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,

vs.

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

Respondents.

RESPONDENTS' BRIEF AND ADDENDUM

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

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ISSUES

1. Is the district court's decision that Appellants had failed to prove their shareholder oppression claim under § 302A.751, which was affirmed by the court of appeals, supported by sufficient evidence?

> Based on over 100 findings of fact, the district court concluded that Appellants had failed to prove Respondents committed any deception, misrepresentation, fraud, breach of fiduciary duty, or violation of any statute or by-law, and that the determination of the fair value of their shares was reasonable.
>
> The court of appeals affirmed, holding that the evidence did not merely support the district court's findings, but that it conclusively established Appellants failed to prove they were treated in an unfairly prejudicial manner.

- Minn. Stat. § 302A.751, subd. 1(b)(2)-(3)
- Minn. Stat. § 302A.423, subd. 2
- Minn. R. Civ. P. 52.01

2. Did the district court and the court of appeals correctly decide that § 302A.471 does not provide dissenters' rights to a judicial appraisal when fractional shares are redeemed for cash, where the Minnesota legislature did not adopt the Model Business Corporation Act provision granting such rights, and instead adopted a provision making the board's valuation conclusive absent fraud?

The district court held Appellants did not have a right to a judicial appraisal under § 302A.471, and the court of appeals affirmed.

- Minn. Stat. § 302A.471, subd. 1(4).
- Minn. Stat. § 302A.423, subd. 2.

STATEMENT OF THE CASE

This appeal is from a judgment following a bench trial in which the district court found that Appellants had failed to prove any of their claims. Appellants challenge the district court's decision that they have no right to receive more than the nearly $5 million they have already received for their redeemed shares in Respondent Cold Spring Granite Company ("CSG"). The Stearns County District Court, by the Hon. Elizabeth A. Hayden, appointed retired Hennepin County Judge Robert H. Lynn as Special Master to preside over trial. After hearing ten days' of testimony, Judge Lynn found that Respondents had committed no wrongdoing—no fraud, no deception, no breach of fiduciary duty, no violation of any statute, and no violation of any corporate by-law—and that CSG's board had acted entirely reasonably in valuing Appellants' shares. (Special Master's Recommended Findings of Fact ("FOF"), Conclusions of Law ("COL") and Order for Judgment, August 28, 2009.) Based on those recommended findings, Judge Lynn concluded that Appellants had failed to prove they have a right to a judicial appraisal. (*Id.*)

Judge Hayden then conducted a *de novo* review of Appellants' objections to Judge Lynn's recommended findings of fact and conclusions of law under Minn. R. Civ. P. 53.07. Judge Hayden concluded that the recommended findings were properly based on the evidence and that the recommended conclusions correctly applied the law. Declaring that any changes would be "merely stylistic," Judge Hayden adopted Judge Lynn's Recommended Findings of Fact, Conclusions of Law and Order for Judgment in its entirety. (Order and Mem., Dec. 8, 2009.) Appellants did not thereafter move for amended or additional findings under Minn. R. Civ. P. 52.02, or for a new trial under Minn. R. Civ. P. 59.

The court of appeals unanimously affirmed the judgment. Judge Lansing wrote a special concurrence to emphasize that district courts have broad remedial powers to protect minority shareholders from oppression under Minn. Stat. § 302A.751, but that Appellants had failed to prove they were treated unfairly or that their reasonable expectations were frustrated.

FACTS

1. Appellants' Failure to Address the Adverse Findings and Evidence.

Before addressing the facts, we note that Appellants' Statement of Facts violates the Minnesota Rules of Civil Appellate Procedure and ignores basic principles of appellate review. Rule 128.02, subd. 1(c), provides: "The facts must be stated fairly, with complete candor. . . . Where it is claimed that a . . . finding of fact or other determination is not sustained by the evidence, the evidence, if any, tending directly or by reasonable inference to sustain the verdict, findings or determination shall be summarized." Minn. R. Civ. App. P. 128.02, subd. 1(c).

Although Appellants have the burden of demonstrating that the trial court's findings were not supported by the evidence, they never address the evidence that supports the findings. Instead, Appellants cite the evidence that would have supported the findings they wanted the district court to adopt, as if they were writing on a clean slate in which the court had made no findings at all.

For example, Appellants' Statement of Facts repeatedly accuses Respondents of making "misrepresentations" and "false statements" without citing or addressing any of the contrary evidence that supports the district court's finding that Appellants "have failed to prove fraud even applying the broader Sifferle definition," which includes "deception, misrepresentation, actual fraud, or . . . violation of a fiduciary duty." Appellants' Addendum ("ADD") 74.)

While that approach would have been appropriate advocacy in a pre-trial brief, it is inappropriate on appeal given the proper role of this Court. *See* Minn. R. Civ. App. P. 128.02, subd. 1(c). This Court does not redetermine the facts. *See, e.g., Fletcher v. St. Paul Pioneer Press,* 589 N.W.2d 96, 101 (Minn. 1999); *Rutz v. Rutz*, 644 N.W.2d 489, 493 (Minn. Ct. App.), *rev. denied* (Minn. 2002). Rather, this Court gives the district court's findings great deference, viewing the evidence in a light most favorable to them, and reversing them only for clear error. *See Fletcher,* 589 N.W.2d at 101; *Kutscheid v. Emerald Square Props., Inc.*, 770 N.W.2d 529, 532 (Minn. Ct. App. 2009); *New Market Twp. v. City of New Market*, 648 N.W.2d 749, 752 (Minn. Ct. App.), *rev. denied* (Minn. 2002). Any finding not challenged as clearly erroneous is deemed true. *Commercial Union Ins. Co. v. Minnesota School Bd. Ass'n*, 600 N.W.2d 475, 480 (Minn. Ct. App.), *rev. denied* (Minn 1999).

When the district court's findings and the record are viewed in this manner, the relevant facts are as follows.

2. The Parties.

Respondent CSG is a Minnesota corporation that has been in the granite business for over 100 years. (FOF 1; Tr. 189-90.) It owns and operates fabrication facilities and quarries in several states and Canada. (FOF 1; Tr. 618-19, 1049-50.) CSG has over 1,000 employees. (FOF 1; Tr. 195.)

Respondent Patrick D. Alexander ("Alexander") is a CSG shareholder. (FOF 5; Tr. 20-21, 101) His grandfather, who was a stone cutter in Scotland, founded the company in 1898. (FOF 2; Tr. 189-90.) Since 1983 Alexander has been CEO of CSG, and since 1997 he has also served as chairman of its board of directors. (FOF 8; Tr. 20, 189-90.) Alexander's mother, Rose Alexander, also serves on CSG's board. (FOF 2; Tr. 1059-60.) For many years, however, the majority of CSG's board members have been outside directors unrelated to the Alexander family. (Aff. of Patrick Mitchell ("Mitchell Aff.") dated Sep. 21, 2007, ¶ 2.)

Respondent Marble Falls Partners, LLC ("Marble Falls") is a land holding company that CSG created and spun-off to its shareholders in 2003. (FOF 7, 27, 30; Tr. 103-05; Appellants' Appendix ("APP") 042-43, 51.)

Appellants are trustees of family trusts (the "Moore Trusts") that held shares in CSG. (FOF 6; Tr. 234-35, 237-38, 356-58, 478-79.) The Moore Trusts received the shares by gift from relatives of the appellant trustees Thomas J. Moore ("Moore") and his sister Ann McCabe ("McCabe"). (FOF 6; Tr. 359-61.) Neither Moore nor McCabe (collectively, the "Moores") has ever been an employee, officer or director of CSG, or been involved in its day-to-day management. (FOF 8; Tr. 231-34, 449-50.)

Before the 2006 reverse stock split and redemption at issue, CSG had two classes of common stock: Class A, which received one vote per share, and Class B, which received 100 votes per share. (FOF 4; Tr. 102-03.) Alexander individually owned approximately 36% of the Class A common stock. (FOF 5; Tr. 20-21, 101.) The Alexander Family Trust, of which Alexander is a co-trustee with his mother and sister, owned approximately 57% of the Class A common stock. (FOF 5; Tr. 21.) Thus Alexander and his family trust held approximately 93% of the Class A common stock. (FOF 5; Tr. 305.) Alexander individually owned all 70 shares of the Class B common stock. (FOF 5; Tr. 20-21, 101.)

The Moore Trusts collectively owned less than 7% of Class A common stock. (FOF 6; Tr. 478-79.)

In addition to common stock, CSG also issued preferred shares that were owned by over 300 shareholders. (Ex. 14, at CSG18654; Mitchell Aff. ¶ 18; Affidavit of George Schnepf ("Schnepf Aff.") in Supp. of Defs.' Mot. for Summ. J., Feb. 9, 2008, Ex. 1.) Preferred shareholders did not have voting rights, but were entitled to annual dividends. (FOF 3; Tr. 82-83, 484-85.) Common shareholders had voting rights, but did not receive cash dividends. (FOF 3; Tr. 82-83, 484-85.)

3. The 2003 Marble Falls Spin-off.

As early as 2001, CSG's corporate counsel, Alan Wilensky, began exploring whether certain recent tax law changes made it attractive for CSG to restructure some of its real estate holdings. (FOF 13; Tr. 2314-18.) At about the same time, CSG began considering its risk of exposure to certain product liability claims in Texas. (FOF 14; Tr. 2318-21.) As a result of his investigation and review of the tax law, in August or September of 2003, Wilensky recommended that CSG transfer certain real estate to a newly created, wholly owned subsidiary, ultimately known as Marble Falls. (FOF 15; Tr. 2317-21.)

Around the time CSG was considering this proposal, Moore invited Alexander to lunch to thank him for allowing him to pledge CSG stock as collateral for a bank loan. (FOF 16-17; Tr. 84, 247-50, 2321-24; Ex. 17.) The lunch took place on or around September 12, 2003. (FOF 18; Tr. 84-88, 2321-24.) Wilensky also attended. Due to Moore's liquidity issues, Wilensky and Alexander proposed that the Moores exchange their common stock for preferred shares, in order to receive dividends. (FOF 18; Tr. 2321-24; APP017-18.) Alexander and Wilensky thought that given the low tax rate on dividends, this transaction would make sense for both parties. (FOF 18; Tr. 250-52, 2321-22; APP017-18.)

