IN THE MISSOURI SUPREME COURT

JOAN L. ROBINSON,	)	
	)	
Respondent/Cross-Appellant,	)	
	)	
v.	)	No. SC97940
	)	
JOHN F. LANGENBACH, et al.,	)	
	)	
Appellants/Cross-Respondents.	)	

Appeal from the Circuit Court of St. Louis County, Missouri
Cause No. 12SL-CC02302-01
Honorable Kristine Allen Kerr
Division 14

SUBSTITUTE COMBINED RESPONSE AND REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY IN SUPPORT OF APPEAL

Respondent recasts this entire litigation, now suggesting hers was a struggle against "John's personal profit" and "looting", that John "diminished PJC profits while increasing John's fortunes and eliminating excess cash that Joan would have a claim on *as a shareholder*," and that John and Judy acted to "enrich" John (R.Br. 15, 47, 29)(emphasis added).

These allegations not only have no basis in the record, but they would have been derivative claims if the allegations were true. As the tone of Respondent's brief demonstrates, if there *was* a basis for such claims, Respondent would have brought them. But Respondent never brought a derivative claim challenging John or his daughters' salaries. Respondent never questioned whether they earned every penny by devoting themselves full time to the company. Respondent never brought a derivative claim questioning whether John (who all concede was travelling the country to visit licensees) should have replaced his old company car with a new Ford, although she now mentions it several times in her brief. Respondent *never* claimed the John was stealing from the company or that he "enriched" himself to the detriment of the PJC shareholders. And so on. The derivative claims that Respondent *did* bring were so frought with logical and legal problems that Respondent did not appeal the trial court's directed verdict against her.

Although Respondent may not like it, even to the point that she warns the Court of the obvious argument (R.Br. 39 n. 25), the lack of any claim of fraud, mismanagement or waste does distinguish this case from virtually every reported case cited by either side in this Appeal. This *is* an unusual case. By *all* accounts, John and Judy asked Respondent to resign to pass PJC on to her and John's heirs. Two years later, John and Judy terminated Respondent because John believed that everyone, including himself, had to work harder and longer, and Respondent and her son refused to do so. And third parties testified, and the trial court found, that John did work harder, much harder in fact.

Respondent's invective may have appealed to the jury, and the distinctions between direct and derivative claims were likely lost on them as well. But this Court can and should distance itself from Respondent's rhetoric in order to focus on the resolution of the narrow issue presented: Did Respondent, John and Judy agree to an investment-based narrative such that John and Judy owed Respondent a "special obligation" when deciding to terminate her?

Argument

I. The Trial Court erred in failing to grant Defendant/Appellants' Motion for a Directed Verdict because Respondent was not entitled to any fiduciary-based right to employment (Appellants' Points Relied On I and II)

A. Respondent had no fiduciary-rooted right to employment

Respondent repeatedly refers to the legal principle that directors owe the minority a fiduciary duty under Missouri law. It is true that the majority may not use "their control to obtain a profit for themselves at the injury of the minority or to produce corporate action that is designed to operate unfairly to the minority." *Betty G. Weldon Revocable Trust v. Weldon*, 231 S.W.3d 158, 172 (Mo.Ct.App. 2007). As this Court has pointed out, that rule generally prohibits self-dealing by directors or majority shareholders:

> Specifically, Dean Ruder identifies ten substantive areas in which the duty of loyalty is subject to breach:
>
> Self-dealing, dealings by a corporate parent with its subsidiaries, majority shareholder injury to minority shareholders in corporate acquisition and reorganization transactions, excessive compensation, use of corporate funds to perpetuate control, sale of control at a premium, insider trading, corporate opportunities, competition by corporate officers and directors with their corporation, and fiduciary obligations in bankruptcy.

Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 904-905 (Mo. 1990).

But that fiduciary duty to the minority is not triggered by every act or vote that a director must take in the governance of a company. It cannot be. If that were the case, directors of closely held companies would be paralyzed by the consideration of every shareholder's individual wishes relating to every corporate decision. That is why this Court has ruled that a director's primary obligation is, in the absence of actionable self-dealing, "to act in the best interests of all shareholders o*n a collective basis.*" *Nickell v. Shanahan*, 439 S.W.3d 223, 227 (Mo. 2014)(emphasis added).

There are limits on just how far one shareholder's desires can override the collective interest. In the context of employment decisions, when a shareholder complains of her termination,[1] the courts and commentators (including those cited by

[1] Respondent suggests that, because the Court instructed the jury on her "removal," her claim took on some greater significance than if the Court had instructed that she was fired or terminated (R.Br. 17). The Court was simply parroting the termination language used

Respondent) have determined that a fiduciary duty is only implicated where "the shareholders struck a bargain for the protection of these investment return components when the minority committed its capital to the venture." Douglas Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts and Inheritances in Close Corporate Disputes,* 86 Minn. L Rev. 717, 732 (2002).

Thus, in *Wilkes,* discussed at length by Respondent, the court decided that the majority interfered with the minority's investment-based objectives because:

> Each of the four men invested $1,000 and subscribed to ten shares of $100 par value stock in Springside. At the time of incorporation it was understood by all of the parties that each would be a director of Springside and each would participate actively in the management and decision making involved in operating the corporation. It was, further, the understanding and intention of all the parties that, corporate resources permitting, each would receive money from the corporation in equal amounts as long as each assumed an active and ongoing responsibility for carrying a portion of the burdens necessary to operate the business.

Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 659-60 (Mass. 1976).

Those facts bear no resemblance to this case. Moreover, the *Wilkes* court noted that, unlike here, there was "no indication in the minutes of the board of directors' meeting" of *any* reason justifying the removal of the shareholder. *Id.,* at 661. Wilkes' termination resulted "not from misconduct or neglect of duties, but because of the

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in the PJC Bylaws. The Bylaws direct the Board to appoint a President who serves "subject at all times to the control of the Board of Directors" (Bylaws at 9). The Bylaws provide that "[a]ny officer of agent appointed by the Board of Directors may be *removed* by the Board of Directors whenever in the judgment of the Board the best interests of the corporation shall be served thereby" (Bylaws at 8, 9)(emphasis added).

personal desire of Quinn, Riche and Connor to prevent him from continuing to receive money from the corporation." *Id.*

Respondent suggests that her years working 2 hours a day, 4 days a week might serve as her "investment" for her father's gift of stock, and that the Court should now imply (because none was proved) an agreement among her siblings to protect that "investment." However, the only case cited for that proposition is the New York decision in *Gunzberg v. Art-Lloyd Metal Prod. Corp.*, 492 N.Y.S.2d 83 (N.Y.App. Div. 1985). *Gunzberg* does not stand for the proposition that the Court can ignore the necessary investment-based analysis. To the contrary, in *Gunzberg*, the siblings' father gifted stock after the fact based on merit—i.e., the stock was gifted subsequent to and in recognition of the siblings' different contributions to the company. *Id.*, at 86.

