Case No. S294190

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEI LI, et al., Plaintiffs and Appellants,

v.

ARCSOFT, INC., et al., Defendants and Respondents,

DANIEL MACKEIGAN, et al., Defendants.

LEI LI, et al., Plaintiffs and Appellants,

v.

ARCSOFT, INC., et al., Defendants and Respondents,

On Request to Answer Question of State Law
U.S. Court of Appeals for the Ninth Circuit
Case Nos. 24-2531, 24-2964

On Appeal from the United States District Court
for the Northern District of California
The Honorable Jeffrey S. White, Presiding Judge
Case No. 4:19-CV-05836 JSW

PETITIONERS' OPENING BRIEF ON THE MERITS

KING, HOLMES, PATERNO & SORIANO, LLP
Howard E. King (SBN 77012)
hking@khpslaw.com
Tor R. Braham (SBN 108234)
tbraham@khpslaw.com
Jackson S. Trugman (SBN 295145)
jtrugman@khpslaw.com
1900 Avenue Of The Stars, Twenty-Fifth Floor
Los Angeles, California 90067-4506
Telephone: (310) 282-8989
Facsimile: (310) 282-8903

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow (SBN 51126)
rmeadow@gmsr.com
*Stefan C. Love (SBN 329312)
slove@gmsr.com
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

Attorneys for Petitioners *LEI LI, STRONG WEALTH INVESTMENT LIMITED and PACIFIC SMILE LIMITED*

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

California Statutes

Other State Statutes

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

ISSUES PRESENTED

The Ninth Circuit certified and this Court accepted the following question:

> Do the appraisal requirements of California Corporations Code section 1312, subdivision (a) and *Steinberg v. Amplica, Inc.* (1986) 42 Cal.3d 1198 preclude a shareholder from seeking buyout-related damages when the facts leading to the shareholder's cause of action were not known until after the buyout was consummated?

There are many possible postures in which "the facts leading to the shareholder's cause of action were not known until after the buyout was consummated." In the action below, the jury found, and defendants do not challenge, that defendants defrauded the shareholders into consenting to the buyout. The judgment against defendants for fraud and breach of fiduciary duty stands on this finding. This is the particular reason why in the action below "the facts leading to the shareholder's cause of action were not known until after the buyout was consummated": The shareholders' consent to the buyout was procured by fraud.

We assume this finding and posture as a premise here. We therefore reformulate the originally certified question into the following question, "fairly included" in the original (Cal. Rules of Court, rule 8.516(b)):

> Does California Corporations Code section 1312, subdivision (a) preclude a shareholder from seeking buyout-related damages when the shareholder establishes that the shareholder's consent to the buyout was procured by fraud?

As explained below, this Court should also address the following fairly included issue:

> Assuming the shareholder's action is not precluded by section 1312, do the buyout-related damages available to the shareholder include compensatory damages measured by lost profits, and punitive damages?

INTRODUCTION

Marc Chan invested his money and energy into software company ArcSoft in the hope that it would one day go public. But after a few years of disappointing performance, that hope receded. At the personal urging of ArcSoft's CEO, Michael Deng, Chan and other shareholders sold their shares to Deng and new investors in a management-led buyout.

What Deng concealed: ArcSoft's financial and business performance had turned around and was improving, and the buyout was one step of Deng's plan to launch an IPO in China. Deng completed this plan a year and a half later, which made him a billionaire. On this basis, a federal district court judged Deng liable for fraud and breach of fiduciary duty and awarded damages. Now Deng argues that Corporations Code section 1312, subdivision (a) (section 1312(a)) bars Chan's action and shields Deng from all liability.

Section 1312(a) limits shareholders' right "to attack the validity of [a] reorganization" and makes their exclusive remedy an appraisal proceeding to determine the value of their shares. In *Steinberg v. Amplica* (1986) 42 Cal.3d 1198, this Court held that section 1312(a) bars a shareholder "aware of all the facts" of wrongdoing at the time of a reorganization from "opt[ing] to sue for damages instead of seeking appraisal." (*Id.* at p. 1214.) Here,

however, the shareholder was defrauded into consenting to the reorganization, unaware of concealed wrongdoing until the reorganization was complete. The Court should reject Deng's argument and hold that section 1312(a) does not bar an action for buyout-related damages when a shareholder is defrauded into consenting to the buyout.

Steinberg, *supra*, left open whether section 1312(a) bars an action for buyout-related damages when the shareholder was *not* aware of the wrongdoing at the time of the reorganization, including when the shareholder's consent to the reorganization was procured by fraud. (*Steinberg*, *supra*, 42 Cal.3d at p. 1214.) What *Steinberg* left open, legislative history and policy resolve beyond doubt.

The Legislature enacted section 1312 to prevent shareholders from using litigation to impede reorganizations and demand more than reasonable value for their shares. But an action by a shareholder who has been defrauded into consenting to a reorganization cannot impede the reorganization. In such an action, the reorganization is the detrimental transaction into which the shareholder entered in reliance on the fraud. The shareholder can plead and prove reliance only after the reorganization is complete—and can no longer be impeded.

Barring actions like this would therefore not promote the purpose of section 1312(a).

Indeed, Professors Ballantine and Sterling, who drafted the first version of section 1312(a), explained that it does not bar an action for damages by a shareholder whose vote was procured by fraud. And nothing in the statute's history suggests the Legislature intended it to bar such an action. To the contrary, actions like this serve "the strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders." (*Steinberg*, *supra*, 42 Cal.3d at p. 1210.)

Further support comes from the history of a related statute, Corporations Code section 1203, which requires interested directors to provide shareholders an independent "fairness opinion" of the buyout share price (something Deng failed to do, neither obtaining nor furnishing a fairness opinion). The Legislature intended section 1203 to prevent exactly the sort of fraud that occurred here. It is inconceivable the Legislature intended section 1312(a) to *bar* actions seeking to remedy that same fraud.

Last, if section 1312(a) does preclude actions for damages by shareholders whose consent to a buyout was procured by fraud, the result will be far more fraud. According to that

interpretation, a successful fraud—one that leads a shareholder to consent—will extinguish any possible remedy. But the shareholder's only other option—dissent and appraisal—is not designed to ferret out concealed fraud, and the threat of dissent and appraisal will not deter concealed fraud.

Given how Deng's interpretation encourages fraud, it is little surprise that *no other state* makes statutory appraisal the exclusive remedy of a shareholder defrauded into consenting to a reorganization. For the Court to adopt that rule here would make California an oasis of corporate wrongdoing.

The Court should also reach a related issue, the scope of buyout-related damages. The Court should hold that the shareholder in Chan's position may pursue the same remedies as in any other fraud suit, by the same standards. These include two forms of damages at issue below and likely to recur: lost profits proximately caused by defendants' wrongdoing; and punitive damages.

STATEMENT OF THE CASE

I. Facts.

A. Marc Chan becomes a major investor and supporter of ArcSoft and its CEO, Michael Deng.

Marc Chan is an entrepreneur and investor. (10-ER-2390–2392.)[1] ArcSoft, Inc. makes software for image processing and related visual-intelligence tasks, such as facial recognition. (10-ER-2376–2377; 13-ER-3257–3258.)[2]

Chan made his first, $3 million investment in ArcSoft in 1999, after meeting its CEO, Michael Deng. (10-ER-2391–2393.) Chan often told Deng that he hoped ArcSoft would carry out an IPO in the U.S. or China. (10-ER-2392, 2408–2409.)

By 2008, Chan had invested $4 million into ArcSoft, owning 13 percent of the company—the same as Deng would own before the buyout. (6-ER-1262 [¶ 60]; 10-ER-2359, 2374; 18-ER-4401 [last paragraph].) Chan invested through the entities Pacific Smile and Strong Wealth and in the name of his wife, Lei Li. (10-ER-2394–2397.) Chan had practical control of all these investments (10-ER-2391–2397), so we call the plaintiffs "Chan."

---

[1] In keeping with the standard of review, we recite the facts and evidence in the light most favorable to plaintiffs as to the issues on which they prevailed.

[2] All record citations are to the Ninth Circuit docket and Excerpts of Record.

B. Deng and ArcSoft defraud Chan into consenting to a management buyout of Chan's shares, with Deng as the primary buyer.

After early success, ArcSoft experienced a period of lackluster performance from 2011 to 2015. (12-ER-3124, 3130–3133.) In this period, Chan and other shareholders stopped receiving regular quarterly and annual financial statements from ArcSoft, and Deng shared fewer details with Chan. (10-ER-2456–2460.) Chan developed "doubts" but "still trusted [Deng] and had confidence in him." (10-ER-2457–2460.)

This period was the prologue to an elaborate fraud by Deng and ArcSoft in 2016 and 2017. The fraud culminated in a management-led buyout of Chan's and others' shares in September 2017.

1. Deng's plan.

Business success. ArcSoft's business was strong in 2016 and accelerated further in 2017. By mid-2017, ArcSoft's head of sales reported to Deng that most major cell phone manufacturers around the world had signed contracts to use its dual-camera processing software, which was set to become its most important product category. (16-ER-3984.) In the first half of 2017 alone, ArcSoft's new contracts executed in this category were three

times that for all of 2016. (*Ibid.*) ArcSoft's biggest customer remained Samsung. (12-ER-3069; 16-ER-3987.)

ArcSoft's finances were also strong and improving. Audited financial statements for 2016 indicated shareholders' equity of $34 million. (16-ER-3901 [next-to-last line]; see 20-ER-4987 [exchange rate].) Quarterly statements showed operating income in the first half of 2017 of $11 million, compared to $6.1 million for *all* of 2016: The company was earning income in 2017 at more than triple the rate of 2016. (Compare 16-ER-4009 and 21-ER-5133 [2017 quarterly statements] with 17-ER-4198 [2016].)

IPO plans. By late 2016, ArcSoft's success attracted the interest of Huatai Securities, one of the biggest investment banks in China and a "major IPO sponsor," comparable to "Morgan Stanley or Goldman Sachs." (10-ER-2416.)

In early 2017, Huatai developed a plan for ArcSoft to carry out an IPO in China. (12-ER-2923, 2937–2938.) The plan would increase Deng's ownership, making him the "actual controller" of the company. (13-ER-3184–3185.) ArcSoft also retained a leading global accounting firm for advice on restructuring and relocating to China in advance of its planned IPO. (12-ER-2922–2923, 13-ER-3171–3173; 16-ER-3849.)