During the lunch meeting, Moore was also told that CSG was interested in restructuring its assets. (FOF 19; Tr. 84-86, 251-53, 2317-24.) After the meeting, Wilensky faxed Moore a memorandum dated September 12, 2003, outlining and discussing CSG's restructuring plan. (FOF 20; APP017-20.) The memorandum explained that CSG was considering creating a subsidiary that would own certain Texas real estate, which would be spun off in a distribution to CSG common stockholders. (*Id.*) Moore sent this memorandum to McCabe. (FOF 20; Tr. 253, 375-76; APP020.)

On November 14, 2003, Alexander and Wilensky met with the Moores to discuss the Marble Falls transaction. (FOF 21; Tr. 97, 256-57, 2324.) The business reasons for the transaction were explained to the Moores, and Wilensky provided them a memorandum he had prepared outlining it. (FOF 22; Tr. 99-100, 257-58, 264, 392-93, 2324-25; APP031-34.)

The memorandum advised the Moores that CSG would transfer certain Texas real estate to a newly formed limited liability company ("Newco"), but would retain granite rights in the transferred land for 15 years, and the interests in Newco would be distributed ratably as a dividend to CSG shareholders before December 31, 2003. (APP031-34.) The memorandum further stated that "the current common shareholders of CSG will own the same proportionate interest in Newco," and that the "current voting arrangements with respect to CSG will apply to Newco." (FOF 23; APP031-34.)

The Moores were told at this meeting, and understood, that CSG had the power to, and intended to, complete the transaction with or without their approval, and without a shareholder vote, by December 31, 2003. (FOF 25; Tr. 299, 301-02, 453-54, 464-65, 2325-27). Alexander also informed Moore after the meeting that CSG was going to complete the transaction by the end of 2003. (FOF 26; Tr. 95-96, 2327.)

The Moores contend that at the November 14, 2003 meeting they requested drafts of the Marble Falls transaction documents, and that Alexander and Wilensky agreed that this request was fair and reasonable. (FOF 24.) But neither Alexander nor Wilensky recalls such a discussion, and Wilensky, who drafted the documents, did not send drafts to the Moores before the transaction was effected. (FOF 24; Tr. 470, 2325-29.)

On December 26, 2003, CSG's board approved the Marble Falls transaction. (FOF 27; Tr. 104-05; APP042-43.) Land in Burnett County, Texas, that CSG did not need for its operations was transferred to a wholly-owned subsidiary, Marble Falls. (FOF 29; Tr. 100.) Based upon Wilensky's advice, the entity was formed as a Delaware limited liability company in order to differentiate it from CSG for liability purposes. (FOF 28; Tr. 2329.) Units in Marble Falls were distributed as a stock dividend on a pro rata basis to all CSG shareholders, including the Moores. (FOF 30; Tr. 104-05; APP042-70.) CSG retained the mineral rights in the transferred land for 15 years, which lowered the land's value, thereby reducing the shareholders' tax liability for the dividend (FOF 29, 37; Tr. 261-62, 1348-54, 2330; Respondents' Appendix ("RA") 9, 15, 19-20, 25, 30.)

Each CSG Class A common share (which had one vote) received one Class A (voting) unit and one Class B (non-voting) unit in Marble Falls. (FOF 30; APP042-43.) Because each Class A share received two Marble Falls units, to maintain the same proportionate ownership interests in Marble Falls between Class A and Class B shares, each Class B (100 vote) share received two Class C (100 vote) Marble Falls units. (*Id.*) Each common share in CSG therefore received two units in Marble Falls.

Therefore, after the Marble Falls transaction, Appellants owned the same pro rata share of Marble Falls that they owned in CSG. They owned 6.58% of CSG's Class A shares (5,067 out of 76,889.53 shares) and 6.58% of the Marble Falls Class A units. (FOF 31; Tr. 478-79.)

As to the percentage of votes in Marble Falls, the Moore Trusts held 6.04% of the votes in CSG and 5.57% in Marble Falls, a difference of 0.47%, so small as to be immaterial. (FOF 32-35; Tr. 479-82; APP042-70.) As Moore admitted, Alexander controlled over 90% of the votes in CSG through his individual shares and as trustee of his family's trust, and over 90% of the votes in Marble Falls. (Tr. 305.)

In February, 2004, CSG sent the Moores IRS Form 1099s reflecting the Marble Falls dividend, but they apparently did not review them. (Tr. 309-10, 334-25; Ex. 33.) At a March 25, 2004 chance meeting between Moore and Wilensky, Moore learned that Marble Falls had been formed. (FOF 36; Tr. 272-73.) After receiving the Marble Falls agreement, the Moores learned that it contained a buy-out provision setting a predetermined price for the purchase of any member's units, and that Marble Falls was created under Delaware law. (FOF 37; Tr. 275; APP042-43.) The Moores consulted with the Best & Flanagan law firm and decided not to take legal action. (FOF 38; Tr. 273-75.) McCabe attended the next shareholder meeting, in August 2004, and did not raise any issues concerning the transaction. (FOF 39; Tr. 408-09; Ex. 122.)

Appellants continue to own their interests in Marble Falls. (Tr. 310-11.) Neither CSG, nor Alexander, nor Marble Falls has attempted to buy Appellants' Marble Falls interests. (*Id.*)

4. The Prior Shareholder Lawsuit Challenging the Marble Falls Transaction.

In May, 2005, John and James Kahlert, then minority shareholders of CSG, commenced an action in Stearns County district court against Alexander and CSG, challenging Alexander's management of the company, including the Marble Falls transaction. (FOF 40; Tr. 444; Ex. 151.) McCabe submitted an affidavit in support of the Kahlerts' lawsuit. (FOF 41; Ex. 52.) The Kahlerts, like the Moores, complained that the Marble Falls transaction was improper, because they had no opportunity to review it in advance, and Delaware law offered less protection than Minnesota law to minority shareholders. (Ex. 151.)

In June, 2005, attorney Lewis Remele was appointed as CSG's Special Litigation Committee ("SLC") to evaluate the Kahlerts' claims. (FOF 44; Tr. 203, 2282; Ex. 63.) After more than six months of investigation, the SLC determined that the Kahlerts' claims were derivative, and should not be pursued because they lacked merit. (FOF 44; Tr. 2294-95; Ex. 63.) As to Marble Falls, the SLC concluded that the "transaction was justified as a reasonable and prudent action in an attempt to avoid a potentially serious issue for the company and its shareholders." (FOF 44; Ex. 63, at 23.) The SLC specifically rejected the contentions that the board had an obligation to consult with shareholders, and that the transaction was intended to deprive minority shareholders of their rights. (FOF 44; Tr. 2292-94; Ex. 63.)

In an Order dated May 12, 2006, the district court found that the SLC was independent and acted in good faith, adopted its findings, and granted CSG summary judgment dismissing the Kahlerts' derivative claims related to Marble Falls. (FOF 45; Ex. 513.)

5. Cobb's Valuation of CSG.

By late 2005, Alexander felt that since CSG was incurring the expense of the *Kahlert* litigation and related company valuation, and since the Moores no longer believed in him, he would actively pursue a method by which CSG could redeem the minority shareholders' shares. (FOF 42; Tr. 140, 148, 201-03.) CSG's counsel advised that under Minnesota law one way this could be effected was through a reverse stock split and redemption of fractional shares for cash. Respondents' Appendix ("RA") RA3-5.) Until Alexander consulted with counsel in late 2005, he had never heard of a reverse stock split. (FOF 42; Tr. 201-02.)

According to the unrebutted testimony of University of Minnesota Law School Professor John Matheson, this method of redeeming minority shareholders is an ordinary and proper practice among Minnesota corporate law practitioners. (Tr. 2843-48; RA90-92.) Prof. Matheson has not only been teaching and practicing corporate law for over twenty years, he is the official reporter for the Minnesota Business Corporation Act ("MBCA"); he serves on the state bar committee that studies and recommends changes to the MBCA; and he is co-author of the leading treatise on Minnesota corporate law. (RA80-81,110-14.)

In order to take this action, CSG's board needed to determine the fair value of the shares to be redeemed. (FOF 48; Minn. Stat. § 302A.423, subd. 2.) CSG had already retained Arthur Cobb, a CPA with 30 years of experience as a business appraiser, to evaluate a valuation report the Kahlerts' appraiser, Patrick Schmidt, had prepared in support of their buy-out claims. (FOF 49-50; Tr. 1251; Ex. 147.) In May 2005, Cobb provided CSG with a preliminary analysis of Schmidt's report, which identified many flaws and concluded it was unreliable, in large part because it projected annual sales and profit increases that were unprecedented in CSG's 115-year history. (FOF 51-52; Tr. 1254-57; Ex. 147.)

CSG then asked Cobb to perform an independent appraisal of the company. (FOF 55; APP188.) In valuing CSG Cobb reviewed, among other things, audited financial statements, investment documents, financial performance histories, budgets, real estate appraisals, and numerous other documents and data. (FOF 55; Tr. 1261-64; RA66-69.) Cobb also interviewed management and visited CSG's operating facilities and quarries in California and Minnesota. (FOF 55; Tr. 655-57, 1261-64.) Cobb further engaged in detailed discussions with management regarding the industry, the customer base, competition, competitive factors and pricing. (FOF 55; Tr. 1261-64.) On September 16, 2005, Mr. Cobb issued a preliminary valuation report estimating the fair market value of CSG to be approximately $80 million as of June 4, 2005. (FOF 55; Ex. 152.)

