Hossfeld Mfg. Co.,* 457 N.W.2d 380 (Minn. 1990).

A. <u>The Court of Appeals Misconstrued This Court's *Whetstone* Decision</u>.

The Court of Appeals has previously misconstrued section 302A.471 as a "very explicit statute." *Whetstone v. Hossfeld Mfg. Co.*, 448 N.W.2d 536, 538 n.1 (Minn. Ct. App. 1989), *rev'd in part*, 457 N.W.2d 380 (Minn. 1990). In *Whetstone*, this Court reversed the Appellate Court's construction of section 471 and ruled that it had misconstrued the "broad investment rights" afforded minority shareholders under section 471, subd. 1 in denying a minority shareholder dissenters' rights where the shareholder's veto rights were eliminated by an amendment to the Company's Articles. *Whetstone v. Hossfeld Mfg. Co.*, 457 N.W.2d 380, 383 (Minn. 1990).

The Court of Appeals has once again misconstrued section 302A.471, subd. 1 and this Court's decision in *Whetstone*. The Court of Appeals found that the "plain language" of section 302A.471, subd. 1 did not give rise to the dissenters' rights in the Moores. (ADD160). Simply put, this Court has previously rejected the Court of Appeals rationale. *See Whetstone*, 457 N.W.2d at 383.

Contrary to the observation of the Court of Appeals, this case is not distinguishable from *Whetstone* because the Moores were eliminated as shareholders. (ADD160.) It is the elimination of the Moores as shareholders <u>and</u> the rights of ownership such as the right to vote and right to obtain payment under section 471, subd. 1 that were eliminated by the reverse stock split and redemption that gave rise to dissenters' rights under this Court's decision in *Whetstone* and Minnesota Statutes section 302A.471, subdivision 1. *See also* O'Neal and Thompson, *Oppression of Minority Shareholders and LLC Members,* § 5.11 n.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).

It is not disputed that the Moores' ownership interests were terminated. (APP166; APP418.) The termination of the Moores' ownership rights entitles them to a Court-supervised valuation proceeding pursuant to Minnesota Statutes section 471, subdivisions 1(a)(2), (4) and (5). *Whetstone,* 448 N.W.2d at 538 n.1.

B. <u>The Moores Are Entitled To A Court Supervised Valuation Proceeding Under Section 302A.471, Subdivision 1(a)(2).</u>

The amendment to CSG's articles of incorporation which enabled the 1-for-7,132.23 reverse stock split unquestionably "created a right in respect of the redemption" of Appellants' shares as that phrase is used in section 302A.471, subdivision 1(a)(2). Without the reverse stock split amendment, Appellants would not hold any fractional shares. Rather, they would continue to hold their 5,067 shares and Respondents would have no right to redeem those shares. With the amendment, Respondents fractionalized Appellants' shares and "created a right in respect of the redemption" of the fractional shares. The Court of Appeals erred, as a matter of law, when it failed to find that Respondents violated Minnesota Statutes section 302A.471, subdivision 1(a)(2) when they created a right to redeem Appellants' shares and denied Appellants a dissenters' rights proceeding to determine the fair value of their shares.

C. <u>The Moores Are Entitled To A Court Supervised Valuation Proceeding Under Section 302A.471, Subdivision 1(a)(4)</u>.

In *Whetstone*, the Company amended its Articles of Incorporation to eliminate the minority shareholder's veto power. *Whetstone*, 457 N.W.2d at 380-82. The minority shareholder asserted he was entitled to a dissenters' rights proceeding under section 471, subd. 1(a)(4) at 383. In reversing the Court of Appeals that held the shareholder was not entitled to dissenters' rights, this Court held that eliminating a minority shareholder's veto power "unquestionably" limits the voting rights of the minority shareholder. *Id.* at 384.

The case for dissenters' rights is much clearer in this case. Respondents did not just <u>limit</u> the Moores' voting power, they eliminated the Moores' voting power. Like the plaintiff in *Whetstone*, the Moores are entitled to a dissenters' rights proceeding under section 471, subd. 1(a)(4).

D. <u>The Moores Are Entitled To A Court Supervised Valuation Proceeding Under Section 302A.471, Subdivision 1(a)(5)</u>.

CSG's January 12, 2006 Board minutes highlight the fact that the reverse stock split and involuntary redemption falls within the broad statutory language found in section 471, subdivision 1(a)(5). (APP143-144.) According to the Board minutes, CSG amended its articles so that "under the provisions of 302A.423 *and 302A.471 . . . the shareholders would not be entitled to assert dissenters' rights*." (APP144.) (Italics added.)

