Filed 9/30/19 Wood v. Sunwest Bank CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DENNIS WOOD et al., Plaintiffs and Appellants, v. SUNWEST BANK et al., Defendants and Respondents.	B286529 (Los Angeles County Super. Ct. No. BC479843)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Cooch and Taylor, R. Bruce McNew; JPG Law and J. Paul Gignac for Plaintiffs, Appellants, and Cross-Respondents.

Callahan & Blaine, Michael J. Sachs and Scott D. Nelson for Defendants, Respondents and Cross-Appellants.

I. INTRODUCTION

In a so-called "freeze-out" transaction, minority shareholders are compelled to surrender their stock in a corporation and thereby relinquish ownership. Plaintiffs, a class of investors holding common stock in a community bank, allege they were unlawfully victimized by such a freeze-out transaction. Plaintiffs assert the Defendants—the corporation, its board of directors (Board), and related business entities—orchestrated the freeze-out over a multi-year period in seemingly discreet but in fact coordinated transactions. Plaintiffs argue they received less than fair value when forced to surrender shares they held.

Defendants take the position there was no multi-year freeze-out plan, but rather a series of distinct transactions with different business rationales that ultimately resulted in the corporation becoming privately held. Defendants assert Plaintiffs received a fair price for their shares upon surrender and are instead attempting through litigation to extract an unjustified premium for their shares.

After five-plus years of litigation, including a three-week bench trial, the trial court resolved this dispute in Defendants' favor, finding no fraud, breach of fiduciary duty, or other grounds warranting relief. Plaintiff shareholders now appeal. They do not dispute the trial court's factual findings. Claiming the court applied flawed legal standards in denying them relief, Plaintiffs argue we should reverse and enter a $25.8 million judgment in their favor. We discern no error and affirm.

II. FACTUAL BACKGROUND

Sunwest Bank (Sunwest) is a California state-chartered community bank that began operations in 1970. In 1996, Western Acquisition, LLC (Western Acquisition) purchased a 43.5 percent interest in Sunwest for $3.6 million. Western Acquisition and its successor Western Acquisition Partners, LLC (WAP) were the controlling shareholder of Sunwest from 1996 until 2009.

A. The Private Placement

During the banking crisis in the late 2000's and early 2010's, Sunwest sought to (and did) profit by purchasing the assets of failed financial institutions at prices it believed were favorable. To fund such acquisitions, in 2009 the Sunwest board approved raising capital by forming a Delaware law holding company called Sunwest Bancorp (Bancorp), and issuing up to $10 million in new Sunwest common stock which Bancorp would in turn purchase. This capital infusion from Bancorp was accomplished through a private placement (the Private Placement), whereby stock was sold directly to Bancorp, as opposed to being sold through a public offering to a market then wary of financial stocks.

The private placement proposal was disclosed to Sunwest board members at multiple meetings and approved by a majority of disinterested board members (in other words, those who were not directors or otherwise affiliated with Bancorp). Sunwest also sought and received approval from its state and federal banking regulators for the transaction. To ensure the proposed price per share of the Private Placement was fair, Sunwest retained FIG Partners, LLC (FIG), an investment banking firm familiar with the community banking industry, to provide a fairness opinion. FIG made a presentation to the Sunwest board valuing the shares to be issued at $1,533.33 per share prior to any board approval of the Private Placement. Based on the Board's review and analysis of the FIG fairness opinion, information provided by Sunwest's officers and attorneys, and the approvals by federal and state regulators, the Board unanimously approved a resolution authorizing the Private Placement, and the issuance of up to $10 million worth of new Sunwest common stock.

In September 2009, WAP transferred its existing shares of Sunwest to Bancorp, and Bancorp became Sunwest's controlling shareholder—owning 12,694 shares of Sunwest's then-outstanding 17,142 shares, or 74.05 percent. In December 2009, Bancorp purchased 5,217 new Sunwest shares issued as part of the Private Placement for $1,533.33 a share—$7,999,383 in total. This increased Bancorp's Sunwest ownership share to 80.1 percent.

In a follow-on transaction in March 2010, Bancorp purchased an additional 500 shares for $1,533.33 per share, at a total price of $766,665. This second tranche of the Private Placement increased Bancorp's ownership percentage of Sunwest to 80.5 percent.

B. The 2011 Reverse Stock Split (2011 RSS)

In 2011, Sunwest considered a reverse stock split, which is a transaction resulting in "the pro rata combination of all the outstanding shares of a class into a smaller number of shares of the same class by an amendment to the articles [of incorporation] stating the effect on the outstanding shares." (Corp. Code,

§ 182.)[1] In Sunwest's case, the contemplated reverse stock split would combine every ten outstanding shares of common stock into one new share. Sunwest considered a reverse stock split as a preliminary step towards becoming a private company whose shares were no longer publicly traded. One way in which a California corporation can go private is through a "short form merger" under section 1110. In such a merger, a publicly traded subsidiary (like Sunwest) can merge with a privately held parent corporation (like Bancorp) upon the execution of a board resolution and the filing of a certificate of ownership. To be eligible for this type of streamlined merger, however, the parent company must own at least 90 percent of the outstanding shares of the subsidiary. (§ 1110, subd. (a).)

At the conclusion of trial, the trial court found that although Sunwest contemplated going private at the time of the 2011 RSS, "Sunwest had not yet made any definitive decision with respect to that potential transaction." Other reasons for the reverse stock split included eliminating administrative burdens and costs associated with small shareholder accounts and avoiding issues with escheatment of stock by shareholders who did not realize they still held shares because of past complications in Sunwest's corporate history.

Sunwest's board discussed the potential reverse stock split several times before moving forward with the transaction. Eric Hovde, the Chairman of the Board of Sunwest, was involved in these discussions. Hovde also served as President, Chief Executive Officer and a director of Bancorp from December 2009

---

[1] All statutory references are to the Corporations Code unless otherwise specified.

until at least December 2015. Hovde was also the managing member of Western Acquisition and then WAP. In 2013, WAP transferred its interests in Bancorp to an entity called H Bancorp, a holding company controlled by Eric Hovde and his brother Steve. As a result of these various corporate relationships, Eric Hovde was one of the controlling shareholders of Sunwest.

In addition to Eric Hovde, the Sunwest board included Glen Mozingo, Russell Wertz, Glenn Gray, Ronald Howarth, John Strockis, and Jeffrey Thomas.[2] An eighth director, Peter Bastone, left the Board before the completion of the 2011 RSS and did not participate in the Board's decision to undertake the transaction. Before the 2011 RSS, Hovde, Gray and other insiders were permitted to exchange their shares of Sunwest for shares of Bancorp. No similar offer was made to Sunwest minority shareholders.

Because the contemplated reverse stock split would combine every 10 outstanding Sunwest shares into one new share, it would result in fractional interests for shareholders who owned more or less than an even multiple of 10 shares. Sunwest did not wish to issue new fractional shares, nor was it obligated to do so, and accordingly resolved to pay cash for the fractional interests created by the 2011 RSS. Sunwest solicited bids from several investment banks, including FIG, to provide a valuation for this purpose. FIG was ultimately retained both to perform the valuation, and to provide a fairness opinion.

---

[2] Hovde, Mozingo and Wertz were also directors of Bancorp.

To arrive at a valuation, FIG analyzed numerous factors including comparable peers, comparable transactions, recent trading activity, discounted cash flow on a stand-alone basis, discounted cash flow on an acquisition basis, discounted cash flow on a control premium basis, and tangible book value. At the time of the 2011 RSS, Sunwest shares were not traded on an exchange, but rather over-the-counter (OTC) on the so-called Pink Sheets. Sunwest shares traded infrequently, and the FIG valuation included consideration of a so-called liquidity discount, which accounts for the reduced amount an investor is willing to pay for a stock that may not be readily convertible into cash. The valuation also backed out any control premium—that is, the extra value an investor may be willing to pay for shares in order to acquire corporate control. In doing so, the valuation effectively applied a minority discount, which is a recognition that the value of a noncontrolling ownership interest in a company may have less value than its proportional share of the value of the entire corporation.[3]

Based on FIG's analysis, the Board determined that $2,734.04 per share was the fair value of Sunwest stock for

---

[3] To give a simple hypothetical, imagine a company with a book value of $110 and a market value of $100 which requires a simple majority for corporate control. The control premium recognizes that someone would pay more than $51 (i.e., more than half the market value of the company) for 51 percent ownership of that company. Conversely, the minority discount recognizes that someone purchasing a 10 percent ownership stake would likely pay market value ($10) even though that is less than the value of the resulting proportional 10 percent ownership share of the corporation ($11).

valuing fractional interests created by the 2011 RSS. The Board made this determination by way of a unanimous written consent. The Board's resolution meant any shareholder with fewer than an even multiple of 10 shares would receive $2,734.04 for shares held immediately before the 2011 RSS that became a fractional interest. At the time of the 2011 RSS, this price was $133.04 per share more than the active trading price.[4]

Before proceeding with the 2011 RSS, Sunwest sent a December 8, 2011 notice to shareholders that the reverse split would be effected later that month. The 2011 RSS was applied in the same manner to all shareholders, whether the fractional share belonged to a majority or minority shareholder. In other words, each fractional share of Sunwest was valued in the same manner, regardless of who owned the fractional share. While it decreased the number of minority shares outstanding, the 2011 RSS did not increase Bancorp's ownership share to 90 percent or higher.

