NO. A10-252

State of Minnesota
In Court of Appeals

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

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

Although Appellants list seven issues, they all are encompassed within the following appellate issues:[1]

1. Should the district court's decision that Appellants failed to prove their claim for a judicial buyout under § 302A.751 be affirmed, where Appellants' brief failed to address (a) the court's findings establishing that Respondents committed no fraud, illegality, or unfairly prejudicial conduct, and (b) the evidence supporting those findings?

Based on over 100 findings of fact, the district court concluded that Appellants had failed to prove grounds for a judicial buyout under § 302A.751.

- Minn. Stat. § 302A.751, subd. 1(b)(2)-(3)
- Minn. Stat. § 302A.423, subd. 2
- Minn. R. Civ. P. 52.01
- *Spinnaker Software Corp. v. Nicholson*, 495 N.W.2d 441 (Minn. Ct. App. 1993)

2. Did the district court properly conclude that § 302A.471 does not provide dissenters' rights to a judicial buy-out when fractional shares are redeemed for cash, where the Minnesota legislature rejected the Model Business Corporation Act provision granting such rights, and instead adopted an inconsistent provision making the board's valuation conclusive absent fraud?

The district court held Appellants did not have a right to a judicial buy-out under § 302A.471.

- Minn. Stat. § 302A.471, subd. 1(4).

[1] Appellants did not move for amended findings or a new trial, and they do not describe how they preserved their issues for appeal, as required by Minn. R. Civ. App. P. 128.02, subd.1(b)(3).

- Minn. Stat. § 302A.423, subd. 2.
- *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273 (Minn. 2000).

3. Did the district court properly refuse to award Appellants prejudgment interest, fees, and expenses, where they did not prevail on any of their claims?

The district court held against Appellants on all of their claims and did not award them prejudgment interest, attorneys' fees, or expenses.

- Minn. Stat. § 549.09
- Minn. Stat. § 302A.473
- Minn. Stat. § 302A.751

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 (and current statewide Senior 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 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 then move for amended or additional findings under Minn. R. Civ. P. 52.02, or for a new trial under Minn. R. Civ. P. 59.

Appellants unfairly complain that Judge Hayden failed to address their objections to the Recommended Findings of Fact and Conclusions of Law (br. at 3), but it was Appellants that failed to identify specific objections to specific recommended findings and conclusions, as contemplated by Rule 53.07(c)-(d). Instead, Appellants submitted a brief that merely re-argued the issues, apparently expecting the court to decipher which specific findings they objected to, and the purported basis for their objections (*e.g.*, insufficient evidence). (Pls.' Mot. to Modify Special Master's Recommended Findings of Fact, Conclusions of Law and Order for Judgment Pursuant to Minn. R. Civ. P. 53.07(b).) Appellants have taken the same misguided tack on appeal.

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. Appellants do not identify specific findings that they claim are unsupported by the record, and then address the relevant evidence supporting them, as Rule 128.02, subd. 1(c) requires—even though the court specifically cited supporting evidence in its findings. Instead, Appellants' Statement of Facts simply ignores *all* of the district court's adverse factual findings, *all* of the evidence that supports those findings, and *all* of the evidence that contradicts Appellants' purported "facts." This approach is consistent with Appellants' failure to address or even identify the standard of review, as required by Rule 128.02, subd. 1(d).

Appellants' failure to address the district court's adverse findings and related evidence renders their Statement of Facts unhelpful and even misleading, given the proper role of this Court. This Court does not redetermine the facts. *See, e.g., Rutz v. Rutz*, 644 N.W.2d 489, 493 (Minn. Ct. App. 2002), *rev. denied* (Minn. 2002). Rather, since Appellants did not move for a new trial or amended findings, "appellate review is limited to examining whether the evidence supports the findings of fact and whether those findings support the conclusions of law." *West St. Paul Fed'n of Teachers v. Ind. School Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. Ct. App. 2006). 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. *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. 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. 1999), *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; APP042-43, 51.)

Appellants are trustees of family trusts (the "Trusts") that held shares in CSG. (FOF 6; Tr. 234-35, 237-38, 356-58, 478-79.) The Trusts received the shares by inheritance 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, 449-450.)

