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In The
COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000574-DG

SHAWNEE TELECOM RESOURCES, INC.,
APPELLANT

V.

ON REVIEW FROM THE
KENTUCKY COURT OF APPEALS
CASE NOS. 2008-CA-000042 AND 2008-CA-00167

KATHY BROWN,
APPELLEE

BRIEF FOR APPELLEE

This is certify that a true and accurate copy of the Brief for Appellee was served by mail, postage pre-paid, this 31st day of January, 2011, on D. Duane Cook, 105 Thoroughbred Way, Georgetown, Kentucky, 40324, counsel for the Appellant, on Hon. Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on Hon. Gary D. Payne, Senior Judge, 3195 Paris Pike, Lexington, Kentucky 40511, and on Hon. James D. Ishmael, Jr., Circuit Judge, Robert F. Stephens Circuit Courthouse, 120 North Limestone, Suite C551, Lexington, Kentucky, 40507. The undersigned further certifies that the record on appeal was not withdrawn by counsel for the Appellee.

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STATEMENT CONCERNING ORAL ARGUMENT

Kathy Brown respectfully joins the Appellant in requesting an oral argument in this case. The issues raised in this appeal invoke a majority trend in the nationwide law of valuing corporations under Kentucky's version of the Model Business Code that avoids a critical and patent unfairness to dissenting shareholders forced to sell their stock back to corporations.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A. The vital background facts and procedure of the underlying litigation to determine the Fair Value of Kathy Brown's shares of Shawnee Technology, Inc.

In 1998, Kathy Brown, along with Jim Clark, Andrea Simmons, and Gina Thomas, founded Shawnee Installation Services, LLC, which they soon incorporated in 1999 as Shawnee Technology, Inc. ("Shawnee"), a company engaged in technical installation of telecommunications equipment. [Kathy Brown's Brief for Valuation Hearing filed January 19, 2006, pg. 2; Record on Appeal Page ("RA") 543]. Kathy Brown owned 24% of the shares in Shawnee Technology, while Jim Clark held 49%, Andrea Simmons held 24%, and Gina Thomas held 3%. [Id.]

In the summer of 2003, Shawnee Technology put into motion a plan to effect a squeeze-out merger to remove Kathy Brown. [Id.] Finally on December 31, 2003, Shawnee Technology, Inc. merged the entirety of its assets and operations into a newly formed company, Shawnee Telecom Resources, Inc., in which Andrea Simmons, Jim Clark, and Gina Thomas continue to own stock. [Id.]

Kathy Brown properly invoked her dissenter's rights to receive Fair Value for her shares of Shawnee Technology under KRS 271B.13-010 – 13-310. [Id.] Shawnee Technology, however, paid Kathy Brown pursuant to KRS 271B.13-250 the curiously low amount of $168,840.00 based upon a valuation of the company as of December 31, **2002** – despite the fact that the statutory valuation date under KRS §271B.13-010(3) was the date of the merger, December 31, 2003. [Id.] A revised valuation by Shawnee Technology's expert propounded a value determination of $232,740, but Shawnee Technology refused to pay the difference to Kathy Brown. [Id.] After Kathy Brown demanded payment of Fair Value for her shares under §271B.13-280, this action

commenced in the Fayette Circuit Court.

The key aspect of this case – and the only aspect for a year and a half of the litigation – was the determination of the Fair Value of Kathy Brown's stock as of December 31, 2003 under the Kentucky dissenter's rights statute. Judge Payne of the Fayette Circuit Court, the Judge presiding over the action from its inception in 2003, appointed the Master Commissioner as the appraiser of Fair Value pursuant to KRS §271B.13-300(4). [Order dated July 15, 2005; RA 429]. Upon referral, the parties extensively briefed the valuation issues and presented evidence at several days of hearings before the Master Commissioner.

The Master Commissioner issued a fifteen-page Report of Appraisal, which outlined much of the significant evidence and findings of the appraiser to support his determination of the fair value of Kathy Brown's stock as of December 31, 2003. [Report of Appraisal filed August 14, 2006; RA 1097-1111]. The Master Commissioner determined that Kathy Brown's stock was worth, first, $414,751 under a Capitalization of Earnings Method of valuation, and second, $322,526 under a Net Asset Value Approach to valuation. [Id.] Combining the two and assigning twice the weight to the Net Asset Value Approach as to the Capitalization of Earnings Method, the Master Commissioner ultimately appraised the Fair Value of Kathy Brown's stock in Shawnee Technology, Inc. to be $353,633. [Id.]

Kathy Brown objected, as a matter of law, to two simple errors in the Master Commissioner's Report of Appraisal, moving the Circuit Court to enter the appraisal with simple mathematical modifications correcting the two errors. [Defendant's Objections to Report of Appraisal filed August 31, 2006; RA 1156-1200]. Those corrections result in

an increase in the Fair Value of Kathy Brown's stock to $553,002. [Id.] The Fayette Circuit Court, affirmed the Report of Appraisal without modification of those errors. [Order entered January 2, 2007; RA 1373].

Later, Kathy Brown filed an extensive and detailed motion for attorneys' fees detailing all of Shawnee Technology's arbitrary, vexatious, and bad faith litigation tactics. [Kathy Brown's Motion for Fees and Expenses filed April 30, 2007; RA 1380-1483; Appendix 1]. Adopting, wholesale, the arguments of Kathy Brown that Shawnee had litigated this matter arbitrarily, vexatiously, and in bad faith, Judge Payne entered a Judgment on the Report of Appraisal and awarding attorneys' fees and costs to Kathy Brown in an amount directly attributed to Shawnee's bad faith tactics. [Judgment entered November 14, 2007; RA 1579]. That Judgment was deemed final and appealable [Id.], and an appeal to the Kentucky Court of Appeals followed Shawnee's last-ditch barrage of motions to avoid liability to Kathy Brown for the Fair Value of her shares and her attorneys' fees – including a drastic and unfounded Motion for Recusal of Judge Payne, even though Judge Payne had already retired to Senior Status, the case had been transferred to Judge Ishmael's division of the Fayette Circuit Court, and Judge Payne was only hearing Kathy Brown's Motion for Attorneys' Fees and Costs because he had presided over Shawnee's actions throughout the valuation portion of the case.

