

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

DAVID R. DODD, DAVID E. DODD, and
DIANN D. MARTIN,

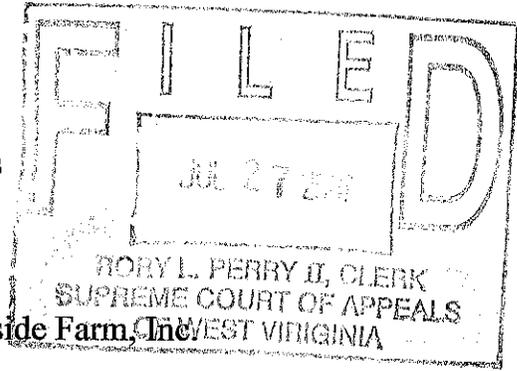
Plaintiffs/Appellants herein,

Circuit Court of Berkeley County
Civil Case No. 02-C-320

vs.

Docket number 071070 33501

POTOMAC RIVERSIDE FARM, INC.;
LOGAN D. WANNAMAKER, individually and as a
Director of Potomac Riverside Farm, Inc.;
MARJORIE LEE WANNAMAKER, individually and as
a Director of Potomac Riverside Farm, Inc.;
NATIONAL CITY BANK, a foreign
corporation doing business in West Virginia,
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.
and as Trustee of Edwin D. Dodd Trust; and
SARAH D. KAUFFMAN, as President of Potomac Riverside Farm, Inc.,



Defendants/Appellees herein.

APPELLANTS' BRIEF

NICHOLS & SKINNER, L. C.

By: 

Peter A. Pentony (W.Va. Bar # 7769)

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I. SUMMARY OF ARGUMENT

This appeal concerns a minority shareholder dissent proceeding pursuant to W.Va. Code §31-1-123. The corporation is Potomac Riverside Farms, Inc., a closely-held corporation whose shareholders were eleven family members. Appellants collectively owned 33% of the 1070 shares. The death of one of the major shareholders led to the consolidation of sufficient shares for an out-of-state bank to control the corporation. The bank voted its shares in favor of selling the corporate land. Appellants objected and tendered their shares, save one each, on August 30, 2001. Thereafter, they had no ability to vote their shares and they did not have the use of the value of their shares.

The trial court erroneously found the value of the corporate land, 360 acres of farm land including 1.4 miles of deep water Potomac River frontage, to be \$1,400,000.00, based upon an out-of-state appraiser's report riddled with problems, and despite a local appraiser valuing the land at \$2,082,000.00. This erroneously resulted in a per share value of \$952.37, and a total principal amount to Appellants of \$339,996.09. Unfairly and inequitably, the trial court also determined that the interest on that value of Appellant's shares should total just \$38,001.71 through the date of the court's order, despite Appellants being without use of their money for over five years. The annualized rate of return from the trial court was just over two percent. The result was unfair and inequitable.

II. NATURE OF PROCEEDINGS AND RULING BELOW

This appeal concerns a minority shareholder dissent proceeding pursuant to W.Va. Code §31-1-123. The case was instituted under the statute as it existed in 2001, shortly prior to the Legislature's recodification of the state corporations law. The trial court appointed a special commissioner to determine the fair value of the minority shareholders' shares in the corporation. The commissioner did so, and also made a recommendation that 8% would be a fair and equitable rate of interest on the value of the minority shareholders' shares. The trial court adopted the commissioner's fair value recommendation of \$952.37 per share, based on a land valuation of \$1,400,000.00. However, the trial court rejected the commissioner's interest recommendation. Thereafter, the trial court entertained briefs from the parties concerning interest, and ruled as follows:

- 1) Plaintiffs shall receive *no* interest on \$835.51 per share for the time period of August 30, 2001 through June 12, 2003.
- 2) Plaintiffs shall receive 10% simple interest on \$116.86 per share for the time period of August 30, 2001 through the date the Court enters this Order.
- 3) Plaintiffs shall receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003 through the date the Court enters this Order.

In concrete numbers, the trial court's ruling is that the fair value of Appellants' 357 shares as of August 31, 2001, was \$339,996.09, but that the interest on Appellants' loss of use of that money for over five years, through the date of the trial court's Order, is only \$38,001.71.

III. STATEMENT OF FACTS

This case involves a dispute in a closely held corporation, Potomac Riverside Farm, Inc. Appellants are minority shareholders of the corporation. Appellant David R. Dodd is the father of Appellants David E. Dodd and Diann D. Martin. Collectively, Appellants owned 360 of the 1070 total shares of the corporation. The issue in this appeal is the fair value of Appellants' shares in the corporation, and the interest which should be paid on that fair value.

1. *Potomac Riverside Farm, Inc.*— The corporation was formed in 1965. The shareholders of Potomac Riverside Farm, Inc. (referred to herein as PRF), were all related by blood or marriage. The three primary shareholders were siblings David R. Dodd, Edwin Dodd, and Sarah Kaufman. None owned a majority of the shares.