Cobb ultimately issued a valuation opinion, dated January 19, 2006, appraising the fair market value of CSG as of December 31, 2005 at $85 million, resulting in a fair value of its minority shares of common stock at $986.50 per share. (FOF 56; RA8.) Cobb also valued CSG's shares of preferred stock at $9,083,760.00. (FOF 56; RA65.) Although Cobb considered three approaches in reaching his opinion of value—the market approach, the discounted cash flow approach, and the net asset approach—he ultimately decided that the net asset approach was the best indicator of CSG's value. (FOF 57; Tr. 1264-69; RA52-65.)

In considering the market approach, Cobb identified and analyzed competitors of CSG, and concluded there were not sufficient comparable companies to reach a conclusion of value. (FOF 58; Tr. 1260-82; RA58.)

In undertaking the discounted cash flow approach, Cobb prepared his own projections based upon CSG's actual historical financial data, management plans and industry information. (FOF 59; Tr. 1284-86, 1300-01; RA60.). Cobb concluded that CSG's historical earnings had been inconsistent, reflecting wide increases and decreases over the years. (FOF 59; Tr. 1284-89; RA60.) He projected net sales increasing 3.5% per year, and gross profits of 21% of net sales. (FOF 60; RA60.) CSG's actual historical data showed that net sales had increased at an average annual growth rate of 3.9% from 2001 through 2004, and 3.2% in 2005. (RA60.)

Cobb did not consider any of the projections prepared by management of CSG, including those he had not been shown before the issuance of his opinion, to be material or relevant to his opinion of value. (FOF 61; Tr. 1252-54, 1284-86, 1300-06, 1361-63; RA59-60.) He was not misled by not having these management projections in hand before rendering his opinion, because he would not have relied upon them. (FOF 61-62; Tr. 1252-54, 1361-63.)

For example, as to the projections prepared by CSG management in the summer of 2005, Cobb had no confidence in them and concluded no willing buyer would have relied upon them in valuing CSG as of December 31, 2005. (FOF 63; Tr. 1288-89, 1361-63.) After reviewing "Version D" of those projections, Cobb gave them no weight or credibility because they were inconsistent with CSG's history. (FOF 63; Tr. 1284-86, 1300-06, 1362.)

Ultimately, Cobb concluded the net asset approach, which yielded a higher value than the discounted cash flow method, was the most reliable method of valuing CSG. (FOF 64; RA51, 63.) Cobb separately valued the assets used in CSG's granite operations and the assets not needed for operations, primarily real estate, and then added them for a total value. (FOF 64; Tr. 1261-62; RA38-65.) Cobb estimated CSG's granite operations had a value of $57 million; its nonoperational real estate had a value of $19,478,050 (which he rounded up to $20 million); and that certain equity investments had a value of $5 million. (FOF 64; Tr. 1261-62; RA65.) Based on those figures, CSG's total equity value was $82 million, which Cobb rounded up to $85 million. (FOF 64; RA65.) After deducting the preferred stock's value, the total value of the common stock was $75,916,240. (*Id.*)

6. Chartwell's Analysis of Cobb's and Schmidt's Valuations.

In December 2005, CSG retained Chartwell Financial Advisors LLC to compare the reports of Cobb and Schmidt and advise the board as to which report Chartwell believed to be more credible and reasonable. (FOF 65; Tr. 1935-37, 1961, 1977-78.) Chartwell, through its principal Jason Vavra, met with Cobb to discuss his assumptions and conclusions. (FOF 66; Tr. 1939.)

Chartwell prepared a matrix to investigate the historical earning power of CSG, and to calculate a range of values based upon different multipliers, and different performance measures from various periods. (FOF 67; Tr. 1981-83, 1986-88; Ex. 57.) The matrix specifically calculated values using EBITDA and a range of multipliers between 5.5 and 9, which he believed was the reasonable range of multiples for most privately held companies. (FOF 68; Tr. 1996; Ex. 57.)

The average value for CSG based upon the range of values and assumptions Chartwell utilized was $90,641,041, with a low of $50,615,500 and a high of $138,286,000. (FOF 69; Ex. 57.) This exercise gave Chartwell confidence that Cobb's value was more credible than Schmidt's. (FOF 69; Tr. 1994-97, 1999-01; Ex. 57.) Vavra, like Cobb, testified that he would rely upon actual financial data to value CSG as of January 2006, rather than forward-looking projections done in 2003, 2004 or 2005. (FOF 70; Tr. 1996-97.)

7. The Reverse Stock Split and Redemption of Fractional Shares.

The CSG board met on January 30 and 31, 2006 to consider the reverse stock split and redemption of fractional shares. (FOF 43, 46, 74, 77; APP147-56.) At the January 30 meeting, the board members present were Alexander, Michael Snow, Pat Mitchell, Alfred Frasier, Jim Dunlap and Dick Giesecke. (FOF 75; APP147.) Director Rose Alexander participated by phone. (*Id.*) Also present were corporate officers and lawyers. (*Id.*)

Cobb and Vavra attended and made presentations regarding their opinions and analyses. (FOF 75; Tr. 213-14, 1063-64, 2363; APP147-53.) At one point Alexander left the room, and Rose Alexander ended her participation by phone, to allow the remaining directors who had no personal interest in the outcome to discuss the appraisals with Cobb and Vavra outside their presence. (FOF 76; APP152.) Snow and George Schnepf, the company's CFO, also left the room at the same time to allow the remaining directors to question Cobb and Vavra outside the presence of management. (FOF 76; Tr. 1061-66, 2358-74.)

During the next day's session, the board voted to approve the reverse stock split and redemption of fractional shares based on Cobb's valuation as of January 31, 2006. (FOF 77; APP153-56.) As a result of the transaction, all minority shares except those owned by Alexander and the Alexander Family Trust were redeemed for cash. (Tr. 183.) Directors Pat Alexander, Rose Alexander and Snow abstained from voting. (FOF 77; APP154-55.) The remaining directors, Mitchell, Frasier, Dunlap and Giesecke, voted unanimously in favor. (FOF 78; APP154-55.) The district court expressly found: "Each of these directors made an independent judgment based upon the information provided them, including the Cobb and Schmidt valuations and the evaluation of those reports by Mr. Vavra." (FOF 78; Tr. 213-15, 1056-66, 2363, 2368-70; Frasier Dep. Designations, at 70-71.)

The Moores offered no testimony from any director suggesting he was misled in any way, or deprived of any information, in connection with his vote in favor of the transaction based on Cobb's valuation. No director testified that the allegedly "concealed" projections or budget would have been material to his decision, or would have affected it in any way.

8. The Moores' Failure to Tender Their Shares for Payment Or Conduct an Appraisal Before Trial

By letter dated February 6, 2006, CSG informed the minority shareholders, including the Moores, that it had effected the reverse stock split and redemption of their shares. (FOF 79, APP166-67.) The letter explained that certain shareholders do not share the board's strategic views; that the *Kahlert* litigation and resulting SLC investigation exonerating management had been a significant distraction; and that the board had determined management needed to focus on the tremendous competitive challenges facing the company, not lawsuits and discord created by non-management minority shareholders. (*Id.*) The letter states: "If you or your advisors have any questions about the appraisal, we will make Art Cobb available to you at a mutually agreeable time and place to answer those questions." (*Id.*)

Although the Moores state that CSG "refused" to pay them for three years (br. at 18), the February 6th letter informed the Moores that payment for their shares was available immediately. It stated: "[Up]on delivery of your shares to US Bank, you will receive payment for your shares." (*Id.*) CSG placed the funds for payment in escrow at U.S. Bank, where they remained available to the Moores at all times. (Tr. 794-95; APP144; ADD024.) When the Moores finally tendered their shares in May 2009, they were paid. (Br. at 19; ADD021.)

Similarly, while the Moores state that CSG "prevented" them from conducting an appraisal (br. at 18), in a letter dated May 5, 2006, CSG's counsel stated: "CSG welcomes the opportunity to allow appraisers of your choice to value some or all of CSG or CSG's assets, and to access and review certain information pertaining to CSG or CSG's assets solely for the purpose of valuing CSG, CSG's assets, or CSG's business under the terms set forth below." (APP168.) The Moores never requested any information or responded to the letter. (Tr. 317.) Instead, they commenced this lawsuit. (*Id.*)

9. The District Court Rejects the Moores' Claims.

The district court considered ten days of trial testimony from 25 witnesses, deposition testimony from four additional witnesses, and over 194 trial exhibits. In addition to receiving testimony from Moore, McCabe, Alexander, six board members, Schnepf, Flint, Vavra, and Cobb, the court heard from eight valuation experts, including two business appraisers retained specifically for this litigation, and two corporate governance experts, including Prof. Matheson, who lauded CSG for its "admirable" conduct in valuing the Moores' shares. (RA99-104.) Prof. Matheson opined that CSG "displayed an unusual and laudatory solicitousness for the interests of minority shareholders," and that the Moores are "the most unlikely of claimants" under § 302A.751. (RA104, 108.)

After carefully reviewing the evidence, the court found that CSG and Alexander had breached no fiduciary duty, violated no statute or corporate by-law, and committed no fraud (under any definition) in connection with the redemption, valuation, or anything else. (FOF 60-64, 78, 87, 97, 99; COL 1, 5-8, 14, 18, 21-24.) Based on his findings of no liability, Judge Lynn concluded the Moores have no right to a judicial appraisal.

On the valuation issue, the court considered the testimony of not only Cobb, but also the Moores' valuation expert witness, Neil Lapidus, and Respondents' valuation expert, Donald Nicholson of Stonehill Group, LLP. Nicholson had been retained by CSG to perform an appraisal as an expert witness and was told about the existence of the Cobb and Lapidus reports, but did not read them and did not know what opinions they reached. (FOF 91; Tr. 2505-07.) Nicholson valued the common shares of CSG as of January 31, 2006 to be between $49.3 million and $56.4 million, or between $640.00 and $732.00 per common share. (FOF 92; Ex. 563.)