Moll recognizes the potential legal and logical problems where the original gift of stock arose, as here, out of paternal largesse, not devotion to the corporate enterprise:

> Finally, these problems are compounded in situations where the transferor distributes its stock to multiple transferees. When a founder dies, for example, its shareholdings may very well pass via inheritance to a number of friends or relatives. Similarly, a shareholder may distribute portions of its holdings as gifts over the years to numerous recipients. Does the transferor's specific reasonable expectation of employment or management pass to all of these transferees? Would a majority shareholder be obliged to employ multiple unskilled and inexperienced transferees to fend off the possibility of oppression liability? Surely the answer to both of these questions is no.

Moll, *supra* at 114.

Respondent also discusses the Indiana decision in *Mink* (R.Br. 37), where a retiring shareholder blamed Mink (who had purchased his stock in the company) for the company's refusal to cash him out at his desired price:

> 21. Mr. Winter threatened Don Mink in the presence of all the directors that if Mr. Mink did not pay Al Winter $250,000 for his stock, then Mr. Winter would hold his stock, not come to work, go to court.

W&W Equip. Co., Inc. v. Mink, 568 N.E.2d 564, 572 (Ind. Ct. App. 1991). Winter then arranged for Mink's termination and:

> 49. Al Winter threatened to use the judicial process against Mr. Mink by keeping the case in court for up to six years by bouncing it from county to county while at the same time drawing salary in an amount up to $500,000 which would be possible as long as there was money coming in, for then the business could remain open and ongoing.

Mink, 568 N.E.2d at 573 (Ind. Ct. App. 1991). *Mink* bears no resemblance to this case.

The *Cooke* case cited by Respondent (R.Br. 27) also has no relevance to this case. There, a brother and sister started a business that the sister's husband joined. When the sister's husband filed for divorce, the siblings began "steps in a pattern whose ultimate goal was to eliminate plaintiff from all participation in what John and Joni saw as a family business." *Cooke v. Fresh Express Foods Corpo., Inc.*, 7 P.3d 717, 723 (Or.Ct.App. 2000). The court acknowledged that while some of those efforts might be objectively justifiable—notably, increased salaries for the majority—"Defendants do not even attempt to suggest a plausible business reason for issuing a stock certificate solely to allow Joni to execute against it, thereby threatening plaintiff's continuing status as a stockholder." *Cooke v. Fresh Express Foods Corp., Inc.*, 7 P.3d 717, 724 n. 16 (Or.Ct.App. 2000). Neither could the defendants explain their decision to distribute "the entire retained earnings through a paper transaction that ensured that the corporate books would show no source for making any cash distribution to plaintiff." *Cooke,* 7 P.3d at 723.

Contrary to Respondent's characterization of the case, *Cooke* does not stand for the proposition that at-will employment is a "non-factor" in breach of fiduciary duty claims. In *Cooke*, the plaintiff pointed to numerous examples of egregious shareholder oppression. His termination was just one of them and, therefore, the court found it was not "irrelevant" to the issue presented. *Cooke,* 7 P.3d at 723 n.13.

The first step in any shareholder termination case is that the plaintiff plead and prove that "the shareholders struck a bargain for the protection of these investment return components when the minority committed its capital to the venture." Moll, *supra*. Respondent did not plead or even attempt to prove any agreement among the shareholders. In fact, the evidence demonstrated a clear *disagreement* between John and Respondent over what was necessary to preserve their father's business.

Respondent acknowledged that John and Judy asked her to retire and that John offered to step aside himself so that PJC could be passed on to the next generation of John *and Respondent's* children (Tr 131). Respondent declined. Two years later, John and Judy asked Respondent and her son to consider expanding their work efforts to a full 40-hour work week. Respondent's son viewed the idea of hard work as a "threat" (Tr

201). Respondent had no interest in such a "new Perma Jack" (Tr 131-32, 168, 222). They declined. That being the case, John and Judy removed Respondent, laying out their reasons in a proper Board resolution.

While the courts might be more inclined to act in the reported cases where the majority fires the minority without bothering to cite a reason, or out of pure spite or where the majority thereafter drains the company coffers, those scenarios have no relevance to this litigation. Respondent did not plead or prove any corporate waste or mismanagement, although much of Respondent's reply reads as if she did--including groundless references to "looting" and the like.

The Court should reverse the Judgment and enter its Judgment for John and Judy on Respondent's claim for breach of fiduciary duty.

B. Respondent was an employee at will

Whether Respondent was an employee-at-will under PJC's bylaws was a purely legal question for the trial court and now this Court. *Teets v. Am. Family Mut. Ins. Co.*, 272 S.W.3d 455 (Mo.App. E.D. 2008), overruled on other grounds in *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013). John and Judy argued that the Court should direct a verdict for lack of a shareholder-based right to employment, and, in fact, cited to the PJC bylaws when doing so (3/16/17 Tr 312). John and Judy's affirmative defenses clearly stated their belief that they had every right to terminate Respondent under the PJC bylaws:

> I. Counts I and II are barred because Plaintiff has no right to continued employment by PJC based upon her shareholder status and, under the law

> of this case, John and Judy had the power and authority to terminate her, and did so according to the Bylaws as set forth in Affirmative Defense E.

(D115, p. 7). Affirmative Defense E stated:

> E. Counts I-III are barred because John and Judy had the power and authority to terminate Plaintiff whenever in their judgment the best interests of PJC would be served by her termination and acted pursuant to that authority

(D115, p. 7).

Respondent never claimed that John and Judy were not entitled to a directed verdict because Respondent was not an employee at will until Respondent raised it response to John and Judy's post-trial motions (D 122). John and Judy were surprised by the argument then (it had merited only a footnote in John and Judy's post-trial motions) and are surprised by it now, given Respondent's wrongful discharge claims previously alleged in this case.