The Restructuring Agreement and Deng's guarantees of ArcSoft's performance. Deng's work with Huatai led to the

Restructuring Agreement between Deng, Huatai, and other investors funding the buyout. (17-ER-4212–4241; see also 17-ER-4207–4209 [email among buyout participants].) The agreement set forth in its first recital that "in preparation for the ArcSoft Group going public" in China, Deng, Huatai, and a few new investors would "complete the offshore and domestic [i.e., Chinese] restructuring of the ArcSoft Group" in a series of transactions. (17-ER-4213; see also 17-ER-4214–4219 [transactions]; 12-ER-3098–3099 [Deng testimony].)

Deng guaranteed to the new investors that ArcSoft's net profits would grow significantly, to at least $41 million in total over 2017 and 2018.[3] Deng agreed personally to pay penalties if he failed to meet this $41 million target—an almost unheard-of provision in a plan like this.[4] Deng's commitment to these large growth forecasts, with a steep penalty for failing to meet them, reduced the risk to new investors and reflected his confidence in ArcSoft's financial performance in advance of the IPO.

In early 2017, well before the buyout, Huatai furnished Deng with a detailed written valuation indicating that ArcSoft's value

---

[3] See 17-ER-4288–4289 ("Performance Target"); 12-ER-3099–4000 (testimony); 20-ER-4987–4992 (about 6.5–6.9 RMB per U.S. dollar in 2017).

[4] See 17-ER-4288–4289 (agreement); 12-ER-3099–4000 (testimony re: guarantee); 11-ER-2818 (this is unheard of).

was approximately $680 million. (20-ER-4892 [row 35: "DCF" valuation].)[5] The valuation was based on ArcSoft's discounted cash flows, not its IPO potential.

2. What Deng told Chan.

One major step of the restructuring plan was for Deng to obtain shareholders' approval for the buyout. (17-ER-4208 [step 6].) As the jury found, Deng did so—by fraud.

Deng's concealment. Deng did not share any of the positive information just described with Chan or other shareholders: not ArcSoft's uptick in new customer contracts or strong, improving financial performance; not the plan to relocate the company to China; not Huatai's sponsorship of the buyout, with the express intention to carry out an IPO; and not Deng's personal guarantee of ArcSoft's earnings growth. (3-ER-503; 10-ER-2416; 12-ER-3100, 3104, 3107–3108; 15-ER-3821, 3823.)

To Chan, Deng presented an entirely different picture. Deng's updates to Chan became "more negative" in 2016. (10-ER-2410.) Deng told Chan that ArcSoft's "sales [were] dropping," ArcSoft was "losing customers," "[b]usiness was going down," and the company was in a "distressed situation." (10-ER-2402, 2410,

[5] See also 20-ER-4987–4989 (exchange rate); 3-ER-387, 408–409 (briefing and testimony); 15-ER-3825 (Deng deposition re: Huatai due diligence); 12-ER-3081 (deposition played into record).

2417.) Deng even falsely told Chan that the company had lost its biggest customer, Samsung. (10-ER-2410, 2417; see 12-ER-3069; 16-ER-3987 [Samsung remained a customer].)

The buyout. In early 2017, Deng told Chan that he had found new investors to buy out Chan and other current shareholders. (10-ER-2415.) Chan asked whether the buyers included any institutional investors. (10-ER-2416.) Deng said the buyers were "just a few individuals," as "the company is in a distressed situation." (10-ER-2415–2416.)

Deng told Chan "there was no possibility" of an IPO; on a move to China, Deng said "nothing of any sort like that" was planned. (10-ER-2411–2413.) If Deng had told Chan of Huatai's role, Chan "would have smelled that this is a plan to relocate the company to China and to list it in China." (10-ER-2416.)

The Information Statement. In September, based in part on Deng's concealment of material information, ArcSoft's board approved the buyout. (11-ER-2659–2660.)[6]

A few weeks later, Deng circulated an Information Statement to shareholders to solicit their agreement to sell their shares at the price offered in the buyout. (10-ER-2417–2418;

---

[6] Compare 16-ER-3859 and 16-ER-3881 (board was informed ArcSoft would earn only $4.8 million in 2017) with p. 25, *ante* (Deng guaranteed $41 million in profits in 2017–2018).

16-ER-4058; 17-ER-4060–4206.) The buyout valued ArcSoft at $150 million—less than one-quarter of the $680 million valuation Huatai had provided Deng. (16-ER-4023 [letter of intent]; 17-ER-4180–4181 [Information Statement].)

Deng knew that his personal stake in the buyout created a conflict of interest, so he was not "supposed to discuss with the shareholders any aspect of the transaction." (12-ER-3010–3011.) Nevertheless, he personally emailed and spoke to Chan to solicit his support. Deng wrote, "Due to the time urgency, please review and seek the right person for reviewing and the signature in your entities ASAP." (10-ER-2517; 16-ER-4058.) Deng told Chan that "this [request] was urgent, approve it," or else "you might not get paid or the deal does not go through." (10-ER-2419, 2421.)

The financial data in the Information Statement provided to shareholders was very different from that in the financial statements discussed above which were concealed from shareholders. Two important examples:

- The Information Statement listed shareholders' equity of negative $30 million at the end of 2016 (indicating a risk of insolvency), versus positive $34 million in the undisclosed, audited 2016 statements;
- The Information Statement listed operating income of $6.1 million for all of 2016, versus $11 million for the

first *half* of 2017 alone, according to quarterly statements not disclosed to shareholders.

(17-ER-4198–4199; see also 10-ER-2423 [testimony].)[7]

The Information Statement also notified Chan for the first time that this was a conflicted management buyout. (10-ER-2417, 2421.) It disclosed that Deng would "indirectly own approximately 50.75% of Parent [of ArcSoft] after the Merger." (17-ER-4178.)

The failure to provide a fairness opinion. Because this was a conflicted management buyout and ArcSoft had more than 100 shareholders, section 1203 required ArcSoft to deliver a "fairness opinion" to accompany the offer, "an affirmative opinion in writing as to the fairness of the consideration to the shareholders."[8] (§ 1203, subd. (a)(2); see 6-ER-1222.) ArcSoft chose to violate this requirement, and no fairness opinion was obtained or delivered. (12-ER-2950–2952, 3011–3012.) Chan had no way of knowing that Arcsoft had over 100 shareholders and was obligated to provide the fairness opinion. (6-ER-1222.)

---

[7] The parties disputed the materiality of the undisclosed audited 2016 figures. (See 10-ER-2409, 2429–2431; 12-ER-2900–2904; 17-ER-4198–4199.) Consistent with the standard of review, the Court presumes the jury resolved this dispute in Chan's favor.

[8] Undesignated statutory references are to the Corporations Code.

In mid-September 2017, within days of receiving the Information Statement and Deng's solicitations, Chan and a majority of other shareholders signed their consents. (5-ER-1106–1107, 1110–1111, 1121–1122, 1131–1132.) Chan received $14.22 million for his shares. (5-ER-1111, 1122, 1132.)

The back-dated proxy. A few months later, Deng asked Chan to sign a backdated "Proxy Letter." (4-ER-697, 708.) The letter purported to grant Deng the power to exercise on Chan's behalf all Chan's rights as a shareholder. (4-ER-708.) The letter and the line for Chan's signature were dated six years before the buyout. (4-ER-698, 708.)

If signed, the letter would have falsely recorded Chan's authorization of Deng's actions through the time of the buyout and beyond. Chan did not sign. (5-ER-1036.)

C. Less than two years after buying back Chan's shares, ArcSoft launches on a Chinese stock exchange, soon trading at a valuation almost 29 times the price paid to Chan.

As Deng had planned all along, ArcSoft promptly relocated to China after the buyout, and then it completed its IPO and listed on a Chinese stock exchange in July 2019. (11-ER-2769–2770; 12-ER-3000–3001; 13-ER-3196–3202, 3241–3242.)

ArcSoft's initial valuation was $1.71 billion, more than 11 times the valuation of $150 million implied by the buyout share price. (18-ER-4315 [406 million shares, price: 28.88 RMB]; 20-ER-5000 [exchange rate].) On its first day of trading, its share price more than doubled. (13-ER-3244 [first listed July 22, 2019]; 20-ER-5039 [closing price: 64.44 RMB]; 20-ER-5000.) A year later, its share price valued the company at $4.3 billion—almost 29 times the buyout price. (20-ER-5032 [closing price July 22, 2020: 74.81 RMB]; 20-ER-5005.)

Through the reorganization, entities under Deng's or his wife's control came to own 33 percent of ArcSoft. (18-ER-4378, 4406–4408.) At the time of the IPO, these shares were worth $564 million. One year later, they were worth over $1.4 billion.

Chan first learned about ArcSoft's IPO about nine months before it happened. (10-ER-2438.) After he read ArcSoft's prospectus, he understood what Deng had done. (10-ER-2439.)

Chan was "upset and disappointed" to learn that ArcSoft's financial condition had been "much, much better, in fact, 180 degrees opposite of what we were told"; that Huatai "was front and center in the whole deal at the buyout"; and that the "restructuring was happening right before the buyout." (10-ER-2416–2417, 2439–2440.) Chan saw Deng's actions as a "complete

betrayal of 18 years that I invested in this company, but not only about money, but time and passion." (10-ER-2440.)

II. Procedural history.

A. Chan sues Deng and ArcSoft in federal district court for fraud and breach of fiduciary duty under California law.

Chan sued Deng and ArcSoft in the Northern District of California for various state law causes of action, including intentional and negligent misrepresentation, fraudulent concealment, and breach of fiduciary duty. (6-ER-1245.)

B. At summary judgment, the court rejects Deng's defense based on section 1312(a), the statute at issue here, and rules for Chan as a matter of law on two elements of fraudulent concealment.

1. The court rejects Deng's argument that under section 1312(a), Chan's exclusive remedy was to request an appraisal of his shares at the time of the buyout.

Deng sought summary judgment, arguing that Chan's exclusive remedy, even for intentional fraud and breach of fiduciary duty, was a "statutory appraisal action" at the time of the buyout. (5-ER-1066, citing § 1312.)

The district court rejected this argument. Based on *Steinberg*, *supra*, 42 Cal.3d at p. 1207, the court concluded that

section 1312(a) does not apply "where the facts underlying the claims were unknown to the plaintiffs at the time of the transaction"; to hold otherwise "could incentivize misconduct." (3-ER-493–495.) The issue went to the jury to decide whether the facts were unknown to Chan at the time of the buyout.