It is thus clear that the enabling amendment to CSG's articles of the RSS was intended solely to eliminate the Moores' right to assert their dissenters' rights and eliminate their right to receive payment under section 302A.471. CSG's amendment thus violated section 471, subdivision 1(a)(5). *See Brown v. Arp & Hammond Hardware,* 141 P.3d 673, 678 (Wyo. 2006) (minority shareholder entitled to dissenters' rights proceeding if articles of incorporation are amended to allow a reverse stock followed by a redemption of fractional shares because action materially and adversely affected shareholder's rights). *See also Sec. State Bank, Hartley, Iowa v. Ziegeldorf,* 554 N.W.2d 884, 887 (Iowa 1996) (allowing dissenters' rights proceeding following reverse stock split/redemption of minority shareholders' ownership interests).

The Court of Appeals found that the Moores were not entitled to proceed with a dissenters' rights fair valuation proceeding because the plain language of section 302A.471 does not provide for dissenters' rights upon a reverse stock split followed by a redemption. (ADD160.) This overly narrow interpretation of section 302A.471, subdivision 1(a)(5) is without merit.

There are many different ways that majority shareholders can "eliminate the right to obtain payment under this subdivision [§ 302A.471, subd. 1(a)(5)]." A reverse stock split followed by a forced redemption of fractional shares is just one of those ways. The Minnesota Legislature could have, but chose not to, follow other states' statutes to more narrowly encompass only reverse-stock splits followed by forced redemptions. The Minnesota Legislature instead left section 302A.471, subdivision 1(a)(5) broader to cover reverse stock splits followed by redemption of fractional shares, in addition to many other situations that adversely affect a minority shareholders' rights with respect to their shares. The Court of Appeals erred by disallowing a dissenters' rights proceeding under the broad language of section 302A.471, subdivision 1(a)(5).

E. <u>The Model Act Does Not Apply Because The MBCA Is Among The Most Liberal In The Nation In Its Protection Of Dissenters' Rights</u>.

The Court of Appeals' reference to the Model Act is unavailing. (*See* ADD160) The MBCA cannot be analogized to the Model Act (or any other state's act) because Minnesota's dissenters' rights provisions are "among the most liberal" in the nation. John H. Matheson, *Corporation Law and Practice,* 18 Minnesota Practice § 7.22 (West 2004). Minnesota never adopted a restrictive form of the Model Business Corporation Act. When the Minnesota Legislature enacted section 302A.471, it noted that "[t]his section greatly expands the occasions upon which a shareholder may dissent from a corporate action." Minn. Stat. § 302A.471 Reporter's Notes – 1981. The Legislature also noted 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." *Id.,* General Comment.

The Official Comment to the Model Act the Court of Appeals cites, and the Model Act provision to which it refers, are not found in the MBCA because it would actually limit, not expand, a minority shareholder's entitlement to a dissenters' rights proceeding under Minnesota law. This would run counter to the Reporter's Notes and case law that make Minnesota's dissenters' rights provisions among the most liberal in the nation.

As discussed above, the Minnesota Court of Appeals has previously misapplied section 302A.471 by requiring that an act giving rise to dissenters' rights be expressly indicated in the statutory language. *Whetstone v. Hossfeld Mfg. Co.*, 448 N.W.2d 536, 538 n.1. To support this characterization, the Court of Appeals cited to the Model Business Corporations Act Annotated and related case law. *Id.* This Court reversed, and ruled that the *Whetstone* court misconstrued the broad "investment rights" afforded to minority shareholders under section 471, subdivision 1. *Whetstone*, 457 N.W.2d 380, 383 (Minn. 1990). This Court should once again reject the Court of Appeals' rationale.

V. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT THE BOARD'S DETERMINATION OF VALUE UNDER SECTION 302A.423 IS CONCLUSIVE BECAUSE THE MOORES ESTABLISHED *SIFFERLE* FRAUD.

Even if section 302A.423 did apply (and it does not), it still does not preclude a valuation proceeding under either sections 302A.471 or 302A.751. Section 302A.423 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 Court of Appeals erred in upholding the District Court's findings that Respondents' actions and the valuation process were not 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—section 302A.423, subdivision 2, section 302A.471, subdivision 4, and section 302A.751, subdivision 1(b)(2)—must be construed more broadly than strict common law fraud. *See Sifferle*, 384 N.W.2d at 507 (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").[6]

A. The Respondents' Concealment of Management's Financial Projections and Valuations Constitutes *Sifferle* Fraud.

The Respondents concealed the financial information from Cobb but more importantly from the Board during the valuation process, including the following crucial information: (1) Versions B-D, which CSG's Chief Financial Officer prepared (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 Court of Appeals erred as a matter of law in upholding the District Court's finding that the concealment of this financial information did not constitute *Sifferle* fraud.

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[6] *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 v. Gast*, 122 F. Supp. 2d 836, 846 (W.D. Mich. 2000) (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.")