C. The Plaintiffs

Plaintiffs' damage claims relate primarily the 2011 RSS. Plaintiff Dennis Wood purchased Sunwest shares in 2003. At the time of the 2011 RSS, he beneficially owned 40 shares—26 held in individual retirement accounts, and 14 held in a joint account with his spouse. As a result of the 2011 RSS and its 10-to-1 exchange, Wood received two new shares in the individual retirement accounts and $16,404.24 for his post-2011 RSS fractional interest in the remaining six prior shares (6 x

---

[4] The lack of liquidity and light trading meant, however, that the market price of Sunwest shares was subject to significant market fluctuation.

$2,734.04), and one new share in the joint account plus $10,936.16 for the post-2011 fractional interest in the remaining four prior shares (4 x $2,734.04). Plaintiff Joseph Helmer purchased one share of Sunwest in February 2011 for $2,635. He received $2,734.04 as a result of the 2011 RSS for that now fractional interest.

D. Open Market Purchases and the 2013 Stock Buyback

After the 2011 RSS, Bancorp periodically acquired Sunwest shares through open market OTC purchases. Between January and August 2012, Bancorp acquired 113 shares. In February 2013, the Sunwest board approved a resolution for a stock buyback (the 2013 Stock Buyback) to facilitate purchasing the remaining Sunwest shares not owned by Bancorp. Sunwest thereafter submitted applications to its federal and state banking regulators for approval of the 2013 Stock Buyback. The documents provided to the regulators included a statement from Sunwest that shares would be purchased in privately negotiated transactions, as "there is no bid or asked prices available, and trading in the Bank's common stock is virtually non-existent."

From August 2012 through August 2013, Bancorp acquired another 125 shares. From August 2013 to August 2014, Bancorp acquired 58 shares. From August 2014 until the time of the 2015 short form merger, Bancorp acquired 11 additional minority shares.

E. The 2015 Short Form Merger

In a November 2015 letter to shareholders, Sunwest announced a plan for a short form merger between Sunwest and Bancorp. Bancorp was to be merged with and into Sunwest, with Sunwest being the surviving corporation. Sunwest's remaining minority shareholders received $56,300 per share in exchange for their surrendered shares. Sunwest and Bancorp completed a short form merger in 2015.

III. PROCEDURAL BACKGROUND

A. The Complaints

Plaintiffs commenced this action on behalf of themselves and others similarly situated in February 2012, shortly after the 2011 RSS. In August 2013, Plaintiffs filed a first amended complaint alleging causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, abuse of control, constructive fraud, unjust enrichment, and declaratory relief. The named defendants were Sunwest, Sunwest Bancorp, Western Acquisition, WAP, and Sunwest directors Eric Hovde, Glenn Gray, Peter Bastone, Ronald Howart, Glen Mozingo, John Strockis, Jeffrey Thomas and Russell Wertz. Plaintiffs alleged that the Defendants breached their fiduciary duties to minority shareholders by seeking to "freeze-out" such shareholders thorough the 2011 RSS. In particular, Plaintiffs claimed they were entitled to receive a pro rata share of Sunwest's entire value for their fractional interests, rather than a market value that backed out any control premium and included a liquidity discount.

In September 2014, Plaintiffs filed a second amended complaint which dropped the abuse of control, constructive fraud, and unjust enrichment claims and added further breach of fiduciary claims related to the Private Placement, and the post-2011 RSS share acquisitions by Bancorp.

On July 21, 2016, Plaintiffs moved for leave to file a third amended complaint. The proposed third amended complaint sought to add allegations regarding the 2015 short form merger but no new causes of action. The court denied the motion for leave to amend, without prejudice to Plaintiffs filing a supplemental complaint setting forth those same allegations. In so ruling, the trial court indicated it considered a supplemental complaint the more appropriate procedural vehicle to add allegations about events occurring after the second amended complaint. On September 19, 2016, the trial court granted Plaintiffs leave to file a supplemental complaint asserting the 2015 short form merger was a further breach of fiduciary duty.

B. Class Certification Issues

On November 5, 2013, the trial court certified a class of "all persons who owned shares of common stock of Sunwest on or after December 8, 2011 [the date the 2011 RSS was announced] and whose shares were, or are subject to being cashed out."

On June 22, 2016, Plaintiffs filed a motion seeking to amend the class definition to include Sunwest shareholders as of the date of the Private Placement (November 29, 2009) rather than the 2011 RSS, and further to include not only shareholders subject to being cashed out but also those who sold their shares to Defendants or anyone affiliated with Defendants. The court denied the motion, holding that Plaintiffs were required to file a motion to amend or modify the order granting class certification that put forward the evidence required in connection with class certification issues.[5]

Plaintiffs filed such a motion to amend the class definition on December 21, 2016. Plaintiffs relied on the evidence they submitted over three years before when the class was initially certified, and did not submit any supporting declarations or other new evidence in support of the motion.[6] The trial court denied the motion on January 27, 2017, a few days before trial began, finding Plaintiffs failed to present evidence supporting a finding of common questions of fact with regard to the proposed new class definition, or that the claims of the class representatives were typical of the proposed class.

---

[5] The court gave as examples that evidence was necessary on "numerosity, ascertainability, and also commonality and common questions of law and fact, as well as whether the plaintiff is an appropriate representative."

[6] On January 20, 2017, after the Defendants filed their reply brief, Plaintiffs filed a declaration listing exhibits in support of the motion to amend the class certification order. The appellate record only includes the index of such exhibits, which evidently included proposed orders regarding the class definition, joint status reports, hearing notices, Plaintiffs' memorandum supporting various motions and Defendants' opposition to such motions, transcripts of court proceedings, the original shareholder mailing list, a transcript from the deposition of one of Plaintiffs' experts along with a damages calculation based on that expert's testimony, and a copy of a tentative ruling from 2015. Updated declarations of class representatives Wood and Helmer were not included.

C. The Related Appraisal Action

On May 2, 2016, Plaintiff Wood filed an appraisal action in Orange County Superior Court pursuant to section 1305 (the Appraisal Action). That matter sought an appraisal of the value of two of his three Sunwest shares acquired in the 2015 short form merger. Soon after filing the Appraisal Action, Plaintiffs represented to the bench officer presiding over the shareholder class action that they would be filing a petition with the Judicial Council to coordinate the Appraisal Action with the class action case.

At a September 19, 2016 hearing, Plaintiffs indicated they had not yet filed a petition to coordinate the class action with the Appraisal Action because of concerns such a petition might delay the commencement of the class action trial until after the five-year deadline in Code of Civil Procedure section 583.310. Plaintiffs indicated, however, they intended to file such a petition once the class action was set for trial.

At a hearing on November 3, 2016, Plaintiffs represented they had filed a motion to coordinate and consolidate the class action and the Appraisal Action, and the motion was in the process of being briefed. The record does not indicate the Appraisal Action was ever ordered to be coordinated or consolidated with the class action, and it was not litigated as part of the class action trial. Wood eventually dismissed the Appraisal Action with prejudice on October 19, 2017.

D. The Trial and Statement of Decision

A bench trial began on February 6, 2017 and the presentation of evidence concluded February 28, 2017. After posttrial briefing followed by closing arguments, the court issued a proposed statement of decision in August 2017 as to which Plaintiffs filed timely objections. The court issued its final statement of decision on October 6, 2017.