The court specifically found Cobb's valuation more reliable than any of the others, for several reasons: Cobb "conducted the most thorough examination of the business"; Cobb "did not rely upon management projections, but rather on historical performance in making his own projections"; unlike the Moores' valuation expert, Cobb "correctly concluded the guideline company approach would not render a valid valuation because there were no companies sufficiently comparable"; and Cobb's "opinion of value is within the range of historical valuations of the business which were made for purposes other than litigation." (FOF 97-107.)

Those historical, non-litigation valuations had been prepared by various divisions of U.S. Bank, as CSG's lender and co-trustee of the Moores' trusts, and Piper Jaffray. (FOF 84-87.) Cobb's $85 million valuation was at the high end of the range of the historical valuations. (*Id.*) Lapidus' valuation, offered by the Moores, of $218 million for CSG's operating assets alone, was significantly outside the range. (*Id.*)

The court's own valuation was substantially similar to Cobb's, and nowhere near Lapidus'. (FOF 103.) Judge Lynn adopted Cobb's valuation of CSG's granite operations at approximately $57 million, thereby rejecting a valuation based on management projections. (*Id.*) Judge Lynn also agreed with Cobb's valuation of CSG's equity investments in the amount of $5 million. (*Id.*)

As to the value of CSG's non-operating real estate, Judge Lynn estimated its value at $34.963 million, as opposed to Cobb's valuation of $20 million, but the undisputed evidence establishes that Judge Lynn mistakenly included $1.925 million for CSG's Fresno real estate. (FOF 102.) The parties had agreed this was *operating* property, which is already included in the $57 million for CSG's operations, and should not be added again. (*See, e.g.,* Pls.' Post-Trial Mem. of Law, Appendix at 2.) When adjustment is made for this error, Judge Lynn's valuation of the non-operating real estate is $33.038 million. (FOF 103.) The difference between Judge Lynn's and Cobb's estimates of the value of CSG is therefore only 10.6%.[1] Because Judge Lynn found no fraud or other basis for a judicial valuation, he determined that Cobb's reasonable valuation, which was adopted by the board, prevailed over his. (FOF 80-106; COL 5-9, 14-18.)

Finally, the court concluded that the Moores could not recover on their claims based on the Marble Falls transaction, because, like the Kahlerts' claims, they were derivative, and a special litigation committee had already rejected pursuing them. (COL

[1] The difference between the court ($95.038 million) and Cobb ($85 million) is $10.038 million, or 10.56% of 95.038 million. The court also increased Cobb's valuation by adding $2.73 million for the "Radiant Red" quarry (FOF 102(b)), located in Gillespie County, Texas, which Cobb classified as operating, *see* RA21, 28, 38, 43-44, 50.) However, the Moores offered no evidence that Cobb erroneously classified Radiant Red. If it, too, were not separately valued, then the difference between Cobb's and Judge Lynn's valuations would be approximately 7.69%.

20-21.) Furthermore, the Moores had failed to prove the Marble Falls transaction was part of a common plan that culminated in the reverse stock split and redemption. (*Id.*)

10. The court of appeals affirms the district court's judgment.

In a unanimous decision, the court of appeals held that the district court properly rejected the Moores' claim for a judicial valuation. The court of appeals first addressed the MBCA provisions that authorize a reverse stock split and redemption of fractional shares based upon a board determination of fair value that "is conclusive in the absence of fraud." (ADD157.) The court of appeals accepted the Moores' contention that "fraud" should be liberally construed to include what they call "*Sifferle* fraud": "deception, misrepresentation, actual fraud, . . . violation of applicable statutes or articles of incorporation, or . . . violation of a fiduciary duty." *See Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. Ct. App. 1986), *rev. denied* (Minn. 1986). (ADD157-58.) But the court of appeals affirmed the district court's finding that the Moores had failed to prove fraud even under this broad definition. (ADD158.)

The court of appeals held that merely effecting the redemption of minority shares via a reverse stock split and payment of cash for fractional shares could not constitute fraud, because the MBCA expressly permits it. (*Id.*) As to the Moores' other contentions, the court of appeals found that the district court's findings in favor of Respondents were supported by the evidence and therefore not clearly erroneous. Specifically, the court held the evidence supported the district court's findings that the information allegedly concealed from Cobb and the CSG board was immaterial, and that the mineral rights reserved to CSG in the Marble Falls transaction had little value because they generated no income and were not marketable. (*Id.*)

The court of appeals next affirmed the district court's determination that the Moores had no dissenters' rights under § 302A.471, because by its plain language the statute does not apply to reverse stock splits or redemptions of fractional shares. (ADD159-60.) The court also noted if § 302A.471 were construed as providing dissenters' rights it would conflict with § 302A.423, subd. 2, which provides that the board's valuation is conclusive absent fraud. (ADD163.)

Finally, the court of appeals held that the Moores failed to show the district court erred in denying them a judicial valuation under § 302A.751, which authorizes such equitable relief as a remedy for unfairly prejudicial treatment of shareholders. (ADD165-67.) The court of appeals held that a judicial valuation under § 302A.751 is a potentially available remedy for minority shareholders whose fractional shares are redeemed, despite the provision in § 302A.423, making a board's valuation conclusive absent fraud. (ADD163.) But the court of appeals held that the Moores had failed to prove "unfairly prejudicial" conduct by Respondents. (ADD165-67.)

In reaching this conclusion, the court of appeals did not merely affirm the district court's finding of no *Sifferle* fraud. It also conducted an independent review of the record and found that the Moores' claims of unfairly prejudicial treatment were baseless. (ADD164.) The court of appeals conducted this independent review because it believed the district court's findings only addressed the *Sifferle* fraud standard (which includes breach of fiduciary duty), not unfair prejudice under § 302A.751. (ADD163.)[2] The court of appeals affirmed under the even more stringent de novo standard of review, concluding that as a matter of law the record does not support a finding of unfair prejudice. (ADD164.)

Judge Lansing wrote separately to emphasize that nothing in the court of appeals' opinion should be read as limiting a district court's equitable power under § 302A.751 to award a judicial valuation to minority shareholders whose shares are redeemed through a reverse stock split and cash-out of fractional shares in an appropriate case. (ADD169.) But Judge Lansing agreed that the Moores had failed to prove unfairly prejudicial conduct as a matter of law, noting that the CSG board had obtained an independent appraisal; the interested directors (including Alexander) had abstained from voting; and the independent directors had questioned the appraiser outside the interested directors' presence and voted unanimously in favor of the transaction. (ADD170-71.)

SUMMARY OF ARGUMENT

The Moores have not shown the district court erred in concluding they have no right to a judicial buy-out under the MBCA, or that the court of appeals erroneously affirmed. They contend they are entitled to a judicial buy-out under two provisions: (1) § 302A.751, which authorizes this remedy in certain cases of shareholder oppression; and (2) § 302A.471, which authorizes this remedy only for specified corporate actions.

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[2] The district court implicitly found no unfair prejudice by expressly finding that the Moores had failed to prove any *Sifferle* fraud, because the standards are so similar—the court of appeals acknowledged the standards "substantially coincide" (ADD163), and the Moores contend they "are synonymous." (Br. at 23.)

As to § 302A.751, the district court made detailed factual findings supporting its decision that the Moores had not proven shareholder oppression. Among other things, the court found that the purportedly concealed projections were not a proper basis for valuing CSG. (FOF 50-64, 70, 97, 99, 103.) The Moores never address the evidence that supports the findings, much less identify a single finding that was unsupported by the evidence.

The Moores argue they have not received "fair value," but they ignore the threshold issue: who did the Minnesota legislature intended should determine fair value, the court or the board? The MBCA provides, "A determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud." § 302A.423, subd. 2. The court found the Moores failed to prove fraud, even broadly defined to include any wrongdoing, such as deception, breach of fiduciary duty, or violation of a statute or by-law. (COL 6-9, 14, 18.) These findings are reasonably based on the evidence. Providing a judicial appraisal when the Moores failed to prove any fraud or shareholder oppression would contravene the Minnesota legislature's intent.

As to dissenters' rights under § 302A.471, the statute's exclusive list of covered actions does not include a reverse stock split followed by a cash-out of fractional shares. This omission is not an oversight. Although the Minnesota legislature adopted all of the other Model Business Corporation Act provisions relating to dissenters' rights, it did not adopt the Model Act's provision granting dissenters' rights when fractional shares are redeemed. Instead, the legislature adopted a bright line rule, expressly described when the MBCA was adopted as being modeled after a California statute, limiting the action to

20% of the class of shares redeemed, and making the board's valuation conclusive absent fraud. If dissenters' rights applied, then the board's valuation would not be conclusive absent fraud, because dissenters always have the right to a judicial appraisal. § 302A.473.

ARGUMENT

I. STANDARD OF REVIEW.

Because the Moores did not move for a new trial or amended findings, review is limited to substantive legal issues properly raised to and considered by the district court, whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and judgment. *See, e.g., Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003). Findings of fact may "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. "The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court." *Id.*[3] A finding is clearly erroneous only if there is not reasonable evidence to support it. *West St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197, West St. Paul*, 713 N.W.2d 366, 378 (Minn. Ct. App. 2006); *Minnesota Souvenir Milkcaps, LLC v. State*, 687 N.W.2d 400, 404 (Minn. Ct. App.), *rev. denied* (Minn. 2004).

An appellate court need not defer to the district court's decision on a pure question of law. *See, e.g., Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d

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[3] A master is equivalent to a "referee" under earlier versions of Rule 53. *See* 2 Minn. Prac., CIVIL RULES ANNOTATED § 53.1 (2004).