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 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 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 their 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. (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"); serves on the state bar committee that studies and recommends changes to the MBCA; and is co-author of the leading treatise on Minnesota corporate law. (RA80-81, RA110-14.)

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.)[2] CSG had already retained Arthur Cob, 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.) Schmidt had valued CSG at $246.7 million as of December 31, 2004. (FOF 49.) 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 increases that were unprecedented in CSG's 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

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[2] Minn. Stat. § 302A.423, subd. 2, provides, in relevant part:

> A corporation shall not pay money for fractional shares if that action would result in the cancellation of more than 20 percent of the outstanding shares of a class or series. A determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud.

market value of CSG to be approximately $80 million as of June 4, 2005. (FOF 55; Ex. 152.)

Cobb issued a final valuation opinion dated January 19, 2006, valuing the preliminary 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 was the most reliable method of valuing CSG. (FOF 64; RA51, 63.) Cobb separately valued the assets used in CSG's granite operation 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.)

Chartwell submitted two letters to the CSG board, one dated January 30, 2006 and the other dated February 14, 2006. (FOF 72; Exs. 65, 69.) The January 30 Chartwell letter states that it was an "in-progress" report, and opined that "Chartwell was more confident in the conclusions drawn within the Cobb and Associates report as to the overall equity of the company as compared to the report prepared by Schmidt Financial, Inc." (FOF 72; Ex. 65.) This letter was intended, in part, to apprise the board of Chartwell's work. (FOF 72; Tr. 1959.) The letter concludes, "We have a higher level of confidence that the Cobb Reports reflect the fair market value of the company and the fair value of the company's common shares when compared to the Schmidt Report." (FOF 72; Ex. 69.)

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 a 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 or she was misled in any way, or deprived of any material information in connection with his vote in favor of the transaction. Although the Moores contend Alexander concealed from the board the effect of the transaction on his percentage ownership and voting rights (br. at 18), the exhibit they cite is a memorandum ***to the board*** explaining the effect of the transaction on share ownership. (Appellants' Appendix ("APP") APP295-300.) The board minutes reflect extensive discussion of this topic. (*See, e.g.*, APP144-45; RA3-5.) There is no evidence the board was unaware that redeeming shares not owned by

Alexander or the Alexander Family Trust would increase Alexander's percentage ownership.

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 21), 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; Appellants' Addendum ("ADD") ADD024.) When the Moores finally tendered their shares in May 2009, they were paid. (Br. at 22; ADD021.)

Similarly, while the Moores state that CSG "prevented" them from conducting an appraisal (br. at 21), 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.)

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 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 (Neil Lapidus), 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.)

The court's own valuation was substantially similar to Cobb's, and nowhere near the value sponsored by the Moores of $218 million. (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%.[3] 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 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.*)

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. 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.

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,

[3] 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%.

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 do not even 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 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. The statute's language does not cover this action, and the undisputed evidence showed that dissenters' rights are not applied to this action in Minnesota. This omission is not an oversight. The Minnesota legislature refused to adopt the Model Business Corporation Act provision that covers this action. Instead, the legislature adopted a bright line rule, modeled after California's statute, limiting the action to 20% of the class of shares redeemed, and making the board's valuation conclusive absent fraud. *See* §§ 302A.402, 302A.423. 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 whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and judgment. *E.g., Novak v. Northwest Airlines, Inc.*, 525 N.W.2d 592 (Minn. Ct. App. 1995). 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.*[4] A finding is clearly erroneous only if there is not reasonable evidence to support it. *West St. Paul*, 713 N.W.2d at 378; *Minnesota Souvenir Milkcaps, LLC v. State*, 687 N.W.2d 400, 404 (Minn. Ct. App.), *rev. denied* (Minn. 2004).

This Court need not defer to the district court's decision on a pure question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001). However, when reviewing mixed questions of law and fact, this Court accords the district court discretion in its ultimate conclusions, and reviews such conclusions under an abuse of discretion standard. *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. §

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

302A.751, like any other equitable relief, is subject to an abuse of discretion standard. *Wiltse v. Boarder Fin. Servs., Inc.*, No. A03-852, 2004 WL 771493 (Minn. Ct. App. April 13, 2004). This 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).[5] The Moores rely on the following two grounds: (1) "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;" and (2) "the directors or those in control of the corporation have acted fraudulently or illegally 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.)