The court found the purpose of the Private Placement was to raise capital so Sunwest could continue acquiring failed banks. The court further found the Private Placement was fair to Sunwest's shareholders in light of FIG's fairness opinion, as well as state and federal regulatory approvals of the Private Placement after those regulators were made aware of what factors were used in setting the share price. The court then addressed the 2011 RSS, and Plaintiffs' claim they did not receive fair value for their Sunwest stock because the 2011 RSS valuation process included a liquidity discount and backed out a control premium. The court first found that while Sunwest contemplated a plan of going private at the time of the 2011 RSS, "Sunwest had not yet made any definitive decision with respect to that potential transaction." Because the 2011 RSS resulted in some Sunwest shareholders having holdings reduced to fractional shares, the court looked to section 407, which provides "[a] determination by the board of the fair value of fractions of a share shall be conclusive in the absence of fraud." The court found no evidence of fraud, noting expert testimony that minority and liquidity discounts are routinely used in reverse stock splits, the lack of legal prohibition on consideration of such discounts, and banking regulators' approval of the transaction following disclosure by Sunwest that it intended to use minority and liquidity discounts in the 2011 RSS. The court further found Plaintiffs were in fact paid fair value for shares acquired in the 2011 RSS, and the defendant directors' decisions about the 2011 RSS were entitled to deference under the business judgment rule.

The trial court additionally found the claims of the Plaintiffs whose shares were acquired as part of the 2015 short form merger had to be brought in an appraisal action, and thus were not judiciable in the class action.

Based on these findings, the court found Plaintiffs failed to establish any breach of fiduciary duty or fraud. The court also found the Defendants had established the defense of the business judgment rule, and further that Defendants met any burden they carried to establish the valuation of Sunwest stock in the 2011 RSS was fair and reasonable. The court thereafter entered judgment in favor of Defendants, and awarded costs to Defendants totaling $82,983.97. Plaintiffs timely appealed.[7]

IV. DISCUSSION

Plaintiffs raise the following challenges to the judgment. They assert the trial court erred in viewing the transactions at issue separately, instead of being a unitary plan to freeze out minority shareholders. They assert the court erred in denying their motion to amend the class definition to include the Private Placement, open market purchases of shares by Defendants, and

---

7 Plaintiffs appeal from the judgment entered after the statement of decision, which stated costs were awarded to Defendants as the prevailing parties with the amount left blank as those costs had not yet been fixed. After Defendants filed a verified memorandum of costs, Plaintiffs filed a motion to strike or tax costs, which the trial court resolved after Plaintiffs' notice of appeal was filed. "[W]hen a judgment awards costs . . . to a prevailing party and provides for the later determination of the amount[], the notice of appeal subsumes any later order setting the amounts of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.)

the 2013 Stock Buyback. They assert the trial court applied the wrong legal standard to their breach of fiduciary duty claims regarding the 2011 RSS, and improperly admitted expert testimony regarding the valuation of fractional shares at the time of the 2011 RSS. They claim the trial court erroneously held Plaintiffs' complaints about the value they received for their shares in the 2015 short form merger had to be brought in an appraisal action. Finally, Plaintiffs argue the court awarded costs that were statutorily unauthorized.

A. Standard of Review

Plaintiffs argue our review should be de novo, as they do not dispute the pertinent facts found by the trial court, and instead challenge the legal standard applied to those facts.[8]

Pure issues of law and application of law to undisputed facts are both reviewed de novo. (*Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1617; *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) In an appeal

---

[8] In addition to the concession in their opening brief and at oral argument that they do not dispute the facts as found by the trial court, Plaintiffs waived any challenge to the sufficiency of the court's factual findings by failing in their opening brief to summarize the evidence both favorable and unfavorable, and showing how and why the evidence is insufficient. (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1166; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) While Plaintiffs' reply brief attempts to assert numerous challenges to the trial court's factual findings, Plaintiffs waived those challenges by failing to raise them in their opening brief. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427—428 [sufficiency of the evidence challenge waived when not raised in opening brief].)

from a bench trial, "[w]e view all of the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving every conflict to the support the judgment. [Citation.] 'Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact . . . . We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment.' " (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24.)

To the extent a more particular standard of review applies to an individual issue raised by Plaintiffs, it is set forth as part of the discussion of that issue. We further note Delaware corporate law parallels California law in many respects, although as discussed below it can and does differ in important ways pertinent to this case. We find Delaware precedent instructive where it is not inconsistent with our state's law. (E.g., *Charter Township of Clinton Police & Fire Retirement System v. Martin* (2013) 219 Cal.App.4th 924, 942; *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 791 fn. 5.)

B. The Trial Court Did Not Err in Evaluating the Transactions at Issue Separately

Plaintiffs challenge the Private Placement in 2009 and 2010, the 2011 RSS, Bancorp's market purchases of shares following the 2011 RSS, and the 2015 short form merger. Relying on *Bank of NY Mellon Trust Co., N.A. v. Liberty Media Corp.* (Del. Ch. 2011) 29 A.3d 225 (*BONY Mellon*), Plaintiffs argue these various transactions must be considered steps in a long-standing plan to freeze out minority shareholders, and therefore evaluated under the so-called "step transaction doctrine" as a single unitary merger transaction.

Plaintiffs seek to conflate these disparate events into one transaction to rely on cases in the merger and corporate dissolution context holding that minority shareholders must receive a pro rata share of the going-concern value of the entire enterprise, such that fair market value measures like minority interest and liquidity discounts are inappropriate. (E.g., *Jones v. H.F. Ahmanson & Co*. (1969) 1 Cal.3d 93, 116—117 [potentially inappropriate to include liquidity discount where de facto merger with holding company "accomplished a fundamental corporate change" of minority shares no longer being publicly traded]; *Ronald v. 4-C's Electronic Packaging, Inc*. (1985) 168 Cal.App.3d 290, 298—300 [minority discount should not be applied in buy-out to avoid involuntary dissolution]; *Brown v. Allied Corrugated Box Co*. (1979) 91 Cal.App.3d 477, 485—487 [use of minority discount inappropriate in involuntary dissolution proceeding].)

However, such "valuation of a stockholder's interest as a 'going concern' is necessary only when the board's proposal will alter the nature of the corporation through a merger," dissolution, or similar transaction because when a corporation ceases to exist through such a transaction its full going-concern value is captured and its shareholders—whether majority and minority—are therefore entitled to their pro rata share of that value. (*Applebaum v. Avaya, Inc*. (Del. 2002) 812 A.2d 880, 893.) In the case of a merger, this valuation requirement "prevent[s] the proponents of the merger from 'reaping a windfall' by placing the full value of the company as a going concern into the merged entity while compensating the dissenting shareholder with discounted consideration." (*Ibid.*)

In contrast, in a reverse stock split or other nonmerger/dissolution transaction where the corporation continues on, "if the cashed-out stockholders were awarded the value of the company as a going concern, they, rather than the corporation, would receive a windfall. The cashed-out stockholders could capture the full proportionate value of the fractional interest, return to the market and buy the reissued stock at the market price, and realize the going concern value a second time should [the corporation] ever merge or otherwise become subject to a change of control transaction." (*Applebaum v. Avaya, Inc.*, *supra*, 812 A.2d at p. 894.)

The trial court's factual findings do not support Plaintiffs' assertion of a lengthy, unitary freeze-out plan such that reliance on the valuation measures in merger or dissolution case law is appropriate. The court found the purpose of the Private Placement was raising capital to continue acquiring failed banks—not a corporate control transaction. While Sunwest contemplated a plan of going private at the time of the 2011 RSS, the court found "Sunwest had not yet made any definitive decision with respect to that potential transaction." After the 2011 RSS, Sunwest stock was still traded OTC, and as evidenced by Bancorp's open market purchases of over 300 shares after the 2011 RSS, its stock was still available in the market to interested buyers—including Plaintiffs. Indeed, it was not until several years later that Sunwest's board—in approving the 2013 Stock Buyback—approved a resolution to facilitate the purchase of remaining shares not owned by Bancorp. It then took another two and half years for Bancorp to acquire sufficient shares before it could proceed with a short-form merger in November 2015.

Given these factual findings, which are supported by substantial evidence, the cases on which Plaintiffs rely do not require amalgamating these transactions into a single transaction culminating in the 2015 short form merger. First, we note that Plaintiffs cite no California authority embracing the step transaction doctrine in the corporate merger context—they rely exclusively on Delaware authority.[9] Assuming, without deciding the matter, that we should recognize the step transaction doctrine in the corporate control transaction context, the underlying facts do not support its application here.