At the time of the shareholder dispute, PRF's assets mainly consisted of two farms located in Berkeley County, West Virginia. The property had been in the shareholders' family for seven generations. The farms are separated from each other by Little Georgetown Road. Together, the farms constitute over 360 acres, feature nearly 1.4 miles of Potomac River frontage, and contain a farmhouse, multiple farm-related outbuildings, and a large limestone manor home built in 1815. The portion of the Potomac River adjacent to the corporate land contains deep water and is suitable for boating. Because a Maryland State Park is on the other side of the river from the property, no development would ever mar the property's view of forested land across the river.

2. *Control of PRF by National City Bank.*— Edwin Dodd, the brother of Appellant David R. Dodd, owned 352 shares of PRF until his death on January 2, 2001. Shortly before his death, he paid \$50,000 to his sister, Sarah Kaufman, for the right to vote her 344 shares of PRF. He then created a Voting Trust for that purpose, and named National City Bank (NCB) to be the Trustee of the Voting Trust. As a result, NCB controls a majority of the shares of PRF.

NCB is also the representative of Edwin Dodd's estate, which owed substantial federal estate taxes. In order to pay the estate tax, NCB sought to liquidate part of Edwin Dodd's estate, including PRF. Accomplishing this meant selling PRF's land.

3. *The dissent.*— On August 31, 2001, at the outset of an enormous upswing in the local real estate market, a majority of PRF's shares were voted in favor of selling PRF's real property. It is important to note that NCB controlled 65% of the shares and thus steered the direction of the corporation.¹ Appellants objected to selling PRF's real property and each tendered all but one of his or her shares in accordance with the then-prevailing law concerning minority shareholders' dissent. From that time until the present, Appellants did not have the right to vote their tendered shares, nor did they have the use of the funds representing the value of those shares.

On March 21, 2002, a real estate development company called WV Hunter, LLC, offered to purchase both the PRF real estate and adjacent land owned by Edwin Dodd's

¹Appellants collectively owned just under 34% of the shares. Other family members owned between one and three shares each.

estate for \$5,000,000.00.² A representative of NCB, Ohio attorney Glenn Rambo, then apportioned the \$5,000,000.00 sales price between PRF and the estate's adjacent property, allocating \$1,399,900 to PRF. Thereafter, Marjorie Wannamaker, a PRF Director and an heir to the estate of Edwin Dodd, signed a contract to sell the PRF real estate to WV Hunter, LLC, for \$1,399,900. The closing actually occurred in June 2003.

On June 27, 2003, the corporation made a formal tender offer, pursuant to the West Virginia minority shareholder dissent statute, to pay the Appellants \$835.51 for each of their 357 shares. The offer was based upon the actual \$1,399,900.00 sales price received for PRF's land, as apportioned by NCB's representative. Because the Appellants had obtained an appraisal of the land for \$2,082,000.00, they rejected the offer, necessitating the instant appraisal proceeding. Since August 31, 2001, Appellants have never had the use of the funds representing their interests in the corporation.

4. *The appraisal proceeding.*-- The trial court ordered that a special commissioner hold a hearing on this matter. With the parties' agreement, the Court appointed Oscar M. Bean, Esquire, to be Special Commissioner. On October 26 and 27, 2005, Commissioner Bean conducted a contested hearing in this matter.

Both parties generally used the net asset method for calculating the value of PRF itself as the first step in determining the fair value of PRF's shares. In the net asset

²There was evidence below that NCB used the attractive, river-front PRF property as a loss leader to sell the adjacent, difficult-to-sell property owned solely by the estate of which NCB was the representative.

method, the corporation's value is determined based upon the value of its assets, less liabilities. The difference between those numbers is then divided by the number of shares of the corporation to reach the fair value of one share. Consequently, an important part of the Commissioner's analysis required determining the value of PRF's land.

The Commissioner heard expert testimony from two real estate appraisers concerning the value of PRF's real estate. The Appellants called Norman McCray, a West Virginia certified general appraiser who appraised the property as of July 2, 2002. Mr. McCray has been an appraiser in the eastern panhandle of West Virginia for twenty-six years. Mr. McCray concluded that the total value of the PRF real estate as of July 2, 2002, was \$2,082,000. After an adjustment for time, the minority shareholders offered evidence that the value of the PRF real property as of August 30, 2001, was \$2,024,745.

Appellee's expert Terence McPherson appraised the property as of January 1, 2001, for the Estate of Edwin Dodd on a temporary West Virginia appraisers permit. Mr. McPherson did not personally view each of the comparables, including several of the comparables in which the riverfront views were valued. Mr. McPherson concluded that the total value of PRF's 360 acres of real estate as of January 1, 2001, was \$1,250,000.