Nonetheless, John and Judy raised the issue in their initial brief here because of the pages Respondent devoted to the issue in their reply brief before the Court of Appeals. There (and now) Respondent took the position that, whether or not Respondent was entitled to a fiduciary-rooted right to employment depended on whether Respondent was an employee-at-will. That is a legal issue that the trial court necessarily ruled against Appellants, and one that this Court can now review *de novo.*[2] John and

[2] John and Judy's legal arguments necessarily encompassed the issue. *See, e.g., Saddleridge Estates, Inc. v. Ruiz,* 323 S.W.3d 427 n.2 (Mo.Ct.App. 2010); *Kaplan v. U.S. Bank*, 166 S.W.3d 60 n.2 (Mo.Ct.App. 2003). As in these cases, the trial court clearly understood the legal issue presented.

Judy did not consider the bylaws—which were most certainly in evidence—to be any barrier to a directed verdict, and the cases from Missouri and other jurisdictions bear that out.

Respondent complains that John and Judy never argued at will employment to the jury (R.Br. 22). However, whether the trial court should have directed a verdict consistent with the bylaws is a very different legal question from the factual inquiry submitted to the jury—whether Appellants *violated* a fiduciary duty to Respondent.[3] Once the trial court denied John and Judy's motions for directed verdict, the remaining jury question (incorrectly, but) necessarily turned on whether John and Judy observed a fiduciary duty to Respondent, a minority shareholder. It did not matter whether Respondent was an employee at will, an employee for a specified term, etc. There was no point in arguing that Respondent was an at will employee to the jury—the trial court had already ruled that did not save John and Judy from allegedly violating their fiduciary responsibilities.

Appellants obviously do not agree with the trial court's decision. The many cases cited demonstrate that PJC's bylaws create an employment at will. The PJC shareholders had the ability by statute to alter their employment relationship by contract, but did not. The Court should not encourage those disappointed by their termination to embroil the remaining officers and directors in expensive litigation, when those officers

[3] Respondent ignores this distinction and *assumes* that the bylaws engraft a good faith standard for discharge when, for example, attempting to distinguish *Swanger* and *Piekarski* (R.Br. 23).

and directors are charged with no malfeasance other than their disagreement over the shareholder's value to the company.

The Court should reverse the jury's verdict and enter judgment in favor of John and Judy on Respondent's breach of fiduciary duty claim.

II. The Trial Court erred in admitting evidence of post-termination salaries because Respondent conceded the amount of the salaries was irrelevant and the evidence merely served to inflame the jury (Appellants' Point Relied On III)

The trial court should not have admitted evidence of the salaries and bonuses paid after Respondent's termination because the evidence was of no probative value and served only to inflame the jury. Respondent all but concedes the point in her response: "The relevant issue is not whether the compensation was excessive" (R. Br. 40). That is one of the few things agreed to by the parties. The fact that John and his daughters were the only PJC employees post-termination was certainly admissible. However, there was no reason to introduce the *amount* of their salaries when Respondent did not complain that the salaries were excessive or unjustified.

The only reason to admit this evidence was to fuel Respondent's desire to argue a derivative case without proving *or pleading* one.[4] Thus, in her brief, as she did at trial, Respondent repeatedly refers to John's "personal profit" (R.Br. 41)—even though Respondent never claimed that John was paid a penny more than he should have been paid.

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[4] Respondent goes so far as to suggest that John bore the burden of proof to justify their salaries, citing the rule of law applicable only to "suits by stockholders to recover for the corporation, salaries claimed to be excessive and paid to officers, who are also directors." *Fendelman v. Fenco Handbag Mfg. Co.*, 482 S.W.2d 461, 463 (Mo. 1972)(R.Br. 42).

John and Judy filed a motion in limine and timely objected to the introduction of the evidence. They did not thereafter invite error by cross-examining Respondent (and securing her admission that the salaries were appropriate) or subsequently asking their expert to address the improperly admitted evidence. This has been the law in Missouri for more than a century:

> One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. *Russ v. Railway Co.*, 112 Mo. 45, 50, 20 S.W. 472, 18 L.R.A. 823; *Gardner v. Railway Co.*, 135 Mo. 90, 98, 36 S.W. 214.

Salt Lake City v. Smith, 104 F. 457, 471 (8th Cir. 1900). *See also*, *United States v. Konovsky*, 202 F.2d 721, 727 (5th Cir. 1958)(citing *Smith*). As stated by this Court:

> Moreover, plaintiff's counsel had unavailingly objected to the introduction of the hospital record in evidence, and having thus objected and been overruled, there was no waiver of the objection by virtue of the subsequent cross-examination of Dr. McClellan upon the same subject matter.

Tinsley v. Wash. Nat'l Ins. Co., 97 S.W.2d 874, 880 (Mo.App. E.D. 1936).

Any other rule would put the objecting party in an impossible position:

> Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent…. They had not invited the error of that ruling, but had protested against it. This was all that they could do…. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By

> no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established.

Salt Lake City v. Smith, 104 F. at 470-71. *See also, Commonwealth v. Charles*, 411 A.2d 527 n.12 (Pa.Super. 1979)(quoting *Smith*).[5]

Respondent admits that the Court should not have admitted the salary evidence to show it was excessive—and admitted that the salaries *were not* excessive (Tr 147). Respondent agreed that John and his daughters *should* be paid more if they were working harder (Tr 146). Nonetheless, the salaries, and the suggestion that they were unreasonable, became the focus of Respondent's argument to the jury and ultimately influenced the trial court's ruling as well. The trial court erred by admitting the evidence of the salaries and bonuses.

III. The trial court should have held Respondent to an irreparable harm standard to prove oppression because Respondent elected a buyout remedy (Appellants' Point Relied On IV)

This case presents a case of first impression on the following question: What is a plaintiff's burden of proof under RSMo. §351.494 where the plaintiff elects to

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[5] This is not a case like *Eighinger* cited by Respondent where the complaining party lost his motion in limine and then first introduced the objectionable evidence. *Eighinger*, 931 S.W.2d 835, 838 (Mo.App. W.D. 1996).

pursue a buyout in lieu of dissolution? This is not a case where the Court, after considering the evidence, decided that a buyout was preferable to a claim for dissolution. Respondent withdrew her request for dissolution and *asked for* a buyout. Neither is this a case where the plaintiff alleges *past or ongoing* corporate waste or mismanagement. Respondent withdrew all her derivative claims—a concession that John and Judy have not and are not causing harm to PJC.