On appeal at the Kentucky Court of Appeals, Kathy Brown again took issue with two legal errors in the Judgment adopting the Report of Appraisal by the Master Commissioner, arguing (1) that the use of the Net Asset Value in determining the Fair Value of Kathy Brown's shares used impermissible market considerations and should not have been considered, and (2) that the value of Kathy Brown's shares of stock in

Shawnee should not have been discounted for lack of marketability. Shawnee took issue with numerous aspects of the Judgment. The Court of Appeals, in its Opinion Reversing and Remanding rendered August 14, 2009 (hereinafter cited as, simply, Shawnee), agreed with Kathy Brown on every issue raised on appeal but one: the determination that the trial court Judgment's award of attorneys' fees and costs based on Shawnee's vexatious litigation tactics needed additional findings of fact and conclusions of law. This appeal followed.

B. Summary of the discrete claims initiated by Kathy Brown on issues separate from the statutory determination of Fair Value in the dissenter's rights action.

Although they are not on appeal here, the separate claims by and against Kathy Brown merit brief mention so that this Court can understand why the claims are distinct and why the valuation Judgment *sub judice* was properly final and appealable under Kentucky law.

1. Kathy Brown's Counterclaim for Breach of Fiduciary Duty:

After learning that Shawnee Technology's successor by merger, Shawnee Telecom Resources, Inc., distributed nearly one million dollars in cash immediately after Kathy Brown was squeezed out – all money that was retained after the company quit its standard and unwavering practice of making distributions in 2003 – Kathy Brown added a Counterclaim against Shawnee, and its individual shareholders Andrea Simmons, Jim Clark, Sr., and Gina Thomas to assert a claim for breach of fiduciary duty for self-dealing at the direct expense of Kathy Brown. [Counterclaim filed April 1, 2005; RA 243-250]. This claim was particularly compelling based on sworn testimony, since Shawnee Technology's president, Andrea Simmons, testified in deposition that she and the other

shareholders intentionally withheld the distributions in 2003 to keep Kathy Brown from getting any money because they did not feel they owed her any duty of loyalty. [Kathy Brown's Response to Motion for Summary Judgment on Counterclaim filed October 31, 2006, pp. 6-10; RA 1331]. Further, Andrea Simmons admitted that she and the other shareholders, Jim Clark and Gina Thomas, received more money from the distributions in early 2004 because of withholding distributions from Kathy Brown. [Kathy Brown's Response to Motion for Summary Judgment on Counterclaim filed October 31, 2006, pp. 6-10; RA 1331]. Thereby, Kathy Brown sought damages in the amount of the 24% of the withheld distributions from 2003. [Counterclaim filed April 1, 2005, pg. 7; RA 249]. Further, Kathy Brown sought punitive damages, since breach of fiduciary duty is considered fraud under Kentucky law, whereby punitive damages are appropriate. [Counterclaim filed April 1, 2005, pg. 7; RA 249]. The trial court, however, in a ruling that has not been made final and appealable, granted summary judgment in favor of Shawnee on this claim.

2. Cross-Claims by the Shawnee Parties against Kathy Brown in retaliation for her Counterclaim for Breach of Fiduciary Duty:

After Kathy Brown amended her pleadings to add the above claim for breach of fiduciary duty, Shawnee Technology and Jim Clark filed a bevy of hollow Cross-Claims against Kathy Brown, alleging several phantom causes of action that are based on neither reality nor any rational transmutation of Kentucky law. [Answer to Counterclaim, Cross-Claims, and Demand for Jury Trial filed June 29, 2005; RA 418]. Among them, Jim Clark alleged a breach of contract, which, when asked about in interrogatories, was a contract to buy Jim Clark's stock "within five years" at a price that was to be agreed upon at a future date by Jim Clark and Kathy Brown. [Kathy Brown's Motion for Partial

Summary Judgment on Jim Clark's Cross-Claims against Kathy Brown filed January 3, 2006; RA 453-482]. Kathy Brown moved for summary judgment on the claims, since the contract was clearly an agreement to agree, which Kentucky law unambiguously recognizes as unenforceable. [Id.] Despite several vain attempts to breathe life into those claims through amendments to the cross-claim pleadings to add a claim for restitution, Kathy Brown again posited to Judge Payne that the claims were bogus in a subsequent motion moving for dismissal and summary judgment of Jim Clark's cross-claims. [Kathy Brown's Motions to Reconsider and Alternative Motion to Dismiss filed February 26, 2006, RA 884-915]. Judge Payne, after hearing the parties' arguments, entered an Order dismissing Jim Clark's cross-claims, finding "as a matter of law that there was not a contract" and holding "that if there had been a contract, Mr. Clark's actions would not support a claim for unjust enrichment." [Order entered August 14, 2006, RA 1112].

ARGUMENT

I. THE RECENT RULINGS OF THE COURT OF APPEALS IN *SHAWNEE* AND *BROOKS* CORRECTLY DEFINE FAIR VALUE IN A DISSENTERS RIGHTS ACTION AND BRING KENTUCKY IN LINE WITH THE PREVAILING LAW OF THE NATION, WHEREBY THIS COURT SHOULD AFFIRM THE OPINIONS OF THE COURT OF APPEALS.

A. The current state of Kentucky law as to the definition of Fair Value

1. Introduction and Standard of Review

The overarching issue facing the Court on this appeal can be reduced to a simple question: What is Fair Value? Apparently, the most simple questions are sometimes the most difficult to answer, but this is why a case such as this comes to the Supreme Court. Kathy Brown readily concedes that the present appeal presents questions of law for *de novo* review. In point of fact, this Court is completely unfettered in its decision-making power on this matter. It is faced with the words "fair value" in a Kentucky statute, which are significantly undefined. There is abundant commentary and persuasive case law from courts across America and below, but no controlling precedent. Only reason, fairness, and justice limit what the Court can determine to be the law in this case, but determining what is reasonable, fair, and just is a weighty challenge.

Faced with that challenge in ruling what Fair Value means in Kentucky, Kathy Brown suggests at the outset that the Court consider the overarching tone of the Appellant and Amicus briefs. Defiance of well-reasoned decisions by courts, thinly veiled attempts to obfuscate the realities of legal pronouncements, and paranoid accusations that courts and the laws they interpret are out to punish corporations – all of these are subtly woven into the arguments opposing Kentucky's new law and Kathy Brown's position in this appeal. For example, though a corporation owes every shred of

its very existence to the law, the Appellant repeatedly accuses the custodians of the law – the courts – of being "confused" (using the word three times on one page to describe courts in this Commonwealth and beyond) about the application of the very law they guard, nurture, and interpret. [Appellant's Brief, pg. 8]. The Kentucky Chamber of Commerce, as Amicus to this appeal, more or less comes to tell this Court it has no power to reinterpret an ambiguous statute, and instead should leave in place an outdated ruling of a lower court of the Commonwealth that previously interpreted the statute the way the Chamber thinks is appropriate.[1] Both the Appellant and the Amicus distort every

[1] The Kentucky Chamber of Commerce takes a strange position, in any regard. In the face of a long-standing, progressive trend in the methods of determining Fair Value throughout the nation, how can it be bad for Kentucky business to protect and fairly treat the minority shareholders of Kentucky corporations?

The Chamber's brief claims the Court of Appeals decisions in Shawnee and Brooks will encourage "minority shareholders to reap windfall profits through dissent and litigation." [Amicus Brief, pg. 5]. Does the Chamber of Commerce think that a corporation exists solely for the profit of its majority shareholder(s)? Does the Chamber of Commerce characterize minority shareholders as greedy, rebellious, and litigious underlings who serve no purpose but to hold back the advancement of Kentucky's economy? Does the Chamber think that Kathy Brown was being litigious and generally acting as a saboteur to the fabric of the Commonwealth's economy and business climate when she disagreed with Shawnee's squeeze-out merger of her and their tendered price for her shares that was less than a third the value determined by the Kentucky Court of Appeals?

In general, none of these queries are before the Court today, which is why they have been relegated to a footnote. It is peculiar and informative with respect to credibility, however, that the Chamber of Commerce seems to think so lowly of minority shareholders and dissenters. The undersigned (though admittedly without the acumen that the Kentucky Chamber of Commerce surely possesses related to how business affects economy and so on) always thought that a corporation was a single entity representing its entire body of shareholders. The undersigned further thought that minority shareholders, and the protections that encourage their investment in or contribution to a corporation, were a rather important part of a corporation's fabric. Although the undersigned may be mistaken, it seems that many contributors of services and capital to innumerable businesses across the Commonwealth might shy away from such investment if they had no protection from the whims of the majority. Are not a significant number of venture capitalists, whose contributions make possible so many corporations' success, nothing more than minority shareholders?

At the expense of redundancy, the undersigned neither knows for certain nor proffers any answers to these queries as they do not relate directly to this Appeal. The undersigned will simply leave this topic by quoting the Vision Statement and Mission Statement contained in the 2008-2011 Strategic Plan of the Kentucky Chamber of Commerce as found on the Chamber's website to which they referred this Court in the Amicus Brief, pg. 5, FN1 – and with a marked inability to understand how this vision and mission are not fulfilled by the proper evolution of a statute designed to protect minority shareholders and afford them their fair share of a return on their investment upon certain actions by the majority:

aspect of following the prevailing nationwide trend in the law as punishing the majority and granting a windfall to the dissenter, even though, as described by the Kentucky Court of Appeals in its recent decisions and by nearly every court that has followed the majority definition of Fair Value, the impetus and actual result of the majority trend is preventing a windfall to the majority and staying the majority's previously held upper hand in decisions to push out a minority shareholder.

Compared to this aggression, Kathy Brown has only ever sought what the law dictates she deserves: The Fair Value of her 24% interest of Shawnee as a going concern on the date of the merger by which she was squeezed-out by the majority. The Court of Appeals, in both Shawnee and Brooks v. Brooks Furniture Mfgrs., Inc., __ S.W.3d __, 2010 WL 4290068 (Ky. App., *en banc*, 2010), has recently revised existing Kentucky law to follow the definition of that Fair Value that dominates the jurisdictions in America, and for the reasons set forth below, Kathy Brown implores this Court to maintain this new level of fairness in Kentucky's definition of Fair Value by affirming those decisions.

2. The distinction between Fair Value and Fair Market Value

The dissenter's rights statute in Kentucky, KRS 271B.13.010(3), defines Fair Value as follows:

> Fair value ... means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or

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Vision Statement
The Kentucky Chamber of Commerce is the major catalyst, consensus builder and advocate for a thriving economic climate in the Commonwealth of Kentucky.

Mission Statement
The Kentucky Chamber of Commerce supports a prosperous business climate in the Commonwealth of Kentucky through advocacy, information and customer service in order to promote business retention and recruitment.

[http://www.kychamber.com/mx/hm.asp?id=09StrategicPlan].

> depreciation in anticipation of the corporate action unless exclusion would be inequitable.

The language of this definition speaks volumes about the appropriate measure for Fair Value. First, the legislature's designation of Fair Value as opposed to Fair *Market* Value reveals an inherent distinction between the two concepts, especially since many Kentucky laws specifically define Fair Market Value for other valuation situations. See, e.g., KRS 131.550; KRS 132.820; KRS 271B.12-200(11); KRS 416.660. It should here be well-noted that the Appellant's comparative analyses of this dissenter's rights valuation to other statutory valuations in the areas of estate, divorce, or tax law are inapplicable inasmuch as most of those invoke the aforementioned statutes that specifically call for a determination of Fair Market Value. Perhaps more importantly, the exclusion in this statutory definition of modifications to Fair Value due to the dissented-from corporate action clearly indicates that Fair Value contemplates the value of the dissenter's shares in the business as a going concern – not in liquidation or sale on the open market. In other words, even if the dissent was from the open-market sale of the corporation, that sale (despite its invaluable insight into the Fair *Market* Value of the corporation either upward or downward) is expressly prohibited from being considered in determining Fair Value. Fair Value contemplates giving the dissenter what they had when they disagreed with the majority: a stake in a corporation as a going concern.

Until recently, Kentucky's sole consideration of Fair Value in a dissenter's rights case was Ford v. Courier-Journal Job Printing Co., 639 S.W.2d 553 (Ky. App., 1982), but the court in that case does not provide a definition of Fair Value. In fact, the Ford case merely determines that certain considerations in reaching Fair Value were not "arbitrary or clearly erroneous" based on a Maine case that summarized the consensus among

jurisdictions using the Model Business Corporations Act in 1979, namely In Re Valuation of Common Stock of Libby, Etc., 406 A.2d 54, (Me., 1979). In the almost three decades since Ford, the Libby case on which the Kentucky Court of Appeals relied has been reconsidered by In re Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1005 (Me., 1989), and the consensus among jurisdictions has changed dramatically.

Delaware, a state that has long set the standard for new developments in corporate law, produced the seminal case on the definition of Fair Value in a dissenter's rights action. In Cavalier Oil Corp. v. Harnett, the Delaware Supreme Court explained that to determine Fair Value, an appraiser's task "was to value what has been taken from the shareholder: *viz.* his proportionate interest in a going concern." Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del., 1989) (emphasis added, quotations omitted). This definition of Fair Value is now the law in the majority of jurisdictions.[2]

In a particularly compelling pronouncement, the Indiana Court of Appeals explained the definition of Fair Value in the context of a statutorily-mandated purchase of shares from a minority owner of a three-person law firm operating as a professional corporation. In Wenzel v. Hopper & Galliher, P.C., 779 N.E.2d 30 (Ind. App., 2002), the court held that "the term 'fair value' is not the same as, or shorthand for, the term 'fair market value.' ... 'Fair value' carries with it the statutory purpose that shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value." Id., at 38. According to the rulings from a "substantial majority" of jurisdictions, the Wenzel court held that Fair Value, by definition, does not allow for the

[2] For a complete list of the majority jurisdictions and representative cases following the definition of Fair Value set forth in Cavalier Oil, see Section I. B. 1., *infra.*

introduction of an "open market concept" to a valuation that has no application in a statutorily-forced sale to the majority shareholders. Id., at 38-39.

In all, the Ford case is no longer good law and has properly been overruled by the Kentucky Court of Appeals in Brooks v. Brooks Furniture Mfgrs., Inc., __ S.W.3d __, 2010 WL 4290068 (Ky.App., *en banc*, 2010), a decision that should be affirmed by this Court.

3. The Kentucky Court of Appeals' recent rulings in *Shawnee* and *Brooks*

On October 29, 2010, the Kentucky Court of Appeals handed down an opinion, which is to be published, in in Brooks v. Brooks Furniture Mfgrs., Inc., __ S.W.3d __, 2010 WL 4290068 (Ky.App., *en banc*, 2010). The Brooks decision more eloquently and thoroughly analyzes the previous Kentucky law, the legislative intent behind Fair Value, and the majority trend and supporting rationales for its decision than Kathy Brown could ever hope to, whereby the Brooks majority and concurring opinions are incorporated herein by reference. Essentially, the well-reasoned majority and concurring opinion in Brooks overrules Ford and holds that, "except under extraordinary circumstances," a marketability discount is impermissible in the determination of Fair Value in a squeeze-out merger. Brooks, at 14-15. The impetus behind the decision is the understanding that, in a dissenter's rights case, the transaction is not a willing-buyer/willing-seller transaction and to apply any concepts of Fair Market Value cloaks the actual forced sale with an inappropriate fiction. Brooks, at 16-17.

Brooks was a logical progression from the Court of Appeals opinion in the present case on appeal. The Shawnee Opinion disallowed consideration of a lack of marketability discount and the net asset approach in Kathy Brown's valuation because

they were factors inexorably intertwined with the definition of Fair Market Value. The Shawnee Opinion stopped short of overruling Ford and was not published, but it relied on the same majority trends and rationales behind the development of the definition of Fair Value as Brooks and should therefore be affirmed by this Court for the same reasons as Brooks.

B. The Court of Appeals opinion in *Shawnee* correctly held that a marketability discount should not apply to the valuation of Kathy Brown's shares at any level, whereby the opinion should be affirmed by this Court.

1. The Court of Appeals below properly applied the modern trend, as reiterated in *Brooks*, to disallow a discount for lack of marketability in the valuation of Kathy Brown's shares.

Even before the Court of Appeals rulings in Shawnee and Brooks, the Report of Appraisal adopted in the Judgment of the trial court below recognized the conflict of Kentucky law with the majority rule, but nevertheless followed Ford and applied a marketability discount to Kathy Brown's shares: "As noted by [Kathy Brown], most courts appear to disagree with the Ford holding, but it is the law in Kentucky and a marketability discount is permissible if it is appropriate under the circumstances of a particular case." [Report of Appraisal, pg. 11, RA 1107]. After the Court of Appeals ruling in Brooks, Ford is no longer the law in Kentucky, and this Court should affirm that shift and the reversal as to the application of a marketability discount in this case.

In the Report of Appraisal, the Master Commissioner erroneously reduced the value under the Capitalization of Earnings Method by discounting Kathy Brown's stock by 25% for a lack of marketability. The marketability discount is based entirely upon Ford v. Courier-Journal Job Printing Co., 639 S.W.2d 553 (Ky. App., 1982), a Kentucky Court of Appeals case that found the application of a marketability discount in a

dissenter's rights appraisal action was not arbitrary or clearly erroneous. Under Ford, a marketability discount was *allowed*, but certainly not required in determining Fair Value.

In issuing its opinions in this case and in Brooks, the Court of Appeals has adopted the law representing the overwhelming national trend to disallow marketability discounts because they are unfair to the dissenting shareholder. Led by Delaware's pronouncement in Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989), a majority of jurisdictions that interpret Fair Value in the context of a statutorily-forced sale have held that a marketability discount is inappropriate.[3] The Supreme Court of Delaware reasoned in Cavalier Oil that a marketability discount "unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result." Cavalier Oil, at 1144. This view now dominates the states that have considered application of a marketability discount to a determination of Fair Value.

Interestingly, the Report of Appraisal and Kentucky's prior view in Ford both rely

[3] See Offenbecher v. Baron Servs., 874 So. 2d 532 (Ala. Civ. App., 2002); Pro Finish United States, LTD v. Johnson, 63 P.3d 288, 293 (Ariz. Ct. App., 2003); Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 361 (Colo. 2003); Devivo v. Devivo, 2001 Conn. Super. LEXIS 1285 (Conn. Super. Ct., 2001); Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del., 1989); Blitch v. Peoples Bank, 540 S.E.2d 667, 670 (Ga. App., 2000); In re Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1005 (Me. 1989); Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285 (Minn., 2000); Swope v. Siegel-Robert, Inc., 243 F.3d 486 (8th Cir., 2001) (interpreting Missouri law); Rigel Corp. v. Cutchall, 511 N.W.2d 519, 526 (Neb., 1994); Lawson Mardon Wheaton, Inc. v. Smith, 734 A.2d 738, 749 (N.J. 1999); Woolf v. Universal Fid. Life Ins. Co., 849 P.2d 1093 (Okla. Ct. App., 1992); Hayes v. Olmsted & Associates, Inc., 173 Or. App. 259, 21 P.3d 178 (2001), review denied, 333 Or. 73, 36 P.3d 974 (2001); Diluglio v. PAB, 1997 WL 839873 (R.I. Super. Ct. 1997), summarily aff'd, 755 A.2d 757 (R.I. 2000); Morrow v. Martschink, 922 F. Supp. 1093 (D.S.C. 1995) (applying South Carolina law); First W. Bank Wall v. Olsen, 621 N.W.2d 611, 619 (S.D., 2001); Hogle v. Zinetics Medical, Inc., 63 P.3d 80 (Utah, 2002); U.S. Inspect Inc. v. McGreevy, 57 Va. Cir. 511, No. 160966 (Va. Cir. Ct., Nov. 27, 2000); Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865, 51 P.3d 159 (Wash. Ct. App., 2002). In addition, five state legislatures have already adopted the 1999 amendments to the Model Business Corporation Act's Fair Value definition, which explicitly prohibit minority and marketability discounts. See 2001 Conn. Acts 01-199 (Reg. Sess.) (amending Conn. Gen. Stat. § 33-855 (2001)); 2002 Iowa Legis. Serv. 1154 (West) (effective Jan. 1, 2003) (amending Iowa Code § 490.1301 (1999)); 2001 Me. Legis. Serv. 640 (West) (effective July 1, 2003) (adding Me. Rev. Stat. Ann. tit. 13-C, § 1301(4) (West 1981)); 2000 Miss. Laws ch. 469, § 28 (amending Miss. Code Ann. § 79-4-13.01(4) (1999)); 2002 W. Va. Acts ch. 25 (adding W. Va. Code § 31D-13-1301 (2002)).

on a Maine decision, In Re Valuation of Common Stock of Libby, Etc., 406 A.2d 54, (Me., 1979), for the proposition that market value issues, such as a lack of marketability, can be considered in determining Fair Value. Maine, however, has since joined the majority view in disallowing marketability discounts because market value considerations are not appropriate in Fair Value appraisals, saying:

> Especially in fixing the appraisal remedy in a close corporation, the relevant inquiry is what is the highest price a single buyer would reasonably pay for the whole enterprise, not what a willing buyer and a willing seller would bargain out as the sales price of a dissenting shareholder's shares in a hypothetical market transaction. Any rule of law that gave the shareholders less than their proportionate share of the whole firm's fair value would produce a transfer of wealth from the minority shareholders to the shareholders in control. Such a rule would inevitably encourage corporate squeeze-outs. In re Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1005 (Me., 1989).

Clearly, the majority view on the inappropriateness of a marketability discount indicates that a marketability discount should not be allowed in a determination of Fair Value. The recent shift in Kentucky law as represented by Brooks should be affirmed by this Court, recognizing the great weight of authority and the legion rationales for not applying a fictitious marketability discount to Kathy Brown's forced sale of shares.

2. Despite misinterpretation by the Appellant, the Amicus, and the Dissenting Opinion in *Brooks, Cavalier Oil* does not allow a marketability discount at the corporate level except in exceptional circumstances.

The seminal law undergirding the national trend on Fair Value is stern in its disallowance of any market considerations absent extraordinary circumstances. No part of the holding of Cavalier Oil can be interpreted to mean that marketability discounts or fair market value considerations should be imposed at the entity or corporate level before Fair Value is determined at the shareholder level, and to argue otherwise is absurd. On

the contrary, Cavalier Oil sparked an overwhelming majority position with a specific understanding of the following:

> The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a "going concern." Cavalier's argument, that the only way Harnett would have received value for his 1.5% stock interest was to sell his stock, subject to market treatment of its minority status, misperceives the nature of the appraisal remedy. Where there is no objective market data available, the appraisal process is not intended to reconstruct a pro forma sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.

Cavalier Oil, *supra*, at 1145. In other words, all considerations of what would happen in an actual sale should be untouched at any level, and Fair Value should be based only on what the dissenter's stock is worth if they are happy to keep it and nothing is changing. As the Concurring Opinion of Judge Acree in Brooks points out, citing Offenbacher v. Baron Services, Inc., 874 So.2d 532, 538 (Ala. Civ. App. 2002), Cavalier does not hold that it is permissible to apply a marketability discount at either the corporate or shareholder level. Brooks, *supra*, at 24.

The Appellant's confusion over Cavalier Oil can be traced to a single leap in its argument: The Appellant states that "'Traditional value factors' can only mean a fair market valuation" – despite the fact that Cavalier Oil never defined "traditional value factors" as Fair Market Value. [Appellant's Brief, pg. 28]. And why would the Cavalier Oil court contradict its clear statement above, reciting so eloquently exactly why market

considerations introduce a fictional and unfair distortion to the reality of the forced sale scenario of a dissenter's right appraisal? Once one understands that the Appellant has distorted "traditional value factors" into "fair market value," Cavalier Oil squares perfectly with the Brooks opinion's reservation of allowing discounts at the corporate level under extraordinary circumstances.

The Appellant would have this Court believe Cavalier Oil completely forgives – and even applauds – the application of a marketability discount through its discussion of Tri-Continental Corp. v. Battye, 74 A.2d 71 (De.Supr. 1950). Such a reading is simply wrong – in addition to the fact that the reading would make the entire Cavalier Oil decision and the majority position a contradictory mess. Even the Appellant underscores the very sentence that limits the Cavalier Oil forgiveness of application of discounts in extraordinary circumstances. [Appellant's Brief, pg. 28]. Reduced to its simplest terms, the corporation at issue in Tri-Continental was an investment firm which, subject to regulations and leverage not necessary for consideration here, carried a net asset value that was artificially higher on the corporate level than any of the shareholders could ever retrieve. In other words, even if just one person held all the stock, the entire corporation was not worth what it held in net assets. Cavalier Oil, *supra*, at 1144 The Cavalier Oil court recognized this was an extraordinary circumstance that warranted a special exception for the discount. Upon this recognition, Cavalier Oil's next sentence says: "The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a 'going concern.'" Cavalier Oil, at 1145. If there is not an extraordinary circumstance requiring a discount at the corporate level, the application

of a discount because a dissenter is being squeezed out ignores the truth that the corporation as a whole is continuing its business as usual.

Cavalier Oil does *not* stand for the proposition that one can apply any discount convenient or consider market factors with unbridled abandon at the corporate level in a dissenter's rights appraisal; the case would make no sense if it did. To the contrary, Cavalier Oil simply recognizes that an extraordinary circumstance may exist where a discount is fair and required by the nature of the entire corporation, which is exactly the exception carved out by the Kentucky Court of Appeals in the Brooks decision, holding that marketability discounts were prohibited except in exceptional circumstances. Brooks, *supra*, at 19. For this reason, the Court should ignore the arguments posited by the Appellant, the Amicus, and the Brooks Dissent, thus affirming Brooks and the opinion below in the present case.

3. Common sense dictates that the same result in diminution of Fair Value falls squarely on the dissenting shareholder regardless of whether the discount is applied at the corporate or shareholder level, whereby the distinction should justly be ignored and a marketability discount should never apply except in extraordinary circumstances that do not exist in this case.

It makes no difference if a marketability discount is applied at the shareholder or entity level – it reduces the shareholder's valuation in exactly the same way. The disallowance of a marketability discount by the Court of Appeals in the present case and in Brooks is based entirely on the fact that the discount is introducing to the Fair Value calculus a host of inapplicable considerations that are inexorably and fundamentally derived from the circumstances of an open market transaction. In many ways, the marketability discount must be applied at the corporate level, because the discount relates to a lack of marketability due to the fact that the enterprise is a close corporation. Such a

diminution in value of stock must apply to all the stock in a close corporation. But the effect of, for example, a 25% marketability discount on the fair value of a dissenters shares is no different whether it is applied on the corporate or shareholder level. For this reason, common sense dictates that this Court affirm the holding of the Court below that Kathy Brown's shares are not subject to any marketability discount.

C. Under Kentucky law defining Fair Value as free from any open-market considerations, the Net Asset Approach to valuing Kathy Brown's shares should be given no weight in the circumstances of her Judgment.

The Report of Appraisal, which is incorporated into the Judgment on appeal before this Court, gives two-thirds weight to a Net Asset Approach in valuing Kathy Brown's shares of stock in Shawnee. [Report of Appraisal; RA 1097-1111]. Because the Master Commissioner specifically and unequivocally determined that the Net Asset Approach was, in his calculus, a consideration of the Fair Market Value, the Court of Appeals was correct in removing the weight given to the Net Asset Approach in this case and the Judgment should be modified to consider only the Capitalization of Earnings Approach for the purpose of fixing a value to the stock.

1. The Report of Appraisal specifically recognizes that the Net Asset Approach is an open-market concept invoking valuation of assets at Fair *Market* Value, whereby, with the *Ford* case overruled, any weight given the Net Asset Approach must be removed from the Judgment.

The Report of Appraisal readily admits that the Net Asset Approach is a Fair Market Value determination: "The net asset approach, within the context of a non-liquidation dissenter's rights case, contemplates that the assets are to be valued at their fair **market** value." [Report of Appraisal, pg. 6; RA 1102 (emphasis added)].

In light of the realities of the unique statutory situation where a dissenter is forced to sell their stock, and in light of their agreement on the definition of Fair Value for

Kathy Brown's shares, both Shawnee's and Kathy Brown's valuation experts unequivocally agreed, in their reports and in testimony at the appraisal hearings alike, that the Capitalization of Earnings Method – rather than the Net Asset Approach – was the most reliable approach to determining the Fair Value of Kathy Brown's shares in Shawnee Technology, Inc. [See Kathy Brown's Memorandum in Support of Objections to the Report of Appraisal, pg. 2; RA 1159]. Despite noting that both experts agreed on the exclusion of the Net Asset Approach [Report of Appraisal, pg. 4; RA 1100], the Master Commissioner erroneously assigned greater weight to a Net Asset Approach to valuation, which essentially computed the value of the company's net assets as of December 31, 2003, resulting in a substantially lower appraisal of Kathy Brown's shares in Shawnee Technology.

First and foremost, a brief explanation of the differences between the two approaches is necessary to understand the error in the Report of Appraisal. A Capitalization of Earnings Method, as used by James Roller, Shawnee's valuation expert, and Marc Ray, Kathy Brown's valuation expert, is a method of projecting the value of a company by regarding, analyzing, and weighting the company's past earnings. In this case, both experts agreed on the years to consider and what weight to give those earnings (in that more recent earnings were considered more indicative of value that distant years). Most importantly, the experts agreed on a rate of capitalization, which turned the weighted average of dollars earned into a number that was the Fair Value of the company. Included in that capitalization rate was a discount for company risk, which the experts testified at the appraisal hearing took into account the possibility that Shawnee Technology might lose its single customer or its key owner, Jim Clark, who Shawnee

claims is responsible for bringing in all of the business for the company. All of these factors are present in the Capitalization of Earnings Method of determining Fair Value, whereby the experts agreed it was the most reliable method for projecting the company's worth.

A Net Asset Value Approach, on the other hand, is simply the value of the company's net assets as of the valuation date and does not take into account the company's proven ability to generate net income.

It is not surprising that both valuation experts concluded that the Capitalization of Earnings Method of valuation was the most appropriate method for calculating the Fair Value of Kathy Brown's stock in Shawnee. Shawnee had been very profitable in all but one of its years of existence up to the December 31, 2003 valuation date. In fact, during 2003, Shawnee's net income was $829,261. By squeezing Kathy Brown out of the company, Shawnee and the remaining shareholders took from her the right to receive 24% of the company's distributed net income into the future. Therefore, it is imminently logical to compute the Fair Value of her shares based upon Shawnee's ability to generate income, which is exactly what both qualified valuation experts did.

In the Report of Appraisal, the Master Commissioner gives his rationale for not relying entirely on the Capitalization of Earnings Method, stating that the "approach implicitly assumes that there will be a market for, or potential buyers of Shawnee at the value established by those approaches. Absent non-compete contracts, it is doubtful that a potential buyer would make that assumption." [Report of Appraisal, pg. 12, RA 1108]. Again, the Report of Appraisal is turning to market considerations that should, as a matter of law, be prohibited from the consideration of Fair Value. The Master Commissioner

goes on to quote MacDonald v. Comm'r Internal Revenue, 3 T.C. 720 (1944) for the proposition that "[i]t is difficult to see why a willing buyer would pay more for this corporation than the value of its tangible assets, where [the corporation's critical owner] was 'at liberty to set up a similar business in the same locality and carry it on in his own name.'" [Report of Appraisal, pg. 12; RA 1108]. Based on these principles, the Report of Appraisal concludes that "the net asset approach commands greater consideration and respect," thus assigns less weight to the Capitalization of Earnings Method. [Report of Appraisal, pg. 12; RA 1108].

As a matter of law, there is a critical error in the Master Commissioner's above-stated rationale for his appraisal: the rationale ignores the principle that Fair Value in a dissenter's rights situation does *not* contemplate a hypothetical third party purchaser, but instead reflects the value of an unwilling seller (the dissenter) to a corporation that is forcing the sale. After squeezing out Kathy Brown, Shawnee Technology was required to buy her shares for Fair Value, which allowed its remaining shareholders to continue to run the business and enjoy the fruits of its ability to generate substantial income. The Appraisal's concerns that a hypothetical third party buyer would not value the company through a Capitalization of Earnings Method because Jim Clark is not subject to a non-compete agreement has no basis in the statutory and legal reality of the case. The fact is, Jim Clark and the other shareholders are the *actual* – not hypothetical – buyers of Kathy Brown's shares. Since Jim Clark was one of the continuing owners of Shawnee, a non-compete agreement from himself for the benefit of himself would have been utterly meaningless.

The Eighth Circuit Court of Appeals clearly explained the legal principle and

truth behind a dissenter's rights valuation:

> "[F]air value" in minority stock appraisal cases is not equivalent to "fair market value." Dissenting shareholders, by nature, do **not** replicate the **willing and ready buyers** of the open market. Rather, they are **unwilling sellers with no bargaining power**. Swope v. Siegel-Robert, Inc., 243 F.3d 486, 492 (8th Cir. 2001)(emphasis added).

Since a dissenter's rights action appraisal necessarily takes no consideration of a hypothetical buyer on the open market, but rather focuses on the truth that the existing corporation is a statutory buyer for the unwillingly selling dissenter as established by the Court of Appeals in Brooks, the Master Commissioner erred in focusing his appraisal on the Net Asset Approach by referencing the potential concerns or wishes of a hypothetical third-party purchaser who has no role in the calculus of Fair Value. Even the Tax Court in MacDonald was faced with a case requiring a determination of Fair Market Value, as opposed to Fair Value, whereby the hypothetical third-party buyer is clearly considered to gauge the open market. Further, Jim Clark, who the Master Commissioner fears losing in the absence of a non-compete agreement, was the majority shareholder of the company purchasing Kathy Brown's shares.

Kathy Brown recognizes that different corporations may require different valuation methods to reach a determination of Fair Value (for example, the corporation at issue in the Brooks decision of the Court of Appeals), but here the Net Asset approach was used and weighted in its use *solely* for open-market considerations that Brooks and the Court of Appeals below have prohibited from applying to this case.

For these reasons, the Master Commissioner should have given no weight to the Net Asset Approach and relied entirely on the Capitalization of Earnings Method of valuing Kathy Brown's stock. This Court, therefore, should affirm the opinion of the

Court of Appeals below disallowing the Net Asset Approach in the determination of Fair Value for the present matter.

D. Relief requested by affirming the opinion of the Court of Appeals: Revised calculations based on Report of Appraisal of the Fair Value of Kathy Brown's shares.

Upon this Court's affirmation of the opinion of the Court of Appeals, thus finding it appropriate to reverse the Judgment to remove the Net Asset Approach and the Lack of Marketability Discount from the Fair Value of Kathy Brown's shares, the remedy on remand is a simple direction of recalculation of the values found as a matter of fact in the Report of Appraisal. No new trial or hearing is necessary, as the Report of Appraisal's facts have been undisturbed.

The last page of the Report of Appraisal contains the Master Commissioner's calculations, which need not be corrected or changed in any way save the removal of the legally offensive considerations. [Report of Appraisal, pg. 15; RA 1111]. Kathy Brown urges the Court to correct two errors reflected in those calculations. The first error is the Report of Appraisal's unjustified assignment of substantial two-thirds weight to the Net Asset Value Approach, and that error should be corrected by giving no weight to that valuation approach since the Master Commissioner himself attributed that approach and its weight to market considerations. Once the Net Asset Value Approach is rightfully removed, the Capitalization of Earnings Method yields a Fair Value that is more appropriate for a going concern such as Shawnee that has produced a substantial income.

The second error committed by the Master Commissioner was the application of the 25% Marketability Discount in his calculation using the Capitalization of Earnings Method. That error is remedied by recalculating to remove the 25% Marketability

Discount, whereby Future Earnings of Shawnee Technology after Capitalization will be $2,304,178. The corrected valuation calculation, based entirely on the Circuit Court's findings of fact for values as reflected in the report of appraisal, is:

CAPITALIZATION OF EARNINGS METHOD

Weighted Average Income (Capitalization Rate 32%)	$737,337
Estimated Future Earnings of Shawnee	$2,304,178
Fair Value of Kathy Brown's 24% Interest	**$553,002**

The Fair Value of Kathy Brown's shares in the corporation as of December 31, 2003 will be, without consideration of the Net Asset Approach or a Marketability Discount, $553,002. This Court should affirm the opinion of the Court of Appeals and remand to the Circuit Court with instructions to modify its Judgment. This will completely correct the only legal errors in the Judgment adopting the Report of Appraisal.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CIRCUIT COURT DID NOT ERR IN MAKING ITS JUDGMENT ON FAIR VALUE OF KATHY BROWN'S STOCK FINAL AND APPEALABLE AS A SEPARATE AND DISTINCT ACTION FROM OTHER DISCRETE CLAIMS IN THIS LITIGATION.

A. Standard of Review

Kentucky unequivocally grants at trial court "broad discretion in making a determination of whether an order is final and appealable under CR 54.02." UPS Capital Business Credit v. C.R. Cable Construction, Inc. *et al.*, 181 S.W.3d 44 (Ky. App., 2005). In that case, the Court of Appeals, recognizing that the final and appealable order only

resolved one of multiple claims in the litigation, went on to hold that "[w]hile things remain to be done in the circuit court litigation, we cannot conclude that the circuit court abused its discretion in determining that there was no just reason for delay under CR 54.02." Id. The Court of Appeals correctly held "that the dissenter's rights action was separate from other claims and that there was no error in making it final and appealable." Shawnee Opinion, pg. 8. Thus this Court must determine whether Judge Payne of the Fayette Circuit Court abused his discretion to rule that the distinct proceeding to set the statutory fair value of Kathy Brown's shares was properly final and appealable.

B. Given the Circuit Court's "broad discretion," there is no reversible error in the designation of the Judgment as final and appealable.

The Circuit Court was well within its discretion to determine that there was no just cause for delay and deeming the Judgment final and appealable. CR 54.02 provides what where more than one claim for relief is presented, and it is determined there is no just reason for delay, "the court may grant a final judgment upon one or more but less than all of the claims or parties." CR 54.02. A final judgment "must conclusively determine the rights of the parties in regard to that particular phase of the proceeding." Hale v. Deaton, 528 S.W.2d 719, 722 (Ky., 1975). A judgment is not properly deemed final where it calls for further findings of fact or other action with respect to that issue. Id. In the present case, there are no further findings of fact or actions that can be taken by any party as to the Judgment determining the Fair Value of Kathy Brown's shares of Shawnee Technology.