[5] The valuation for the buy-out is determined by the same appraisal proceeding afforded dissenting shareholders under § 302A.473. *See* Minn. Stat. § 302A.751, subd. 2.

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. 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 or the Delaware Corporation Act. *See* MODEL BUS. CORP. ACT. § 6.04 (2003); Del. Code Ann. tit. 8, § 155 (2009). Instead, 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"); *Small v. Sussman*, 713 N.E.2d 1216, 1220 (Ill. Ct. App. 1999) (holding that forced redemption of minority shareholder's stock through reverse stock split and elimination of fractional shares "[c]learly . . . is not a cognizable legal injury of any sort" because it is authorized by Illinois Business Corporation Act). 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.[6] 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 percent** 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 also confirmed 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.

The Moores also assume it was *per se* improper 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

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

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 non-management minority 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.) The 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.*)

B. The District Court Properly Found That the Moores Failed to Prove the Board's Valuation Was Fraudulent.

"Valuation of property is a finding of fact which an appellate court will reverse only if clearly erroneous." *Spinnaker Software Corp. v. Nicholson*, 495 N.W.2d 441, 445 (Minn. Ct. App. 1993). A district court accordingly has broad discretion in deciding a proper valuation method. *See id.*; *Rainforest Cafe, Inc. v. State of Wisconsin Inv. Bd.*, 677 N.W.2d 443, 450 (Minn. Ct. App. 2004) ("[f]indings of valuation will not be disturbed if within the limits described by the evidence") (citations omitted); *see also* Minn. Stat. § 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").

Here, the court found that the board's valuation of the fair value of the Moores' shares was not fraudulent, either with respect to the process or substance of the valuation. (FOF 74-78, 87; COL 5, 6-9, 14-18, 21.) The Moores have failed to show these findings were clearly erroneous.

1. No fraud based on allegedly concealed projections.

The district court properly rejected the Moores' argument that various management projections had been concealed. It found that the projections were not material or reliable, and adopted Cobb's valuation of CSG's operations largely because he did *not* rely upon management projections. (FOF 60-64, 89-90, 97, 99, 103.) The court's findings are not clearly erroneous, particularly given the court's broad discretion in choosing valuation methods, because they are reasonably based upon the evidence, including Cobb's testimony and valuation report. (Tr. 1252-54, 1284-86, 1288-89, 1297-98, 1300-06, 1362; RA60.) *See Rainforest Cafe*, 677 N.W.2d at 450; *Spinnaker*, 495 N.W.2d at 445.

Not only are the district court's findings reasonably based on the evidence, the Moores' contentions are based on distortions of the record. The various projections are addressed below.

A. The Schmidt Report Projections.

The Moores contend CSG concealed projections contained in the February 10, 2005, valuation report prepared by the Kahlerts' appraiser, Patrick Schmidt. (Br. at 19-21.) Schmidt valued the company as of December 31, 2004, based on the discounted cash flow method, using November 23, 2003 projections that are set forth and cited in the report. (APP93-97.) The projections forecasted revenues for the next five years based on CSG's then-newly adopted strategy to grow rapidly by opening residential granite countertop retail stores across the nation (a so-called "Blockbuster Video" strategy). (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 lowered CSG's credit rating in January and February 2006. (Tr. 2418-19, 2472-76; APP431-33 Ex. 544.)

Cobb's appraisal valued the company as of December 31, 2005, a year later than Schmidt's, and after the growth strategy had failed. In performing his appraisal, Cobb had available to him CSG's *actual* results for 2003 through 2005, which were significantly lower than the projections that had been relied upon by Schmidt. (Tr. 658-59, 1067-69, 1254, 1361-62, 1997, 2374, 2822, 2894-98; Ex. 74.) Thus, it is not surprising that both Cobb and Vavra testified they did not consider the projections relevant. (FOF 62, 70; Tr. 1252-53, 1997.) Indeed, Schmidt himself testified that neither he nor any reasonable appraiser would have relied upon the allegedly concealed projections in valuing the company as of December 31, 2005. (Affidavit of Patrick Schmidt in Supp. of Defs.' Mot. for Summ. J., Feb. 20, 2008, ¶ 5.)