2. The court rules as a matter of law that Deng breached a duty to disclose the 2017 quarterly financial statements.

The court also ruled at summary judgment that Chan had established two elements of fraudulent concealment as a matter of law. First, "no reasonable jury could find that Deng did not solicit Plaintiffs' approval for the buyout," and as a fiduciary seeking shareholder approval of a buyout, Deng had a duty to disclose material information. (3-ER-476, 478–480.)

Second, Deng breached this duty by failing to disclose ArcSoft's financial statements for the first and second quarters of 2017, the statements that showed earnings in the first half of 2017 to be nearly double earnings of all of 2016. (3-ER-478–480.) "[N]o reasonable jury" could find these statements "immaterial." (*Ibid.*; see pp. 24, 26, *ante*.) The court observed, "It is fundamental that the financial performance of a company is material to an investor deciding to sell or hold its shares," and

the court quoted ArcSoft's own expert that the statements were "'foundational,'" "'got to have them. No doubt.'" (3-ER-480.)

C. After a 10-day jury trial, the court enters judgment against defendants for fraud and breach of fiduciary duty.

1. Mid-trial, the court rules as a matter of law that Chan may not seek lost profits as damages.

Chan asserted two independent measures of damages: (1) ArcSoft's fair market value at the time of the buyout; (2) the profits Chan would have earned absent the fraud if he had remained a shareholder through ArcSoft's IPO. (5-ER-882; see also 3-ER-544–547, 565–568; 10-ER-2370–2371.)

Mid-trial, the court ruled that the issue of lost profits would not "go to the jury." (1-ER-17.) The jury was instructed only on the fair-market-value measure of damages. (2-ER-121.)

2. The court grants judgment as a matter of law to defendants on punitive damages.

At the close of Chan's evidence, the court granted judgment as a matter of law to defendants on punitive damages. (1-ER-11.)

The court believed California law required Chan to offer evidence of the "'intention' to cause injury to the plaintiffs as

opposed to a mere intention to defraud" and found that Chan had not done so. (1-ER-10–11.)

3. The jury finds that defendants committed fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty and awards $9.7 million in damages.

The jury found Deng and ArcSoft liable for fraudulent concealment and negligent misrepresentation and Deng liable for breach of fiduciary duty. (2-ER-52, 54, 60, 62, 68, 70.) The jury awarded Chan $9.7 million in damages, which it found was the difference between "the fair market value of Plaintiffs' shares" at the time of the buyout and "the compensation the Plaintiffs received for their shares." (2-ER-57, 59, 65, 67, 73, 121.)

The jury rejected defendants' affirmative defense based on section 1312(a). The jury found defendants failed to prove Chan "was aware of all material facts underlying" his claims "when [he] consented to the Buyout." (2-ER-53–54, 61–62, 69–70.)

The court denied defendants' renewed motion for judgment as a matter of law based on section 1312(a), entering judgment according to the verdict. (1-ER-2–4.)

D. Ninth Circuit appeals and certification.

Both sides appealed to the Ninth Circuit. (9-ER-2173–2178.) Chan's appeal argues that he offered evidence sufficient to have

a jury decide his requests for lost profits as damages and for punitive damages. (Appellants' 1st Br. (Dkt. 24.1) 38–69.) Defendants' cross-appeal argues that Chan's action is barred as a matter of law by section 1312(a). (Appellees'/X-Appellants' Br. (Dkt. 44.1) 57–63.)

The Ninth Circuit concluded that the cross-appeal raises a determinative question of California law unanswered by "controlling precedent." (Ord. Cert. Q. (Dkt. 73.1) 3 (Cert. Ord.).) It noted that *Steinberg*, *supra*, "held that § 1312(a) limits a minority shareholder's remedy in a merger or reorganization to seeking an appraisal" but limited the rule to cases in which "'the plaintiff was aware of all the facts leading to his cause of action.'" (Cert. Ord. 6.)

The Ninth Circuit cited findings supporting the conclusion that section 1312(a) should not bar Chan's action: "Deng withheld information about the ongoing negotiations with Huatai and the state of ArcSoft's finances"; Deng "failed to provide a fairness opinion"; the buyout valued ArcSoft at $150 million, "considerably lower than Huatai's $680 million valuation less than a year earlier"; shareholders approved the buyout "[b]ased on the incomplete information they had available to them"; and Chan was "unaware of ArcSoft and Deng's tortious conduct until after the buyout." (Cert. Ord. 4–5.) The Ninth Circuit also

perceived a "tension between § 1312(a)'s policy objectives and background concerns of equity." (Cert. Ord. 9.)

The Ninth Circuit certified the present question to this Court (Cert. Ord. 9–10), which took it up.

STANDARDS OF REVIEW

The certified question arises from a judgment following a jury verdict that defendants are liable for fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty. The Court therefore interprets the facts and evidence ""in the light most favorable to the party securing the verdict,"" that is, Chan. (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 192.)

The certified question presents an issue of statutory interpretation, namely, the circumstances in which section 1312(a) bars an action for buyout-related damages. The Court reviews that issue de novo. (*People v. Braden* (2023) 14 Cal.5th 791, 804.)

"In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) This involves consideration of the statute's language and purpose, legislative history, and public policy.

The Court "begin[s] with the language of the statute, giving the words their usual and ordinary meaning," construing the language "'in the context of the statute as a whole and the overall statutory scheme,'" and "'giv[ing] "significance to every word, phrase, sentence, and part of an act."'" (*Smith*, *supra*, 39 Cal.4th

at p. 83.) "If the statutory terms are ambiguous," the Court looks to "extrinsic sources" to construe the statute. (*Ibid.*) These include ""the statute's purpose, legislative history, and public policy."" (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617.)

Based on all these considerations, the Court "choose[s] the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith*, *supra*, 39 Cal.4th at p. 83.)

ARGUMENT

I. Section 1312(a) does not preclude a shareholder from seeking buyout-related damages when the shareholder establishes that the shareholder's consent to the buyout was procured by fraud.

A. *Steinberg* left open whether section 1312(a) precludes such a claim.

Section 1312(a) does not bar all actions merely *related to* a reorganization. Instead, it limits only shareholders' "right at law or in equity to attack the validity of the reorganization."[9]

---

[9] In full, section 1312(a) states:

> No shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to

[*Footnote Continues On Next Page*]

"Valid" means "[l]egally sufficient; binding." ("Valid," Black's Law Dict. (12th ed. 2024).) And, because section 1312 bars attacks on the validity of a reorganization both "at law" and "in equity," it bars at least some actions for damages, not just actions seeking to unwind a reorganization. (*Steinberg, supra*, 42 Cal.3d at p. 1205.) Putting these points together, section 1312(a) bars an action for damages if the action asserts that the reorganization is in some way legally insufficient or not binding.

Steinberg, *supra*, 42 Cal.3d 1198, further interprets this language. The plaintiffs there bought shares in the defendant company in a public offering. (*Id.* at p. 1202.) Three months later, the company announced its imminent merger with another company and its intention to buy outstanding shares. (*Id.* at pp. 1202–1203.) The plaintiffs agreed to the buyout but later

---

> attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded, except in an action to test whether the number of shares required to authorize or approve the reorganization have been legally voted in favor thereof; but any holder of shares of a class whose terms and provisions specifically set forth the amount to be paid in respect to them in the event of a reorganization or short-form merger is entitled to payment in accordance with those terms and provisions or, if the principal terms of the reorganization are approved pursuant to subdivision (b) of Section 1202, is entitled to payment in accordance with the terms and provisions of the approved reorganization.

sought damages for fraud and breach of fiduciary duty in connection with it. (*Id.* at pp. 1203–1204.)

Steinberg divided the plaintiffs' allegations into two claims. The first claim said the buyout was "illegal because it was not accomplished for a valid business purpose but to 'freeze out' the public shareholders." (*Steinberg*, *supra*, 42 Cal.3d at p. 1206.) *Steinberg* held that this claim was "an attack on [the reorganization's] validity" barred by section 1312(a). (*Ibid.*, italics added.) In general, then, a claim based on a reorganization's wrongful purpose is an attack on its validity.

The second claim said the "defendants breached their fiduciary obligation in agreeing to the merger terms, and in the process engaged in self-dealing and other breaches of duty." (*Steinberg*, *supra*, 42 Cal.3d at p. 1206.) *Steinberg* found that "[t]he language of section 1312(a)(a) does not provide a ready answer" to whether it bars this claim, "for it is not entirely clear whether such a claim amounts to an attack on the 'validity' of the merger." (*Id.* at p. 1207.) *Steinberg*'s uncertainty on this point confirms that section 1312(a) does not bar all claims *related to* a reorganization. If it did, then *Steinberg* would have had a "ready answer" regarding the second claim, too, which was at least related to the merger at issue.

Steinberg concluded that the second claim was barred by section 1312(a) based on this additional point: "[T]he plaintiff was aware of all the facts leading to" the claim "prior to the time the merger was consummated but deliberately opted to sue for damages instead of seeking appraisal." (*Steinberg*, *supra*, 42 Cal.3d at p. 1214.) *Steinberg* repeats this point four times. (See *id.* at pp. 1207, 1210–1211, 1214.) *Steinberg* explains that if the shareholder is "fully informed as to the facts," "the gravamen of a cause of action for appraisal and breach of fiduciary duty in this context is substantially the same—i.e., that the shares have been undervalued by the corporation." (*Id.* at p. 1210.) In that case, the "misconduct may be litigated in an appraisal proceeding," making appraisal an adequate remedy. (*Id.* at p. 1209.)

Steinberg left open whether an action for damages is an attack on the validity of the reorganization when the plaintiff was not aware of the facts underlying the cause of action at the time of the reorganization. This gap includes the action here, in which the shareholder's consent to the reorganization was procured by fraud.

B. Legislative history and policy make clear that section 1312(a) does not preclude a shareholder from seeking buyout-related damages when the shareholder's consent to the buyout was procured by fraud.

As with the second claim in *Steinberg*, the language of section 1312(a) "does not provide a ready answer" to whether a shareholder's action "attacks the validity of the reorganization" when consent to the reorganization was procured by fraud. (*Steinberg*, *supra*, 42 Cal.3d at p. 1207.) But legislative history and policy do provide a ready answer. They establish beyond doubt that section 1312(a) does not bar the shareholder from seeking buyout-related damages.

1. The history of section 1312(a) demonstrates that the Legislature did not intend it to apply when the shareholder's consent to the buyout was procured by fraud.

a. The Legislature enacted the first version of section 1312 to prevent dissenting shareholders from delaying or thwarting reorganizations.