See Krieger v. Gast, 122 F. Supp. 2d at 850 (the disclosure of all material financial information validates the appraisal process; when failure to disclose such information occurs, the appraisal remedy afforded becomes meaningless).

The Court of Appeals' error was based on a misperception of what was concealed and to whom CSG's CFO's projections should have been disclosed. First, under section 302A.403, subdivision 2, it is the board that is charged with determining value. In this case, Mr. Cobb is not the one statutorily charged with the responsibility of determining fair value. While Cobb may have been retained as a resource for the Board, section 403 does not allow a board to abdicate its responsibility to determine fair value. Accordingly, the failure to disclose the CFO's projections and the 2006 budget CSG provided to U.S. Bank is the critical deficiency in the Board's valuation process. What Cobb may have deemed relevant to him is not, as the Court of Appeals appears to have found, the key to the analysis. Rather, the uncontroverted fact that the Board itself was never apprised of the CFO's projections and CSG's 2006 budget that was provided to U.S. Bank, projections and a budget prepared essentially contemporaneously at the time CSG's Board was considering the reverse stock split and redemption is the key. The failure to provide the projections and budget to the Board is what constituted *Sifferle* fraud. Had the Board been provided the materials it would have been in a position to inquire of both management and Cobb concerning their contents. Yet, the Board was never given this opportunity and thus there was a failure on the part of Respondents to disclose material information necessary to the fair value determination.

In fact, 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 lower courts erred when they failed to address CSG's own expert's admissions regarding the recent projections and budget 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 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")); *Klein v. First Edina Nat'l Bank,* 196 N.W.2d 619, 622 (Minn. 1972) (parties in a fiduciary relationship must disclose material facts).

Second, the Court of Appeals mistakenly concluded that the CFO's projections Version A-1) and the 2006 budget "were dated and based on an aborted plan to significantly enlarge the business. (ADD158) The Court of Appeals (and presumably the District Court) failed to appreciate the difference between the projections the Kahlerts' appraiser used earlier in connection with his valuation for the Kahlerts, and Versions A-D prepared by CSG's CFO and the 2006 budget. CSG's projections and the U.S. Bank 2006 budget were not dated or based on some aborted business plan. The record is uncontroverted that the CFO's projections (Versions A-D and the 2006 U.S. Bank budget) were prepared in connection with the Board's fair value determination and were based on management's assessment of CSG's business at that time. Accordingly, the lower courts erred in relying upon the wrong financial information to rationalize a finding that the failure to disclose the management projections and the 2006 budget were immaterial. Simply stated, the lower courts focused on the wrong financial information.

B. 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 found the Respondents represented to the Moores that the real estate without the mineral rights was worth $1.95 million. (ADD044 ¶ 37.) The District Court further 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, and the Court of Appeals failed to address the error, 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 at 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).[7]

VI. COBB'S VALUATION METHODOLOGY IS FLAWED AS A MATTER OF LAW.

Under the Minnesota buy-out statute, fair value "means the pro rata share of the value of the corporation *as a going concern.*" *Advanced Commc'n Design v. Follett,* 615 N.W.2d 285, 290 (Minn. 2000) (italics added) (citing *Cavalier Oil Corp. v. Harnett,* 564 A.2d 1137, 1144 (Del. 1989) & 2 American Law Institute, *Principles of Corp. Governance: Analysis and Recommendations* § 7.22(a) (1994) (recommending that fair value should equal the shareholder's proportionate interest in the corporation)).

The District Court's finding that Cobb "ultimately decided that the net asset approach was the best indicator of CSG's value" (ADD051 ¶ 57, ADD053 ¶ 64) was not addressed by the Court of Appeals. The Court of Appeals erred in this respect as Cobb's net asset valuation methodology should have been rejected as a matter of law because it failed to value CSG as a going concern, and instead established CSG's minimum liquidation value. (APP368.) *See Helfman v. Johnson,* No. A08-0396, 2009 WL 437818, at *2 (Minn. Ct. App. Feb. 24, 2009) (rejecting expert's asset valuation method because it did not value company as a going concern and set an unrealistically low value).

In addition, as part of his valuation methodology, Cobb erroneously used book value to establish the value of CSG's equipment and machinery. (Tr. 1203:1-1206:24.)

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[7] Either Alexander deceived the Moores or he was deceptive in the fair valuation process. Regardless, the deception constitutes fraud under *Sifferle.*

See Rainforest Café, Inc. v. State of Wis. Inv. Bd., 677 N.W.2d 443 (Minn. Ct. App. 2004) (rejecting book value and noting, "case law from Minnesota and other jurisdictions overwhelmingly recognizes that book value is not a reliable indicator of fair value") (citing *Thomas v. Thomas,* 407 N.W.2d 124, 126 (Minn. Ct. App. 1987) (stating book value is often an erroneous figure and easily subject to manipulation) and also citing *Beerly v. Dep't of Treasury,* 768 F.2d 942, 946 (7th Cir. 1985) (stating book value is "virtually meaningless" index of share value)). *See also* Shannon Pratt, et al., *Valuing A Business* 308 (4th ed. 2000) ("It is important to distinguish between the application of any asset-based approach valuation method and simple reliance on an accounting 'book value' to conclude a value estimate . . . accounting book value is not a business valuation method. In fact, accounting book value is not a business valuation method at all.").