Undeterred, the Moores continue to accuse CSG, specifically its CFO, of having "concealed" these projections from Cobb and Vavra, based upon purported "facts" that are false and misleading. (*See* Br. at 19-21.) As to Cobb, each of the following purported "facts" is unsupported by the Moores' record cites:

> "Flint's testimony completely contradicts Cobb's testimony. Flint testified that he never spoke with Cobb about these materials. (Tr. 553:23-557:2.) He also testified that he knew exactly where these materials were at all material times. (Tr. 545:12-546:12.) Flint further testified that CSG's other executives knew he prepared the projections and management materials referenced in the Schmidt report, but no one ever asked for them until after this lawsuit began. (Tr. 523:8-528:3; 554:16-[555]:8)."

(Appellants' Br. at 19-20.)

As to Vavra, the Moores falsely state that CSG's CFO misled him by concealing the 2003 projections Schmidt used, and substituting "wacky" projections. (*Id.* at 20-21.) In fact, the transmittal email to Vavra makes clear that the attached projections were not the same as Schmidt's, which were "wacky" because they were based on the company's prior "grandiose plans" to "double our business" that "were not executable." (APP157.) Vavra knew the projections he was sent were different from the ones contained in the Schmidt Report; they were different on their face. (Tr. 2000-01.) His opinion that Cobb's valuation was more reliable than Schmidt's was not based on any "wacky" projections or fraud; it was based on his own analysis of the company's performance, and the fact that Cobb's projections were more consistent with that history than were Schmidt's. (Tr. 1980-97.)

B. 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 he found the projections unreliable and unduly optimistic, and that CSG had withheld no material information from him. (Tr. 1284-89, 1300-03, 1362-63.) 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.)

C. 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 13.) 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. (Tr. 1017-24.) 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" possible valuations using hypothetical assumptions to try to determine how much a redemption might cost. (Tr. 594-606.) The lowest value was 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.)

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

What the Moores describe as "Mitchell's June 23, 2005 valuation" (br. at 13) 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.)

E. 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.) According to U.S. Bank, CSG did not know how much the redemption would cost, but told the Bank 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" for all the minority shares. (Tr. 2475, 2494.) U.S. Bank confirmed that CSG did not express an opinion that the minority shares were worth $10 million, and did not express an opinion of the company's value until it received Cobb's appraisal. (Tr. 2428, 2445.)

2. *No "Sifferle fraud" based on nonmaterial information.*

The Moores argue (br. at 41) that the board's determination of value is not conclusive because they proved "fraud" within the meaning of *Sifferle*, 384 N.W.2d at 503, but the district court properly concluded they "failed to prove fraud even applying the broader Sifferle definition." (COL 8.) In *Sifferle* this Court interpreted the MBCA provision that precludes dissenting shareholders from setting aside corporate actions unless the action was "fraudulent." § 302A.471, subd. 4. This Court held that, even under a liberal definition of fraud, the minority shareholder failed to state a claim because the alleged misrepresentation was not material. 384 N.W.2d at 508; *see also Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 371-73 (Minn. Ct. App. 2004), *rev. denied* (Minn. 2000) (affirming summary judgment because omitted facts immaterial as matter of law). Thus, the Moores' claim of "*Sifferle* fraud" is defeated by the district court's express findings, supported by the record, that the projections were immaterial to the valuation.

3. *No fraud based on board's reasonable determination of fair value.*

Similarly misplaced is the Moores' argument that the board's adoption of Cobb's valuation is fraudulent because it is lower than the court's. "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 district court properly found that Cobb's valuation was "within the range of historical valuations . . . made for purposes other than litigation," and that it is "not so unreasonably low as to indicate fraud." (FOF 97(d), 106.) The difference between the court's and Cobb's estimates of value is only 10.6%, well within a reasonable margin of accuracy.

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.")).

