No. 81923-8

SANDERS, J. (dissenting)—The majority correctly rejects the Court of Appeals' narrow interpretation of the word "fraudulent" in RCW 23B.13.020(2). In the next breath, however, it erects a barrier that limits relief to shareholders. I see no reason—or legal support—for such a barrier. I also cannot agree with the majority's standing analysis. I would allow shareholders involuntarily divested of shares through a reverse stock split orchestrated to deprive them of standing to maintain suit. Because I would reverse the Court of Appeals on both grounds, I dissent.

ANALYSIS

I. RCW 23B.13.020

The majority concedes some claims of fraud do not belong within the appraisal remedy. *See, e.g.,* majority at 14. It nonetheless holds plaintiffs who bring claims outside the appraisal remedy must make "*some* showing that the corporate action itself . . . is 'fraudulent with respect to the shareholder or the

corporation.'" Majority at 10 (quoting RCW 23B.13.020(2)). It continues: "A dissenting shareholder cannot seek identical relief outside the appraisal proceeding by merely *alleging* fraudulent conduct." *Id*.

The majority relies on the New York case of *Walter J. Schloss Associates v. Arkwin Industries*, *Inc*., which holds: "An action for *damages alone* will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings." 90 A.D.2d 149, 161, 455 N.Y.S.2d 844, 851-52 (App. Div. 1982) (Mangano, J., dissenting), *reversed*, with adoption of dissenting opinion, 61 N.Y.2d 700, 460 N.E.2d 1090, 472 N.Y.S.2d 605 (Ct. App. 1984). Importantly, Afshin Pisheyar does not seek "identical" relief. As the majority recognized, Pisheyar brought claims for both damages *and* equitable relief. Majority at 12. Pursuant to *Schloss*, then, Pisheyar's claims for equitable relief belong outside the appraisal proceeding because they are not identical to those addressed within it.

Despite this straightforward approach, the majority asserts it would be "illogical" to allow Pisheyar's claims for equitable relief to move forward without "evidence of some fraud beyond the mere fact that a reverse stock split took place." *Id*. at 13-14. This requirement that plaintiffs must make "*some* showing," *id*. at 10, erects an unwarranted barrier to otherwise legitimate suits. This barrier makes no

sense (which might explain why the majority fails to support it with any relevant case law).[1] The appraisal remedy is a clunky and inappropriate tool for claims unrelated to share price. Moreover the majority's requirement is superfluous because preexisting court procedures already address frivolous claims. Claims lacking merit may be dismissed pursuant to various rules of civil procedure, such as CR 12(b)(6)[2] or CR 56(c).[3]

Perhaps Pisheyar would not have prevailed on these claims. Maybe the court would have dismissed them. But the majority's interference with our well-established court procedures hamstrings a prayer for relief before it has a chance to stretch its legs.

II. Standing

CR 23.1 requires a shareholder who brings a derivative suit to enjoy shareholder status when the alleged corporate malfeasance occurred. A shareholder must show he was "a shareholder or member at the time of the transaction of which

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[1] *Schloss*, 455 N.Y.S.2d at 851-52, does not comment on a plaintiff's need to make a showing of fraud. It merely mentions that suits for damages alone cannot lie outside the appraisal remedy.

[2] "A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) only 'if it appears beyond a reasonable doubt that no facts exist that would justify recovery.'" *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007) (quoting *Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994)).

[3] Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Briggs v. Nova Servs*., 166 Wn.2d 794, 801, 213 P.3d 910 (2009).

he complains or that his share or membership thereafter devolved on him by operation of law." CR 23.1. The rule further provides: "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." *Id*. CR 23.1 does not explicitly address remedies for shareholders divested of shares during litigation.

Relying heavily on *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987), the majority holds a minority shareholder loses standing to maintain a derivative action when majority shareholders involuntarily divest the minority shareholder of his shares during litigation. Majority at 15-16. *Haberman*, however, does not settle whether a plaintiff retains standing after being involuntarily divested of shareholder status. In fact *Haberman* addresses only whether a plaintiff enjoys standing to *initiate* a lawsuit.[4] It says nothing about the issue here, where we must decide divestiture's impact on standing once a suit is already live. Because Pisheyar enjoyed standing when he brought his lawsuit, *Haberman* does not help this endeavor.

Other jurisdictions, however, have mapped this landscape. Delaware, for

[4] "Standing *to bring* a stockholder derivative claim requires a proprietary interest in the corporation whose right is asserted." *Haberman*, 109 Wn.2d at 149 (emphasis added).

example, has carved out an exception to the general rule that loss of shareholder status results in loss of standing. In *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984), the court established that standing cannot be removed when the plaintiff alleges fraud against the corporate action that rescinded shareholder status.[5] *See also Lewis v. Ward*, 852 A.2d 896, 899 (Del. 2004) (noting exception when corporate action is "'perpetrated merely to deprive shareholders of the standing to bring a derivative action'" (quoting *Kramer v. W. Pac. Indus.*, 546 A.2d 348, 354 (Del. 1988) and *Lewis v. Anderson*, 477 A.2d at 1046 n.10).

Pisheyar also directs our attention to another rule that would allow him to retain standing after being involuntarily deprived of stock. Taking a cue from the American Law Institute (ALI), Oregon allows derivative suits to continue if the loss of standing "*is the result of corporate action in which the holder did not acquiesce* . . . ." *Noakes v. Schoenborn*, 116 Or. App. 464, 841 P.2d 682, 685 (1992) (quoting Am. Law Inst., Principles of Corporate Governance § 7.02(a) (Proposed Final Draft 1992).[6]

Lewis v. Anderson, 477 A.2d 1040, and *Noakes*, 116 Or. App. 464, make

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[5] In *Lewis v. Anderson*, 477 A.2d 1040, the corporate action was a merger, and here it is the reverse stock splits. The result in both cases is the same: loss of shareholder status due to involuntary divestiture of stock.

[6] The American Law Institute approved the proposed final draft. It can be found at American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 7.02(a)(2) ("Standing to Commence and Maintain a Derivative Action"), at 34 (1994).

sense. Here Pisheyar lost his shareholder status due to reverse stock splits after he initiated litigation. He opposed those reverse stock splits. I would adopt the *Lewis v. Anderson* and American Law Institute exceptions to guard against majority shareholders' terminating derivative actions by orchestrating a merger or reverse stock split for the purpose of eliminating a minority shareholder. While the majority treats exceptions almost as a dirty word, in this circumstance an exception to the general rule is precisely the answer.

The majority also goes astray by misinterpreting the plain language of CR 23.1. The majority requires that a plaintiff in a derivative action "fairly and adequately represent the interests of the other shareholders." Majority at 15-16. But this requirement does not accurately recite the rule.

A shareholder derivative action is "a suit asserted by a shareholder on the corporation's behalf against a third party (usu. a corporate officer) because of the corporation's failure to take some action against the third party." Black's Law Dictionary 509 (9th ed. 2009). The majority's misreading of the rule today forecloses Pisheyar, a shareholder, from bringing suit on behalf of the company. It would similarly bar any single shareholder in future disputes from bringing suit unless they can somehow show they represent the interests of the "other shareholders." Majority at 16.[7] In cases of closely held corporations such as Sound

Infiniti, the majority's interpretation of CR 23.1
would effectively eviscerate derivative actions by
minority shareholders.

I read the majority position to mean that a shareholder-plaintiff must somehow show he represents the interests of some percentage (a majority?) of shareholders. CR 23.1 does not require this. In fact, it permits the exact opposite. The rule begins, "In a derivative action brought by *one* or more shareholders . . . ." CR 23.1 (emphasis added). It clearly contemplates that a single shareholder can bring suit. To maintain that suit, the plaintiff must "fairly and adequately represent the interests of the shareholders or members *similarly situated*." *Id*. (italics added). The plaintiff, then, must represent only the interests of shareholders similarly situated—not the majority's notion of some percentage of the entire shareholder pool. Here Pisheyar held 19 percent of both Sound Infiniti and Infiniti of Tacoma shares prior to the reverse stock splits. He fairly and adequately represented the interests of shareholders similarly situated (i.e., himself) to enforce the rights of the corporation against the alleged misdeeds of its officers.

[7] The word "other" is not found in CR 23.1. By inserting it into the opinion, the majority changes the rule.

CONCLUSION

Because the majority today (1) restricts relief to shareholders by hampering claims properly outside the appraisal remedy and (2) denies standing to plaintiffs who are squeezed out through corporate action intended to eliminate the derivative action, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Gerry L. Alexander

Justice Debra L. Stephens

Justice Tom Chambers