Finally, the lower courts should have rejected Cobb's use of the discounted cash valuation methodology. Like Cobb, the defendant's expert in *In re Radiology Associates Inc. Litigation* used a discounted cash flow/earnings valuation methodology to value the company. 611 A.2d 485, 490-91 (Del. Ch. 1991). The court rejected the defendant's expert's discounted cash flow/earnings opinion because his earnings projections were based on historical earnings and because they were *not* based on projections of future earnings that were prepared with management's direct input. *Id.* at 490-91, 497-98. As in *In re Radiology,* the District Court expressly found that Cobb "prepared his own projections, based upon CSG's historical financial data in undertaking his discounted cash flow analysis" and that "Cobb did not rely upon projections that were prepared by management." (ADD051 ¶ 60-61.) *See also 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 a company's management or board of directors 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").

The *In re Radiology* court rejected the expert's projections based on doubts as to the credibility of the information supplied to him. *Id.* at 498. The facts in this case are nearly identical to *In re Radiology*. CSG's counsel sent Cobb only the Version A projections, even though CSG internally admitted the Version A projections were "too pessimistic." (Tr. 636:8-15, 637:7-640:1, 667:18-668:4.) The more realistic projections in Versions B, C, and D were concealed from the Board and Cobb. (Tr. 1127:2-1128:3, 1135:13-1136:14.) Cobb incredibly concluded that the Version A projections were "overly optimistic" and he prepared an even lower set of net income projections that he purportedly based on the Company's historical financial performance. (Tr. 1132:10-19, 1285:10-15, 1299:25-1302:11.)

For the same reasons the *In re Radiology* court disregarded the defendant's expert's discounted cash flow/earnings approach, the lower courts should have rejected Cobb's discounted cash flow approach and the rest of his valuation methodology. *Id.* at 498. *See also Doft & Co. v. Travelocity.com, Inc.*, 2004 WL 1152338, at *5-6 (Del. Ch. May 20, 2004) (discounted cash flow analysis "depends on the validity and reasonableness of the data relied upon," so courts prefer "valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's operations"); *Gilbert v. MPM Enters., Inc.*, 709 A.2d 663, 668-69 (Del. Ch. 1997) (stating that "management was in the best possible position" to provide accurate business forecasts of the company's future prior to the merger); *Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001) (courts are inherently suspicious of post-merger, litigation-driven forecasts because the possibility of hindsight bias and other cognitive distortions seems untenably high); *Hull Junction Holding Corp. v. Princeton Borough,* 16 N.J. Tax 68 (N.J. Tax. Ct. 1996) ("The DCF method . . . is an amalgam of interdependent, attenuated assumptions of limited probative value; . . . its use in this case can only be described as an exercise in financial haruspication.").

VII. IT WAS ERROR AS A MATTER OF LAW TO REFUSE 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.[8] (Tr. 286:21-287:25.)

[8] 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

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 and judgments." Minn. Stat. § 302A.473, subd. 1(d).[9] 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.

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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.)

[9] Aside from §§ 302A.471, 473, interest may also be awarded independently under Minnesota Statutes section 549.09, subdivision 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).

A. **<u>The Lower Courts Also Erred When They Failed To Award The Moores Their Costs And Fees.</u>**

The Court of Appeals erred as a matter of law in affirming the District Court's failure to find violations of section 302A.473, subdivision 8(b), section 302A.751, subdivision 2, and section 302A.467 based on CSG's undervaluation of the Moores' 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.[10] *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 § 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 Bank v. Huff,* 609 F. Supp. 1124 (N.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).

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[10] Even if the 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.

CONCLUSION

The Moores request that this Court reverse the Court of Appeals, and remand for a new trial with guidance to the District Court that the Moores are entitled to a judicial determination of the fair value of their shares valued in accordance with an appropriate valuation based on the financial projections and information of CSG's management plus interest, costs and fees. Alternatively, the Moores request that this Court reverse the Court of Appeals, modify the District Court's judgment, and order that the Moores are entitled to the fair value of their shares consisting of an additional $800,000, and an additional $740,350 for their share of the mineral rights lease, together with interest, costs and fees.

Dated: December 22, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3, the undersigned hereby certifies, as counsel for Appellants, that this brief complies with the type-volume limitation as there are 13,338 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2003.

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