In 1931, the Legislature enacted the first version of section 1312, former Civil Code section 369. (Stats. 1931, ch. 862, § 2, pp. 1817–1819 (former section 369).) Before that, a dissenting minority of shareholders "could delay or thwart a merger altogether." (*Steinberg*, *supra*, 42 Cal.3d at pp. 1204–1205.)

Appraisal statutes like former section 369 "enabl[ed] the majority to effect a merger" while protecting the minority's "right to receive fair cash value for their shares." (*Id.* at p. 1205.)

Former section 369 provided that a dissenting shareholder could demand "the fair cash value of his shares." (Fmr. § 369, at pp. 1817–1818.) In language similar to section 1312(a), it made this remedy exclusive: "The rights and remedies of any shareholder at law or in equity *to object to or litigate as to any such merger or consolidation* shall be and are hereby limited to the right to receive the fair cash value of his shares[.]" (Fmr. § 369, *supra*, at p. 1819, italics added.)[10]

b. The drafters of the first version of section 1312 expressly stated that it does not bar an action for damages by a shareholder whose consent to a reorganization was procured by fraud.

The drafters of former section 369, Professors Ballantine and Sterling, considered these points in a 1939 article. The Court has looked to this article before when interpreting section 1312(a). (See *Steinberg*, 42 Cal.3d at pp. 1207–1208, 1214, fn. 14.)

The article expressly identifies actions like Chan's as exceptions to the statute.

---

[10] A 1933 amendment changed the phrase "fair cash value" to "fair market value." (Stats. 1933, ch. 533, § 69, pp. 1399–1400.)

Ballantine and Sterling distinguish between "dissenting shareholders" who assert merely "fraud in the exercise of their power by the majority" from "consenting shareholders" who, like Chan, assert "fraud in procuring the affirmative votes." (Ballantine & Sterling, *Upsetting Mergers and Consolidations* (1939) 27 Cal. L.Rev. 644, 663 (Ballantine & Sterling).) They provide that "[a] consenter who has been defrauded" may pursue "his common law remedy for damages against the persons who have perpetrated the fraud." (*Ibid.*) These actions do not "open[] the door of [former section 369] to nuisance litigation and to attacks on the entire merger or consolidation." (*Ibid.*)

Ballantine and Sterling repeat this point in their summary of "the remedies available to shareholders in cases of merger or consolidation." (Ballantine & Sterling, *supra*, at pp. 667–668.) Among the remedies, they list "[t]he common law right of the consenting shareholder to sue for damages for fraudulent procurement of his vote or for conversion of his shares." (Ballantine & Sterling, *supra*, at p. 668.) They say this remedy is available after "the filing of the merger or consolidation agreement, and certificates as to its approval, with the secretary of state." (*Ibid.*) Practically, this condition prevents the action from impeding the reorganization.

Steinberg, *supra*, acknowledged that Ballantine and Sterling made an exception for shareholders defrauded into consenting to a reorganization. *Steinberg* said that "the enumerated remedies" in Ballantine and Sterling's article "do not include an action for fraud or breach of fiduciary duty by a shareholder *except for fraudulent procurement of his vote*." (42 Cal.3d at p. 1208, fn. 14, italics added.)

c. Later changes to section 1312 did not alter its meaning.

The Legislature intended no substantive change in the law when it changed the old phrase "object to or litigate as to any such merger or consolidation" to the current phrase "attack the validity of the reorganization," in 1947. (Stats. 1947, ch. 1038, p. 2380.) The Office of Legislative Counsel said the bill enacting the new language "makes no substantive change in the existing law, but rearranges and restates in simplified language the substance of existing laws." (MJN-7.)[11] And the later history of the statute does not suggest any change in purpose or meaning

[11] Citations to "MJN" are to the concurrently filed motion for judicial notice of certain legislative history materials. (See *Madrigal v. Hyundai Motor America* (2025) 17 Cal.5th 592, 609, fn. 10 ["a court will take judicial notice of the legislative history of a statute to ascertain the statute's purpose and meaning if the statute is ambiguous"].)

either. (See Stats. 1947, ch. 1038, p. 2380; Stats. 1975, ch. 682, § 7, pp. 1516, 1587–1588.)

What was true of former section 369 remains true of section 1312. The Legislature intended section 1312(a) to bar shareholder litigation that impedes a reorganization to get a better deal. The Legislature did not intend it to bar actions to remedy fraudulent procurement of consent to a reorganization. To hold that it does so would be a gross misinterpretation.

2. The history of a different statute, the "fairness opinion" requirement of section 1203, confirms that the Legislature did not intend section 1312(a) to apply when the shareholder's consent to the buyout was procured by fraud.

Section 1203, the fairness opinion statute, requires that when a reorganization proposal originates from "an interested party," such as a director or other insider, "an affirmative opinion in writing as to the fairness of the consideration to the shareholders of that corporation shall be delivered" to the shareholders. (§ 1203, subd. (a)(4).)[12] According to a Senate

---

[12] Section 1203 does not apply when the corporation has fewer than 100 shareholders. (§ 1203, subd. (a).) ArcSoft had more than 100 shareholders at the time of the buyout. (6-ER-1222.) The first version of section 1203 directed that the fairness opinion would "attest that the value of the proposal is *just and reasonable*" to the shareholders. (MJN-25, italics added.) The

[*Footnote Continues On Next Page*]

committee, the responsibility to provide the opinion falls on the "managers of a corporation who seek to purchase a controlling interest." (MJN-13.)

Enacted in 1988, the Legislature intended section 1203 to prevent reorganizations in which, "after the shareholders sold their shares to management, management has later (and often, not much later) re-sold the same corporation either to the public or some private party for greater consideration than what was received by the original shareholders." (MJN-17.)[13] The purpose of section 1203 is to prevent corporate insiders from obtaining shareholders' consent to a reorganization by deceit—exactly the deceit that Chan's action, and other actions in the same posture, aim to remedy.

If section 1312(a) does not preclude such actions, then section 1312(a) harmonizes with section 1203. Section 1203 attempts to prevent a certain form of deceit; section 1312(a) does

---

"just and reasonable" standard proved impracticable, and the Legislature urgently amended it to the current standard, which requires an opinion "as to the fairness of the consideration to the shareholders." (MJN-25; § 1203, subd. (a).)

[13] See also MJN-14 (Senate committee report: "This bill resolves the problem of having a conflict of interest in which management is both determining the price of the offer in acting as the purchaser and representing the shareholders as their fiduciary in their role as corporate officers and advisers to the sellers (shareholders)"); MJN-20 (same).

not preclude an action to remedy that same deceit after section 1203 has failed to prevent it (perhaps because, as here, an interested director violated section 1203).

The Legislature intended the two statutes to cooperate. A committee report on section 1203 explains that existing law already "[p]rovides dissenting shareholders with certain rights," including "the right, under certain conditions, to demand that the corporation purchase their shares at the fair market value," a reference to appraisal under section 1312. (MJN-19.) The report explains that section 1203 "*[a]dds* a requirement" to provide a fairness opinion in management-led buyouts, "to ensure that shareholders have an alternative source of information about the inherent value of their shares." (MJN-19–20, italics added; see also *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310, 335 ["'The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute'"].)

On the other hand, if section 1312(a) precludes actions for buyout-related damages by shareholders whose consent to a reorganization was procured by fraud, section 1312(a) is at cross-purposes with section 1203. In that case, after section 1203 has failed to prevent the deceit—after a corporate insider wrongfully procures shareholders' consent, perhaps by violating section 1203

itself—then section 1312(a) deprives the shareholder of any remedy for that same deceit.

"""A court must, where reasonably possible, harmonize statutes""" and """reconcile seeming inconsistencies in them.""" (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) The Court should harmonize section 1312(a) and section 1203 and hold that section 1312(a) does not preclude actions for buyout-related damages by shareholders whose consent to a reorganization was procured by fraud.

3. There is no credible public policy argument for barring an action for buyout-related damages when the shareholder's consent to the buyout was procured by fraud.

Steinberg, *supra*, found that whether section 1312(a) barred the plaintiffs' second claim, for breach of fiduciary duty, "depends on considerations of public policy," and *Steinberg* identified "impressive arguments on both sides of the issue." (42 Cal.3d at p. 1210.) But when a shareholder has been defrauded into consenting to a reorganization, the impressive policy arguments are all on the same side.

The prime policy concern is "[t]he extensive reach of the duty of controlling shareholders and directors to the corporation and its other shareholders." (*Jones v. H. F. Ahmanson & Co.* (1969) 1

Cal.3d 93, 108 (*Ahmanson*).) Controlling shareholders and directors are fiduciaries; they "may not use their power to control corporate activities to benefit themselves alone or in a manner that is detrimental to the minority" or "'in disregard of the standards of common decency and honesty.'" (*Id.* at pp. 108–109.) Thus arises "the strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders." (*Steinberg*, *supra*, 42 Cal.3d at p. 1210.)

It promotes this public interest to allow a shareholder defrauded into consenting to a reorganization to bring an action for damages. If appraisal is the only remedy, individual wrongdoers will "go unpunished": Because "only the corporation would be liable for the fair market value of the shares," appraisal will pose "no deterrent to individual misconduct." (*Steinberg*, *supra*, 42 Cal.3d at p. 1211.)

a. If section 1312(a) precludes actions by shareholders whose consent to a buyout was procured by fraud, the statute will place shareholders in an unfair dilemma—and greatly encourage fraud.

Understanding the policy consequences of the issue at hand requires reviewing the procedure by which a shareholder consents or dissents to a buyout. The process begins when the

corporation notifies the shareholder of the terms of the buyout; the offered consideration for the shares could include cash or other shares. (See §§ 1201–1203, 1300, subd. (b)(1); e.g., *Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 421–423.)

Then the shareholder has two choices:

- The shareholder could consent to the buyout offer. Upon doing so, the shareholder becomes entitled to the promised consideration but waives the right to seek appraisal. (See § 1304, subd. (a) [only dissenting shares may seek court appraisal]; § 1300, subd. (b)(2) [only shares not voting for reorganization can be dissenting shares].)
- The shareholder could dissent. By doing so, the shareholder waives the offered consideration. If the parties cannot agree on a dissenting share price, then either party can seek court determination of the shares' fair market value within six months of notice of approval of the buyout. (§ 1304, subd. (a).) The appraisal proceeding also provides a forum to "litigate" any "claim of misconduct" the shareholder wants to assert at that time. (*Steinberg*, *supra*, 42 Cal.3d at p. 1209.)

In either case, the reorganization can proceed without interruption.