Even the out-of-state case on which Shawnee relies actually supports the decision of the Circuit Court to make the appraisal Judgment final and appealable. The second quotation from Nelbro Packing Co. v. Baypack Fisheries, 6 P.3d 22 (Wash. App., 2000)

argues that the judicial economy is best served by foregoing final and appealable judgments if the "claims are **closely related** and stem from essentially the **same factual allegations**." Id., at 27 (emphasis added). Fact is, Kathy Brown's Fair Value appraisal judgment is completely unrelated to all of the other claims, and the factual allegations behind it are even more distinct. Kathy Brown's Counterstatement of the Case, *supra*, illustrates this point well: The dissenter's rights appraisal proceeding is a mechanism of valuing stock based on one's status as a dissenting shareholder, while all of the other claims – be they viable or dismissed – run to separate actions and transactions between shareholders in the corporation.

Shawnee, in its brief, argues that the claims are interrelated by raising the specter of Jim Clark's cross-claims against Kathy Brown and how those claims affect the separate determination of the Fair Value of Kathy Brown's shares under the Kentucky dissenter's rights statute. First, the Circuit Court below has already dismissed those claims and allegations, and their mention was not even allowed in the valuation proceedings, ostensibly due to the general speciousness of the claims described *supra*.

Perhaps more importantly, even if one ignores the fact that the claims have been dismissed and had no bearing on the Fair Value of Kathy Brown's shares, it is elementary that a claim for breach of contract or restitution is separate and distinct from the determination of the Fair Value of shares for purposes of dissenter's rights. The Fair Value can be determined and awarded. Thereafter, if you imagine that Jim Clark had a viable claim, the remedy for his breach of contract or unjust enrichment claims would be monetary damages, which could still be fixed – without any regard to the determination of Fair Value. It matters nothing at all whether any damages for separate claims exceed

the Judgment entered in favor of Kathy Brown. The proceedings and claims are entirely separate actions aiming at entirely separate remedies.

The Circuit Court, realizing these truths, was well within its discretion to determine that there was no just cause for delay, and nothing argued by Shawnee substantiates any abuse of that discretion. Thus the holding of the Court of Appeals should be confirmed by this Court.

III. JUDGE GARY PAYNE NEITHER SAID NOR DID ANYTHING IMPROPER IN THE PROCEEDINGS BEFORE THE CIRCUIT COURT, WHEREBY HIS PARTIAL RECUSAL BECAUSE THE CASE HAD BEEN REFERRED TO A NEW DIVISION UPON HIS RETIREMENT WAS PROPER.

A. Standard of Review

Shawnee's call for the recusal of Judge Payne is so perplexing and defies common sense to such an extent that, frankly, there probably exists no standard of review – because nobody has made such an argument before. Nevertheless, as disqualification of a judge is controlled by KRS 26A.015, it seems that whether disqualification was required is a question of law. Because this claim fails under any standard, Kathy Brown agrees that *de novo* review of the motion for recusal is appropriate.

B. Judge Payne's statement evidenced no bias, no prejudice, and no reasonable inference of either, whereby his partial recusal (because of retirement – not because he was prejudiced) was proper.

As a starting point to any consideration of such a far-fetched motion, there is merit to considering exactly what Shawnee is asking this Court to do. At its core, this is what some might call "the nuclear option." All else had failed. Shawnee finally pushed too far, contorted too much, or changed their story too often, so much that even an impartial, unbiased judge looked past the farce and took the drastic step of awarding

attorneys' fees and costs against the offending party. Then, and only then, when a trial judge has begun to see through a party's litigation tactics to understand that the judicial system is being abused for the sake of harassment and hostility, a party suddenly has nothing to lose by risking everything to get the judge disqualified. Shawnee pushed the red button, hoping everything – including the past five years of litigation, in which little has gone their way – would explode. Shawnee implored Court of Appeals and now wants Kentucky's Supreme Court to rule that Judge Payne's innocuous – even if self-fulfilling – statement requires everything that has happened in this matter before the Fayette Circuit Court to be unwound, and the entire litigation started afresh.

There is absolutely no way, under Kentucky law or under any imaginable principle of fairness, justice, or plain-old good sense, that Judge Payne's statement could justify overturning an entire case. Judge Payne, to close out the separate valuation portion of the case, ruled heavily against a party that he had seen to be highly litigious and wont to try every imaginable theory, assault, or sworn statement to confuse the case – regardless of how baseless or contradictory the attempt may have been. [See Kathy Brown's Motion for Attorneys' Fees and Costs; RA 1380-1483]. Judge Payne, by that point, well knew Shawnee, and feared what might come after the stern ruling that they had acted vexatiously, arbitrarily, and in bad faith. Thus his comment was: "I am sure I will be accused of being prejudiced." [Oct. 24, 2007 Hearing Video at 12:51:46 pm; RA 1576]. The comment reflected no actual bias and was proof of no prejudice. It was a judge, who had just leveled attorneys' fees against an extremely litigious party, commenting on what he expected that party to do after he ruled. Judge Payne simply

commented that he expected Shawnee would turn an award of attorneys' fees into some indication that he was being unfair to the company. Turns out, Judge Payne was right.

KRS 26A.015 requires an actual bias or impartiality, or "circumstances in which his impartiality might be **reasonably** questioned." (Emphasis added). Neither of those exist here, as a matter of law, based on the totality of the circumstances. No reasonable person could glean anything from Judge Payne's remark except that he expected Shawnee would turn their *modus operandi* of shotgun litigation toward him. Likewise, the remarks by counsel were harmless and had no effect on Judge Payne's ruling; with even a cursory glance at Kathy Brown's Motion for Attorneys' Fees and Costs, this Court can easily see that Shawnee's own, on-the-record actions were more than sufficient to find arbitrary, vexatious, and bad faith behaviors.

The Court of Appeals agreed with Kathy Brown, stating that "Shawnee's motion for recusal was unnecessary and put forth no evidence that even hinted Judge Payne was being biased. There is no evidence in the record that Judge Payne was being prejudiced and his statement was nothing more than a passing comment." Shawnee Opinion, pp. 8-9.

Kathy Brown asks this Court to likewise suffer Shawnee no right to confuse or upend this litigation any further. As a matter of law, with absolutely no evidence of any actual prejudice or bias, and with no reasonable means of questioning Judge Payne's impartiality, the Court should rule that Judge Payne's partial recusal – which was already effected by his retirement – be upheld and this nonsensical issue of disqualification or recusal be laid to rest. The Court of Appeals decision on this matter should also be affirmed.

CONCLUSION

The Opinion Reversing and Remanding of the Court of Appeals rendered August 14, 2009 should be AFFIRMED in its entirety and this case should be REMANDED to the Fayette Circuit Court with instructions to enter the Judgment as Modified in accordance with the Opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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