After hearing the testimony of both experts, and other witnesses, Special Commissioner Bean found that the value of PRF's real estate on August 31, 2001, was \$1,400,000.00, determined that PRF's liabilities were \$396,196.00, and recommended that the trial court find the fair value of a share of Potomac Riverside Farm, Inc., as of

August 31, 2001, to be \$952.37. The trial court agreed, and entered an Order Adopting Special Commissioner's Recommended Findings in Part dated April 6, 2006.

Because the minority shareholder dissent statute requires interest to be awarded, the Special Commissioner also recommended that simple interest at the rate of 8% per year be granted to Appellants for the loss of use of their money. The trial court disagreed, asserting that the question of interest was outside of the Special Commissioner's jurisdiction (despite all parties submitting evidence and proposed findings on the issue to the Special Commissioner). The trial court did not hold a hearing and instead entertained briefs on the interest issue. Ultimately, and confusingly, the trial court ruled that Appellants receive no interest on \$835.51 per share for the time period of August 30, 2001, through June 12, 2003, that Appellants receive 10% simple interest on \$116.86 per share for the time period of August 30, 2001, through October 5, 2006, and that Appellants receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003, through October 5, 2006.

The inequitable effect of the trial court's ruling on interest is that Appellants, who collectively owned approximately one-third of the shares of the corporation, lost use of all of their shares save one each on August 30, 2001, the day they tendered. From that time until the present, the Appellants had no use of either the shares or the value of the shares. They could not sell their shares and they could not enjoy the benefits of owning their shares, nor could they invest the value of their shares as they saw fit. Nonetheless, the

trial court found that, although their shares were worth \$339,996.09, the interest on Appellants' loss of use of that amount for over five years, through the date of the trial court's Order, is only \$38,001.71, for an annualized rate of return of just over two percent.

IV. ASSIGNMENTS OF ERROR

In a minority shareholder dissent proceeding, is a partial finding of no interest, and a partial finding of interest at the rate of just 1.674%, a fair and equitable rate of interest, where the fair value of the minority shareholders' shares is at least \$339,996.09, and where the minority shareholders tendered their shares in August 2001?

The trial court erroneously found that a partial finding of no interest, and a partial finding of interest at the rate of 1.674%, was fair and equitable.

Did the trial court err in its determination of the fair value of corporate shares, where the valuation was based on a finding that 360 acres of land fronting on the Potomac River was worth only \$1,400,000.00, despite the valuation occurring during a time of rampant real estate value escalation in the eastern panhandle?

The trial court erroneously found that it was appropriate to value the corporate land at \$1,400,000.00.

V. AUTHORITIES RELIED UPON

Authorities for the standard of review:

Hensley v. W.Va. Dept. Of Health and Human Resources, 203 W.Va. 456, 508 S.E.2d 616 (1998)

In re Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997 (Me. 1989)

Authorities for the discussion concerning interest:

W.Va. Code §31-1-123(c)(1974)

In re Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1007 (Me. 1989).

In the Matter of Fair Value of Shares of Bank of Ripley, 184 W.Va. 96, 399 S.E.2d 678 (1990)

Nelson v. W.Va. Public Employees Ins. Bd., 171 W.Va. 445, 300 S.E.2d 86 (1982)

Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341 (1985)

Jones v. Williams, 6 Va. 102 (1799)

In re: Valuation of Common Stock of Penobscot Shoe Co., 2003 WL 21911141 (Me.Super. May 30, 2003)

W.Va. Code §31D-13-1302(5) (2002)

W.Va. Code §56-6-31 (1981)

Cede & Co. v. Technicolor, Inc., 884 A.2d 26, 43 (Del. 2005)

Weigel Broadcasting Co. v. Smith, 682 N.E.2d 745, 752 (Ill. App. 1996), *reh. denied*

In the Matter of Fleischer, 486 N.Y.S.2d 272 (N.Y. App. Div.2d 1985)

Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341 (N.Y. App. Div.2d 1985)

Computer Task Group, Inc. v. Peierls, 810 So.2d 977 (Fl. 2002), *reh. denied*

Sarrouf v. New England Patriots Football Club, Inc., 492 N.E.2d 1122 (Mass. 1986)

Onti, Inc. v. Integra Bank, 751 A.2d 904 (Del. Ch. 1999)

VI. DISCUSSION OF LAW

A. Standard of review.

With respect to the rate of interest, the Court's review should generally be for abuse of discretion. In this case, however, the trial court failed to even award interest on a portion of the share value, despite the mandatory language of the statute. Consequently, an analysis of the rate of interest also involves a question of law, requiring a *de novo* review. See Syl. Pt. 2, *Hensley v. W.Va. Dept. Of Health and Human Resources*, 203 W.Va. 456, 508 S.E.2d 616 (1998) (addressing prejudgment interest rather than shareholder appraisal interest). Moreover, the question of whether the interest should be simple or compound also involves a question of law. See *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989) (where the appellate court found that the grant of simple interest rather than compound interest was an error of law).