Respondent complained of a single wrong—her termination. Thus, the beginning point for the Court's analysis is the settled principle that the Missouri courts have long held that "[u]nless extremely serious, no single act would constitute sufficient oppression to allow dissolution." *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 467 (Mo.App. E.D. 1992). The parties agree that Respondent would have to prove irreparable harm, imminent danger of loss or a miscarriage of justice to justify dissolution (R. Br. 44). John and Judy submit that, where a minority shareholder elects a buyout remedy, the Court should hold the shareholder to the same standard where, as here, the shareholder does not complain of mismanagement, theft, fraud or waste. *Accord*, *Bedore v. Familian*, 125 P.3d 1168, 1173 (Nev. 2006)(reversing trial court's buyout remedy where "[t]he dissension among the three shareholders did not threaten irreparable injury to Silver State, and Familian and Athey had not abandoned the business. Finally, Bedore did not request dissolution of Silver State in his complaint; rather, he asked the district court to issue a mandatory injunction forcing Familian and Athey to pay him reasonable compensation to buy out *his* interest in Silver State")(emphasis in original).

From John and Judy's perspective, a forced buy out is no less burdensome or harsh than dissolution. John and Judy remain obligated for PJC's continued operation and growth, now with the added burden of financing the acquisition of Respondent's shares if the Judgment stands. The buyout is the ultimate insult to John in particular, who now devotes 60 hours a week to PJC, and whose devotion to PJC has never been called into question by Respondent. Given the acrimony between these siblings, had Respondent believed that John (or Judy) had acted in any way to the detriment of PJC, that claim would have found its way into a derivative action. Absent such allegations, which permeated the *Whale Art* decision cited by Respondent, Respondent should have to allege and prove the stringent predicates to dissolution to justify the harsh remedy of a forced sale. Absent imminent danger of irreparable harm, a forced buyout is not a remedy for the plaintiff. Rather, it constitutes a punishment to those left to continue the successful operation of the company.

IV. The Trial Court's finding of shareholder oppression was against the weight of the evidence because Respondent introduced no evidence that Appellants acted regardless of the consequences to PJC (Appellants' Point Relied On V)

John and Judy do not base their challenge to the trial court's ruling on a "vague proposition of law" (R.Br. 31). In order to find shareholder oppression, the trial court had to find—"a case must be made out"—that John and Judy "acted with an intent to subserve some outside purpose, *regardless of the consequences to the company*, and in a manner inconsistent with its interests." *Herbick v. Rand*, 732 S.W.2d 232, 234-35 (Mo.App. E.D. 1987)(emphasis in original).

Although the trial court did not recite that factual determination, it was necessary to its ruling and, under Rule 73.01, "[all] fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." This Court's review "includes facts expressly found in the written judgment or necessarily deemed found in accordance with the result reached." *England v. England,* 454 S.W.3d 912, 914 (Mo.App. W.D. 2015). *See also, Ivie v. Smith*, 439 S.W.3d 189, 206 (Mo. 2014); *Detmer v. United Security Ins. Co*., 309 S.W.2d 713, 717 (Mo.Ct.App. 1958)("The ultimate question in the determination of this case is whether or not the implied finding of fact by the trial judge that the plaintiff was riding in a 'private passenger automobile' is without substantial evidence to support it").[6]

John and Judy properly cited all the favorable evidence conceivably supporting the notion that they acted "regardless of the consequences to the company, and in a manner inconsistent with its interests." John and Judy do not understand, for example, how the fact that John Robinson and Jessica Langenbach continued to receive their salaries is probative of anything. Or the fact that PJC happened to have money in the bank when Respondent was terminated. Or the fact that John supposedly "increased expenses" while revenues were flat—which theoretically might support a derivative claim, but has nothing to do with whether Respondent's termination was done "regardless of the consequences to the company." Similarly, while Respondent references John and

[6] In *Hopkins*, cited by Respondent, the appellant failed to identify any factual proposition at all. In *O'Gorman,* the appellant failed to refer to *any* favorable evidence. *See* R.Br. 50-52. Neither case addresses the Court's review of deemed or implied findings.

Jessica's bonuses and salary, as previously indicated, Respondent apparently agrees that the amount of those items was not relevant.

At the end of the day, Respondent views *everything* through the lens of her termination. However, none of the facts Respondent cites as missing from Appellants' recitation have any bearing on whether John and Judy acted "opposed to the true interests" of PJC or "regardless of the consequences to the company, and in a manner inconsistent with its interests" *when they terminated Respondent.* By all accounts, PJC has thrived since Respondent's termination. John did not, as sometimes happens in these cases, terminate Respondent so that he could bleed the company dry. There is no derivative claim for corporate waste here, no claim that John paid himself or his daughters too much and no suggestion that Judy has taken *anything* from PJC. Respondent does not point to proof that John and Judy hurt PJC, because there is none. To the contrary, the uncontroverted evidence demonstrated that John honored his admonition to Respondent and her son. John now works 60 hours a week (as opposed to 8) and his hard work has borne fruit—PJC now has 10 new licensees.

John and Judy asked Respondent to step aside, and, when she refused, Appellants told Respondent and her son that PJC's future depended upon a new commitment from the officers and employees. John made good on that commitment. There is not a solitary piece of evidence that John and Judy did *anything* contrary to *PJC's* best interests. Respondent abandoned any claims she had that John or Judy damaged PJC and, to this day, has never articulated how John and Judy did anything "in a manner inconsistent with" PJC's interests.

Respondent simply offers up reasons why she thinks she was a good PJC President or at least entitled to remain in that position, in her opinion. That is an argument that John and Judy acted contrary to *her* interests, nothing more. That will always be the case when directors vote to terminate an officer and, as a result, that cannot be and is not actionable shareholder oppression. Even if John and Judy were motivated by some ill will toward their sister, and not by their stated objections to her business practices, those motivations are irrelevant to the issue before the Court: "A director's motivation is different than whether there was a rational basis for a decision." *Ironite Products, Inc. v. Samuels,* 17 S.W.3d 566, 573 (Mo.App. E.D. 2000).

RESPONSE TO CROSS-APPEAL

Statement of Facts

The trial court heard from two valuation experts, Mike Prost (Appellants) and Chris King (Respondent).

A. Mike Prost

Mr. Prost explained that, whatever the valuation methodology, all seek to encompass "market conditions and an underlying concept of fairness" (11/1/17 Tr 77). Most contemplate a level of fairness to both buyer and seller, although there are exceptions. "Investment Value," for example, requires the valuation expert to examine value solely from the buyer's perspective (11/1/17 Tr 78-79). But, as a general rule, valuation of a shareholding interest requires some consideration of the interests of both buyer and seller (11/1/17 Tr 79).