For the step transaction doctrine to apply, "the component transactions [must] meet one of three tests. First, under the 'end result test,' the doctrine will be invoked 'if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result.' Second, under the 'interdependence test,' separate

---

9 Plaintiffs do cite statements in noncorporate control cases suggesting that when multiple steps are part of a unified action, they should be considered holistically and not individually. (E.g., *Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 925 [in Truth-In-Lending Act matter "we must look to the substance of the transaction and not allow mere form to dictate the result"]; *Willett v. Jordan* (1934) 1 Cal.2d 461, 464 [noting "doctrine of relation" may apply when "several proceedings are essential to complete a particular transaction"]; *McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 554—556 [step transaction doctrine applies to taxation matters to assure tax consequences turn on substance of transaction rather than its form] transactions will be treated as one if 'the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series.' The third and 'most restrictive alternative is the binding-commitment test under which a series of transactions are combined only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps.' " (*BONY*, *supra*, 29 A.3d at p. 240.)

As regards the "end result" test, the trial court found the transactions were not pre-arranged parts of a single transaction. Nor does the "interdependence test" apply because the various transactions were not so interdependent that one transaction would have been fruitless unless all were completed. The Private Placement could have been accomplished alone. So could the 2011 RSS, as well as the later stock repurchases. While it is true the 2015 short form merger could not have occurred unless Bancorp acquired at least 90 percent ownership, the prior transactions would not have been fruitless without the short form merger. Raising capital for corporate acquisitions, consolidating the number of shareholders through a reverse stock split, and stock buybacks all can and do occur in the absence of a later short form merger. Finally, the "binding commitment" test is inapplicable as there was no binding commitment to undertake the short form merger in 2009 at the time of the Private Placement, or even by the time of the 2011 RSS. Accordingly, we decline to consider the various transactions at issue as steps in one, single transaction.

Citing *Reis v. Hazlett Strip-Casting Corp*. (2011) 28 A.3d 442 (*Reis*), Plaintiffs alternatively argue that the 2011 RSS was the functional equivalent of a merger. *Reis*, however, is distinguishable both factually and legally. In *Reis*, two brothers owned all 1,150 outstanding shares of a closely held family business. One brother owned 800 shares, and the other 350 shares. The brother owning 350 shares died, and his shares were bequeathed to 169 individuals. (*Id*. at p. 451.) After an unsuccessful attempt to purchase the shares from the decedent's estate to avoid their widespread disbursal, the directors approved a 400 for 1 reverse stock split, meaning the brother who owned 800 shares now owned two shares, and the deceased brother's estate owned less than one share, which the directors deemed a fractional interest and sought to cash out at an unfair price. (*Id*. at pp. 452—454.)

Because the reverse stock split cashed out all shareholders save the one brother without any procedural protections, the Delaware Court of Chancery reviewed the transaction for entire fairness with the burden of proof on the defendant fiduciaries to demonstrate such fairness. (*Reis*, *supra*, 28 A.3d at p. 460.) While the court did not set aside the stock split, it did find the estate's fractional interest had been undervalued and awarded money damages. (*Id*. at p. 479.)

The 2011 RSS cannot be compared to the reverse stock split in *Reis*, and *Reis* does not compel viewing the 2011 RSS as a de facto merger or freeze-out. Indeed, under California law a reverse stock split of the type at issue in *Reis* is impermissible, as the Corporations Code prohibits a corporation from paying cash for fractional shares "if that action would result in the cancellation of more than 10 percent of the outstanding shares of any class." (§ 407.) The reverse stock split in *Reis* cancelled outstanding shares well in excess of the limit in section 407 and froze out everyone other than one person. Sunwest's reverse stock split complied with the 10 percent limit in section 407, it did not cash out all shareholders other than the controlling shareholder, and it did not amount to a de facto control transaction. Indeed, numerous minority shareholders (including Plaintiff Wood) continued to hold stock Bancorp after the 2011 RSS, and Bancorp did not reach 90 percent ownership for another four years after the 2011 RSS.

As we find no grounds to combine disparate transactions over a multi-year period into a single coordinated plan, we review each transaction individually, in chronological order, pursuant to the legal standard applicable to Plaintiffs' claim of error concerning that transaction.

C. The Trial Court Did Not Err in Denying Permission to Amend the Class Definition to Include the 2009 and 2010 Private Placements

Plaintiffs contend the trial court erred in denying their motion to amend the class certification order to include the Private Placement, as well as those shareholders who sold shares to Defendants or their affiliates in open market transactions. They raise this challenge despite an admission at trial from their own expert that the price Bancorp paid for shares in the Private Placement was within the range of a fair and reasonable prices, and the court's factual findings (which Plaintiffs do not dispute) that the Private Placement was fair to Sunwest shareholders.

1. Standard of Review

" ' "The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.]" ' " (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 967–968.)

We will not disturb the trial court's ruling " ' " 'unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.' " ' " (*McCleery v. Allstate Ins. Co*. (2019) 37 Cal.App.5th 434, 450.) "If the court's 'reasons for granting or denying certification . . . are erroneous, we must reverse, whether or not other reasons [could have been] relied upon [to] support[ ] the ruling.'. . . ' "In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial." ' " (*Ibid*.)

2. Plaintiffs' Motion and the Trial Court's Ruling

As certified, the class included "all persons who owned shares of common stock of Sunwest on or after December 8, 2011 and whose shares were, or are subject to being cashed out." Plaintiffs sought to amend this class definition to include " 'All persons who owned shares of Sunwest Bank on or after November 29, 2009 and whose shares were cashed out by Sunwest Bank in the December 2011 reverse stock split and/or the November 2015 short-form merger and/or whose shares were acquired directly or indirectly by a Defendant, an immediate family member of a Defendant or an entity controlled by a Defendant.' "

While Plaintiffs' motion to amend asserted modification was necessary "to conform the class definition to the facts obtained through discovery," Plaintiffs submitted no evidence in support of this contention and instead relied on the same evidence submitted with the prior class certification motion over three years earlier—before the discovery that allegedly produced the new evidence justifying a change to the class definition. Shortly before the hearing on the motion to amend, Plaintiffs submitted a hodgepodge of prior pleadings, a tentative ruling from 2015, transcripts of court proceedings, the original shareholder mailing list, an expert deposition and accompanying damages calculation in support of their motion.

After hearing argument, the trial court declined to amend the class definition. The court found "if Plaintiff seeks to change the scope of the class based on facts that neither they nor the court had at the time of the original certification it follows that Plaintiffs must now offer evidence which supports a finding of common questions of fact in light of these new facts. And pursuant to California Rule of Court 3.764, such evidence is to be submitted in the form of declarations and judicial notice. However, Plaintiffs have not done so, so this requirement is left unsatisfied." The court also found Plaintiffs had not offered any evidence that Plaintiffs' claims were typical of the proposed class such as "declarations of counsel, class representatives, or any other related evidence, and so not only is the commonality not established by evidence; the typicality is not satisfied either."

3. Declining to Modify the Class Definition Was Not an Abuse of Discretion

Considering the lack of evidence that the proposed broader class definition met the commonality or typicality requirements necessary to certify a class, the trial court did not abuse its discretion in denying Plaintiffs' 11th hour request to amend the class definition.

(*a*) *Plaintiffs Did Not Establish Commonality*

Plaintiffs submitted no evidence showing common issues of law or fact predominated between the shareholders who held shares at the time of the Private Placement in 2009–2010, or those who sold their shares to Sunwest or people affiliated with Sunwest before the 2015 short-form merger. When a party moves to modify a class definition, pleadings themselves are not enough. "[P]leadings are allegations, not evidence, and do not suffice to satisfy a party's evidentiary burden." (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154.) California Rules of Court, Rule 3.764(c)(3) mandates a party seeking class certification demonstrate the predominance of common questions with evidence in the form of declarations of counsel, class representatives, or other appropriate declarants or requests for judicial notice.