When both sides operate in good faith, this procedure allows shareholders to test the buyout offer while facilitating reorganizations. But because officers and directors know far more about the company and buyout than the shareholder ever could, they can also attempt to procure consent by fraud when it serves their self-interest.

If the Court holds that section 1312(a) precludes actions for damages by shareholders whose consent to a buyout was procured by fraud, the consequence is clear: a lot more fraud.

Under that rule, by consenting to the buyout offer, the shareholder waives every other right—not only to appraisal, but also to seek damages upon later discovery of fraud. Thus arises the remarkable phenomenon of a fraud whose very success extinguishes every possible remedy. To some unscrupulous directors and officers, a fraud like this will prove irresistible. To shareholders, consenting will appear far riskier than before.

But dissenting is no better. Sure, by dissenting, the shareholder has six months to uncover misconduct so that it can be litigated within the appraisal proceeding. But to preserve this right, the shareholder must forgo the original offer and may end up with far less. The shareholder must also decide quickly

whether to dissent—before the shareholder meeting to approve the buyout, or within 30 days of notice of approval. (§ 1301, subd. (b).) Even then, the appraisal process is designed to test the value of the shares, not to allow shareholders to uncover concealed wrongdoing. The shareholder has few means of discovery or investigation. Unless the shareholder strongly suspects wrongdoing, it would be unwise to dissent just to preserve the right to litigate potential misconduct.

Meanwhile, unscrupulous directors and officers know that even in the face of dissent, if they can keep the fraud concealed for six months, they and the corporation are untouchable. And even if the fraud is discovered, the appraisal proceeding poses no risk of personal liability. (*Steinberg*, *supra*, 42 Cal.3d at p. 1211.)

Therefore, to hold that section 1312(a) precludes actions for damages by shareholders whose consent to a buyout was procured by fraud would greatly increase the rewards of fraud and diminish the potential downside. It would amount to amnesty for the most effective fraudsters. It would be "tantamount to giving free reign to deliberate corporate pilfering by management and then immunizing those responsible from liability by virtue of the merger which they arranged"—"a grossly inequitable result." (*Gaillard v. Natomas Co.* (1985) 173 Cal.App.3d 410, 420 [re: shareholder derivative suits].)

b. Precluding actions by shareholders whose consent to a buyout was procured by fraud would not promote the policy aims of section 1312(a).

Steinberg lists the policy arguments in favor of applying section 1312(a). "[I]f a minority shareholder, *fully informed as to the facts* underlying his claim of breach of fiduciary duty, was permitted to bring an action for damages," it could lead to "some of the evils which an action for appraisal was designed to avoid": "[S]uch litigation" could "prevent the consummation" of beneficial reorganizations; "the corporation might be pressured into making concessions to the minority which would be unwarranted absent such a threat"; "[t]he so-called 'strike suit' would be encouraged"; and the risk of personal liability, including for punitive damages, "would be almost as powerful a disincentive to legitimate mergers as a threat to unwind the merger." (*Steinberg*, *supra*, 42 Cal.3d at p. 1210, italics added.)

Unlike the *Steinberg* plaintiffs, a shareholder defrauded into consenting to a reorganization was perforce not "informed as to the facts" of the cause of action until afterward. The risks *Steinberg* identified are absent in an action like this. This is true for substantive and procedural reasons.

Substantively, until the reorganization is final, the plaintiff cannot plead or prove that consent to the reorganization was

procured by fraud. Before that point in time—when the reorganization might not be consummated—the plaintiff cannot show detrimental reliance as an element of fraud.

Procedurally, the requirement to plead this theory of fraud with particularity in order to avoid the section 1312(a) bar cuts against any risk of "strike suits." (See *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993 [fraud plaintiff must plead """*facts* which 'show how, when, where, to whom, and by what means the representations were tendered,""" original italics].) To win on this theory, the plaintiff must plead reliance on the material facts that the defendant misrepresented or concealed; then show this to be a triable factual issue to overcome summary judgment; then prove it to a factfinder. These procedural hurdles, part and parcel of this theory of liability, require plaintiffs to show at each stage that they did not know the relevant facts at the time of the reorganization, ensuring the action comes under the potential exception *Steinberg* identified. (*Steinberg*, *supra*, 42 Cal.3d at p. 1214.)

In short, there is not a single policy argument in favor of applying section 1312(a) counterbalances the powerful policy arguments in favor of allowing actions for damages by shareholders whose consent to a buyout was procured by fraud.

From the perspective of public policy, precluding these actions would be indefensible.

c. No state follows the rule that statutory appraisal is the exclusive remedy of a shareholder defrauded into consenting to a reorganization.

Nearly every state has an appraisal statute similar to section 1312, and they take various approaches to claims of wrongdoing connected to a reorganization. Two common points emerge. They are consistent with the rule the Court should adopt here, that section 1312(a) does not bar an action for buyout-related damages by a shareholder defrauded into consenting to a buyout.

This first point is most important: No court, anywhere, under any statute, has ever held that a shareholder defrauded into consenting to a reorganization is limited to a statutory appraisal remedy. This rule has no precedent anywhere in the United States. That is unsurprising, given the rule's odious policy implications.

Second, cases across states fit the pattern of *Steinberg*: The plaintiff shareholder raises claims of fraud or breach of fiduciary duty; the defendant argues that appraisal is the exclusive remedy; the court attempts to discern whether the tort claims are

merely disguised objections to the price (as in *Steinberg*) or genuinely independent torts, and if it finds the tort claims to be genuinely independent, it affords remedies in addition to or separate from statutory appraisal.

State statutes making appraisal exclusive with exception for unlawful conduct. By far the majority approach—across 35 states and territories—is a statute which makes appraisal exclusive with an explicit exception for fraud or unlawful conduct.

This approach has been disseminated through the 1984 and 2016 Revisions of the Model Business Corporation Act (MBCA) promulgated by the American Bar Association, which drew upon the law of Delaware (discussed below). Statutes based on the MBCA provide an exception to appraisal when the corporate action "is unlawful or fraudulent with respect to the shareholder or the corporation" or is "procured as a result of fraud, a material misrepresentation, or an omission of a material fact."[14] Thirty-

---

[14] Model Bus. Corp. Code (1984), § 13.02, subd. (b) ("A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement *unless the action is unlawful or fraudulent* with respect to the shareholder or the corporation," italics added); Model Bus. Corp. Code (2016) § 13.40 ("The legality of a [reorganization] may not be contested . . . after the shareholders have approved," except, for example, where the reorganization "was procured *as a result of fraud, a material*

[*Footnote Continues On Next Page*]

three states, including New York, have statutes based on the MBCA.[15]

Pennsylvania's non-MBCA statute applies the exception in cases involving "fraud or fundamental unfairness." (15 Pa. Cons. Stat. § 1105.) In Georgia, the other non-MBCA jurisdiction in this category, the statutory exception alludes to the possibility of shareholder consent being procured by fraud. It allows

---

misrepresentation, or an omission of a material fact," italics added).

[15] Jurisdictions adopting the 1984 Revision of the MBCA or substantially similar language include Arizona (Ariz. Rev. Stat. § 10-1302), Arkansas (Ark. Code. Ann. § 4-27-1302), Hawai'i (Haw. Rev. Stat. § 414-342), Illinois (805 Ill. Comp. Stat. 5/11.65), Massachusetts (Mass. Gen. Laws ch. 156D, § 13.02), Michigan (Mich. Comp. Laws § 450.1762), Minnesota (Minn. Stat. § 302A.471), New Mexico (N.M. Stat. Ann. § 53-15-3), New York (N.Y. Bus. Corp. Code § 623(k)), North Dakota (N.D. Cent. Code § 10-19.1-87), Oregon (Or. Rev. Stat. § 60.554), Tennessee (Tenn. Code Ann. § 48-23-102), Utah (Utah Code Ann. § 16-10a-1302), Vermont (Vt. Stat. Ann. tit. 11A § 13.02), Washington (Wash. Rev. Code § 23B.13.020), and Wisconsin (Wis. Stat. § 180.1302). Jurisdictions adopting the 2016 Revision or substantially similar language include Alabama (Ala. Code § 10A-2A-13.40), Colorado (Colo. Rev. Stat. § 7-113-401), the District of Columbia (D.C. Code Ann. § 29-311.50), Florida (Fla. Stat. § 607.1340), Guam (Guam Code Ann. § 281302), Idaho (Idaho Code § 30-29-1340), Iowa (Iowa Code § 490.1340), Montana (Mont. Code Ann. § 35-14-1340), Nebraska (Neb. Rev. Stat. § 21-2, 183), Nevada (Nev. Rev. Stat. § 92A.380), New Jersey (N.J. Stat. Ann. § 14A:11-1), Rhode Island (7 R.I. Gen. Laws § 1.2-1201), South Dakota (S.D. Codified Laws § 47-1A-1302.3), Texas (Tex. Bus. Orgs. Code Ann. § 10.368), Virginia (Va. Code Ann. §13.1-741.1), West Virginia (W. Va. Code § 31D-13-1302), and Wyoming (Wyo. Stat. Ann. § 17-16-1340).

shareholders to challenge a corporate action whenever "the vote required to obtain approval of the corporate action was obtained by fraudulent and deceptive means, *regardless of whether the shareholder has exercised dissenter's rights*." (Ga. Code Ann. § 14-2-1302(b), italics added.)

These states' appraisal statutes adopt the same, good policy this Court should adopt in its interpretation of section 1312(a). Appraisal is not shareholders' exclusive remedy when their consent to a reorganization was procured by fraud.

It does not matter to this conclusion that unlike these states' statutes, section 1312(a) does not include an express exception for fraud. The Legislature's failure to amend section 1312(a) to conform to the MBCA should not carry any interpretative weight. (See *Scher v. Burke* (2017) 3 Cal.5th 136, 147 ["Arguments based on supposed legislative acquiescence rarely do much to persuade"]; *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156 [rejecting argument that "legislative inaction signals acquiescence" to court interpretation]; *People v. King* (1993) 5 Cal.4th 59, 75–77 [same].) The Legislature last amended section 1312 in 1988, but only to cross-reference section 1202, newly added that year. (See Stats. 1988, ch. 919, pp. 2923–2924.) The previous amendment was in 1976, well before the dissemination of the MBCA's 1984 Revision.