639, 642 (Minn. 1984). However, when reviewing mixed questions of law and fact, an appellate court accords the district court discretion in its ultimate conclusions, and reviews such conclusions under an abuse of discretion standard. *See Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997); *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 442 (Minn. Ct. App. 2003). Whether to grant a judicial buy-out under Minn. Stat. § 302A.751, like any other equitable relief, is subject to an abuse of discretion standard. *See* Minn. Stat. § 302A.751, subd. 2 (stating court "may" order buy-out "if the court determines in its discretion that an order would be fair and equitable to all parties under all of the circumstances"); *Pooley v. Mankato Iron & Metal, Inc.* 513 N.W.2d 834, 838 (Minn. Ct. App.), *rev. denied* (Minn. 1994). An appellate court will affirm a decision if it can be sustained on any grounds, even if they differ from the district court's grounds. *See, e.g., First Nat. Bank in Worthington v. State*, 406 N.W.2d 571, 572 (Minn. Ct. App. 1987).

II. THE DISTRICT COURT PROPERLY FOUND THAT THE MOORES FAILED TO PROVE GROUNDS FOR A JUDICIAL BUY-OUT UNDER § 302A.751.

A. Section 302A.751 Must Be Read In the Context of the MBCA's Provisions Authorizing this Transaction and Making the Board's Valuation Conclusive Absent Fraud.

The Moores' principal argument is that they are entitled to a judicial appraisal under § 302A.751, subd. 2, which gives a court discretion to provide this remedy if the shareholder establishes one of the statutory grounds. *See, e.g., Bolander v. Bolander*, 703 N.W.2d 529, 552 (Minn. Ct. App.), *rev. dismissed* (Minn. 2005). The Moores rely on the following two grounds: (1) "the directors or those in control of the corporation have acted fraudulently or illegally toward one or more shareholders in their capacities as shareholders;" and (2) "the directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders." § 302A.751, subd. 1(b)(2)-(3). The district court properly concluded the Moores had failed to make either showing. (COL 6-8,14-18.)

In reaching its decision, the district court correctly concluded that § 302A.751 must be read in context to give effect to all of the MBCA's provisions. (COL 11-18.) *See* Minn. Stat. § 645.17(2); *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000); *Sundberg v. Lampert Lumber Co.*, 390 N.W.2d 352, 356 (Minn. Ct. App.), *rev. denied* (Minn. 1986).

Specifically, § 302A.751 must be read together with the MBCA provisions that permit majority shareholders to cash out minority shareholders by adopting a reverse stock split (a "share combination") and paying cash for the resulting fractional shares, but only if 80% or more of the class and series of stock being redeemed are not cashed out. *See* Minn. Stat. §§ 302A.402, 302A.423; 18 JOHN H. MATHESON, PHILIP S. GARON, MINNESOTA PRACTICE – CORPORATION LAW AND PRACTICE § 5:13, at 157 (West 2d ed. 2004) [hereinafter MINNESOTA PRACTICE]; 20 BRENT A. OLSON, MINNESOTA PRACTICE – BUSINESS LAW DESKBOOK, FORMATION AND OPERATION OF BUSINESSES § 2.29, at 75 (2009-10 ed.) [hereinafter MINNESOTA BUSINESS LAW DESK BOOK]; Philip S. Garon, Michael A. Stanchfield, & John A. Matheson, *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 815-16 (2006) [hereinafter

"Garon"]. Alternatively, the MBCA permits corporations to cash out minority shareholders by a short form merger. *See, e.g., id.*

These two methods for cashing out minority shareholders differ as to the availability of a judicial appraisal. With a short-form merger, the cashed-out shareholders may assert dissenters' rights under § 302A.471, subd. 1(c), and thereby obtain a judicial appraisal under § 302A.473, subd. 7. *See* Garon, *supra,* at 815-16. However, with a reverse stock split and cash-out of fractional shares, "no dissenters' rights are available." *Id.*; *see also* § 302A.471, subd. 1 (listing actions creating dissenters' rights). Instead, when a corporation decides to "pay in money the fair value of fractions of a share . . . , [a] determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud." § 302A.423, subds. 1-2.

Minnesota's statute regarding cashing out fractional shares is unusual, both in precluding cash-outs that affect more than 20% of outstanding shares, and in making the board's determination of value conclusive absent fraud. These provisions are not found in the Model Business Corporation Act from which Minnesota adopted all of the provisions relating to dissenters' rights *except* for the provision which granted dissenters' rights upon redemption of fractional shares, nor in the Delaware Corporation Act from which other significant portions of the MBCA were adopted. *See* MODEL BUS. CORP. ACT. § 6.04 (2003); Del. Code Ann. tit. 8, § 155 (2009). Instead, as stated in the Reporter's Notes at the time the MBCA was enacted, they are based on the California Corporations Code (although California imposes a 10%, not 20%, limitation). *See* Minn. Stat. § 302A.423, Reporter's Notes-1981; Cal. Corp. Code § 407.

In most states, the extent to which a reverse stock split can be used to cash out minority shareholders is uncertain. Garon, at 816. In Minnesota, however, the 20% limitation in "[t]he MBCA codifies the limitations upon freeze-outs of minority shareholders through a reverse stock split, providing a bright-line test for the validity of the action." *Id.*; *see also* Cal. Corp. Code § 407, legislative committee comments (10% limitation is for "protection of minority shareholders"). Accordingly, the district court properly concluded that CSG's action satisfied this bright-line test for cashing out its minority shareholders because they held less than 7% of the Class A common shares. (COL 3.)

The Moores argue the cash-out of their shares was improper because the corporation was closely held, but they failed to prove CSG met the MBCA's definition of a closely held corporation. Under the MBCA a "closely held corporation" has no more than 35 "shareholders." Minn. Stat. § 302A.011, subd. 6a. "Shareholders" include owners of "shares," whether common or preferred. *See* Minn. Stat. § 302A.011, subds. 28, 29 (defining "share" to include ownership interest "however designated"); § 302A.401, subds. 2, 4 (using "share" to describe both common and preferred shares). The Moores did not offer evidence of the total number of CSG shareholders. In fact, CSG has more than 300 shareholders (including preferred shareholders). (Ex. 14, at CSG18654; Mitchell Aff. ¶ 18; Schnepf Aff. Ex. 1.)

Even if CSG were a closely held corporation, moreover, both § 302A.402 and § 302A.423 expressly apply to any "corporation," which the MBCA defines to include both "closely held" and "publicly held" corporations. *See* Minn. Stat. § 302A.011, subd. 6a (defining "closely held corporation"), subd. 8 (defining "corporation" as a domestic corporation "organized for profit and incorporated under or governed by this chapter"); subd. 40 (defining "publicly held corporation"). Throughout the MBCA, the legislature used the terms "closely held" or "publicly held" when it wanted to limit a provision's applicability to one or the other.[4] If the legislature did not want § 302A.402 and § 302A.423 to apply to closely held corporations, then it would have so provided.

Indeed, the Minnesota Practice Business Law Deskbook contains a "practice pointer" advising that the MBCA permits this transaction with respect to closely held corporations:

> **The board of a Minnesota corporation may divide its shares (both issued and unissued) in such a proportion as to create fractional shares** without shareholder approval. The board may **then "cash out" the fractional interests, provided it would not result in the cancellation of more than 20%** of the outstanding shares of a particular class or series. **The procedure** may allow a publicly held corporation to save costs in cashing out small minority holders **or allow closely held corporations to eliminate minority interests.**

MINNESOTA BUSINESS LAW DESKBOOK § 2.29 (emphasis added, citations omitted).

Prof. Matheson testified that the use of a reverse stock split and redemption by a closely held corporation to eliminate minority shareholders is an ordinary corporate custom and practice in Minnesota. (Tr. 2843-48; *see also* RA90-92.) His testimony was unrebutted.

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[4] *See, e.g.,* Minn. Stat. §§ 302A.011, subd. 17(c); 302A.135, subds. 4(b)-(c); 302A.237, subd. 2.

B. The court of appeals properly concluded that the Moores failed to prove unfairly prejudicial conduct under § 302A.751.

"Unfairly prejudicial" conduct has been defined as conduct that frustrates the "reasonable expectations" of shareholders. *Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 374 (Minn. Ct. App.), *rev. denied* (Minn. 2000). To be reasonable, expectations must be known and accepted by the other shareholders. *See Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 191 (Minn. Ct. App.), *appeal dismissed* (Minn. 2001). Whether a shareholder's reasonable expectations have been frustrated is an issue of fact. *Id.*

The Moores argue that, as a matter of law, the evidence at trial conclusively established that their reasonable expectations as shareholders were violated. The court of appeals concluded just the opposite—that the evidence relied upon by the Moores was insufficient as a matter of law. The court of appeals was correct. None of the Moores' argument has merit.

1. No reasonable expectation of a judicial valuation.

The Moores' principal argument is that they are entitled to a judicial valuation because the district court's valuation was higher than the board's, but this argument is entirely circular. The board's valuation was conclusive absent fraud. If a mere difference in value *required* a court to provide a judicial valuation as a matter of law, as the Moores contend, then the board's valuation would not be conclusive absent fraud. It would only be conclusive if the court's valuation were lower.

Of course, a board's valuation could be so unreasonably low as to constitute fraud or unfairly prejudicial conduct, but the Moores have failed to come close to making such a showing here. Indeed, the only reason the district court set forth its own valuation—which was identical to Cobb's except for the value of certain real estate holdings—was to show that Cobb's valuation was well within the range of values that reasonable business appraisers could reach. This finding is supported by the evidence. As the district court found, Cobb's valuation was "within the range of historical valuations . . . made for purposes other than litigation." (ADD68.)

Another flaw in the Moores' argument is the assumption that there is one correct "fair value" that can be determined with scientific precision. Fair value is "not susceptible of determination by precise mathematical computation and no one formula or figure is binding or conclusive." *MT Props., Inc. v. CMC Real Estate Corp.*, 481 N.W.2d 383, 390 (Minn. Ct. App. 1992) (citing *Richardson v. Palmer Broad. Co.*, 353 N.W.2d 374, 377 (Iowa 1984)).