To put the 10.6% difference in context, the Moores offered a valuation that is over 350% higher than the court's.[7] (FOF 93, 103.) If a 10.6% difference in valuation were "fraudulent," then the MBCA's directive that the board's determination of value is

[7] The Moores' appraiser, Lapidus, valued the company at $218 million without the non-operational real estate, compared to the court's valuation of $62 million.

conclusive absent fraud would be meaningless. The closeness in value actually proves CSG's reasonableness and good faith.

4. No fraud based on estimated value of retained mineral rights.

The Moores also contend that the board's valuation fraudulently undervalues by $13 million the mineral rights CSG retained in the land transferred to Marble Falls (br. at 46-47), but that assertion is contrary to the evidence. The only evidence of the actual value in 2005 of the mineral rights by themselves was the testimony and appraisal by Cobb. (Tr. 1348-54, 1399-00; RA21.) The Moores offered no evidence of their actual value. Cobb testified that the mineral rights alone had a *de minimis* value because (1) they were not marketable; (2) granite was widely available in that part of Texas, and (3) they were not being used by CSG or generating any income. (Tr. 1348-54, 1399-1400.)

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 23-24.) 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.

C. The district court properly found that the Moores failed to prove fraudulent or unfairly prejudicial conduct under § 302A.751.

The Moores contend that the district court erred in not granting them a judicial buy-out under § 302A.751, subd. 1(b)(2)-(3).[8] Those provisions give a court discretion to award a judicial buy-out upon a showing that "the directors or those in control of the corporation" have acted "fraudulently" or in a manner "unfairly prejudicial" toward shareholders. *Id.* The Moores characterize the same alleged conduct as violating their "reasonable expectations," as "unfairly prejudicial," and as amounting to a "breach of fiduciary duty." (Br. at 28-34.) These are essentially various labels for shareholder oppression under § 302A.751, subd. 1(b)(3). *See, e.g., Berreman*, 615 N.W.2d at 374. There is no need to distinguish between these terms, because regardless of what label is used, the issue remains whether the court properly determined they had failed to make a sufficient showing under the statute. *See id.* Whether a shareholder's reasonable expectations have been frustrated is an issue of fact. *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 191 (Minn. Ct. App. 2001), *appeal dismissed* (Minn. 2001).

The district court's determination that the Moores had failed to show grounds for a judicial buyout under § 302A.751 is not clearly erroneous. Indeed, Prof. Matheson, who

[8] The Moores also cite § 302A.467, but that provision merely authorizes equitable relief if another MBCA provision has been violated. *Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 378-79 (Minn. Ct. App. 2004), *rev. denied* (Minn. 2005).

has written extensively about § 302A.751, was of the view that CSG "displayed an unusual and laudatory solicitousness for the interests of minority shareholders," and that Moores are "the most unlikely of claimants" under § 302A.751. (RA104, 108.)

The Moores' § 302A.751 arguments can be divided into complaints about (1) the 2006 cash-out of their shares, and (2) the 2003 Marble Falls transaction. (Br. at 27-34.) The district court properly rejected them all.

1. No § 302A.751 claim based on the 2006 cash-out.

A. No right to remain shareholders for 15 years.

The Moores argue that they had a reasonable expectation that their shares could not be redeemed without their consent, but 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 them or accepted by the other shareholders.

The Moores rely on a statement allegedly made by Alexander or Wilensky, during the November 15, 2003 meeting regarding the Marble Falls spin-off, that they would be shareholders for at least 15 years, but that reliance is misplaced, for several reasons. First, the Moores cite McCabe's testimony, but she later admitted the statement related to their ownership interest in the entity to be spun-off (*i.e.*, Marble Falls), not in CSG. (Tr. 454-55.)

Second, the court's finding that the Moores "were completely aware of Alexander's desire to acquire their minority interest" (FOF 11) is inconsistent with their purported reasonable expectation that they would remain long-time shareholders.

Third, and most importantly, their 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' 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. 1992), *rev. denied* (Minn. 1992). The Moores were never employees, officers or directors; they were merely indirect minority shareholders who acquired their beneficial shares by inheritance. 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.

B. No violation of by-laws.

The 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.

C. No concealed projections.

The Moores were not unfairly prejudiced by the allegedly "concealed" projections. As previously discussed, nothing was concealed. The projections were immaterial to Cobb's valuation, and the court's. (FOF 61-63, 97.)