With respect to the determination of the fair value of the corporate shares, the Court's review should be for abuse of discretion.

B. Discussion.

Appellants assignments of error focus on two points. First, the trial court's interest ruling was erroneous because it was not fair and equitable. Second, the trial court's fair value ruling was erroneous because it undervalued the corporate real estate.

- 1. The trial court erred by making an inequitable and unfair allowance for interest, where the court's order partially allowed for no interest, and partially allowed for interest at the rate of 1.674%.**

The trial court's ruling on interest contained three different interest rates on portions of the share value for different periods of time: no interest on a portion, 10% interest on a portion, and 1.674% interest on a portion.

The specific nature of the rulings demonstrates the inequity. First, the trial court ruled that Appellants "shall receive *no* interest on \$835.51 per share for the time period of August 30, 2001 through June 12, 2003." Presumably, the time span is based upon the date Appellants tendered their shares, August 30, 2001, and the date of the closing on the sale of PRF's land, June 12, 2003. Appellants did not accept that amount as the fair value, and did not have the use of those funds at any time during the pendency of this case. The trial court's order is unclear as to why Appellants should receive no interest whatsoever on the bulk of their share value for nearly two years.

Second, the trial court ruled that Appellants "shall receive 10% simple interest on \$116.86 per share for the time period of August 30, 2001 through the date the Court enters this Order." The \$116.86 is the difference between the corporation's tender offer of \$835.51 and the trial court's ruling that the fair value is \$952.37. The trial court's order does not explain why 10% is fair and equitable for this portion of the share value but not for the rest of the share value.

Third, the trial court ruled that Appellants "shall receive 1.674% simple interest on

\$835.51 per share for the time period of June 13, 2003 through the date the Court enters this Order.” The 1.674% rate is apparently based upon the amount of interest the corporation earned on the proceeds of the sale of the corporate real estate, which the corporation deposited into a simple money market account at NCB.³

In concrete numbers, the trial court’s ruling is that the fair value of Appellants’ 357 shares totals \$339,996.09, but that over five years of interest on Appellants’ loss of use of that money, through the date of the trial court’s Order, is only \$38,001.71. Such a ruling yields an annualized rate of return of just over 2%. The trial court’s ruling on interest was not fair and equitable.

In evaluating the interest rate, the Court should keep in mind that the purpose for awarding interest in an appraisal action is “to reimburse the Dissenters for the lost use of their money during the pendency of the appraisal proceeding while the corporation retained control and use of it.” *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989). Thus, the analysis must be based upon the dissenters’ loss of use of the money, rather than what the corporation actually did with the money.

Application of the Legislature’s subsequent amendment of the statute would allow

³The breach of fiduciary duty inherent in NCB placing the funds in its own money market account, earning money on those funds, then hammering the Appellants with the low interest returned on those funds, is indicative of the heavy-handed manner in which Appellees have treated the minority shareholders in this matter. Indeed, according to NCB’s 2004 Annual Report, its net interest margin (that is, its interest income less its interest expenses) for 2004 was 4.09%. In other words, NCB earned more interest on the proceeds of the sale of PRF’s land than it asserts Appellants should receive on the fair value of their shares.

interest at the rate of 10%; the new statute should provide guidance to this Court as to the rate the Legislature believes to be fair and equitable.

The Court should also be mindful of its previously announced directive *In the Matter of Fair Value of Shares of Bank of Ripley*, 184 W.Va. 96, 99-100, 399 S.E.2d 678, 681-682 (1990), that “dissenter’s rights statutes are construed favorably toward the shareholder, particularly where there is no prejudice to the corporation. . . . Doubts arising from a lack of precision or accuracy in the statute should, where possible, be resolved in favor of the dissenting shareholder. [Footnote omitted].” The statute is intended to be protective of the dissenting minority shareholders, while allowing the majority to determine the direction of the corporation. The trial court’s ruling on interest penalizes the Appellants for their minority status, unjustly enriches the Appellees, and is neither fair nor equitable.

- a. The trial court’s ruling that Appellants shall receive no interest on \$835.51 per share for the time period of August 30, 2001, through June 12, 2003, is neither fair nor equitable.

The trial court’s refusal to return interest on a substantial amount of the Appellants’ share value violates the mandate of the minority shareholder dissent statute. The operative law, W.Va. Code §31-1-123(e), requires the final judgment to provide for interest:

The judgment **shall** include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from

the date on which the vote was taken on the proposed corporate action to the date of payment (emphasis added).