"Valuation is an art, not a science." *Kmart Corp. v. County of Stearns*, Nos. CX-00-404, CX-01-1465, C2-02-1387, 2005 WL 937620, at *9 (Minn. Tax. Ct. March 3, 2005), *aff'd* 710 N.W.2d 761 (Minn. 2006). The difference between the court's and Cobb's estimates of value is only 10.6%, well within a reasonable margin of accuracy. To put this 10.6% difference in perspective, the Moores' valuation was ***over 350%*** greater than the district court's.[5] (FOF 93, 103.)

[5] The Moores' appraiser, Lapidus, valued the company at $218 million excluding the non-operational real estate, compared to the court's valuation of $62 million.

Professional appraisers consider their valuations to be accurate if they are within a margin of error ranging from 15 to 30 percent, which has been described as the "zone of plausibility." Keith Sharfman, *Valuation Averaging: A New Procedure For Resolving Valuation Disputes*, 88 Minn. L. Rev. 357, 367 & n. 35 (2003) (citing McKINSEY & CO., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 294 (3d ed. 2000) ("We typically aim for a valuation range of plus or minus 15%, which is similar to the range used by investment bankers."); Christian J. Henrich, *Game Theory and Gonsalves: A Recommendation for Reforming Stockholder Appraisal Actions*, 56 Bus. Law. 697, 706 n. 45 (2001) ("Professional appraisers often have difficulty identifying *v* [a firm's fair value] with precision greater than plus or minus thirty percent.")).

The Moores also argue that they had a reasonable expectation that their shares could not be redeemed without their consent, but the court of appeals properly rejected this argument. To be reasonable, expectations must be known and accepted by the other shareholders. *See Gunderson*, 628 N.W.2d at 191. There was no evidence that this purported expectation was ever expressed by the Moores, or accepted by the other shareholders.

Furthermore, this purported expectation is objectively unreasonable because it conflicts with the MBCA, which gives CSG the right to redeem their shares, based either on a non-fraudulent value set by the board (in the case of fractional shares), or in an appraisal proceeding by the court (in the case of a short-form merger). *See* Garon, *supra,* at 815-16. A shareholder's purported subjective expectation that is directly contrary to the controlling shareholder's express legal rights is objectively unreasonable as a matter of law. *See Regan v. Natural Res. Group, Inc.*, 345 F. Supp. 2d 1000, 1012-13 (D. Minn. 2004) (granting summary judgment).

The Moores contend that, as a matter of law, it was a breach of fiduciary duty for CSG to effect a transaction designed to cash-out minority shareholders, but that is not the law in Minnesota. Some states have adopted the "business purpose" doctrine, which requires a corporation to have a valid business purpose for eliminating minority shareholders, but the Minnesota legislature has expressly rejected that doctrine. *See Sifferle v. Micom Corp.*, 384 N.W.2d 503, 508-10 (Minn. Ct. App. 1986), *rev. denied* (Minn. 1986); Minn. Stat. § 302A.471, Reporter's Notes-1981; MINNESOTA PRACTICE § 7.4, at 248 ("[i]n enacting the MBCA, the Minnesota legislature rejected the business purpose doctrine").

Moreover, CSG had a valid business purpose for eliminating the non-management minority common shareholders. The Kahlerts, supported by McCabe, had sued the corporation and its management over its decision to spin off non-operating land, a decision the SLC determined was "reasonable and prudent." (FOF 44; Tr. 2292-93; Ex. 63, at 23.) The litigation and resulting SLC investigation had been a significant distraction. (RA3, 6.) CSG's directors had a duty to discharge their duties in what they reasonably believed "to be in the best interests of the corporation." Minn. Stat. § 302A.251, subd. 1. CSG's shareholders included not just the Alexanders and the minority common shareholders, but hundreds of preferred shareholders. CSG's board made a reasonable business decision that it was in the corporation's best interests to cash out disgruntled non-management shareholders so management could focus on meeting competitive challenges. (*Id.*) Only disinterested board members voted on the transaction. Alexander, the only Respondent that is a shareholder, abstained from voting.

The Moores' contention that CSG is a common law closely held corporation does not affect this analysis. This is not a situation involving a shareholder-employee who is cashed-out of a closely held corporation in violation of a reasonable expectation of remaining employed. *See Pedro v. Pedro,* 489 N.W.2d 798 (Minn. Ct. App.), *rev. denied* (Minn. 1992). The Moores were never employees, officers or directors; they were merely indirect minority shareholders who acquired their beneficial shares by gift. No Minnesota case suggests it is improper for a closely held corporation to cash out *non-employee* minority shareholders via a corporate action expressly permitted by the MBCA.

In addition, it is not true, as the Moores contend, that in *Berreman* the Minnesota Court of Appeals "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." (Br. at 31.) In *Berreman* the court merely stated, in dicta, that courts in other jurisdictions "have found breaches of fiduciary duty based on majority shareholders' *preferential use of corporate assets*." 615 N.W.2d at 370 (emphasis added).

The Moores also cite cases from other jurisdictions for their contention it was improper for CSG to redeem their shares through a reverse stock split (br. at 32-33), but they completely ignore the unique provisions in the MBCA authorizing this transaction. As previously discussed, while in most states it is uncertain whether a reverse stock split can be used to cash out minority shareholders, the MBCA adopts a bright-line rule authorizing this type of transaction so long as no more than 20% of outstanding shares are redeemed. This provision is based on the California Corporations Code, and it is not found in the Model Business Corporation Act or the Delaware Corporation Act.[6]

2. No violation of CSG by-laws.

The district court also properly rejected the Moores' contention that the transaction violated CSG's by-laws. (COL 22.) Section 7.3 expressly permits the board to effect reverse stock splits without a shareholder vote. (FOF 109; APP011-12.) The Moores cite § 7.4, which provides, "Transfer 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." (FOF 108; APP012.) That section, however, has nothing to do with reverse stock splits or redeeming shares. It addresses the administrative function of recording the *transfer* of shares on the corporate books. (COL 22.) There is no evidence the Moores' shares were transferred on the corporation's books. The Moores have failed to show the district court's finding was clearly erroneous.

3. No refusal to allow appraisal.

Finally, the Moores' assertion that CSG prevented them from conducting an appraisal (br. at 18) is not true. The May 5, 2006, letter from CSG's counsel allowing

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[6] The Moores also completely ignore the fact that the cases they cite rely upon the business purpose doctrine, which is not the law in Minnesota. *See Clark v. Pattern Analysis & Recognition Corp.*, 384 N.Y.S.2d 660, 665 (N.Y. Sup. Ct. 1976); *Leader v. Hycor, Inc.*, 479 N.E.2d 173, 177-78 (Mass. 1985).

them to conduct their own appraisal merely includes a general reservation of CSG's right to limit access to specific information in case a dispute later arose. (APP168-69.) As the court of appeals concluded (ADD166-67), this reservation was appropriate—shareholders do not have an absolute right to unlimited access to all corporate information, the Moores had not specified the information they would seek, and the *Kahlert* litigation was pending. *See, e.g.,* Minn. Stat. § 302A.461, subd. 4. The Moores never attempted to resolve any issues they had with the letter's terms. Moore admitted CSG never indicated it was unwilling to negotiate if he found anything in the letter unacceptable. (Tr. 317.) And even if the Moores' contention were true, they suffered no prejudice, because they conducted an appraisal to support their buy-out demand, and it was rejected by the court as being more than triple a reasonable value. (FOF 93, 99.)

III. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY FOUND THAT THE MOORES FAILED TO PROVE GROUNDS FOR A JUDICIAL BUY-OUT UNDER § 302A.471.

The MBCA grants shareholders a right to dissent from a corporate action and exit the corporation with a judicial appraisal of their shares ("dissenters' rights") only in the specific situations listed in § 302A.471, subd. 1. *See* § 302A.473, subd. 1. These statutory grounds for dissenters' rights are exclusive. *See* Minn. Stat. § 302A.471, Reporter's Notes-1981 ("[s]ubdivision 1 lists *all* of the events upon which dissenters' rights may arise"); *Wigart v. Cervenka*, No. C7-98-1505, 1999 WL 243231, at * 5 (Minn. Ct. App. April 27, 1999), *rev. denied* (July 28, 1999).

A reverse stock split that leads to redemption of fractional shares is not one of the corporate actions specified as creating dissenters' rights under § 302A.471, subd. 1(a).

(COL 15-18; Order for J. ¶ 1.) *See* Garon, *supra,* at 815-16. The MBCA's dissenters' rights provision is based on the Model Business Corporation Act section in effect in 1981, which identified four types of articles amendments triggering dissenters' rights: amendments concerning (1) shareholders' preferential rights; (2) redemption rights; (3) preemptive rights, and (4) voting rights. *See* Minn. Stat. § 302A.471, reporter's notes-1981; 33 Bus. Law. 2587, 2591 (July 1978).