Plaintiffs argue there was already evidence in the record establishing the commonality and typicality of the broader proposed class, and they did not need to provide any additional evidence because the court's findings when initially certifying the class in 2013 were sufficient. It is not credible for Plaintiffs to claim the necessary evidence was already before the trial court when the reason Plaintiffs gave for seeking to amend the class definition was the discovery of additional facts *after* the class's original certification in 2013. In any event, the declarations submitted in 2013 plainly did not suffice, as they did not address the Private Placement, and obviously could not have anticipated facts regarding share buybacks that happened in the months and years after the class was initially certified.

Nor did the trial court make any finding, when certifying the class in 2013, that supported the proposed expanded definition three years later. The trial court made no findings as to any common question of fact or law on the Private Placement, as that transaction was not part of the then-current class definition. Nor did the court make any findings as to a common question or fact or law on share buybacks which had not yet occurred, and which would in any event involve nuanced questions of how each individual shareholder who sold stock was situated given Plaintiffs' claims that these sales were the product of economic coercion by the Defendants.

(b) Plaintiffs Did Not Establish Typicality

Before a class certification order can be amended to include new class members, the proposed class representatives must demonstrate they have claims or defenses typical of the class. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) In their 2013 declarations, class representatives Wood and Helmer stated that they owned Sunwest stock as of December 8, 2011, and that they were willing and able to represent a class of " "all persons who owned shares of common stock of Sunwest Bank on or after December 8, 2011 and whose shares were, or are subject to being, cashed out.' "

These declarations were not sufficient to show either class representative had claims typical of the proposed amended class. Helmer did not acquire any Sunwest shares until 2011—after the Private Placement. Moreover, his one and only Sunwest share was cashed out as part of the 2011 RSS. Helmer's claims were not typical of the proposed amended class, as he did not own any shares during the earlier or later transactions and associated time frames sought to be added to the class definition.

Wood purchased his Sunwest shares in 2003 and held them at the time of the Private Placement through the 2015 short form merger. Even assuming arguendo his claims as to the Private Placement could be considered typical (something we do not know in the absence of any evidence on that point), Wood did not sell shares in the open market or otherwise have claims typical of individuals whose shares were acquired directly or indirectly by Defendants or their affiliates. Whatever coercion Plaintiffs claim existed, it certainly was not such that Wood felt compelled to sell his shares at any point before the 2015 short form merger.

D. The Trial Court Correctly Applied Section 407 to the 2011 RSS

As discussed above, the 2011 RSS resulted in all shareholders holding anything other than an even multiple of ten shares receiving a fractional interest, which Sunwest bought out at a predetermined price. Section 407 provides that in such a circumstance, a "determination by the board of the fair value of fractions of a share shall be conclusive in the absence of fraud." Plaintiffs argue the trial court erred in relying on section 407 to conclude Plaintiffs failed to establish any claim for damages in connection with the 2011 RSS.

1. Section 407

Section 407 provides that a "corporation may, but is not required to, issue fractions of a share . . . upon transfer." (§ 407.) If the corporation determines not to issue fractional shares, it must "arrange for the disposition of fractional interests by those entitled thereto . . . ." (*Ibid.*) The disposition must either be "pay[ment] in cash [of] the fair value of fractions of a share as of the time when those entitled to receive those fractions are determined" or the issuance of securities "which shall entitle the holder to receive a certificate for a full share upon the surrender of the scrip or warrants aggregating a full share . . . ." (*Ibid.*) If the corporation pays cash, a "determination by the board of the fair value of fractions of a share shall be conclusive in the absence of fraud." (*Ibid.*)

2. There Was No Procedural Defect in the Board's Establishment of Fair Value

Plaintiffs first argue section 407 does not govern their challenge to the Board's valuation of fractional interests because the unanimous written consent setting that valuation was procedurally improper. Specifically, Plaintiffs assert one director (Peter Bastone) failed to sign the unanimous written consent form. Citing section 307, subd. (b), which requires "all members of the board" to consent in writing to board action in the absence of a meeting, Plaintiffs argue the unanimous written consent was ultra vires, and should be disregarded.

The trial court rejected this argument, finding director Bastone left the Board before the completion of the 2011 RSS, "did not participate in the Board's decision to undertake the 2011 RSS," and thus was not required to sign the unanimous written consent. While the trial court found Bastone was on the Board until December 1, 2011, there is evidence in the record Bastone resigned from the Board effective November 9, 2011. The draft unanimous written consent was not emailed to board members until November 17, 2011; not surprising, Bastone was not copied on the email requesting signatures from Board members. All current board members (no longer including Bastone) then signed the unanimous written consent.

Substantial evidence supports the trial court's finding that the written consent was approved and signed by all current board members in conformance with section 307, subd. (b), as we "must resolve all conflicts in the evidence in favor of the prevailing party and must draw all reasonable inferences in support of the trial court's judgment." (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308.)

Even if Bastone's consent to the unanimous written consent procedure should have been obtained, the Board ratified the unanimous written consent through its later actions implementing the 2011 RSS. A corporate act, "unlawful in its inception for lack of duly held meeting, can be ratified by the board of directors, and such ratification does not require the holding of a regular meeting of the board or the passing of a resolution regarding the ratification. [Citations.] 'Anything from which it may be clearly found . . . that the board as a board as agreed that the void act should be binding will suffice.' [Citation.]" (*Meyers v. El Tejon Oil & Refining Co*. (1946) 29 Cal.2d 184, 187.) The continued pursuit and ultimate consummation of the 2011 RSS after Bastone resigned was proof the Board, as a Board, agreed to the 2011 RSS and the related valuation of fractional shares. Accordingly, there was no procedural impropriety that made section 407 inapplicable.

3. Section 407 Limits the Remedies Available for a Breach of Fiduciary Duty

Plaintiffs next contend that even if section 407 applies, common law fiduciary duty principles trump section 407's mandate that the Board's determination of fair value "shall be conclusive in the absence of fraud" such that their breach of fiduciary duty claims related to the 2011 RSS were still cognizable in the absence of fraud.

Corporations are creatures of state law. (*Boschetti v. Pacific Bay Investments, Inc*. (2019) 32 Cal.App.5th 1059, 1066.) When the Legislature enacts a statutory remedy evincing an intent to "occup[y] the field" on a corporate law issue, that statutory remedy "preclude[s] resort to dormant common law doctrines for the provision of extra-statutory relief." (*Pacific Scene, Inc. v. Peñasquitos, Inc*. (1988) 46 Cal.3d 407, 413.) Numerous examples of such limitations exist. (E.g., *id*. at p. 418 ["the Legislature has precluded the assertion of postdissolution claims against the former shareholders of a dissolved corporation under the equitable 'trust fund' theory"]; *Steinberg v. Amplica, Inc*. (1986) 42 Cal.3d 1198, 1214 ["Section 1312(a) was clearly intended to provide some limitation on the right of a minority shareholder to legal and equitable relief."] (*Steinberg*); *Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1368, fn. 5 ["we are not free to interject equitable doctrines into what is otherwise a comprehensive statutory scheme specifying the requirements and powers of California corporations."]; § 204, subd. (a)(10) [articles of incorporation may eliminate or limit the personal liability of a director for monetary damages for conduct provided it is not intentional or reckless misconduct, a knowing and culpable violation of law, or other similarly egregious conduct]; § 309 [director who meets certain requirements in performance of his or her duties "shall have no liability based upon any alleged failure to discharge the person's duties as a director"].)

Section 407 is no different. A corporation can only pay cash for fractional shares created by a reverse stock split if the shares to be cancelled are 10 percent or less of the outstanding shares of the class at issue. To afford a board the ability to exercise its business judgment in determining the value of a fractional share in these limited circumstances, the Legislature provided that such determination could only be challenged for fraud. Section 407 does not relieve board members of their fiduciary duties in valuing fractional shares, nor does it insulate their valuation from review, but section 407 does provide that to overturn that valuation a shareholder must show evidence of bad faith and duplicity amounting to fraud. We decline Plaintiffs' invitation to expand the avenues of challenge to a board's valuation determination under section 407 beyond the statute's clear language.[10]

---

10 We reject Plaintiffs' assertion that *Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405 (*Remillard*) compels a different result. In that case, the defendants argued the Corporations Code provision concerning self-dealing transactions (then section 820, now section 310) insulated them from any review of a self-dealing transaction. As the provision at issue provided self-dealing transactions are not automatically void or voidable if certain factors are met, and not that such transactions are automatically validated, the court rejected defendants' argument. (*Remillard* at p. 418.) Here, in contrast,

4. Plaintiffs Did Not Establish Fraud

Plaintiffs finally suggest they did establish fraud as required by section 407. Noting that the Board owed them fiduciary duties, Plaintiffs assert we should construe "fraud" in section 407 to include constructive fraud, as constructive fraud "allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship." (*Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) Whether "fraud" as used in section 407 includes constructive fraud is an interesting interpretive question that we leave for another day, as it is not necessary to resolve the matter before us. While a breach of fiduciary duty can often constitute constructive fraud, the elements of the two claims are not coterminous. Constructive fraud requires the breach of fiduciary duty be an omission, and that the fiduciary intended to deceive. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [elements of breach of fiduciary duty claim " 'are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach' "] with *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 [elements of constructive fraud cause of action are the existence of a fiduciary relationship, nondisclosure in breach of fiduciary duty, intent to deceive, and reliance and resulting injury].)