The trial court's ruling, which fails to provide for interest on a significant portion of the per share value, violates the mandatory requirements of the statute.⁴

Other appellate courts have reversed trial courts which fail to return interest on the fair value of a minority shareholder's shares. For example, in a case involving a corporate dissolution forced by a minority shareholder, the appellate court found that the trial court erred in not returning interest on the fair value of the minority shareholder's shares. *Blake v. Blake Agency, Inc.*, 486 N.Y.S.2d 341 (1985). Appellant notes that the New York statute in that case was silent as to the award of interest, but that the statute was favorably compared to the minority shareholder appraisal statute, with interest ordered to achieve fairness. *Id.* at 350.⁵

The unfairness of the trial court's ruling is that the Appellants were forced to make a twenty-two month, no interest loan of \$298,277.07⁶ to the corporation. Even the earliest opinions note the injustice of not allowing interest to a person who does not have the use

⁴"It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. Pt. 1, *Nelson v. W.Va. Public Employees Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982).

⁵Appellant notes that the interest was 9% in that case. *Id.* In a shorter opinion delivered just one month later, the same appellate court upheld an award of 12% interest in a minority shareholder dissent proceeding. *In the Matter of Fleischer*, 486 N.Y.S.2d (1985).

⁶The amount is calculated by multiplying the \$835.51 amount upon which the trial court ruled no interest should run, and the 357 shares tendered by Appellants.

of his or her money. “[I]t is natural justice that he who has the use of another’s money should pay interest for it.” *Jones v. Williams*, 6 Va. 102 (1799). This portion of the trial court’s ruling is not fair and is not equitable. This honorable Court should correct the trial court’s error of law.

- b. The trial court’s ruling that Appellants shall receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003 through October 5, 2006, is neither fair nor equitable.

The third element of the trial court’s ruling was that Appellants receive 1.674% simple interest on the \$835.51 per share tender offer for the time period of June 13, 2003, (when PRF’s real estate was sold) until the trial court’s October 5, 2006, Order. The unfairness of the trial court’s ruling is demonstrated by its contrast with the second element of the trial court’s interest determination, in which the trial court allowed 10% interest on the difference between PRF’s tender offer of \$835.51 and the trial court’s fair value ruling of \$952.37. It is not clear from the trial court’s order why 10% is fair and equitable for one part of the share value but not for the remainder.

The only source for the figure of 1.674% comes from Appellee’s briefing below, where Appellee alleged that, after the sale of PRF’s real estate, the corporation placed the funds into a money market account at NCB which returned 1.674%. This is a classic example of the tail wagging the dog. The interest earned by the Appellees on the funds should have no bearing on the determination of the fair and equitable interest which should be paid to the minority shareholders for the loss of use of their money. Otherwise,

a corporation could act punitively toward its dissenting minority shareholders by its investment choices. This is contrary to the holdings of *In the Matter of Fair Value of Shares of Bank of Ripley*, 184 W.Va. 96, 399 S.E.2d 678 (1990), concerning the statute's goal of protecting dissenting shareholders.

Indeed, even Appellees' evidence supported an interest rate higher than that determined by the trial court. Appellees' expert accountant, Phillip Cox, a CPA, testified about the reasonable interest a person investing in the corporation would expect to receive on the investment:

- A. . . . [A] person who is going to be investing in this would discount the price for the amount of reasonable interest, in my opinion, that could be earned on that money that they would be investing for those twenty-four months it takes to start to realize the return on the investment so that was sixteen percent, two years eight percent.
- Q. **That reasonable interest was eight percent per year?**
- A. **Yes.**
- Q. And that's your opinion as a local CPA and a local businessman with experience in this area; is that right?
- A. Yes.

Tr. II, at pages 366, line 9 - page 367, line 3 (emphasis added). While being questioned by Appellees' counsel, Mr. Cox referred to that rate as conservative. The corporation should not be allowed to escape the testimony of its own expert concerning a reasonable interest rate. The Appellees' evidence further demonstrates the inequity of the trial court's ruling.

Other courts' rulings confirm the inequity of the trial court's ruling. See *In re: McLoon*, 565 A.2d at 1006-07 (8% interest); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d

26, 43 (Del. 2005) (10.32% interest); *Weigel Broadcasting Co. v. Smith*, 682 N.E.2d 745, 752 (Ill. App. 1996), *reh. denied* (7% interest); *In the Matter of Fleischer*, 486 N.Y.S.2d 272 (N.Y. App. Div.2d 1985) (12% interest); *Blake v. Blake Agency, Inc.*, 486 N.Y.S.2d 341 (N.Y. App. Div.2d 1985) (9% interest). The rate of 1.674% is neither fair nor equitable, and this honorable Court should reverse the trial court's unfair and inequitable ruling.