State laws not making appraisal exclusive. The next most common approach, in thirteen states, is an appraisal statute that does not make it exclusive of other remedies.[16] Some of these statutes mimic the MBCA without the exclusivity provision.[17]

In other jurisdictions in this category, notably including Delaware, case law has established that appraisal is exclusive unless the corporate action involves fraud or other misdeeds. (*Cede & Co. v. Technicolor, Inc.* (Del. 1988) 542 A.2d 1182, 1186 [statutory appraisal and actions for "fraud, misrepresentation, self-dealing and other actionable wrongs" "are designed to provide different, and not interchangeable, remedies"]; see also, e.g., *Walter J. Schloss Associates v. Chesapeake and Ohio Ry. Co.* (Md.App. 1988) 536 A.2d 147, 156–158 [looking to Delaware law and arriving at similar principle].) Indeed, Delaware's

---

[16] These include Alaska (Alaska Stat. § 10.06.574), Connecticut (Conn. Gen. Stat. § 33-856), Delaware (Del. Code. Ann. tit. 8, § 262), Kansas (Kan. Stat. Ann. § 17-6712), Maine (Me. Stat. tit. 13-C, § 1302), Maryland (Md. Code Ann., Corps. & Ass'ns § 3-202), Mississippi (Miss. Code Ann. § 79-4-13.02), New Hampshire (N.H. Rev. Stat. Ann. § 293-A:13.02), North Carolina (N.C. Gen. Stat. § 55-13-02), Oklahoma (Okla. Stat. tit. 18, § 1091), Puerto Rico (P.R. Laws Ann. tit. 14, § 3743), South Carolina (S.C. Code Ann. § 33-13-102), and the Virgin Islands (V.I. Code Ann. tit. 13, § 256).

[17] E.g., Connecticut, Maine, New Hampshire, and South Carolina.

development of this principle informed the statutory exception for fraud and unlawful conduct in the 1984 Revision of the MBCA. (Model Bus. Corp. Act (1984), §13.02 com. 2.) The Court should follow this principle here.[18]

State statutes resembling section 1312(a). Last, five other states have statutes which, like section 1312(a), make appraisal exclusive without exception for fraud or unlawful conduct: Indiana, Kentucky, Louisiana, Missouri, and Ohio.[19] Even in these states, however, no court has held that appraisal is the exclusive remedy for a plaintiff defrauded into *consenting* to a reorganization.[20]

---

[18] Delaware's deployment of courts of equity to determine questions of corporate law limits the direct relevance of its case law to California law. (See, e.g., *Cede & Co.*, *supra*, 542 A.2d at pp. 1186–1187 [an action asserting fraud in connection with a reorganization challenges its "entire fairness" and supports demand for "rescissory damages"].) But, given the state's importance to corporate law, how Delaware resolves these questions should carry persuasive weight from the perspective of policy.

[19] See Ind. Code § 23-1-44-8; Ky. Rev. Stat. Ann. § 271B.13-020; La. Stat. Ann. § 12:1-1340; Mo. Ann. Stat. § 351.405; Ohio Rev. Code Ann. § 1701.85.

[20] See, e.g., *Fleming v. International Pizza Supply Corp.* (Ind. 1997) 676 N.E.2d 1051, 1052, 1056–1057 (plaintiff "advised the corporation that he dissented from the sale," but "the exclusive remedy available to a shareholder *seeking payment for the value of the shareholder's shares* is the statutory appraisal procedure," italics added); *Yeager v. Paul Semonin Co.* (Ky. 1985) 691 S.W.2d 227, 228–229 (plaintiff "alleged that the *plan* of merger was

[*Footnote Continues On Next Page*]

To the contrary, the Ohio Supreme Court has held that "an action for breach of fiduciary duty is maintainable outside the appraisal statute 'so long as it does not seek to overturn or modify the fair cash value determined.'" (*Stepak v. Schey* (Ohio 1990) 553 N.E.2d 1072, 1075; see also *ibid.* ["remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price which he received for his shares"].) Courts in the other four states in this category have simply not discussed any comparable case.[21]

Notwithstanding the outward differences in their approaches, across every state where the question has been considered—by the Legislature or the courts—the law heeds the

---

unlawful, that it was unfair and inequitable to minority stockholders," but "[t]he record does not disclose any issue as to *fraud*," italics added). Connecticut's current appraisal statute does not have an exclusivity provision. (Conn. Gen. Stat. §§ 33-856-872.) Its former statute was exclusive, without exception for fraud or unlawful conduct, but the case law applying this former statute follows the pattern. See, e.g., *Yanow v. Teal Industries, Inc.* (Conn. 1979) 422 A.2d 311, 315, 318 ("The plaintiff dissented from the merger," but appraisal statute "explicitly makes appraisal the exclusive remedy of the *objecting shareholder*," italics added).

[21] Cf. *Kolwe v. Civil and Structural Engineers, Inc.* (La.App. 2019) 264 So.3d 1262, 1275, fn. 10 (sole Louisiana case citing its statute); *Flarsheim v. Twenty Five Thirty Two Broadway Corp.* (Mo. 1968) 432 S.W.2d 245, 253 (discussing "fraud" only to reject defendants' argument that plaintiff could not bring action for statutory appraisal).

overwhelming policy reasons for making an exception to statutory appraisal when consent to a reorganization has been procured by fraud.

The Court should follow their example.

4. Other California case law is consistent with the rule that section 1312(a) does not bar an action for damages by a shareholder defrauded into consenting to a reorganization.

A few other important decisions have interpreted section 1312(a). All are consistent with the rule the Court should adopt. Section 1312(a) does not bar an action for buyout-related damages by a shareholder defrauded into consenting to a reorganization.

Beechwood. The Ninth Circuit was the first court to apply former section 369, the first version of section 1312, in a decision *Steinberg* would cite with approval, *Beechwood Securities Corp. v. Associated Oil Co.* (9th Cir. 1939) 104 F.2d 537 (*Beechwood*). (See *Steinberg*, *supra*, 42 Cal.3d at p. 1206 & fn. 11.)

Like *Steinberg*, *Beechwood* concerned a plaintiff who clothed an objection to price in the costume of a tort claim. The plaintiff alleged that the terms of a proposed buyout were "a violation of the duty of the directors to the corporation's shareholders *amounting to fraud*." (*Beechwood*, *supra*, 104 F.2d at pp. 539–

540, italics added.) But the plaintiff's real objection was that the "new stock offered" to it was "of less value than the Beechwood shares to be surrendered." (*Ibid.*) The Ninth Circuit therefore held that former section 369 barred the claim. (*Id.* at pp. 539–540.) This result is consistent with *Steinberg*, and consistent with an exception to section 1312(a) when the shareholder's consent to a reorganization has been procured by fraud.

Sturgeon. Shortly before *Steinberg*, the leading decision on section 1312(a) was *Sturgeon Petroleums Ltd. v. Merchants Petroleum Co.* (1983) 147 Cal.App.3d 134 (*Sturgeon*). In *Sturgeon*, the plaintiff shareholders haggled with the defendant corporation for months about the price of plaintiffs' shares in a buyout. (*Id.* at pp. 136–137.) The defendant filed an action "to obtain a judicial determination of the fair market value" of plaintiffs' shares; the plaintiffs sued for damages for breach of fiduciary, fraud, and other claims. (*Id.* at p. 137.)

Sturgeon held that section 1312(a) barred the plaintiffs' claims and that plaintiffs' exclusive remedy was statutory appraisal. (*Sturgeon*, *supra*, 147 Cal.App.3d at pp. 139–140.) As in *Steinberg*, the *Sturgeon* plaintiffs knew all the facts underlying their claims before the reorganization was consummated. (See *id.* at pp. 137, 139–141.) For this reason, the decision noted that the plaintiffs would have the chance "to establish *in the appraisal*

action that respondents engaged in misconduct." (*Id.* at p. 141, italics added.) And because these plaintiffs dissented from the reorganization, it is impossible they were defrauded into *consenting* to it.

Singhania. *Singhania*, *supra*, 136 Cal.App.4th 416, the most significant decision after *Steinberg*, is also consistent with the right result here. There, the plaintiffs sued for damages on the allegation that the defendants, corporate insiders, breached their fiduciary duty by "fail[ing] to set a buyout price" and "fail[ing] to comply with shareholders' demands for access to records or information for the purpose of deciding whether to exercise dissenters' rights." (*Id.* at pp. 420, 435.) The court held that section 1312(a) barred plaintiffs' claims. Defendants' "alleged failures were known to [plaintiffs] at the time" of the buyout. (*Id.* at p. 435.) Appraisal and other statutory remedies could address all of them. (See *id.* at pp. 431–432.) As a result, the claims were attacks on the validity of the reorganization.

Singhania expressly distinguished its plaintiffs' claims from other possible actions that might not be precluded by section 1312(a). These include an action "where fraud or breaches of fiduciary duty cause a shareholder to go along with a reorganization, based upon misinformation or nondisclosures material to a decision whether to exercise dissenters' rights, and

the shareholder would have cashed out as provided by dissenters' rights law had the shareholder known the true facts." (*Singhania*, *supra*, 136 Cal.App.4th at pp. 434–435.) *Singhania* thus leaves room for the right result in this case. (Cf. *Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028, 1039–1050 [recapping history of § 1312, subd. (a), then interpreting subd. (b), concerning the set-aside remedy in common-control reorganizations].)

C. Alternatively, even if section 1312(a) could bar some actions for buyout-related damages by a shareholder defrauded into consenting to a buyout, it does not bar Chan's action.

As explained, the Court should adopt the general rule that section 1312(a) does not preclude a shareholder from seeking buyout-related damages when the shareholder establishes that the shareholder's consent to the buyout was procured by fraud. This rule requires holding that section 1312(a) does not bar Chan's action.

But even if the Court is not inclined to adopt that general rule, other features of this case reinforce the conclusion that Chan's action, at least, must fall outside section 1312(a). Whatever rule the Court adopts should produce the same holding.

Statutory language. In no sense does Chan's action attack the validity of the ArcSoft reorganization. The buyout closed years ago; the reorganization is complete, along with the subsequent IPO. Chan did not and does not challenge any of this as legally insufficient, or seek to unwind it; indeed, by the time of his action, with ArcSoft shares being publicly traded, that would have been impossible.

Instead, the gravamen of Chan's action is fraud. (See pp. 22–30, *ante*.) Deng engaged in an elaborate scheme to conceal ArcSoft's true financial and business condition, and to conceal concrete plans, sponsored by a major Chinese investment bank (and backed by Deng's personal guarantee), to carry out an IPO in China. To support the scheme, Deng and ArcSoft violated the requirement to provide a "fairness opinion" under section 1203, a requirement the Legislature intended to prevent misconduct just like this. And after the buyout was complete, Deng even sought Chan's retroactive blessing on his wrongful acts, which Chan wisely refused. Chan's right to damages arises from this pattern of deception, which took place for months leading up to the buyout and continued even afterward, and which he did not discover until long after. None of this involves any attack on the validity of the reorganization.