Even if "fraud" in section 407 should be read to include "constructive fraud," Plaintiffs' claims fail. Plaintiffs initially asserted a constructive fraud claim, but withdrew it prior to trial. Even if we construed the operative complaint as including such a

---

section 407 provides that the board's determination "shall be conclusive in the absence of fraud."

claim, the trial court found Plaintiffs did not carry their burden to show any nondisclosure or intent to deceive when it rejected the fraud and breach of fiduciary duty claims Plaintiffs did assert. The Board hired a respected investment banking firm with extensive industry expertise to value the fractional interests and relied on that valuation. Sunwest was transparent with its regulators that it used liquidity and minority discounts in deriving the valuation, and those regulators raised no concern. Helmer testified that when he was first notified by Sunwest of the 2011 RSS, it was obvious to him the valuation was based on the current market price of Sunwest shares rather than the actual value of the bank—in other words, that Sunwest had adopted the very valuation approach Plaintiffs alleged was improper. In addition to this lack of evidence of nondisclosure, expert testimony at trial, which we discuss next, supported the reasonableness of the Board's valuation and the factors considered in arriving at it, and thus the Board's lack of any intent to deceive.

E. The Trial Court Did Not Abuse its Discretion in Declining to Exclude Expert Testimony

Sunwest called two expert witnesses at trial on valuation related issues. One was an investment banker/consultant named Craig Mancinotti, whose testimony the trial court found credible. Plaintiffs contend the trial court committed reversible error in failing to exclude Mancinotti's testimony because he lacked the requisite expertise and used invalid methods to reach his conclusions.

1. Standard of Review

" 'The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse.' " (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 284 (*Hernandez*).) "[W]e review its ruling excluding or admitting expert testimony for abuse of discretion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*).)

2. Qualifications

Plaintiffs complain that Mancinotti conducted an appraisal but did not belong to any recognized professional association which propounded objective business appraisal standards. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Cal. Evid. Code, § 720, subd. (a).) "When a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience go to the weight, not the admissibility, of the witness's testimony." (*People v. Jones* (2013) 57 Cal.4th 899, 949-950.)

Mancinotti had worked in the finance industry for over 30 years providing investment banking and consulting services to community banks. Mancinotti heads his firm's appraisal practice, and has performed over one thousand bank valuations. He served as a board member of a community bank for 10 years, and had taught executive education programs for bank officers. He also held several relevant securities licenses. In light of these qualifications, the trial court's decision to permit Mancinotti to testify as an expert on valuation was within its discretion. (See *People v. Jones, supra*, 57 Cal.4th at p. 950; see also *Hernandez*, *supra*, 37 Cal.App.5th at p. 284 [2019 WL 3002861 at p.8] [police officer with extensive field experience sufficiently qualified to testify about defendant's impairment even though he lacked medical training and had not been certified as a drug recognition expert].)

3. The Disputed Testimony

(a) Valuation Factors

Mancinotti prepared valuation analyses of Sunwest common stock as of November 18, 2009 (for the Private Placement) and December 19, 2011 (for the 2011 RSS). Both Mancinotti and Plaintiffs' valuation expert, Robert Reilly, used income and market approaches to calculate share value. The difference between their approaches was Mancinotti's use of minority interest and liquidity discounts, whereas Reilly used no such discounts. Mancinotti opined that the FIG valuation reports were prepared using industry accepted valuation methods, including the two discounts just mentioned, and therefore produced reasonable valuations. This testimony was corroborated by Sunwest's other expert, Kenneth Sayre-Peterson, a former state banking regulator who worked for California's Division of Financial Institutions (DFI) for 22 years. Sayre-Peterson, whose testimony Plaintiffs do not challenge, testified that including such discounts in valuation for reverse stock splits is common practice.

(b) Income Calculation

In calculating Sunwest's income, both Mancinotti and Reilly treated Sunwest's purchase of failed banks as a nonrecurring income item, because both experts did not expect the purchase of failed banks to continue in the future. They differed, however, in how they accounted for those nonrecurring items. Mancinotti adjusted for loan discount accretion and realized gains and losses on investments, while Reilly did not.

4. The Trial Court Did Not Abuse Its Discretion in Admitting Mancinotti's Testimony

(a) Sargon

Plaintiffs argue the trial court should have excluded Mancinotti's testimony under the framework laid out in *Sargon*, *supra*, 55 Cal.4th 747. "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony." (*Sargon*, *supra*, 55 Cal.4th at pp. 771—772.) Essentially, the trial court must exclude " 'clearly invalid and unreliable' expert opinion[s]." (*Id.* at p. 772.)

In *Sargon*, an expert testified about a dental implant company's future profits using hypothetical situations, circular reasoning, and pure speculation. (55 Cal.4th at pp. 776—778.) The expert based his conclusion not on any objective business metric, but on his personal belief that the company was "innovative," and that innovation was the prime market driver. (*Id.* at p. 777.) He compared the company, which at the time made up one half of one percent of the dental implant market, with the "Big Six" dental implant companies, rather than with companies of its size, because he believed it to be very innovative. (*Ibid.*) The court concluded the expert had no rational basis for reaching his conclusion that the company's profits would have grown exponentially to match those of the "Big Six" had their contract with defendants not been breached. (*Id.* at pp. 777—778.)

Unlike the expert in *Sargon*, Mancinotti did not base his conclusions on unsupported speculation. He explained his conclusions in a detailed report, in depositions, and at trial. He explained that he excluded the income Sunwest made from purchasing failed banks because he considered the business of acquiring failed banks to be unsustainable, which he testified is standard practice when determining a bank's income. Reilly himself identified the need to discount for nonrecurring or unusual items not expected to continue in the future. The two experts differed only how they adjusted the income to account for the nonrecurring items.

Plaintiffs also challenge Mancinotti's testimony that backing out a control premium and discounting for liquidity were properly used in valuing Sunwest's shares for purposes of the 2011 RSS. Sunwest's other expert Sayre-Peterson, a person with deep expertise in bank regulation, testified this was common practice, and Plaintiffs do not challenge his testimony. As discussed above, the only law identified by Plaintiffs as excluding such factors involved inapposite situations such as a merger or dissolution. The trial court therefore did not abuse its discretion pursuant to *Sargon* in permitting Mancinotti to testify.

(b) Kelly/Frye

Plaintiffs further argue Mancinotti's testimony should have been excluded under the *Kelly/Frye* standard, which requires a "foundational showing, that is, foundational evidence disclosing general acceptance of the test within the relevant scientific community," before admission of an expert opinion involving scientific methods or theories. (See *People v. Leahy* (1994) 8 Cal.4th 587, 591 (*Leahy*).) The standard is named after *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), which in turn adopted the holding of *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. (*Kelly*, *supra*, 17 Cal.3d at p. 30.)[11]

Kelly/Frye, however, applies to new *scientific* theories or methods and is therefore inapplicable the financial valuation testimony at issue here. (See *Leahy*, *supra*, 8 Cal.4th at p. 605 [" '*Kelly/Frye* only applies to that limited class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is *new* to science and, even more so, the law.' "].) An unproven scientific technique is subject to *Kelly/Frye* if it "appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) Obvious examples would be "machines or procedures which analyze physical data. Lay minds might easily, but erroneously, assume that such procedures are objective and infallible." (*Ibid.*) *Kelly/Frye* has also been applied to "less

---

11 The *Kelly/Frye* test still applies in California courts despite the United States Supreme Court's rejection, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, of the test set forth in *Frye*. (*Sargon*, *supra*, 55 Cal.4th at p.772, fn. 6.)

tangible new procedures which carry an equally undeserved aura of certainty," but "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (*Id.* at pp. 1156—1157.)