Appellees argued below that PRF was unprofitable, that the shareholders did not receive dividends on their shares, and that consequently there should be little or no interest paid. However, Appellees' argument ignores the appreciation in value of PRF's underlying assets: the land. Dividends reflect whether a corporation is generating revenue; the net asset method was used to value PRF. Under the net asset method, the value of the underlying assets determines the value of the corporation. The assets of Potomac Riverside Farms, Inc., consisted of approximately 360 acres of land containing over one mile of Potomac River frontage. Thus, the increase in value of the land drove an increase in the value of the shares, and the lack of dividends in no way informs the fair and equitable interest rate. Appellee's lowball interest rate suggestions are motivated only by the Appellees' desire to punish Appellants for their dissent. Low interest is neither fair nor equitable.

2. The fair and equitable rate of interest should be 10% per annum, compounded annually.

Appellants voted against the corporate decision to sell substantially all of the assets of the corporation on August 30, 2001. Thereafter, each Appellant tendered all but one of his or her shares. From that time until the present, Appellants have not had the ability to use the money which represents the fair value of his or her shares.⁷ Accordingly, an allowance for interest must be made. W.Va. Code §31-1-123(c)(1974).

Commissioner Bean heard the evidence, judged the demeanor and credibility of the witnesses, and determined that 8% interest should be applied to the value of Appellants' tendered shares from August 30, 2001, until paid. Commissioner Bean is an experienced attorney who is also Chairman of the Board of Summit Financial Group. His recommendation concerning interest should be given weight. Indeed, in light of Appellees' expert's testimony regarding interest, 8% should be the floor for the Court's consideration. The fairest and most equitable rate of interest is 10%, compounded annually.

a. 10% is a fair and equitable interest rate because of the language of the revised statute and because of the rapid escalation in real estate prices during the operative time period.

Interest at the rate of 10% is fair and equitable for two reasons. First, the current minority shareholder dissent statute requires interest to be paid at the prejudgment interest

⁷The value of Appellant David R. Dodd's 311 shares at the rate of \$952.37 per share, as found by the trial court, is \$296,187.07. The value of Appellant David E. Dodd's 27 shares is \$25,713.99. The value of Appellant Diann Dodd Martin's 19 shares is \$18,095.03.

rate of 10%, and the Court should take guidance from the revised statute. Second, the corporate assets were real estate, the value of which escalated rapidly in this area during the operative time period.

i. The current minority shareholder dissent statute requires interest to be paid at the prejudgment interest rate of 10%.— The revised minority shareholder statute, W.Va. Code §31D-13-1302(5) (2002), defines the appropriate interest rate as “the rate of interest on judgments in this state on the effective date of the corporate action.” On August 30, 2001, the rate of interest on judgments was 10% per annum. W.Va. Code §56-6-31 (1981). The Legislature passed the revised statute in 2002, just months after the Appellants’ August 30, 2001, dissent. Equity calls for the Court to take substantial guidance from the revised statute.

ii. A 10% interest rate for the fair value of shares of a corporation whose main asset is real estate is fair and equitable in light of the escalation of real estate values in the eastern panhandle and the testimony of Appellees’ expert.— Two large parcels of real estate were the main assets of the corporation. Real estate values in the eastern panhandle rose dramatically during the time period Appellant’s money was held by Appellee. For example, the median sales price of Berkeley County residential properties increased 26.25% from January 1, 2005, to December 31, 2005.⁸ See Exhibit A to Petitioner’s

⁸It is interesting to compare this evidence of the strong local real estate market to the statements made by the corporation’s counsel’s law firm in the Ohio probate court, where they stated that the adjacent property “is located in a poor West Virginia county . . . away from the more populated metropolitan areas of West Virginia. . . . [It] is a beautiful property in the wrong location. It is

Memo Concerning Interest and Costs. In all fairness, the rate of interest on the fair value of Appellants' shares in the land-owning corporation should reflect the escalation of land values during the operative time period.

b. The interest should be compounded in order to achieve true fairness and equity.

The minority shareholders should receive compensation for the loss of use of their money. In determining the fair and equitable way to make up for that loss of use in similar circumstances, other jurisdictions have found it appropriate to compound interest. The jurisdictions discussed below have statutes similar to West Virginia's old statute, which granted discretion to the court in determining interest.⁹

In the case of *In re: Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989), the Supreme Judicial Court of Maine ruled that compound interest on the fair value of a dissenter's shares was appropriate. To explain its reasoning, the

surrounded by poverty and situated beyond the sprawling Washington, D.C. corridor." Memorandum in Support of Application for Interim Payment of Attorney Fees, filed on September 17, 2001, in *In the Matter of: The Estate of Edwin D. Dodd, deceased*, Wood County, Ohio, Probate Court Case No. 011050, at pages 3 -4 (emphasis added).