Fair market value contemplates a valuation based upon the traditional willing buyer and willing seller (11/1/17 Tr 77-78). Fair value, however, contemplates a specific buyer and specific seller under identified circumstances—in this case, in the context of a shareholder oppression claim (11/1/17 Tr 78). The two methodologies contemplate different dates of valuation. Fair market value is appropriate if the Court would award a present day value, because fair market value necessarily includes the benefits (or burdens) of the company's operations since the allegedly oppressive conduct (11/1/17 Tr 79). On the other hand, fair value contemplates a valuation immediately before the oppressive conduct, so that the seller (Respondent) is neither punished by poor results nor benefitted by extraordinary results occurring in her absence (11/1/17 Tr 79-

80). In that way, Respondent receives the value of her “investment” as if her termination never occurred.

The treatises introduced by both parties confirmed this approach. John and Judy introduced the Trugman treatise, which stated:

> An appraisal is an estimate of value at a given point in time. The date of the appraisal, whether statutorily mandated or otherwise, is of great importance. And by now, you that that. Most state statutes provide that when a dissenting shareholder’s stock is to be purchased, fair value is determined as of the day prior to the meeting of shareholders at which the action dissented from was opposed….This means that the dissenting shareholder does not get credit for any gain nor is he or she penalized for any loss that results from the action from which he or she dissented. **This actually makes sense when you think about it.**

(D. Ex. 10-26 E at 628) (emphasis added). Respondent introduced the Pratt treatise, which provided that the date of a fair valuation should be “immediately before the effectuation of the corporate action to which the shareholder objects” (P. Ex. 31 at 917). Mr. King, Respondent’s expert, testified as follows:

> Q. Right. And it goes on to indicate, which now gets to why I was harping on dissenting shareholders, that "In those instances the date of value is typically the day prior to the decision to sell;" correct? Do you see that?
>
> A. Where are you at? You're on page 628?
>
> Q. Yes.

A. Valuation date. Says, "Date of the appraisal whether statutorily mandated or otherwise is of great importance."

Q. Indicates "Most state statutes provides that when a dissenting stockholder stock is to purchased, fair value is determined as of the day prior to the meeting of the shareholders." Do you see that?

A. Okay.

Q. And if you look at the last sentence in that paragraph it tells you why when you're using fair value, as you are, it's because, "This means that the dissenting shareholder," here Mrs. Robinson, "Does not get credit for any gain nor is he or she penalized for any loss that results from the action from which he or she dissented." Do you see that?

A. Yep.

Q. Okay. That's what you should aspire to in a fair value analysis, correct?

A. Yes.

(10/26/17 Tr 51-52; emphasis added).

The Court utilized Mr. Prost's fair valuation of Respondent's interest as of September 30, 2012, the closest fiscal year results to Respondent's June 2012 termination, including the application of minority and marketability discounts (D140 pp. 9-10, ¶¶ 34-35; D.Ex. 10-26 B; 11/1/17 Tr 84).

Both parties' treatises pointed out that there is no hard and fast rule regarding the use of discounts to determine fair value. Trugman observed that "the case law is literally all over the place" (D.Ex.10-26 E at 624). Pratt agreed that the use of discounts "vary considerably from state to state," and that "some allow both lack of control and lack of marketability discounts" (P.Ex. 31 at 931). When asked on direct examination regarding the propriety of the use of discounts in the fair value context, Mr. King, Respondent's expert testified: "Again it would be an interpretation of the Court as to whether or not these ultimately would apply in this context" (10/26/17 Tr 38-39).

Mr. Prost's fair value approach followed the methodology advocated by the parties' treatises to provide Respondent with the value of her shares unaffected by circumstances flowing from her termination. Using 2012 income, Mr. Prost made a normalizing adjustment for legal fees, because the extraordinary fees paid during 2012 would obviously not have been incurred absent Respondent's termination (11/1/17 Tr 86-87). There was no need to "normalize" 2012 salaries as both John and Respondent presumably paid themselves at a rate they jointly deemed appropriate that year (11/1/17 Tr 85-86). Applying both marketability and minority discounts, Mr. Prost concluded a fair value of $59,000 for Respondent's 1/3 interest in PJC (11/1/17 Tr 91).

B. <u>Chris King</u>

Mr. King performed what appeared to be a hybrid analysis that he labeled a fair value report. However, Mr. King acknowledged that "the date of the appraisal is of great importance" (10/26/17 Tr 50-51, 53). Mr. King also acknowledged that learned treatises in the area (and the Missouri dissenting shareholder statutes) contemplated that "fair value" should be calculated at a moment in time just prior to the objectionable conduct so that Respondent would not benefit from John's hard work, or be punished if John did a poor job (10/26/17 Tr 51-52, 53). Nonetheless, Mr. King picked a 2017 valuation date, which is, of course, five years after Joan's termination (D.Ex. 10-26 C at 3). Mr. King presumably chose that date so that he might work from 2017 net income figures that were nearly 3 times those experienced in 2012 (D.Ex. 10-26 C at 4, 24). Despite picking a 2017 valuation date, Mr. King chose to normalize utilities, rent and travel to 2012 rates (D.Ex. 10-26 C at 4), presumably because 2012 expenses were lower (and thus resulted in a higher valuation). Mr. Prost strongly disagreed with that approach:

> Well, it's a proverbial mixing oranges and apples….so to isolate any of these expenses and say you could produce those results with another year's expenses, is ridiculous actually. It's preposterous. So the entire accounting profession of income is based on the matching principle. And the matching principle is matching the revenues and expenses of the appropriate periods properly.

(11/1/17 Tr 92).

Argument

I. The Trial Court did not err in applying minority and marketability discounts in determining the fair value of Respondent's stock because Respondent was not an unwilling seller inasmuch as Respondent elected a buyout remedy (Respondent's Points Relied On I and II)

The trial court appropriately disregarded Mr. King's analysis and relied upon Mr. Prost's conclusions, as follows:

Indicated Operating Equity Value	$233,194
Respondent's Interest	33.3%
	77,724
Minority Int. Discount (15%)	(11,659)
	66,065
Marketability Discount (10%)	(6,607)
	59,458
Value, Rounded	$59,000

(D.Ex. 10-26 B).

The last Missouri state court decision addressing the use of minority and marketability discounts in the fair value context approved the use of both discounts and concluded that whether to use either or both discounts was within the "sound discretion of the trier of fact." *King v. F.T.J., Inc.*, 765 S.W.2d 301, 305, 306 (Mo.App. W.D. 1988). The Eighth Circuit refused to follow *FTJ* in *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486 (8th Cir. 2001), though conceding that even it would use discounts in the fair value context in "extraordinary circumstances." *Id.*, at 493. Also important is the fact that *Swope* addressed the issue "in an appraisal action, where the minority sellers are unwilling to dispose of their stock." *Id.*, at 495. In that context, the minority are "*unwilling* sellers with no bargaining power." *Id.*, at 492 (emphasis added).

One of the cases cited by the Eighth Circuit recognized "the 'harder question' of whether to apply a marketability discount where the oppressing shareholder buys out the oppressed shareholder." *Advanced Communication Design, Inc. v. Follett,* 615 N.W.2d 285, 292 (Minn. 2000). *See, Swope*, 243 F.3d at 493. The Minnesota court acknowledged that discounts could work to the disadvantage of an oppressed shareholder, but also recognized that "a bright-line rule that would foreclose consideration of a marketability discount in all circumstances could lead to a valuation that is unfair to the remaining shareholders." *Follett*, 615 N.W.2d at 292. In *Follett,* the court *applied* a marketability discount where the undiscounted price would have provided the plaintiff with "a value for his stock based on the past growth of the corporation, but the remaining shareholders are left with stock in a corporation that has extremely doubtful potential for growth." *Id.,* at 293.

The Eighth Circuit also referred to the often cited treatise, American Law Institute, *Standards for Determining Fair Value, Principles of Corporate Governance: Analysis and Recommendations* (ALI) § 7.22 (1994). *Swope,* 243 F.3d at 492. The ALI treatise recognizes the "extraordinary circumstances" proviso and indicates that "[t]he valuation principles adopted by § 7.22 are those that are appropriate for appraisal, and they do not necessarily apply in other contexts…." ALI, § 7.22, Cmt. e. The ALI commentators suggest that extraordinary circumstances might exist where "the dissenting shareholder has held out in order to exploit the transaction giving rise to appraisal so as to divert value to itself that could not be made available proportionately to other shareholders." *Id*.

While the scenario posited by ALI is not an exact fit here, it does allude to the extraordinary circumstances present in this case that justify the use of marketability and minority discounts here. First, this case is different from most statutory buy out cases because the trial court ordered John and Judy, *not* PJC, to purchase Respondent's stock. *See, e.g.,* RSMo §351.455 ("The surviving or new corporation shall pay to each such dissenting shareholder…").[7] Thus, John and Judy must acquire stock that they do not need given their current controlling interest. Judy is particularly disadvantaged. Despite her service on the Board, Judy has never asked for or received any remuneration for her shareholding interest.

Second, despite Respondent's protestations, this is not a case where the Court foisted the buyout upon an "unwilling seller," or where defendants insisted upon or elected the buyout remedy. Respondent's pleadings always sought relief in the alternative—i.e., dissolution and/or repurchase of Respondent's stock. John and Judy could not know, and did not know, which remedy Respondent would choose until Respondent announced her final intentions at trial. Indeed, Respondent made it clear as late as January 2017 that she had yet to decide on which remedy she would pursue:

> However, additional evidence may need to be put before the Court for determination of the appropriate remedy for Plaintiff on Count I at a hearing sometime after the February 14, 2017 jury trial. **Plaintiff will not know the appropriate relief to request from the Court on Count I until the jury has decided Counts II and III.**

[7] Respondent incorrectly states that, under the Missouri statute, either the company or the majority must purchase the stock (R.Br. 62).

(D216, p. 2, Respondent's Motion for Separate Trials filed 1/27/17)(emphasis added).

It was Respondent's *right* to maintain that position, whether she did it to impose maximum leverage or otherwise. But she obviously did not want to risk a fire sale attendant to dissolution.[8] The use of discounts ensures that Respondent will not benefit from the implementation of that litigation strategy and Appellants will not be disadvantaged by it:

> In this case, it is undisputed that neither the articles of organization nor any corporate bylaw obligates Malden or the defendants to purchase the plaintiff's shares. Thus, there is nothing in the background law, the governing rules of this particular close corporation, or any other circumstance that could have given the plaintiff a reasonable expectation of having her shares bought out.
>
> In ordering the defendants to purchase the plaintiff's stock at the price of her share of the company, the judge created an artificial market for the plaintiff's minority share of a close corporation -- an asset that, by definition, has little or no market value. Thus, the remedy had the perverse effect of placing the plaintiff in a position superior to that which she would have enjoyed had there been no wrongdoing.

Brodie v. Jordan, 857 N.E.2d 1076, 1081 (Mass. 2006)(citations omitted).[9]

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[8] "The old story, so often told, of a prominent Eastern newspaperman's reply to the question of what the shares in his company were worth, is very apt: 'There are 51 shares, said he, that are worth $250,000. There are 49 shares that are not worth a -- --.'" *Humphrys v. Winous Co.*, 133 N.E.2d 780, 783 (Ohio 1956).

[9] Respondent tried to double down on this peculiar result with highly questionable expert testimony that inappropriately inflated the sale price by mixing and matching revenues and expenses, among other things.

Appellants have not located a case discussing whether it is appropriate to use minority and marketability discounts where the minority *asks* to be bought out, eschewing other possible remedies. Where the minority *picks* this remedy, the shareholder should not benefit from the choice by forcing the majority to buy according to a market and market value that do not exist. The circumstances are particularly extraordinary here given Respondent did not buy her shares in the first place. Respondent did not invest in this stock with the expectation, reasonable or otherwise, that she would ever profit from its sale. Indeed, there is no evidence to suggest that Respondent could have any reasonable expectation that she could ever sell her PJC stock at all, to anyone—absent a sale of the entire company.

Should the Court affirm the trial court's finding of shareholder oppression, the Court should affirm the trial court's valuation of Respondent's stock.

II. The Trial Court did not err in using the date of termination to value Respondent's stock because, in doing so, the trial court ensured that Respondent would not benefit from Appellants' success or be punished by Appellants' mismanagement of PJC post termination[10] (Respondent's Point Relied On III)

Respondent's position that the trial court should have determined the fair value of her shareholding interest as of 2017, instead of 2012, is contrary to the testimony of *both* experts, contrary to the treatises introduced by *both* parties and contrary to

[10] Appellants question whether this Point Relied On preserves any matter for review. It consists of "vague legal conclusions without a clear proclamation as to how the trial court erred." *Parker v. Dubois*, 489 S.W.3d 328, 332 (Mo.App. E.D. 2016). For example, it does not identify "the facts found by the jury" (R. Br. 46) and, as a result, does not and cannot state how the trial court's ruling failed to "fit the circumstances of case [sic]" by failing to conform to them.

direction suggested by Missouri law. The trial court did not abuse its discretion when it determined and applied the fair value as of the date of Respondent's termination. That choice ensured that Respondent would not be punished had John mismanaged PJC following her termination, or benefitted by John's success. The trial court's choice of 2012 was fair.

As Respondent points out, the Eastern District determined that there is "no bright-line rule regarding the date for valuing corporations in dissolution actions" in *21 West v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858, 968 (Mo.App. E.D. 1995). In *21 West,* the Court affirmed the trial court's valuation date (as of the date when the oppression began) specifically because the trial court accounted for the diminution in value thereafter caused by the oppressor's conduct. *Id.* Thus, the court of appeals approached the issue just as the parties' treatises recommend—the minority "does not get credit for any gain nor is he or she penalized for any loss that results from the action from which he or she dissented" (10/26/17 Tr 51-52).

Missouri's analogous dissenting shareholder statutes are consistent with the trial court's approach. Section 351.455, deals with shareholder dissention from corporate mergers, and provides that the shareholders are entitled to be paid fair value for their shares, valued as of the day prior to the date on which the vote was taken approving the merger. Section 351.405 deals with shareholder dissention from a sale of all or substantially all of a corporation's assets, and provides that the shareholder is entitled to the fair value of his shares as of the day prior to the date on which the vote authorizing the sale was taken.

The approach makes sense here. Respondent should not be rewarded for John's hard work that has improved PJC's financial condition—and it seems highly unlikely that Respondent would have instructed her expert to value her interest using 2017 income had that been a bad year, or had PJC cratered under John's leadership. There is no reason to believe that PJC would have turned around absent Respondent's termination and John's work ethic. There is no reason to believe that Respondent would have insisted upon the increased hours necessary, or that she or her son were inclined to work any harder. To the contrary, John Robinson testified flat out that he was not and Respondent was adamant that 8 hours a week was more than enough time to devote to PJC business.

Valuation as of the date of Joan's termination provides her with the full value that she created by virtue of her thirty years as President and CEO. *Accord, Torres v. Schripps, Inc.*, 776 A.2d 915, 918, 925 (N.J. Super. Ct. App. Div. 2001) (choosing the date when a plaintiff shareholder was terminated from employment as the valuation date because "[t]he decrease in the corporate value from February [the termination date] to September was not due to plaintiff's efforts, but may have been due to [the majority shareholder's] lack of experience in managing the corporation. Because plaintiff was terminated, it was fair not to ascribe the losses to plaintiff"); *Hughes v. Sego Int'l Ltd.*, 469 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1983)(as between the date on which the oppressed plaintiff was fired and the date on which the judgment for dissolution was entered, the judge "adopted the earlier date since the subsequent increase in value of [the company] could not be attributed to plaintiff's efforts").

III. The Trial Court did not err in refusing to award pre-judgment interest because Respondent did not demand or request a buyout until trial (Respondent's Point Relied On IV)

The trial court did not abuse its discretion when it decided not to award pre-judgment interest to the purchase price for Respondent's stock. In most situations, Missouri law predicates an award of pre-judgment interest on proof that the successful claimant previously made demand on the defendant, the notion being that the defendant cannot complain if he failed to pay a sum due when he had the chance. For example, RSMo. §408.020 governs interest awards generally and permits an interest award "for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made." Section 408.040 governs the award of pre-judgment interest in tort cases, and provides "if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives…and the amount of the judgment or order exceeds the demand for payment or offer of settlement, then prejudgment interest shall be awarded…." *See also*, *Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 106 (Mo.App. W.D. 2012)("the obligee must make a demand on the obligor for the amount due" to support award of pre-judgment interest).

Respondent never made any demand that John and Judy purchase her PJC stock. The filing of a lawsuit can sometimes substitute for a demand for payment. *Ogg v. Mediacom*, LLC, 383 S.W.3d 108 (Mo.App. W.D. 2012). However, as previously mentioned, Respondent's pleadings always sought relief in the alternative—i.e., dissolution and/or repurchase of Respondent's stock. Respondent indicated that she could not make her decision until the jury spoke: "Plaintiff will not know the appropriate relief to request from the Court on Count I until the jury has decided Counts II and III" (D216, p. 2).

The Eighth Circuit's decision in *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 497 (8th Cir. 2001) is not on point. In *Swope*, the governing statute, RSMo. §351.455(3), "expressly state[d] that a dissenting shareholder seeking appraisal is entitled to judgment based upon the fair value of the stock as of the day prior to the date of the vote approving the corporate action, 'together with interest thereon to the date of such judgment.'" *Swope*, 243 F.3d at 497. The dissolution statute governing Respondent's claim does not contain similar language.

Respondent decided to hedge her bets, holding out the threat that she might push for dissolution instead of a buyout. Perhaps Respondent thought the strategy might provide her with leverage as the case proceeded. Regardless, this was no "war of attrition" as suggested by Respondent (R.Br. 77). Until the last possible minute, Respondent threatened her siblings with dissolution of their father's company. There is no basis, equitable or otherwise, to award Respondent pre-judgment interest.

IV. The Trial Court did not err when it did not award any relief based on PJC's indemnification of John and Judy because Respondent did not plead or request such relief (Respondent's Point Relied On V)

Missing from Respondent's argument on this point is the fact that Respondent never pleaded *any* claim to recover legal fees paid by PJC, derivative, equitable or otherwise. *See* D112, Third Amended Petition. At the bench trial, neither Respondent nor her counsel mentioned the indemnified fees. Respondent did ask the

Court to require John and Judy to pay *Respondent's* fees (10/26/17 Tr at 67-68). But Respondent did not ask the Court for any relief relating to the fees paid by PJC. Had Respondent done so, Appellants would have pointed out that the claim should have been brought as a derivative claim.

Respondent first mentioned the indemnified fees *after* the trial in her Suggestions in Support of her proposed judgment (D136 p. 12). However, in her Proposed Judgment, Respondent mentioned the fees only to justify her request that John and Judy pay her lawyer. Respondent did not ask the trial Court to for any relief at all for the indemnified fees (D137 pp. 15-16).

A close reading of the trial court's Judgment reflects that the court understood that Respondent referred to the indemnified fees only to support her claim that the court should order John and Judy to pay Respondent's fees. The Court referred to the indemnified fees only in the context of Respondent's request that the Court deviate from the American Rule relating to the payment of fees (D140 pp. 12-13, ¶s 45-47). The Court ruled that "Plaintiff's Joan Robinson's request for attorneys' fees is denied" (D140 p. 14). The trial court did not "deny" Respondent any relief regarding the indemnified fees (R.Br. 79). The trial court did not rule one way or the other on any request for relief regarding the indemnified fees, which was perfectly proper because Respondent did not plead or request any such relief at trial. *See, e.g., Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 432 (Mo. banc 2016) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review").