In 1984, the Model Act was amended to expressly cover the very type of transaction at issue here—when an articles amendment "reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash. *See* Model Bus. Corp. Act Annotated §13.02(a)(4) (3d ed. 1991 Supp.). (Respondents' Addendum ("RAD") RAD8.) While 20 states have adopted all five of the 1984 Model Act's grounds for dissenter's rights, Minnesota is not one of them.[7] Minnesota has never adopted the relevant provision covering cash-outs via redemption of fractional shares.[8]

[7] *See* Ala. Code § 10-2B-13.02(a)(4) (2007); Ariz. Rev. Stat. Ann. § 10-1302(A)(4) (West 2008); Ark. Code Ann. § 4-27-1302(a)(4) (West 2007); Conn. Gen. Stat. Ann. § 33-856 (West 2007) (repealed 2001); Fla. Stat. Ann. § 607.1302(1) (West 2007); Ga. Code Ann. § 14-2-1302(a) (West 2007) (repealed 2003); Haw. Rev. Stat. Ann. § 414-342(a)(4) (2007); Iowa Code Ann. § 490.1302 (West 2007) (repealed 2002); Ky. Rev. Stat. Ann. § 271B.13-020(1)(e) (West 2007); Mass. Gen. Laws Ann. Ch. 156D, § 13.02(a)(4) (West 2008); Miss. Code. Ann. § 79-4-13.02 (West 2007) (repealed 2000); Mont. Code Ann. § 35-1-827(1)(d) (2007); Neb. Rev. Stat. § 21-20,138(1)(d) (2007); N.H. Rev. Stat. Ann. 293-A:1302(a)(4) (2008); N.C. Gen. Stat. Ann. § 55-13-02(a)(4) (West 2008); S.C. Code Ann. § 33-13-102(A)(4) (2007); Tenn. Code Ann. § 48-23-102(a)(4) (West 2007); Vt. Stat. Ann. tit. 11A, § 13.02 (West 2007) Wis. Stat. Ann. § 180.1302(2) (West 2008); Wyo. Stat. Ann. § 17-16-1302(a)(iv) (West 2008). The Model Act has since been amended again, but it retains the provision specifically

According to Prof. Matheson, who has served on the Minnesota State Bar Association committee that recommends MBCA amendments for over 20 years, this omission was not an oversight. (Tr. 2849-52; RA97-98.) The Model Act provision granting dissenters' rights for this type of cash-out is inconsistent with the MBCA's bright-line rule limiting the transaction to 20% of the class of shares redeemed, and making the board's determination of value conclusive absent fraud. §§ 302A.402, 302A.423. Automatic appraisal rights are inconsistent with deferring to the board's determination of value. § 302A.423, subd. 2. The other two states that similarly make the board's determination conclusive absent fraud—North Dakota and California—also do not grant dissenters' rights for a reverse stock split/cash-out of fractional shares. *See* N.D. CENT. CODE § 10-19.1-87(1); CAL. CORP. CODE § 1300.

As the district court correctly noted (COL 12-14), the Minnesota legislature was fully aware of the issue of providing minority shareholders the right to dissent and judicially challenge a board's valuation of their shares in a cash-out transaction, because the legislature expressly provided appraisal rights for a short-form ("squeeze-out") merger. *See* § 302A.471, subd. 1(c). More importantly, as the court of appeals correctly observed, regardless of whether the legislature's omission of dissenters' rights for this transaction was intentional or inadvertent, it is for the legislature, not the courts, to amend

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covering reverse stock splits. *See* Model Bus. Corp. Act Annotated §13.02(a)(4) (3d ed. 2000/01/02 Supp.)

[8] The Model Act has since been amended again, but it retains the provision specifically covering reverse stock splits. *See* Model Bus. Corp. Act Annotated §13.02(a)(4) (3d ed. 2000/01/02 Supp.)

the statute. *See Beardsley v. Garcia,* 753 N.W.2d 735, 340 (Minn. 2008); *Rotation Eng'g & Mfg. Co. v. Secura Ins. Co.*, 497 N.W.2d 292, 295 (Minn. Ct. App. 1993) (refusing to apply uniform act provision not adopted in Minnesota).

The Model Act also confirms that the plain language of the MBCA provisions the Moores rely upon do not apply to this transaction. Here is a comparison of the relevant MBCA and 1984 Model Act provisions:

MBCA § 302A.471, subd. 1(a)	**Model Act § 13.02**
A shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of * * * an amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it:	A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of * * * an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:
(1) alters or abolishes a preferential right of the shares;	(i) alters or abolishes a preferential right of the shares;
(2) creates, alters, or abolishes a right in respect of the redemption of the shares, including a provision respecting a sinking fund for the redemption or repurchase of the shares;	(ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;
(3) alters or abolishes a preemptive right of the holder of the shares to acquire shares, securities other than shares, or rights to purchase shares or securities other than shares;	(iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;
(4) excludes or limits the right of a shareholder to vote on a matter, or to cumulate votes, except as the right may be excluded or limited through the authorization or issuance of securities of an existing or new class or series with similar or different voting rights* * *; or	(iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or
(5) eliminates the right to obtain payment under this subdivision;	(v) **reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under section 6.04;**

(RAD8.)

The Moores attempt to shoehorn this transaction into ground 2—articles amendments that affect shareholders' redemption rights—and ground 4— articles amendments that affect shareholders' voting rights. Those provisions plainly do not apply. The articles amendment at issue here reduced the number of authorized shares of stock; it did not alter the Moores' rights, as *shareholders*, to vote or redeem their shares.[9] (APP154.)

Moreover, if those provisions applied to a reverse stock split leading to a cash-out of fractional shares, then it would have been unnecessary for the Model Act to add ground 5—an explicit provision (§ 13.02(v)) granting dissenters' rights for that action. The Moores' argument requires the Court to assume that the Model Act's drafters, and 20 state legislatures, enacted a superfluous provision, an assumption that defies both common sense and basic principles of statutory construction. S*ee, e.g., Sundberg*, 390 N.W.2d at 356. The Moores' argument also requires the Court to ignore the MBCA's express provision making the board's valuation conclusive absent fraud.

The Moores also attempt to rely upon § 302A.471, subd. 1(a)(5), but that provision applies only to an articles amendment that "eliminates the right to obtain payment *under this subdivision*," *i.e.*, that eliminates dissenters' rights.[10] This provision was part of a 2004 statutory amendment permitting corporations to opt out of having

[9] The Moores did not argue that ground 2 applied in their court of appeals' brief.

[10] The Moores did not argue that this ground applied in their court of appeals' brief, either.

articles amendments trigger dissenters' rights. *See* Minn. Stat. § 302A.471, subd. 1(a) ("unless otherwise provided in the articles"); MINNESOTA PRACTICE – CORPORATION LAW AND PRACTICE § 2.22, at 48 & n.4. Such an amendment itself would trigger dissenters' rights. *Id.* Since CSG has not amended its articles to opt out of dissenters' rights, this provision is irrelevant.

The court of appeals correctly concluded that *Whetstone*, which the Moores rely upon heavily, is inapposite, because that case concerned a shareholder who continued to be a shareholder, but with impaired rights associated with his shares. *See Whetstone v. Hossfeld Mfg. Co.*, 457 N.W.2d 380 (Minn. 1990). In *Whetstone*, this Court held that an articles amendment that removed a minority shareholder's express veto power over certain corporate actions "limited" his voting rights, and he therefore had the right to dissent and be bought-out under § 302A.471, subd. 1(a)(4). The *Whetstone* Court explained that dissenters' rights allow minority shareholders in closely held corporations "*to escape* when the nature of their investment rights is fundamentally altered." 457 N.W.2d at 383 (quoting Reporter's Notes to § 302A.471, emphasis added). Without such a remedy, the shareholder would remain as a shareholder, with an illiquid investment, but on substantially less favorable terms than existed before the amendment. Here, there is no need to provide the Moores with a means to escape from CSG following the articles amendment, because they were no longer shareholders.

IV. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S FINDING THAT THE BOARD'S VALUATION WAS NOT FRAUDULENT.

The Moores argue that the board's determination of value is not conclusive because they proved "*Sifferle* fraud," but the district court expressly found that the Moores "failed to prove fraud even applying the broader Sifferle definition." (COL 8.) In *Sifferle* the court held that, even under a liberal definition of fraud, the minority shareholder had failed to state a claim because the alleged misrepresentation was not material. 384 N.W.2d at 508. Here, the district court not only found that the allegedly concealed projections were immaterial to CSG's valuation, it affirmatively rejected them as a reasonable basis for valuing the company; the court adopted Cobb's valuation largely because he *did not rely* upon the projections, and it *rejected* the valuation offered by the Moores' expert (Lapidus) in part because he *did rely* upon them. (FOF 60-64, 89-90, 97, 99, 103.) The district court also agreed with Cobb that the mineral rights reserved to CSG in the Marble Falls transaction had de minimis value. (APP236, ADD067.)[11]

A district court has broad discretion in deciding a proper valuation method. *See Minnesota Entm't Enters., Inc. v. State,* 306 Minn. 184, 187-88, 235 N.W.2d 390, 392-93 (1975); *Spinnaker Software Corp. v. Nicholson,* 495 N.W.2d 441, 445 (Minn. Ct. App.), *rev. denied* (Minn. 1993); *Rainforest Cafe, Inc. v. State of Wisconsin Inv. Bd.*, 677 N.W.2d 443, 450 (Minn. Ct. App. 2004) (citations omitted); *see also* Minn. Stat. §

[11] Respondents do not concede the Moores' argument that the court of appeals' definition of fraud in *Sifferle* properly applies to the interpretation of fraud under § 302A.423, subd. 2, but since the Moores failed to make an adequate showing even under that standard, it is unnecessary for this Court to reach that issue.

302A.473, subd. 7 (court may take "into account any and all factors the court finds relevant, computed by any method or combination of methods that the court, in its discretion, sees fit to use, whether or not used by the corporation or by a dissenter"). "Valuation of property is a finding of fact which an appellate court will reverse only if clearly erroneous." *Spinnaker Software*, 495 N.W.2d at 445.

The court of appeals properly affirmed the district court's findings because they are supported by the evidence, as discussed below.

A. The allegedly concealed projections were properly found to be immaterial.

The court of appeals correctly affirmed the district court's finding that the allegedly concealed projections were immaterial to the valuation of CSG. This finding is supported by the evidence, including Cobb's testimony that none of the projections prepared internally at CSG were material or relevant to his opinion of value. (Tr. 1362.) Cobb testified that the projections were unreliable, unduly optimistic, and not of the type that a reasonable buyer would rely upon in making a determination of value of CSG as of December 31, 2005. (Tr. 1362.)

The CSG board had the statutory right to rely on Cobb's opinion of value. *See* Minn. Stat. § 302A.251, subd. 2. Nevertheless, the Moores contend the court of appeals' citation of Cobbs' testimony reflects a "misperception" of their *Sifferle* fraud argument, because it is based on alleged concealment from the CSG board, not just Cobb. Actually, the court of appeals expressly rejected the Moores' contention that anything was wrongfully concealed from "Cobb and the board." (ADD158.) It cited Cobb's testimony because it is substantial evidence that the projections were immaterial to a reasonable valuation of CSG ***by Cobb or the board***. This is particularly true in light of the Moores' utter failure to elicit *any* testimony, by *any* board member, that *any* of the allegedly concealed projections would have had *any* impact on his decision.