D. No refusal to allow appraisal.

The Moores' assertion that CSG prevented them from conducting an appraisal (br. at 21) is not true. The May 5, 2006, letter from CSG's counsel allowing 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.) This reservation was appropriate, since 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.)

2. No § 302A.751 claim based on the 2003 Marble Falls transaction.

A. The Moores Cannot Seek Reversal Based on Their Purported Marble Falls-Based Claims.

The Moores argue that they are entitled to reversal based on alleged wrongdoing in connection with the Marble Falls transaction (br. at 30-31), but they have failed to preserve this argument for appeal. The district court held that the Moores cannot pursue claims based on the Marble Falls transaction, because the claims are derivative. (COL 19-20.) The Moores did not address the court's ruling that their claims based on the Marble Falls transaction are derivative in their opening brief.

Issues that are not addressed in an appellants' opening brief are waived and cannot be revived in a reply brief. *See Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. Ct. App. 2009); *Swarthout v. Mutual Service Life Ins. Co.*, 632 N.W.2d 741, 748 (Minn. Ct. App. 2001); *Shepherd of the Valley Lutheran Church of Hastings v. Hope Lutheran Church of Hastings*, 626 N.W.2d 436, 443 (Minn. Ct. App. 2001). Because the Moores' brief does not address the district's ruling that their claims based on Marble Falls are derivative, they have waived the issue on appeal. *See id.* They cannot seek reversal or raise any issue regarding the Marble Falls transaction.

B. Even if The Moores Could Raise the Issue, The Court Properly Concluded Their Marble Falls Claims Were Derivative.

Even if the Moores could challenge the court's ruling, it was correct. Claims are derivative if the injury arises from the plaintiff's status as a shareholder. *See Wessin v. Archives Corp.*, 592 N.W.2d 460, 465 (Minn. 1999); *Skoglund v. Brady*, 541 N.W.2d 17, 21 (Minn. Ct. App. 1995), *rev. denied* (1996). The Kahlerts, like the Moores, alleged the Marble Falls transaction was improper because they had no advance opportunity to approve it, and Delaware law purportedly offers minority shareholders less protection than Minnesota law. (Ex. 151, ¶¶ 16-21.) The prior judgment dismissing the Kahlerts' Marble Falls-based claims as derivative, based on the SLC's report, is *res judicata* as to the Moore Trusts' derivative claims challenging the Marble Falls transaction, because in both cases, despite the difference in nominal plaintiffs, the real party in interest is the corporation. *See Cramer v. General Tel. & Elects. Corp.*, 443 F. Supp. 516 (E.D. Pa. 1977), *aff'd,* 582 F.2d 259 (3d Cir. 1978); *Parkoff v. General Tel. & Elects. Corp.*, 442 N.Y.S.2d 432 (N.Y. 1981).[9]

[9] Although the district court had previously ruled that the Moores had stated a direct Marble Falls-related claim, the direct claim was that Alexander had allegedly promised them the opportunity to veto the transaction, a claim proven false at trial. (*See* Jan. 25, 2007 Order at 9-10; Oct. 1, 2007 Order at 3-4, 6-8; Tr. 453-54, 464-65, 2326-27.) Furthermore, the district court was not bound by its prior interlocutory rulings. *Antiel v. V.W.E. Invs.*, 353 N.W.2d 681, 682 (Minn. Ct. App. 1984), *rev. denied* (Minn. 1985).

C. Even if The Moores' Marble Falls Claims Were Not Derivative, They Are Not Grounds For A Buy-Out.

In addition to being derivative, each of the Moores' claims based on Marble Falls (br. at 30-31) is baseless.

First, the district court correctly found that there was no material difference between the Moores' percentage ownership and voting rights in Marble Falls and in CSG. (FOF 23, 30-35; Tr. 481-82). As Moore admitted, Alexander controlled over 90% of the votes in both entities when Marble Falls was created. (Tr. 305.)

Second, as previously addressed, the evidence supported Cobb's valuation of CSG's 15-year mineral rights in the Marble Falls land. The Moores failed to prove that the Marble Falls transaction was part of a plan that culminated in the reverse stock split and redemption. (COL 22.)

Third, the Moores offered no evidence they were unfairly prejudiced by the buy-out provision in the Marble Falls agreement. They remain owners of Marble Falls, and no one has attempted to buy them out. (Tr. 310-11.)

Fourth, the Moores offered no evidence they were unfairly prejudiced by the formation of Marble Falls as a Delaware LLC. They rely on Wilensky's testimony that Delaware law "was a bit more protective" of corporations than Minnesota law, but he also said the differences "cut both ways" depending on the situation. (Tr. 2333.) They cite no evidence contrary to the Court's finding that "Marble Falls was formed as a Delaware limited liability company . . . upon Mr. Wilensky's advice in order to differentiate Marble Falls from CSG" because of certain potential liability issues. (FOF

28.) They also cite no evidence supporting their assertion that Alexander was aware of any differences between Minnesota and Delaware law.

Fifth, the Moores offered no evidence they had any reasonable expectation to receive draft Marble Falls documents before the transaction, or that they were unfairly prejudiced by not receiving them. While the Moores claimed they were promised copies of draft documents at the November 14, 2003 meeting, the court made no such finding, noting that neither Alexander nor Wilensky recalled such a discussion. (FOF 24.) The court found, based on the Moores' own testimony that they "were told . . . and understood that CSG had the power to and [intended] to go forward with the transaction without a shareholder vote . . . by December 31, 2003." (FOF 25; Tr. 299, 401.) The Moores were not prejudiced because they had no right to enjoin the Marble Falls transaction: the SLC concluded it "was justified as a reasonable and prudent action"; there was no evidence it was intended to deprive minority shareholders of rights under Minnesota law; and the board was not required to consult with shareholders first. (FOF 44; Ex. 63, at 23; Tr. 2292-94.)

III. THE DISTRICT COURT 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; 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).

The district court correctly concluded that 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 Moores have cited not a single Minnesota case in which dissenters' rights were provided based on the cash-out of fractional shares following a reverse stock split. According to Prof. Matheson, this is a common corporate action in Minnesota, and he is unaware of any instance where dissenters' rights have been provided. (Tr. 2847-48; RA94-96.)

The Moores attempt to shoehorn this transaction into the provision granting dissenters' rights from an articles amendment that "excludes or limits the right of *a shareholder* to vote on a matter," but it plainly does not apply. *See* § 302A.471, subd. 1(a)(4) (emphasis added). The articles amendment at issue here did not affect the Moores' rights, as *shareholders*, to vote on any corporate matter. It reduced the number of authorized shares of stock. (APP154.) The reverse stock split led to the Moores being paid cash for their shares so they would no longer be shareholders, but it did not affect any of their voting rights *as shareholders*.

The *Whetstone* case relied on by Plaintiffs actually illustrates this distinction. *See Whetstone v. Hossfeld Mfg. Co.*, 457 N.W.2d 380 (Minn. 1990). In *Whetstone*, the articles of incorporation and by-laws granted a 36% minority shareholder in a closely held corporation veto power over certain corporate actions. The court held that an articles amendment that removed his veto power limited his voting rights, and he therefore had the right to dissent and be bought-out under § 302A.471, subd. 1(a)(4). As the court explained, the buy-out remedy allows minority shareholders "*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 the corporation following an articles amendment, because following the amendment they were no longer shareholders.

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). In contrast, with a reverse stock split and redemption of fractional shares, the legislature has made the board's determination of value conclusive absent fraud. *See* § 302A.423, subd. 2; § 302A.402, subd. 3.

In fact, the Minnesota legislature has specifically *refused* to adopt the Model Business Corporation Act ("Model Act") section that provides dissenters' rights when reverse stock splits lead to the cash-out of fractional shares. The Model Act was amended in 1984 to provide for dissenters' rights for the very transaction at issue—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.).