⁹Appellants note that this honorable Court has ruled that a prevailing party is not entitled to compound *prejudgment* interest. *Hensley v. W.Va. Dep't of Health and Human Resources*, 203 W.Va. 456, 508 S.E.2d 616 (1998). However, *prejudgment* interest and interest in a minority dissent proceeding are not the same. See *In re: Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (1989) (noting that "[p]rejudgment interest . . . is explicitly a procedural device to encourage expeditious litigation . . . [while] interest under the appraisal statute . . . is a substantive right, intended to reimburse the Dissenters for the lost use of their money during the pendency of the appraisal proceeding while the corporation retained control and use of it[.]") Consequently, the holding in *Hensley*, regarding *prejudgment* interest, does not preclude compound interest in this case, regarding interest under the appraisal statute.

McLoon court quoted at length from a persuasive scholarly article:

in the absence of compound interest, the corporation could force the dissenter to sell his shares at less than fair value. If the corporation initially makes a low settlement offer, lengthy appraisal proceedings are inevitable. However, the allowance of only simple interest on the appraisal award could, in some cases, result in a situation where it would be more profitable for the shareholder to accept the settlement offer and invest the money in a savings account, drawing compounded interest quarterly, rather than go through the lengthy appraisal process. This result is clearly inconsistent with the purpose of the appraisal statutes which is to guarantee the dissenting shareholder fair value of his shares and to encourage the corporation to make a fair settlement offer.

Id. (citations omitted). The court in the *McLoon* case ruled that fairness and equity require compound interest on the fair value of dissenters' shares.

Likewise, in *Computer Task Group, Inc. v. Peierls*, 810 So.2d 977 (Fl. 2002), *reh. denied*, the Florida district court ruled that compound interest should be awarded to the dissenting minority shareholders. The *Computer Task Group* court quoted the same article that the *McLoon* court did, and cited multiple other sources for the rule that the interest should be compound.

The Massachusetts Supreme Judicial Court addressed compound interest in *Sarrouf v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1122 (Mass. 1986). In holding that an award of compound interest in a minority dissent case was not an abuse of discretion, the court noted that appraisal is an equitable proceeding in which a court may allow compound interest so that the dissenter can be fairly compensated for his or her inability to use the money. *Id.* at 1129. Appellants note that this Court previously cited

the *Sarrouf* case approvingly on a different issue. *In the Matter of Fair Value of Shares of Bank of Ripley*, 184 W.Va. 96, 102, 399 S.E.2d 678, 684 (1990)

Lastly, a helpful explanation of the fairness of compound interest is found in *Onti, Inc. v. Integra Bank*, 751 A.2d 904 (Del. Ch. 1999). There, the trial court determined that compound interest was fair and equitable in a minority shareholder dissent proceeding. In so holding, the court noted that “[i]t is simply not credible in today’s financial markets that a person sophisticated enough to perfect his or her appraisal rights would be unsophisticated enough to make an investment at simple interest- in fact, even passbook savings accounts now compound their interest daily.” *Id.* at 926. In a footnote, the court noted

compound interest is ‘the standard form of interest in the financial market.’ . . . Certainly [defendant] has earned compound interest on its investments during the pendency of this proceeding and certainly [plaintiffs] would have had to pay compound interest to borrow funds during the pendency of this proceeding. Accordingly, I am unable to conclude that an award of simple interest will adequately compensate the [plaintiffs] for the loss of the use of their funds or prevent the corporation from retaining unjust benefits from the use of [plaintiffs’] funds.

Id. at 926, n.88.

The Court should follow these persuasive and fair rulings concerning interest and order that the minority shareholders receive compound interest on the value of their shares.

3. **The trial court erred in determining that the fair value of Appellants' shares of the corporation which owned in excess of one and one-half miles of deep water Potomac River frontage was \$952.37 per share.**

The determination of the fair value was based on the value of the corporate assets, less the corporate liabilities. That number was then divided by the number of outstanding shares to reach the fair value of a single share.¹⁰ There was no realistic dispute about the corporate liabilities, and the parties stipulated to the number of outstanding shares (1070). The most disputed issue was the value of the corporate assets.

The assets largely consisted of several adjacent parcels, containing approximately 360 acres. The property also contained in excess of one mile of deep-water Potomac River frontage. The Special Commissioner heard evidence concerning value from Plaintiffs' expert appraiser, Norman McCray from Shepherdstown, and the Defendants' expert appraiser, Terence MacPherson from Frederick, Maryland.

The Special Commissioner's dissatisfaction with both appraisals was evident:

both experts made substantial adjustments off of comparables. In one instance a listing was used as a comparable. Out of county property was used; Out of state property was used; Property with frontage on rivers other than the Potomac River were used; some comparables had no river frontage; some had buildings, some did not; some comparables involved smaller tracts, and the amount of river or water frontage also varied greatly as did the access thereto. The Commissioner believes it would have been more helpful to have an independent appraiser commissioned by PRF for the sole purpose of determining the fair value on August 31, 2001, but alas,

¹⁰The special commissioner recommended, and the trial court ruled, that minority and marketability discounts should not be applied when calculating the fair value of Appellants' shares.

that was not done, and of the two imperfect appraisals the Commissioner believes the Defendants' expert testimony and appraisal was the more credible.

Special Commissioner's Recommended Order at page 10. The Special Commissioner, apparently reluctantly, chose the Defendants' appraiser. Unfortunately, that appraisal was error-ridden, and reliance upon it constitutes an abuse of discretion.

First, Mr. McPherson appraised the property as of January 1, 2001, for the Estate of Edwin Dodd on a temporary West Virginia appraisers permit. Notably, Mr. McPherson did not even personally view each of the comparables, including several of the comparables in which the riverfront views were valued. This failure is important because the river frontage is a key aspect of the corporate real estate.

Second, three of Mr. McPherson's comparables for the river front farm were adjusted 70%. Such substantial adjustments call into question whether the comparables were actually comparable to the subject property.

Third, Mr. McPherson failed to make a time adjustment for any comparable which was sold within one year of the effective date of the appraisal. The effect of this failure is that there was no adjustment made for sales over a *two-year period*, that is, one year in either direction from the effective date of the appraisal. In light of the rapid increase in property values in the eastern panhandle of West Virginia over the past few years, of which the Special Commissioner took judicial notice, this lack of adjustment is a serious flaw in the appraisal.

Fourth, Mr. McPherson failed to adjust for river frontage for four of the five

comparables, and in fact reduced the fifth comparable, apparently finding that it had superior river frontage. However, none of the comparables had as much river frontage as the corporation's 1.4 miles. Moreover, Mr. McPherson failed to personally see the river views from at least three of the river front comparables. Failing to adjust the comparables for their river frontage is a substantial flaw in the appraisal, especially when Mr. McPherson made substantial downward adjustments to the comparables based upon size.

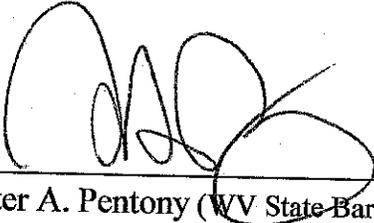
Based upon these glaring problems with the Appellee's appraisal, it was an abuse of discretion to rely upon the same in determining the fair value of PRF shares. Therefore, this Court should remand the issue of fair value to the trial court so that it can address the value of the land and, thus, the fair value of Appellants' shares.

C. CONCLUSION.

In conclusion, this Honorable Court should correct the trial court's errors in this minority shareholder proceeding. First, because the interest rate determined by the trial court was not fair and equitable, and in part violated the mandatory requirements of the minority shareholder dissent statute, the Court should reverse the trial court's ruling on interest. Second, because 10% compound interest is fair and equitable in this case, the Court should grant interest at the fair and equitable rate of 10%. Third, because the trial court erred in valuing the corporate real estate, the Court should remand the issue of the fair value of the corporate shares to the trial court. All of the same should be done to promote fairness and equity and to encourage small business investment in this state.

VII. RELIEF REQUESTED

WHEREFORE, based upon the foregoing, Appellants respectfully request this honorable Court to reverse the trial court's rulings concerning interest and the fair value of Appellants' shares of the corporation, to enter an additur allowing for interest at the rate of 10%, compounded annually, and to remand the issue of fair value to the trial court for further consideration.



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DAVID R. DODD, DAVID E. DODD,
DIANN D. MARTIN, and all other
similarly situated minority shareholders
of Potomac Riverside Farm, Inc.,
Appellants, by counsel

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

DAVID R. DODD, DAVID E. DODD, and
DIANN D. MARTIN,

Plaintiffs/Appellants herein,

Circuit Court of Berkeley County
Civil Case No. 02-C-320
Docket number 071070

vs.

POTOMAC RIVERSIDE FARM, INC.;
LOGAN D. WANNAMAKER, individually and as a
Director of Potomac Riverside Farm, Inc.;
MARJORIE LEE WANNAMAKER, individually and as
a Director of Potomac Riverside Farm, Inc.;
NATIONAL CITY BANK, a foreign
corporation doing business in West Virginia,
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.
and as Trustee of Edwin D. Dodd Trust; and
SARAH D. KAUFFMAN, as President of Potomac Riverside Farm, Inc.,

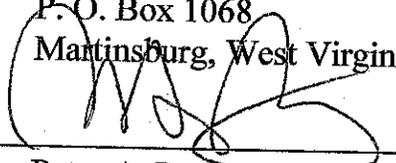
Defendants/Appellees herein.

CERTIFICATE OF SERVICE

I, Peter A. Pentony, counsel for the Appellants, do hereby certify that I have
mailed a true copy of the foregoing **Appellant's Brief** upon the following persons, by
mailing the same by U.S. Mail, postage prepaid, this 26th day of July, 2007:

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