Had Respondent brought a claim to recoup fees for the company, it would have been derivative. A claim that the corporation improperly indemnified its directors' legal fees is a claim that runs to the corporation:

> Corporate shareholders cannot in their own right and for their own personal use and benefit maintain an action for the recovery of corporate funds or property improperly diverted or appropriated by the corporation's officers and directors. The injury is to the corporation -- to the shareholders collectively -- and not to the shareholders individually. The right to maintain the suit is a right of the corporation, and therefore, suit must be brought derivatively.

Dawson v. Dawson, 645 S.W.2d 120, 125 (Mo.App. W.D. 1982).

Respondent's current challenge to PJC's indemnification of John and Judy was, if anything, a derivative claim, not a claim relegated to the Court's equitable jurisdiction. That Respondent now wants only "her share" of the company's relief does not make it any less derivative.

The Court should not award Respondent damages for a claim she never brought.

V. The Trial Court did not abuse its discretion in denying Respondent's request for attorneys' fees because this case does not present the extraordinary circumstances necessary to avoid the American Rule (Respondent's Point Relied On VI)

The denial of a request for attorneys' fees is reviewed for an abuse of discretion. *Green v. Plaza in Clayton Condo. Ass'n*, 410 S.W.3d 272, 281 (Mo.App. E.D. 2013).

> 'A court abuses its discretion when its action is so clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration.' *Kopp v. Home Furnishing Ctr., LLC*, 210 S.W.3d 319, 329 (Mo. App. 2006). In reviewing a denial of attorneys' fees, this Court reviews the evidence with great deference toward the trial court. *Id*. "'The party requesting an award of attorney's fees has the burden of proving entitlement to such award.'" *Potts v. Potts*, 303 S.W.3d 177, 196 (Mo. App. 2010)(quoting *Andrews v Andrews*, 290 S.W.3d 783, 787 (Mo. App. 2009).

Oliver v. Ford Motor Credit Co., LLC, 437 S.W.3d 352, 366 (Mo.App. W.D. 2014).

As Respondent acknowledges, Missouri adheres to the "American Rule," which provides that with few exceptions "each litigant bear the expenses of his or her own attorney's fees." *21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858,881 (Mo.App. E.D. 1996)(R.Br. 80). "Awards of attorney's fees are permitted only when called for by contract; when provided by statute; when incurred, as an item of damages, because of involvement in collateral litigation; or when a court of equity finds it necessary to adjudge them in order to balance benefits." *Id*. (internal quotation marks omitted). The latter exception can be invoked only upon a showing of "very unusual circumstances." *Id.* (citing cases).

> "Very unusual circumstances" has been construed to mean an unusual type of case, or unusually complicated litigation. *Dugger v. Welp*, 646 S.W.2d 907, 909 (Mo.App.E.D. 1983). The party seeking attorney's fees must show the legal actions taken by the parties significantly differ from other actions taken by other parties in similar situations, or by others trying to achieve the same result.

Id., 913 S.W.2d at 881. As this Court has pointed out, "our courts have rarely found the very unusual circumstances that permit the award of attorneys' fees." *David Ranken, Jr. Technical Inst. v. Boykins,* 816 S.W.2d 189, 193 (Mo. 1991). The exception is only triggered where the plaintiff proves the defendant "engaged in intentional conduct that was spiteful, fraudulent, or groundless." *Trustees of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC,* 2019 Mo.LEXIS 315 *34 (Mo. 2019).

Respondent has not demonstrated the "very unusual circumstances" required to invoke the equitable exception. The *21 West* case cited by Respondent makes clear that Respondent cannot do so. In that case, this Court reversed an award of attorney's fees under the equitable exception in a shareholder dispute involving contested valuation issues – claims and issues very similar to those in this case – holding that the "very unusual circumstances" standard had not been met and thus the trial court had abused its discretion in awarding attorney's fees. *Id.*, 913 S.W.2d at 881, citing *Osterberger v. Hites Constr. Co.*, 599 S.W.2d 221, 230 (Mo.App. E.D. 1980). *Kirtz v.*

Grossman, the other case cited by Respondent, does not even discuss attorney's fees or the equitable exception and is inapposite. *See id*., 463 S.W.2d 541 (Mo.App. 1971).

This case likewise did not present "very unusual circumstances." It was a standard shareholder oppression case—in actuality more akin to a wrongful termination claim. Neither the liability nor valuation issues were unusual or complex. Rather, such straightforward claims and issues are routinely involved in shareholder disputes. In comparison, the *21 West* case, also a shareholder dispute, was far more complex, involving claims for breach of contract, unjust enrichment, contempt, dissolution of a corporation, misappropriation of corporate funds, breach of corporate director's fiduciary duties, intentional interference with business expectancies, trespass and imposition of vendor's liens and stock valuation issues. Despite this complexity, this Court held that *21 West* did not involve "very unusual circumstances." *Id*., 913 S.W.2d at 881.

The trial court's refusal to award attorney's fees here is hardly "so arbitrary and unreasonable as to shock one's sense of justice." Accordingly, the trial court did not abuse its discretion in denying Respondent's request for attorney's fees.

Conclusion

For the reasons set forth above and in Appellants' initial Brief, Appellants request that this Court (i) reverse the February 13, 2018 Memorandum, Order and Judgment in Favor of Respondent on Shareholder Oppression (Count I) and enter judgment in favor of Appellants on this claim and (ii) reverse the January 13, 2018 Amended Judgment and enter judgment in favor of Appellants on Respondent's Claim for Breach of Fiduciary Duty (Count II), or, alternatively, remand for a new trial as to this claim. Additionally, for the reasons set forth above, this Court should deny Respondent's Cross Appeal.

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CERTIFICATE OF COMPLIANCE

The filing attorney certifies that this substitute reply brief includes the information required by Rule 55.03 and complies with the requirement of Rule 84.06, including the limitations stated in Rule 84.06(c) and Local Rule 360. This brief contains 10,830 words as determined by the software application for Microsoft Word. The typeface is 13 point Times New Roman, except for larger type on cover page.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 14, 2019, a true and accurate copy of this brief was filed electronically via the Missouri Electronic Filing System which sent electronic notification of such filing to all those individuals currently registered with the court to receive electronic notices.

/s/ Paul J. Puricelli