The Moores' argument that, as a matter of law, the projections were fraudulently concealed from the board is also belied by the inherently speculative nature of the materials. The various projections are addressed below.

1. The June 2005 Projections.

In June 2005, Flint, who prepared hundreds of projections and budgets for CSG, prepared projections labeled Versions A, B, C, and D, which forecast identical revenues and gross profits, and similar net income, depending on what expenses were predicted. (Tr. 606, 635-40, 2348-52; APP193-96; Ex. 162.) The Moores state that CSG concealed the increasingly optimistic "Version B-D" projections from Cobb, but they completely ignore Cobb's testimony that the projections were unreliable and unduly optimistic, and that no willing buyer would have relied upon those projections in valuing CSG as of December 2005. (Tr. 1284-89, 1300-03, 1362.) As it turns out, Cobb was right to be skeptical. CSG did not even meet the 2005 projected net income in Cobb's report (it lost almost $2 million). (Tr. 1290-91; Ex. 74.)

2. *Flint's "Possible Valuations" Summary.*

The Moores state that "in the summer of 2005," Flint valued the company at a minimum of $135 million, and that his "notes reflect an enterprise value of CSG of $150 million." (Br. at 12.) Each assertion is false or misleading:

- ***"In the summer of 2005 . . ."*** Flint testified he created the spreadsheet at issue in October 2004, not the summer of 2005. (Tr. 505, 598.) The timing is significant because in 2004 CSG was still pursuing its "Blockbuster" growth strategy, which it later abandoned. (Tr. 1017-24.) [12] As support for the assertion that it was created in the summer of 2005, the Moores cite Flint's deposition testimony where he mistakenly first said this, but during his deposition he corrected himself when, prompted by the Moores' own counsel, he saw the 2005 numbers were projected, not actual. (Tr. 503, 683-84.)
- ***"Flint valued CSG between $135 million and $209 million . . ."*** Flint, who is not a trained appraiser, was not expressing an opinion of value, but rather was "bookending" different scenarios to try to understand how much money the company might need to redeem all of its minority shareholders.

[12] In 2003, CSG adopted a strategy to grow rapidly by opening residential granite countertop retail stores across the nation. (Tr. 607-14,1017-23.) However, by the time Cobb prepared his appraisal, CSG's growth strategy had failed and been replaced by austerity measures, including layoffs, pay cuts, and a capital expenditure freeze. (Tr. 633-35, 662-64, 857-63, 879-80, 1017-23.) As a result of CSG's financial difficulties, Appellant U.S. Bank (which was also CSG's lender) lowered CSG's credit rating in January and February 2006. (Tr. 2418-19, 2472-76; APP431-33; Ex. 544.)

(Tr. 594-606, 683-84.) This document was never intended to reflect a personal or professional opinion of the value of CSG. (Trial Tr. 605-06.) The lowest value was not $135 million, but approximately $77 million. (APP186.)

- "***Flint's handwritten notes reflect an enterprise value of CSG of $150 million . . .***" True, but misleading: the Moores neglect to mention Flint testified he was writing down *Moore's view* of CSG's value, not Flint's. (Tr. 604-05.)

3. Mitchell's June 23, 2005 "valuation."

What the Moores describe as Mitchell's June 23, 2005 "valuation" (br. at 41) are merely several pages of his handwritten notes. (APP201-10.) The Moores' counsel chose not to ask Mitchell to explain their context or reliability. (Tr. 931-42.) Mitchell, who like Flint is not an appraiser, specifically testified he did not know when he wrote the pages at issue. (Tr. 932, 935.) Although the Moores say he valued the company "up to $162.7 million," the notes also reflect a value of $74.3 million. (APP207.) And while the Moores contend this "valuation" was concealed from Cobb and the board, Cobb testified they were not relevant to his opinion, and Mitchell himself is a member of the board. (Tr. 931, 1297-99.)

4. 2006 Budget Provided U.S. Bank.

CSG submitted these documents to appellant U.S. Bank in January 2006, when it was seeking to increase its credit facility to fund a potential redemption of minority shareholders' stock and costs related to its move to a new facility. (Tr. 2425, 2474; Ex.

544, at USB004873.) Flint told U.S. Bank that CSG would need "anywhere from 5 to 10 million" to buy out all the minority shareholders. (Tr. 682-83.) U.S. Bank's witness at trial, Suzanne Wirta, confirmed that CSG did not express an opinion that the minority shares were worth $10 million, but rather stated that the "potential purchase price, top side, before they had an appraisal, before they knew what the company was going to appraise at, could be as much as $10 million." (Tr. 2428, 2444-45, 2475, 2494.) U.S. Bank characterized this budgeted amount as a "guesstimate." (Tr. 2444.) Moreover, the Moores offered no evidence that CSG's board was unaware of the budget.

B. The retained mineral rights were properly found to have de minimis value.

The court of appeals correctly rejected the Moores' contention that the board's valuation fraudulently undervalues the mineral rights CSG retained in the land transferred to Marble Falls. The only evidence of the actual value in 2005 of the mineral rights was the testimony and appraisal by Cobb. (Tr. 1348-54, 1399-1400; RA21.) After lengthy discussions with CSG management and board members who reside in Texas, Cobb valued those rights at $41,919, because they generated no income and were not expected to generate income in the future, they were not marketable, and granite was widely available in that part of Texas. (Tr. 1348-54, 1399-1400.) This evidence supports the determination that the granite rights have de minimis value.

According to the Moores, because the value of fee simple ownership of the land (including mineral rights) was $15 million, and the value of the land without mineral rights was nearly $2 million, the mineral rights by themselves must have a market value of $13 million. (Br. at 21.) This argument is a *non sequitur*. A granite company's right to quarry land obviously dramatically lowers its potential use and enjoyment, and therefore its market value (in this case from $15 to $2 million). (RA9, 15, 19-22, 25.) But that does not mean the rights, by themselves, are valuable, or that they are worth the same amount as the diminution in the land's value ($13 million). There was no evidence that Cobb undervalued the granite rights.

The Moores also ignore the fact that they remain owners of Marble Falls. Marble Falls will own the entire fee simple absolute interest in the land when the 15-year mineral rights lease expires. As a result, the Moores failed to show they have been injured by the valuation of CSG's interest in Marble Fall's mineral rights.

V. THE DISTRICT COURT PROPERLY FOUND COBB'S VALUATION METHODOLOGY TO BE REASONABLE.

In determining that the board's determination of fair value was reasonable, not fraudulent, the district court adopted Cobb's valuation method. Cobb determined the fair value of CSG's common shares, which he understood was the "pro rata share of the value of the corporation ***as a going concern*** without discount for lack of marketability," using three approaches: net asset value, market (comparables), and income (discounted cash flow). (APP251-52, emphasis added.) Cobb rejected the market approach because of the lack of sufficient comparables. (APP271.) He ultimately used the net asset value approach because it yielded a higher value than the income approach.

The Moores' argument that the district court erred as a matter of law in crediting Cobb's value fails for two reasons. First, the Moores did not make this argument to the court of appeals, so they should not be permitted to raise it now. *See City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 14 (Minn. 2008).

Second, the Moores' argument is contrary to Minnesota law. A district court may determine fair value "computed by any method or combination of methods that the court, in its discretion, sees fit to use." Minn. Stat. § 302A.473, subd. 7. This Court has recognized that Minnesota's statutory scheme "is clearly directed toward providing the court maximum flexibility" and therefore "a bright-line rule is not appropriate." *Advanced Communication Design, Inc. v. Follett*, 615 N.W.2d 285, 292 (Minn. 2000). No Minnesota court has ever held it was error to use net asset value as a floor in determining fair value. The Moores rely on *Rainforest Cafe*, but that case actually held that the district court did not abuse its discretion in adopting a value that was lower than book value, thereby confirming the maximum flexibility afforded district courts. *Rainforest Cafe,* 677 N.W.2d at 452.

VI. THE DISTRICT COURT PROPERLY REFUSED TO AWARD THE MOORES INTEREST, FEES OR EXPENSES.

The Moores' contention that they are entitled to prejudgment interest is baseless. They contend they are entitled to interest under § 549.09, but that statute only provides for interest "on pecuniary damages," and they were awarded none. They also argue (for the first time on appeal) that they are entitled to interest under the dissenters' rights statute, § 302A.473, subd. 7, but the court correctly held they had no dissenters' rights.

Furthermore, the Moores' assertion that CSG "refused to make any payment to the Moores for over three years" (br. at 18) is not true. CSG not only informed the Moores in

February, 2006, that "upon delivery of your shares to US Bank, you will receive payment for your shares," CSG placed the payment funds in escrow. (Ex. 68; Tr. 794-95; APP144, 167; ADD024.) There is absolutely no evidence the Moores tendered their shares and were denied payment. On the contrary, they admit they did not tender them until May 2009, when they were paid. (Br. at 19; ADD021.)

The Moores also claim the district court erroneously failed to award them attorneys' fees and expenses under various MBCA provisions, but such an award is proper only when a party *prevails* on a claim under the MBCA, and even then it is subject to the district court's discretion. *See Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979); *Tuaolo v. Want Some Weather, Inc.*, No. A07-2139, 2008 WL 5136614 (Minn. Ct. App. Dec. 9, 2008); *Powell v. Anderson*, No. A05-734, 2006 WL 44336 (Minn. Ct. App. 2006), *rev. denied* (Minn. Mar. 28, 2006). The Moores lost. They are not entitled to any fees or expenses.

CONCLUSION

Respondents respectfully request this Court to affirm the district court's judgment.

Dated: January 21, 2011

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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,

vs.

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

Respondents.

CERTIFICATION OF BRIEF LENGTH

CASE NO. A10-252

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,966 words. This brief was prepared using Microsoft Word 2003.

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