When the Model Act added this provision, it already had a provision granting dissenters' rights when a shareholder's voting rights are excluded or limited (the provision relied upon by the Moores). *See* Model Bus. Corp. Act Annotated §13.02(a)(4) (3d ed. 1991 Supp.). Many states adopted both provisions, granting dissenters' rights in two different circumstances: (1) when a shareholder's voting rights are excluded or limited, and (2) when there is a reverse stock split and cash-out of fractional shares.[10] If a

[10] *See* Ala. Code § 10-2B-13.02(a)(4) (2009); Ariz. Rev. Stat. Ann. § 10-1302(A)(4) (West 20089; Ark. Code Ann. § 4-27-1302(a)(5) (West 2009); Conn. Gen. Stat. Ann. § 33-856 (West 2009) (repealed 2001); Fla. Stat. Ann. § 607.1302(1) (West 2009); Ga. Code Ann. § 14-2-1302(a) (West 2009) (repealed 2003); Haw. Rev. Stat. Ann. § 414-342(a)(4) (2007); Iowa Code Ann. § 490.1302 (West 2009) (repealed 2002); Ky. Rev. Stat. Ann. § 271B.13-020(1)(e) (West 2009); Mass. Gen. Laws Ann. Ch. 156D, § 13.02(a)(4) (West 2009); Miss. Code. Ann. § 79-4-13.02 (West 2009) (repealed 2000); Mont. Code Ann. § 35-1-827(1)(d) (2009); Neb. Rev. Stat. § 21-20,138(1)(d) (2009); N.H. Rev. Stat. Ann. 293-A:13.02(a)(4) (2009); N.C. Gen. Stat. Ann. § 55-13-02(a)(4) (West 2009); S.C. Code Ann. § 33-13-102(A)(4) (2009); Tenn. Code Ann. § 48-23-102(a)(4) (West 2009); Vt. Stat. Ann. tit. 11A, § 13.02 (West 2009); Wis. Stat. Ann. § 180.1302(2) (West 2009); Wyo. Stat. Ann. § 17-16-1302(a)(iv) (West 2009). The Model Act has since been amended again, but it retains the provision specifically covering reverse stock splits. *See* 3 Model Bus. Corp. Act Annotated §13.02(a)(4) (4th ed. 2008.).

reverse stock split/cash-out of fractional shares were already covered by the voting rights provision, then the Model Act drafters, and the 20 states that adopted both grounds for dissenters' rights, would have been adding a meaningless provision.

Minnesota only adopted the voting rights provision, and did not adopt the provision granting dissenters' rights from a reverse stock split/cash-out of fractional shares. According to Prof. Matheson, who has served on the committee that recommends MBCA amendments for over 20 years, this was not an oversight. (Tr. 2849-52; RA97-98.) Minnesota has adopted a bright-line rule allowing the cash-out of fractional shares of up to 20% of the outstanding shares of a class or series by board action alone, and prohibiting it for any amount above 20%. §§ 302A.402, 302A.423. Appraisal rights are inconsistent with deferring to the board's conclusive non-fraudulent 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. Because Minnesota has not adopted the Model Act provision granting dissenters' rights from a reverse stock split/cash-out of fractional shares, this Court must honor the legislature's intent, and apply the statute as enacted. *See, e.g., 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).[11]

[11] The Moores' argument (br. at 39) that none of subdivision 3's "exceptions" applies puts the cart before the horse—since they failed to show that any of subdivision

IV. 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. 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 21) 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 22; ADD021.)

In support of their assertion that CSG refused to make payment, the Moores rely solely upon testimony that was *excluded from evidence* under Minn. R. Evid. 408. (Br. at 22; Tr. 442-43.) Although the Moores state this evidentiary ruling was error, they waived this argument by failing to move for a new trial, or properly brief it on appeal. *See, e.g., Sauter v. J.P. Wasemiller, M.D.,* 389 N.W.2d 200, 201 (Minn. 1986).

1's exclusive grounds for dissenters' rights applies, the exceptions are irrelevant. *See* Minn. Stat. § 302A.471, subds. 1, 3.

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.*, 2008 WL 5136614 (Minn. Ct. App. Dec. 9, 2008); *Powell v. Anderson*, 2006 WL 44336 (Minn. Ct. App. 2006), *rev. denied* (Minn. 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: April 5, 2010

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STATE OF MINNESOTA
IN COURT OF APPEALS

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

Appellants,

vs.

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

Respondents.

CERTIFICATION OF BRIEF LENGTH

APPELLATE COURT 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 13,728 words. This brief was prepared using Microsoft Word 2003.

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