Chan's action implicates the buyout only with respect to the element of reliance: The buyout was the detrimental transaction to which Chan agreed in reliance on Deng's fraud. But, just as a claim of fraudulent inducement of contract implicates a contract but does not "attack" a problem within the contract, Chan's claim of fraud implicates the buyout but does not "attack" a problem within the buyout. (Cf. *Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 13 [re: fraudulent inducement of contract].) And just as fraudulent inducement entitles the plaintiff "to 'affirm' the contract and to sue for damages in tort (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1220, italics omitted), Chan's fraud and breach of fiduciary duty claims—to which section 1312(a) should not apply—entitle him to let the buyout and IPO lie and sue for damages.

Legislative history and policy. Barring Chan's action would not serve in any way the purpose or intent of section 1312(a). Nor would it advance the public policy underlying corporate law. Instead, it would reward the effectiveness of defendants' fraud, including their willful failure to comply with section 1203, which the Legislature intended to prevent misconduct like theirs. It would deprive Chan of any remedy, and it would shield defendants from having to pay any award for

their egregious deception, a deception which made Deng a billionaire.

In short, to make a rule under which section 1312(a) bars Chan's action would turn corporate law into a tool for corporate fiduciaries to deceive and oppress minority shareholders. It would be the wrong result, in every way.

II. A shareholder whose consent to a reorganization is procured by fraud may pursue all available remedies for fraud, including lost profits and punitive damages.

The next question is the scope of available buyout-related damages in an action by a shareholder whose consent to a reorganization was procured by fraud. The Court should address this question, because it is fairly included in the certified question and it is likely to arise in similar actions.

The Court should hold that the same remedies are available, by the same standards, for any fraud claim, regardless of whether the cause of action is related to a buyout. The Court should also specifically address two forms of damages at issue in Chan's action and likely to recur in future cases: lost profits as the measure of compensatory damages, and punitive damages.

A. The Court should decide this issue because it is fairly included in the certified question and it is likely to recur.

The Court "may decide any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) To give a complete answer to the certified question and clarify this area of California law, the Court should decide the scope of buyout-related damages.

In previous cases, the Court has discussed lost profits and punitive damages as potential remedies for shareholders injured by corporate fiduciaries' wrongdoing. Lost profits came up in *Ahmanson*, *supra*, 1 Cal.3d 93. There, a company's majority owners exchanged most of its shares for shares of another company they created. (*Id.* at pp. 102–103.) Through this and further transactions, the owners made the plaintiff's shares in the company all but unmarketable. (*Id.* at pp. 103–105.) This Court held that the majority's acts breached their fiduciary duties to the plaintiff. (*Id.* at pp. 113–115.)

On the proper remedy, the Court held that the majority forced a "fundamental corporate change" on the plaintiff, for which the plaintiff "was entitled to more" than the "fair value" of her shares at the time of the wrongdoing: She was entitled to "the same opportunity" the majority had arranged for itself, an

award putting her "in a position at least as favorable as that the majority created for themselves." (*Ahmanson*, *supra*, 1 Cal.3d at pp. 117–118.) In short, lost profits. Because *Ahmanson* involved a corporate maneuver other than a reorganization, section 1312(a) did not arise at all, so *Ahmanson* did not reach whether lost profits would be available in an action like Chan's.

As in *Ahmanson*, Chan's action does not come under the appraisal statute. (Arg. § I, *ante*; *Ahmanson*, *supra*, 1 Cal.3d at pp. 116–117.) As in *Ahmanson*, the equities at play here—defendants' proven, egregious fraud—support putting Chan "in a position at least as favorable" as Deng. (*Ahmanson*, at pp. 117–118.) This case thus provides an opportunity to clarify the force and scope of *Ahmanson*'s rule of lost profits.

Meanwhile, *Steinberg*, *supra*, 42 Cal.3d 1198, repeatedly mentions punitive damages as a potential remedy for defrauded shareholders. (*Id.* at p. 1202 ["We are concerned in this case" with "whether an action for compensatory and exemplary damages will lie" for "fraud and breach of fiduciary duty by the majority stockholders and others in connection with the merger"]; see also *id.* at pp. 1204, 1207, 1209, 1211–1212 [further references to exemplary damages].) But, having held that the plaintiffs' action was barred by section 1312(a), *Steinberg* never

decided whether a shareholder could pursue punitive damages for a fraud action not so barred.

This case squarely presents this issue. At trial, Chan sought lost profits and punitive damages. The district court found that Chan had not offered sufficient evidence to go to the jury with either form of damages. (See 1-ER-17 [mid-trial, based on reviewing "the entire record," ruling that lost profits would not go to the jury]; 1-ER-11 [granting defendants' mid-trial motion for judgment as a matter of law on punitive damages].)

The parties thoroughly briefed both issues to the Ninth Circuit. Chan's briefing explains that the district court applied incorrect legal standards to its evaluation of the evidence on both issues. (Appellants' 1st Br. (Dkt. 24.1) 38–67; see also Appellees'/X-Appellants' Br. (Dkt. 44.1) 30–55; Appellants' 3rd Br. (Dkt. 51.1) 16–57.)

These issues will recur in similar cases. Lost profits are at issue whenever insiders wrongfully exclude minority shareholders from a business opportunity. In such situations, as recognized in *Ahmanson*, damages based on shares' "fair value" at the time of the wrongdoing will often be inadequate, and lost profits a more appropriate measure. (*Ahmanson*, *supra,* 1 Cal.3d at p. 117.) Punitive damages are a potential remedy in all cases of fraud, and for breaches of fiduciary duty that verge into

"oppression" or "malice." (Civ. Code, § 3294, subd. (a) [punitive damages available upon "clear and convincing evidence" of "oppression, fraud, or malice"].)

In answering the certified question, therefore, the Court should also address the scope of buyout-related damages.

B. As in any other tort action, the shareholder defrauded into consenting to a reorganization can seek lost profits proximately caused by the defendant's wrongdoing as compensatory damages.

A plaintiff may recover damages for "all the detriment proximately caused" by a tort, "whether it could have been anticipated or not." (Civ. Code, § 3333; see *Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 746–747 [explaining rule]; see also Civ. Code, § 1709 ["One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"].) Those damages can include prospective profits the plaintiff lost because of the wrongdoing. (E.g., *Strebel*, at pp. 746–747.) *Ahmanson*, *supra*, has already recognized that an award of lost profits may be appropriate in cases of wrongdoing by corporate fiduciaries. (See 1 Cal.3d at pp. 117–118; cf. *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240–1241 [plaintiff "defrauded by its fiduciaries" in real

property transaction is entitled to "'benefit-of-the-bargain'" damages, a "'broader' measure of damages" similar to lost profits].)

These rules should apply when a shareholder has been defrauded into consenting to a reorganization and, like Chan, raises claims for fraud, breach of fiduciary duty, or other torts. These torts entitle the shareholder to compensation for all the injury proximately caused by defendants' wrongdoing, including, upon a proper showing, lost profits. To award any less than that would be unfair and unjustified. The law does not support diminishing plaintiffs' compensation or defendants' liability just because the injury was related to a corporate reorganization.

This case also presents an opportunity to restate the standard for proving entitlement to lost profits.

Proof of lost profits takes two steps. At the first step, the plaintiff produces "sufficient evidence of the *fact* of lost profit damages": evidence from which the jury could form "'a reasonable certainty'" that the fraud proximately caused the plaintiff at least some lost profits. (*Asahi Kasei Pharma Corp. v. Actelion, Ltd.* (2013) 222 Cal.App.4th 945, 972, original italics.)

At the second step, the plaintiff produces evidence from which the amount of "lost profits can be estimated with reasonable certainty." (*Sargon Enterprises, Inc. v. University of*

Southern California (2012) 55 Cal.4th 747, 779 (*Sargon*).) "'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used,'" "'even if the result reached is an approximation'"—"'especially'" if "'it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits.'" (*Id.* at pp. 774–775, italics in original, citations omitted.)

"""[T]he facts forming the basis of the [plaintiff's] profit projections""" at trial need to bear only """a substantial similarity"""—not an identity—to """the business opportunity that was destroyed.""" (*Sargon*, *supra*, 55 Cal.4th at p. 776.) For example, "one way to prove prospective profits" is "the experience of similar businesses." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 885.) And multiple cases hold that an appropriately "similar business" is the *actual* business the defendant pursued, having wrongly excluded the plaintiff. (See *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 874; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1140.)

The Court should restate this standard to provide guidance to litigants and courts in future cases—but also to the Ninth Circuit here, where this issue remains in hot dispute.

Chan offered evidence supporting a finding in his favor at both steps. At the first step, the jury could have formed a reasonable certainty that defendants' wrongdoing proximately caused Chan at least some lost profits, by inferring that Chan could have participated in *some* profitable IPO of ArcSoft—even if not precisely the IPO that occurred. This inference could rest, for example, on evidence of ArcSoft's strong potential for an IPO, and evidence of Chan's capacity and experience as an investor. (See pp. 22–26, *ante*; cf. *Asahi Kasei Pharma Corp.*, *supra*, 222 Cal.App.4th at pp. 969–972 [enumerating "substantial evidence" of "the *fact* of lost profits," original italics].)

At the second step, the expert testimony Chan proffered on the amount of lost profits fit the law. Chan's expert calculated lost profits based on the assumption that Chan "continued to hold [his] equity interest in ArcSoft through the date of ArcSoft's IPO" and sold his interest on the open market after the one-year lock-out period. (2-ER-318.) The testimony thus used the example of defendants' "similar business" following the ArcSoft IPO, and it therefore provided "some reasonable basis of computation" of the amount of lost profits. (*GHK Associates*, *supra*, 224 Cal.App.3d at p. 873; *Sargon*, *supra*, 55 Cal.4th at pp. 774–775.)

The Court should therefore hold that the law permits an award of lost profits as damages when a shareholder has been

defrauded into consenting to a reorganization and direct the Ninth Circuit on the standard governing such an award under California law.

C. As in any other fraud action, the shareholder can be awarded punitive damages upon clear and convincing evidence of intentional fraud, including fraudulent concealment.

Civil Code section 3294, subdivision (a), permits an award of punitive damages when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." A shareholder who has been defrauded into consenting to a reorganization should have the same opportunity to show entitlement to punitive damages as any other fraud plaintiff. As with lost profits, the fact that the fraud against this plaintiff involved a reorganization does not justify diminishing the plaintiff's compensation or the defendant's liability.