Mancinotti's method and techniques were not scientific within the meaning of *Kelly/Frye*. Mancinotti did not purport to relay some definitive, objective and infallible truth, but rather provided an opinion regarding a reasonable valuation. Plaintiffs' expert critiqued that opinion and provided his own contrasting valuation of the shares. Because *Kelly/Frye* was inapplicable, the trial court did not abuse its discretion in failing to exclude Mancinotti's testimony on *Kelly/Frye* grounds.

F. The Open Market Purchases

Plaintiffs assert Bancorp's open market purchases following the 2011 RSS caused them damage under the "special facts" doctrine, and further were coercive transactions by a fiduciary because the parties holding those shares were forced to sell them. The special facts doctrine is akin to the rule against insider trading, and provides that "where an officer or a director of a corporation has knowledge of special facts affecting the value of its stock, he cannot deal with a stockholder at arm's length but is under a duty to disclose such facts before making a purchase or sale of the stock." (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 432—433; compare *Chiarella v. United States* (1980) 445 U.S. 222, 227 [under federal securities law, "a corporate insider must abstain from trading in the shares of his corporation unless he has first disclosed all material inside information known to him."].) To demonstrate coercion of the type they allege, Plaintiffs were required to show "the doing of a wrongful act [by

Defendants] which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc. v. Ashton Development Inc.* (1984) 157 Cal.App.3d 1154, 1158.)

Putting aside the lack of record support for these claims, Plaintiffs lack standing to pursue them. Bancorp made no open market purchases from the two class representatives—both of these plaintiffs instead were cashed out as part of the 2011 RSS and/or the 2015 short-form merger. The class definition did not include open market purchases—it encompassed "all persons who owned shares of common stock of Sunwest on or after December 8, 2011 and whose shares were, or are subject to being cashed out." The transactions after December 8, 2011 in which shareholders were subject to being cashed out were the 2011 RSS and the 2015 short form merger. As discussed above, Plaintiffs' attempt to broaden this class definition to include any open market purchases by Defendants or their affiliates was properly rejected. The trial court therefore did not err in declining to award Plaintiffs any relief on these claims.

G. Plaintiffs' Remedy for Assertions They Did Not Receive Fair Market Value in the 2015 Short Form Merger is an Appraisal Action

The 2015 short form merger resulted in the buyout of Sunwest's remaining minority shareholders at $56,300 per share. Under California law, minority shareholders dissenting from a buyout of their shares pursuant to a merger "may file a complaint in the superior court of the proper county praying the court to determine . . . the fair market value of the dissenting shares . . . ." (§ 1304, subd. (a).) Plaintiff Wood did exactly that, filing the

Appraisal Action in Orange County Superior Court, a proper county given Sunwest's business operations there. The Appraisal Action was never consolidated with the class action and remained before the Orange County Superior Court. In declining to grant relief to Plaintiff Wood or other class members whose shares were acquired in the 2015 short form merger, the trial court held any claims such shareholders did not receive fair market value had to be brought as an appraisal action. The trial court based this decision on its reading of section 1300, et seq. as interpreted by *Steinberg*, *supra*, 42 Cal.3d 1198 and *Busse v. United PanAm Financial Corp*. (2014) 222 Cal.App.4th 1028 (*Busse*).

In *Steinberg*, a minority shareholder claimed the defendant corporations and their officers and directors breached their fiduciary duty by arranging a merger, "[t]he effect [of which] was to freeze out the public shareholders at a grossly inadequate price." (42 Cal.3d at p. 1203.) Our Supreme Court concluded that section 1312, subdivision (a) barred the minority shareholder from suing for damages and limited the plaintiff to the appraisal remedy set forth in section 1304, subdivision (a). (*Id*. at p. 1214.)

The Supreme Court began its analysis by reviewing the pertinent code provisions: "The Corporations Code provides that the holder of shares in certain types of corporations may require the corporation to purchase his shares for fair market value if the corporation merges with another, and the shareholder dissents from the merger. (Corp. Code, §§ 1300, 1301.) The corporation must offer the dissenting shareholder a price which it determines to be fair market value for his shares (§ 1301, subd. (a)). In the event of a failure to agree on a price, he may file an action in the superior court to determine such value, and the court may either decide the issue or refer the matter to an appraiser to do so (§§ 1304, 1305). [¶] Section 1312, subdivision (a) . . . provides in relevant part, 'No shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded. . . .' (*Steinberg*, *supra*, 42 Cal.3d at pp. 1201—1202, fns. omitted.)

"[B]alancing the need to deter misconduct by corporate insiders against the risk that desirable corporate changes will be hampered by minority stockholders who seek to 'exercise leverage for their own aggrandizement,' " the Court concluded that "where the plaintiff was aware of all the facts leading to his cause of action for alleged misconduct in connection with the term of the merger prior to the time the merger was consummated but deliberately opted to sue for damages instead of seeking appraisal, section 1312(a) acts as a bar" on such a damages claim. (*Id*. at p. 1214.)

Steinberg did not involve a situation where the merging corporations are under common control or one controls the other, and therefore did not address language in section 1312, subdivision (b) stating "[i]f one of the parties to a reorganization or short-form merger is directly or indirectly controlled by, or under common control with, another party to the reorganization or short-form merger, subdivision (a) shall not apply . . . ." In *Busse*, *supra*, 222 Cal.App.4th 1028, the court considered a common control fact pattern and interpreted section 1312, subdivision (b)'s language. In doing so, it concluded that dissenting shareholders in a common control situation are also barred from suing for damages.

In *Busse*, minority shareholders challenged a corporate buyout allegedly orchestrated by insiders that undervalued the stock at issue. (222 Cal.App.4th at p. 1035.) *Busse* noted that "[s]ection 1312 is not the most pellucid of statutes, . . . [b]ut when one examines the judicial history of section 1312, any mystery as to the Legislature's intent seems to dissipate. . . . [W]e find no evidence the Legislature wanted, in subdivision (b)[,] to establish or even recognize a monetary remedy that hadn't previously been there (at least after 1931). It merely wanted to add one additional big, but wholly *equitable*, stick to the remedies minority stockholders already had—the ability to sue to set aside a reorganization." (*Id*. at pp. 1038–1039.) Thus, shareholders dissenting from a merger where there is a control relationship between the corporations can either seek an appraisal, or sue to set aside the reorganization. *Busse* further held those remedies are mutually exclusive—"if dissenting shareholders do choose the big stick of a set aside remedy, they obviously cannot also have the alternative of an appraisal." (*Id*. at p. 1050.)

The trial court correctly relied on section 1312, *Steinberg*, and *Busse* to hold Plaintiffs could not sue for damages allegedly resulting from the 2015 short form merger, but instead were required to pursue relief through an appraisal action. Plaintiffs attempt to distinguish *Busse* in several different ways, none of which we find persuasive. Plaintiffs first assert *Busse* is wrongly decided, or must be limited to its specific facts. We find *Busse*'s analysis persuasive, and instructive here. Second, without any citation to the record, Plaintiffs assert that they had no prior notice of when and how the merger was going to happen. The record, however, shows that Sunwest's shareholders received notice prior to the merger. Sunwest announced the short-form merger plan to its shareholders on November 4, 2015. The Agreement and Plan of Merger included with that notice provided the merger would not become effective until a number of conditions precedent were satisfied, including the passage of at least 20 days from notice to shareholders. Plaintiffs also repeat their claim that all the corporate transactions at issue here must be viewed as a single transaction, to argue *Busse* does not require the 2015 merger portion of the alleged unitary transaction be severed and treated separately. For the reasons stated above, the step transaction doctrine does not apply here and we view the 2015 short form merger on its own, not as the culmination of an alleged six-plus year unitary transaction commencing with the Private Placement.

Plaintiffs finally seek to rely on Delaware case law to suggest that appraisal is not their only remedy, ignoring that California and Delaware law are distinct on this point. (Compare *Steinberg*, 42 Cal.3d at pp. 1213—1214 [other than Colorado, no jurisdiction has statute similar to § 1312] and *Busse*, *supra*, 222 Cal.App.4th at p. 1050 [under § 1312, subd. (b), dissenting shareholders must elect between set aside or appraisal remedy] with *In Re Orchard Enterprises, Inc. Stockholder Litigation* (Del. Ch. 2014), 88 A.3d 1, 50 [under Delaware law, minority shareholders in short-form merger may in some circumstances be "entitled to more than statutory appraisal"].) In short, we perceive no error in the trial court's holding that Plaintiffs were required to pursue relief through an appraisal action for any alleged damages resulting from the 2015 short form merger.