"[P]roof of *the cause of action for fraud* is itself an adequate basis for awarding punitive damages." (*Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 336, italics added.) This includes fraudulent misrepresentation and fraudulent concealment alike, claims at issue in Chan's action and likely to be at issue in similar actions. (See *Rattagan*, *supra*, 17 Cal.5th at p. 39 ["California law has generally not treated

fraud claims differently based on whether they allege affirmative deception or concealment"]; *Alliance Mortgage Co.*, *supra*, 10 Cal.4th at p. 1241 ["Punitive damages are recoverable in those fraud actions involving intentional, but not negligent, misrepresentations"]; e.g., *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 665–666 ["liability on at least a theory of concealment" supported award of punitive damages below].)

The common law cause of action for fraud corresponds to the definition of fraud from Civil Code section 3294, subdivision (c)(3). The statute defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." The statute thus specifies two forms of intent. The first, "intentional misrepresentation, deceit, or concealment," excludes negligent or accidental acts. The second, "with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury," requires that the defendant did the act for a culpable reason. This corresponds to another element of common law fraud, the "intent to defraud, i.e., to induce reliance." (*Rattagan*, *supra*, 17 Cal.5th at pp. 32, 40, internal quotation marks omitted.)

The result: Proof by clear and convincing evidence of the cause of action of intentional misrepresentation or fraudulent concealment entitles the plaintiff to an award of punitive damages under the "fraud" prong of section 3294.[22]

The policy reasons supporting punitive damages operate with extra force when a shareholder has been defrauded into consenting to a reorganization. The purpose of punitive damages is punishment and deterrence: "to punish wrongdoing and thereby to protect [the public] from future misconduct, either by the same defendant or other potential wrongdoers." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) The decision whether to award punitive damages, and in what amount, depends on what "'serves the societal interest.'" (*Ferguson v. Lieff, Cabraser,*

---

[22] The district court misunderstood this point. It granted judgment as a matter of law to defendants on punitive damages because it believed California law also required some extra element, which the court called the "'intention' to cause injury to the plaintiffs *as opposed to* a mere intention to defraud." (1-ER-10, italics added.) It also relied on an inapplicable legal standard, the rule, from *In re First Alliance Mortg. Co.* (9th Cir. 2006) 471 F.3d 977, 998, that in a claim of "aiding and abetting" fraud, the defendant's "actual knowledge of [another's] fraud" does not entitle the plaintiff to punitive damages. (1-ER-11.)

Civil Code section 3294 defines "fraud" in a special way because it is possible to establish entitlement to punitive damages via the statutory "fraud" prong without proving common law fraud. (E.g., *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 21–22 [tort of bad faith supported award of punitive damages for "fraud"].)

Heimann & Bernstein (2003) 30 Cal.4th 1037, 1046.) "The function of punitive damages is not served if the defendant is wealthy enough to pay the award without feeling economic pain." (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581, citing *Adams*, at p. 110.)

The facts of this case illustrate the need to allow plaintiffs to seek punitive damages in an action like Chan's. It is no overstatement to say that Deng's fraud made him a billionaire. (See pp. 30–31, *ante*.) The jury below, denied the opportunity to consider punitive damages, awarded compensatory damages of just $9.7 million. (2-ER-57, 59, 65, 67, 73.) Compared to Deng's profit from his fraud, the compensatory award is a rounding error. Deng feels more "economic pain" from the daily movements of ArcSoft's share price.

This fact pattern will tend to recur. A powerful director or group of insiders will control a closely held corporation; they will see the opportunity for a potentially extraordinary increase in value; they will exploit the situation by defrauding the other shareholders into selling their shares, and they will keep for themselves the vast profits that the opportunity yields later on. Without the threat of punitive damages, the law will end up encouraging fraud—the bigger, the better—for even after

defendants are caught, as happened here, fraud will be a profitable business decision.

From the perspective of "'the societal interest'" (*Ferguson*, *supra*, 30 Cal.4th at p. 1046), this situation cries out for punitive damages. They are the only way to deter future fraud like this. Restraint is no virtue in the law's treatment of corporate fiduciaries who defraud minority shareholders. Fiduciaries' "'[s]elf-dealing in whatever form it occurs should be handled with rough hands for what it is—dishonest dealing.'" (*Ahmanson*, *supra*, 1 Cal.3d at p. 111.) In cases like this, the right rough hands are punitive damages.

CONCLUSION

The Court should (1) hold that section 1312(a) does not preclude a shareholder from seeking buyout-related damages when the shareholder establishes that the shareholder's consent to the buyout was procured by fraud, or state an alternative rule under which section 1312(a) does not preclude Chan's action; (2) hold that a shareholder whose consent to a reorganization was procured by fraud can seek lost profits as compensatory damages, by proving that the fraud proximately caused at least some lost profits and establishing the amount by reasonable approximation; (3) hold that a shareholder whose consent to a

reorganization was procured by fraud can seek punitive damages, including by proving intentional misrepresentation or fraudulent concealment by clear and convincing evidence.

Dated: April 23, 2026

KING, HOLMES, PATERNO & SORIANO, LLP
Howard E. King
Tor R. Braham
Jackson S. Trugman

GREINES, MARTIN, STEIN & RICHLAND LLP
Stefan C. Love

By /s/ *Stefan C. Love*
Stefan C. Love
Attorneys for Plaintiffs and Appellants
LEI LI, STRONG WEALTH INVESTMENT LIMITED and PACIFIC SMILE LIMITED

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this **OPENING BRIEF ON THE MERITS** contains 13,737 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 23, 2026

/s/ *Stefan C. Love*
Stefan C. Love

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, my email address is *pherndon@gmsr.com*.

On April 23, 2026, I hereby certify that I electronically served the foregoing **OPENING BRIEF ON THE MERITS** through the Court's electronic filing system operated by ImageSoft TrueFiling. I certify that all participants in the case are registered TrueFiling users and appear on its electronic service list and will be served pursuant to California Rules of Court, rule 8.70:

***** SEE ATTACHED SERVICE LIST *****

Executed on April 23, 2026, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon

Pauletta L. Herndon

LEI LI, et al. v. ARCSOFT, INC., et al.
California Supreme Court Case No. S294190
U.S. Court of Appeals for the Ninth Circuit Case Nos. 24-2531, 24-2964
United States District Court for the Northern District of California
Case No. 4:19-CV-05836 JSW

SERVICE LIST

COOLEY, LLP
Kathleen R. Hartnett, Esq.
khartnett@cooley.com
Miranda Li, Esq.
mjli@cooley.com
3 Embarcadero Center, 20th Floor
San Francisco, California 94111

COOLEY, LLP
William K. Pao, Esq.
wpao@cooley.com
355 South Grand Avenue, Suite 900
Los Angeles, California 90071

COOLEY, LLP
Carlton Forbes, Esq.
cforbes@cooley.com
Alexander J. Kasner, Esq.
akasner@cooley.com
Matthew K. Nguyen
mnguyen@cooley.com
1299 Pennsylvania Avenue, NW, Suite 700
Washington, DC 20004

Defendants, Appellees, and Cross-Appellants
ARCSOFT, INC.* and *MICHAEL DENG

Service via U.S. Mail

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
The James R. Browning Courthouse
95 7th Street
San Francisco, California 94103
[Case Nos. 24-2531, 24-2964]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Clerk to the Honorable Jeffrey S. White
Ronald V. Dellums Federal Building & United States Courthouse
1301 Clay Street
Oakland, California 94612
[Case No. 4:19-CV-05836 JSW]

CA Supreme Court Court Name	**PROOF OF SERVICE**	S294190 Case Number

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **slove@gmsr.com**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

BRIEF: S294190_Opening Brief on the Merits_LeiLi

MOTION: S294190_Motion for Judicial Notice_LeiLi

ADDITIONAL DOCUMENTS: S294190_Exhibits ISO Motion for Judicial Notice_LeiLi

Person Served	Service Address	Type	Service Date
Stefan Love	slove@gmsr.com	e-Serve	04-23-2026 2:48:10 PM
Greines, Martin, Stein & Richland LLP		707b5168-efb5-4d5a-86b2-543eadd2bf80	
Robin Meadow	rmeadow@gmsr.com	e-Serve	04-23-2026 2:48:10 PM
Greines Martin, Stein & Richland, LLP		2fe507a6-d2e6-42f6-a4f8-abd00a1f0e35	
Howard King	hking@khpslaw.com	e-Serve	04-23-2026 2:48:10 PM
King, Holmes, Paterno & Soriano, LLP		1d7499ed-02f5-4330-940c-5fbe760e8736	
Paula Herndon	pherndon@gmsr.com	e-Serve	04-23-2026 2:48:10 PM
Greines Martin Stein & Richland LLP		1b123899-e9fa-4a51-b267-189af17b67d0	
Tor R. Braham	tbraham@khpslaw.com	e-Serve	04-23-2026 2:48:10 PM
		37495259-283a-40ee-89d3-348a9b4d8a56	
Jackson S. Trugman	jtrugman@khpslaw.com	e-Serve	04-23-2026 2:48:10 PM
		f31328a3-6440-4748-bf28-c90213402836	
Kathleen R. Hartnett	khartnett@cooley.com	e-Serve	04-23-2026 2:48:10 PM
		027da7a3-c462-4485-823e-ac33efa33015	
Miranda Li	mjli@cooley.com	e-Serve	04-23-2026 2:48:10 PM
		1482b421-27e1-4ffd-8748-11291be728a6	
William K. Pao	wpao@cooley.com	e-Serve	04-23-2026 2:48:10 PM
		cac16081-a1f8-4a26-8d2d-ea587752613b	
Carlton Forbes	cforbes@cooley.com	e-Serve	04-23-2026 2:48:10 PM

		80d9fef4-c65c-4612-be2b-e93336e45411	
Alexander J. Kasner	akasner@cooley.com	e-Serve	04-23-2026 2:48:10 PM
		bff42f42-a240-4722-b7af-ac10ed1acf34	
Matthew K. Nguyen	mnguyen@cooley.com	e-Serve	04-23-2026 2:48:10 PM
		f2f1b485-b216-41c3-b9ba-53f254c3285a	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.
The contents of this proof of service are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

04-23-2026
Date

/s/Paula Herndon
Signature

Love, Stefan (329312)
Last Name, First Name (Attorney Number)

Greines, Martin, Stein & Richland LLP
Firm Name