H. There Was No Error in the Costs Awarded to Defendants

Defendants, as the prevailing parties, initially requested $86,107.87 in costs. Plaintiffs filed a motion to tax costs challenging the items Defendants claimed. In response, Defendants lowered the amount they were requesting to $82,983.97. The trial court awarded Defendants the full $82,983.97 requested, which included $8,650.11 for models, enlargements, and photocopies of exhibits.

Plaintiffs argue the $8,650.11 award was improper because Defendants never used at trial some of the exhibits for which they were awarded costs. Defendants admit they did not use a number of the exhibits at trial, but argue the court acted properly in awarding costs for all exhibits whether used at trial or not. In ruling on this issue, the trial court stated it was looking to "the need for exhibits from the pretrial vantage point of the litigant. [The litigant] does not yet know whether or not the evidence will be needed. . . . In other words, the costs must be necessary at the time of incurring it, not based on hindsight. . . . Defendants would not necessarily be able to reasonably anticipate which [exhibits] would not be used, especially in a complex case such as this. . . . [I]t would be inequitable to deny those allowable costs and, therefore, the court will allow the costs of those exhibits" pursuant to Code of Civil Procedure section 1033.5, subdivision (c)(4).

1. Standard of Review

Generally, a trial court's award of costs is reviewed for abuse of discretion. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298.) "However, when the issue to be determined is whether the criteria for an award of costs have been satisfied, and that issue requires statutory construction, it presents a question of law requiring de novo review." (*Berkeley Cement, Inc. v. Regents of University of California* (2019) 30 Cal.App.5th 1133, 1139.) Here, because the parties are asking us to interpret the statute authorizing the award of costs, we review the award de novo.

2. The Trial Court Did Not Err in Awarding Exhibit Related Costs

" 'In ruling upon a motion to tax costs, the trial court's first determination is whether the statute expressly allows the particular item and whether it appears proper on its face. "If so, the burden is on the objecting party to show [the costs] to be unnecessary or unreasonable." [Citation.] Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary. [Citation.]' " (*Gorman v. Tassajara Development Corp*. (2009) 178 Cal.App.4th 44, 71.) However, "because the right to costs is governed strictly by statute," if the costs are not statutorily authorized, either expressly or impliedly, the court has no discretion to award to them, even if they were reasonable and necessary. (*Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774 (*Ladas*).)

Code of Civil Procedure section 1032 states that "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." As relevant here, Code of Civil Procedure section 1033.5 provides that costs for "[m]odels, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact." (Code Civ. Proc.§ 1033.5, subd. (a)(13).) Section 1033.5, subdivision (b) lists items that are not allowable as costs, and subdivision (c)(4) provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (§ 1033.5, subd. (c)(4).) All costs awarded, regardless of whether they are expressly allowable under subdivision (a) or discretionary under subdivision (c), must be "reasonably necessary to the conduct of the litigation" and "reasonable in amount." (§ 1033.5, subds. (c)(2) and (c)(3).)

The Courts of Appeal have split as to whether Code of Civil Procedure section 1033.5 authorizes costs for exhibits not used at trial. (Compare, e.g., *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1558—1560 (*Seever*) and *Ladas*, *supra*, 19 Cal.App.4th at p. 775 with *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856—857 (*Benach*) and *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364 (*Applegate*).) Those cases that have held such costs are not recoverable have focused on the language in section 1033.5, subdivision (a)(13) requiring the exhibits "were reasonable helpful to aid the trier of fact," and have held this "statutory language excludes as a permissible item of costs exhibits not used at trial, which obviously could not have assisted the trier of fact." (*Seever*, *supra*, 41 Cal.App.4th at p. 1557; see also *Ladas*, *supra*, 19 Cal.App.4th at p. 775 [statutory language that costs for trial exhibits " 'may be allowed *if they were reasonably helpful to aid the trier of fact*' " means "fees are not authorized for exhibits not used at trial."].)

Those cases that have upheld the award of costs for exhibits not used at trial have found that Code of Civil Procedure 1033.5, subdivision (a)(13) does not expressly bar such costs and therefore the catch-all provision in section 1033.5, subdivision (c)(4) authorizes such an award. (*Benach*, *supra*, 149 Cal.App.4th at p. 856; *Applegate*, *supra*, 23 Cal.App.4th at p. 364). *Benach* and *Applegate* both recognize, as did the trial court here, that prudent counsel must prepare exhibits in advance of trial. While at the time of preparation, counsel expects those exhibits will be reasonably helpful to aid the trier of fact, trials are not predictable, rote exercises. Trial lawyers may hope for the best, but must prepare for the worst. Events can and do occur that result in exhibits, prepared with the best of intentions, not being used at trial. To take a few examples, the case settles during jury selection. The opposing party concedes points in its presentation, making exhibits cumulative. Parties make tactical decisions not to call certain witnesses, such that exhibits for the direct and cross-examination of that witness are not used.

The amount of variability in exhibit use often correlates to the complexity of the case. Here, there was a three-week trial in a document intensive complex corporate law matter. As the *Benach* court observed, although the defendant "did not use the majority of its exhibits at trial, nothing indicates it could have anticipated that they would not be used. An experienced trial judge would recognize that it would be inequitable to deny as allowable costs exhibits any prudent counsel would prepare in advance of trial." (149 Cal.App.4th at p. 856; see also *Applegate*, *supra*, 23 Cal.App.4th at p. 364.)

Focusing on the statutory language, we find no absolute prohibition on an award of costs for exhibits not used at trial in

Code of Civil Procedure section 1033.5. Rather, reasonably interpreted, section 1033.5, subdivision (a)(13) requires an exhibit to meet an objective standard of being "reasonably helpful to aid the trier of fact," and not that the trier of fact was, in fact, aided by the particular exhibit.[12] In other words, the focus of the statutory language is on the potential value of the exhibit to the trier of fact, not whether it was used and its actual impact when used. For this reason, we believe *Seever* and *Ladas* have read into the statutory language a prohibition on the recovery of costs for exhibits not used at trial that does not plainly exist. (See *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 613–614 [" ' "one should not read into the statute allowing costs a restriction which has not been placed there" ' "].) Had the Legislature intended to bar recovery of costs related to exhibits not used at trial, it could have (but did not) include them in the list of items "not allowable as costs" in subdivision (b) of section 1033.5, or articulated in subdivision (a)(13) as being limited to exhibits used at trial.

Having concluded there was no legal prohibition on the trial court's award of exhibit related costs, we see no abuse of discretion in the trial court's award. Defendants' request for exhibit costs was proper on its face, and Plaintiffs' only objection to it was that Code of Civil Procedure section 1033.5 did not permit recovery. Having determined that the costs were statutorily authorized, the trial court was within its discretion to award costs for the exhibits at issue.

---

[12] The statutory language regarding deposition costs has analogous language recognizing that not all depositions will be used at trial, and permits recovery of costs when the depositions were "necessary . . . ." (Code Civ. Proc., § 1033.5, subd. (a)(3)(A).)

I. Defendants' Cross-Appeal is Moot

As a protective measure in the event of a reversal, Defendants cross-appealed the trial court's denial of their demurrer to one of Plaintiffs' causes of action. As we affirm the judgment, we need not address the cross-appeal.

That being said, Plaintiffs have moved to strike those portions of Defendants' reply brief in support of their cross-appeal entitled "Objections to Appellants' Reply Brief" as an improper surreply. Plaintiffs are correct that " 'a cross-appellant may not use its *cross-appellant's* reply brief to answer points raised in the appellant's reply brief.' " (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268.) We deny Plaintiffs' motion to strike in the interest of judicial economy, as the rule on which they rely does not authorize us to strike nonconforming briefs outright, but requires us to give Defendants "leave to file a new brief within a specified time." (Cal. Rules of Court, rule 8.204(e)(2)(B).) "However, we give effect to [Plaintiffs'] motion by disregarding issues or contentions raised for the first time in [Defendants'] cross-appellant[s'] reply brief." (*Hawran v. Hixson*, supra, 209 Cal.App.4th at p. 268.)

V. DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution