STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Kim A. Lund, as trustee and beneficiary of the Revocable Trust of Kim A. Lund; as co-trustee and beneficiary of the Trusts created by the Trust Agreement of Russell T. Lund, Jr. dated February 14, 1990 for the benefit of Kim; as beneficiary of the Trusts created by the Irrevocable Trust Agreement of Russell T. Lund dated July 8, 1969; and as beneficiary of the Qualified Marital Trust under Complete Amendment to Trust of Russell T. Lund, dated September 21, 1984,

Plaintiff,

v.

Russell T. Lund III, Gene Gerke, Mitch Avery, and Stanley Rein, individuals; Lunds, Inc. and Lund Food Holdings, Inc., Minnesota corporations; and Lund Real Estate Holdings, LLC, a Minnesota limited liability company, John and Jane Does 1–10, and ABC Corporation,

Defendants.

Court File No. 27-CV-14-20058

Judge Ivy S. Bernhardson

Memorandum of Law and Order on Fair Value, Trustee Removal, and Attorneys' Fees; and Order for Judgment

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This matter came before the undersigned Judge of District Court in Courtroom 657 of the Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota 55487, for a court trial, which was held on February 7, 8, 9, 10, and 13, 2017.

Richard T. Ostlund, Esq. and Janel M. Dressen, Esq., Anthony, Ostlund, Baer, and Louwagie, P.A., appeared for Plaintiff.

Steven J. Wells, Esq. and Jaime Stilson, Esq., Dorsey and Whitney LLP, appeared for Defendants.

INTRODUCTION

This is a valuation proceeding brought pursuant to Minn. Stat. §§ 302A.751 and 302B.833. Plaintiff Kim Lund (hereinafter "Kim"), an indirect twenty-five percent (25%) owner, through her trusts as described below, of Defendants Lunds, Inc., Lund Food Holdings, Inc. ("LFHI"), and Lund Real Estate Holdings, LLC ("LREH") (collectively, "the Lund Entities" or "Lunds", as described in more detail below), seeks a fair valuation of the Lund Entities following the Court's October 4, 2016 Order (the "Buyout Order") granting Kim's motion for an equitable buyout of her trusts' interests in the companies under Minn. Stat. §§ 302A.751 and 322B.833.[1] For the reasons set forth below, the Court concludes that, as of October 2, 2016, the fair value of the Lund Entities was $191.5 million. Plaintiff's trusts are entitled to $45.2 million, which constitutes the entirety of her trusts' interests in Lunds, Inc. and LREH, plus her trusts' interest in LFHI, excluding the shares of LFHI that are presently held in the Qualified Marital Trust for her benefit.

[1] Kim's statutory claims are brought under Minn. Stat. § 302A.751 with respect to corporate defendants Lunds, Inc. and Lund Food Holdings, Inc., and under Minn. Stat. § 322B.833 with respect to defendant Lund Real Estate Holdings, a limited liability company. The language of Minn. Stat. § 302A.751 is substantially the same as that of Minn. Stat. § 322B.833. For ease of reference, the Court's citations to Minn. Stat. § 302A.751 ("Section 751") throughout this Order also include references to Minn. Stat. § 322B.833. (*See* Minn. Stat. § 322B.01, Reporter's notes, at preface; *see also Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 486 (Minn. Ct. App. 2007) (stating that law on chapter 302A guides judicial interpretation of limited liability company laws because chapter 302A served as the basis for chapter 322B).)

FACTUAL BACKGROUND

A. The Parties

Plaintiff Kim Lund is the eldest of the four grandchildren of Russell T. Lund, Sr. ("Lund Sr."), the founder of Lunds, Inc. Kim is indirectly a 25% owner of the Lund Entities. These shares are held in trust for her benefit as follows:

25% of Lunds, Inc. = 6,125 shares

13.806% of LFHI = 4,625 shares

25% of LREH = no units issued

Kim's remaining 11.194% interest in LFHI may materialize when certain estate tax obligations related to the Qualified Marital Trust ("QMT"), described in greater detail below in this Order, are satisfied by 2023, at which time the remaining assets of the QMT will be divided equally among four new "Credit Trusts," each one benefiting one of the Lund grandchildren/siblings and their issue. (A more detailed description of the ownership and trust structures relevant to this case is provided on pages 14 and 15 of this Order.)

Defendant Tres Lund ("Tres") is Kim's brother, the second eldest of Lund Sr.'s grandchildren, and also a 25% indirect owner of the Lund Entities. Tres is the only family member who is directly involved in running the Lund businesses. Tres was elected President and Chief Executive Officer of Lunds, Inc. in 1992 and has chaired the board of directors of Lunds, Inc. and LFHI since 1994. Tres is a co-trustee of several of the family trusts holding Lund Entities' stock, including several of Kim's trusts at issue in this litigation.

Defendant Lunds, Inc., with its wholly-owned subsidiaries, is a chain of upscale grocery stores founded by Lund Sr., now operating throughout the Twin Cities' metropolitan area as Lunds & Byerlys stores.

Defendant Lund Food Holdings, Inc. ("LFHI") is a Minnesota corporation formed in 1997 in connection with the expansion of the Lund Entities through the purchase of Byerly's, a grocery chain with which Lunds, Inc. competed at the time. LFHI operates as a management company, has a number of subsidiaries that operate grocery stores and food-processing companies that provide products to other Lund-affiliated entities and unrelated retail stores, and it is also engaged in the retail sale of grocery products. Lunds, Inc. and LFHI are taxed under Subchapter S of the Internal Revenue Code.

Defendant Lund Real Estate Holdings, LLC ("LREH") is a limited liability company, related by common ownership, that develops and rents commercial real estate and leases certain of those properties to Lunds, Inc. and LFHI.

Defendant Stanley Rein ("Mr. Rein") is a retired lawyer from Dorsey & Whitney LLP, where he practiced for nearly forty years in the firm's Trusts and Estates group. In his capacity as a trusts and estates partner at Dorsey, Mr. Rein discussed with both Russell T. Lund, Sr. and Russell T. Lund, Jr. the purposes behind the trust structures related to their trusts. He has served for the last twenty years as a trustee for certain Lund family trusts, including, with respect to this litigation, the Canadian Oil Trusts and the QMT. Mr. Rein first began working with Lunds, Inc. and Lund family members in 1974, advising members of the Lund family regarding gift and estate planning; drafting and assisting Lund family members with the execution and implementation of their wills, trust agreements and other related estate planning documents; assisting Russell T. Lund, Sr. with making gifts for the benefit of family members; advising the fiduciaries of the estates of deceased Lund family members respecting their duties; advising the trustees of various trusts for the benefit of Lund family members regarding the meaning of the relevant trust instruments and their duties to the beneficiaries of the various trusts; and advising Lunds, Inc. regarding tax laws and trust accounting rules relevant to the holding of various family assets, including S corporation stock, by trusts and estates. Mr. Rein's testimony at trial was credible and reliable.

Defendants Mitch Avery and Gene Gerke have served on the Board of Directors for Lunds, Inc. and LFHI for nearly a decade. Both individuals were unanimously elected by the Lund shareholders, including Kim. Mr. Avery provides real estate-related consulting services to the Lund Entities and testified at trial. Mr. Gerke did not testify.

The Court previously found none of Mr. Rein, Mr. Avery, or Mr. Gerke is liable with respect to the various claims in Kim's Complaint. Accordingly, they are dismissed from this lawsuit with prejudice.

Nonparties to this action whose interests were considered by the Court, as required by Minnesota law, include the following: Shauna McFeeley and Robert Lund, the other two siblings of Kim and Tres Lund, who each hold an indirect 25% interest in the Lund Entities, through substantially identical, parallel trusts. Ani Lund and Ben Lund, Kim's adult children, are remainder beneficiaries in certain trusts which hold Lund Entities shares. All of these Lund family members testified at trial.

B. The Lund Entities

1. Overview of Lunds' Management

Lunds, Inc. was founded in 1939 when Russell T. Lund, Sr., who had been employed in the grocery store business for seventeen years, opened his first grocery store on Lake Street in Minneapolis. Lund Sr. successfully grew his business by opening several grocery stores in the Twin Cities.

Tres Lund began working full-time for his grandfather's business in the mid-1980s, when Lunds, Inc. was operating six stores. Presently, Lunds, Inc. and LFHI together operate twenty-six (26) Lunds & Byerlys stores in the Twin Cities area. The Lund Entities also operate liquor stores, food production facilities, and a distribution center, and own select real estate assets.

The other officers of Lunds, Inc. and LFHI include Von Martin, chief administrative officer, Jim Geisler, chief operating officer, and Phil Lombardo, chief marketing and merchandising officer. None of these individuals testified in this proceeding.

Fred Miller, who is Vice President of Finance for Lunds, Inc. and LFHI, reliably testified regarding the Lund Entities' budgeting and forecasting practices, their general financial performance in recent years, and their pension obligations. Mr. Miller has been a trustee of the UCFW Local 653 Pension (the "653 Pension Plan"), described below, since early 2008. Miller began his career with Byerly's in 1980 in the finance function, and in 1997 he became the VP of Finance for the combined entities. He oversees finance, analysis, and control functions, along with the treasury and risk control functions for the Lund Entities.

The Lund Entities employ about 3,700 people, most of whom are union members. The average tenure of a Lunds employee is over 17.5 years. Thirty percent of the employees have family members who also have worked for Lunds at some time. Nine percent of its employees are second, third, or fourth-generation Lunds families. To demonstrate the Lund Entities' ability to foster long-term careers for their employees, Tres testified that the majority of Lunds' leadership started by carrying out groceries for customers. High employee retention rates and the Lund Entities' market differentiators of "extraordinary food, exceptional service, and passionate expertise" have contributed to the companies' strong performance for the last twenty years, during which time Lunds has consistently ranked in the top 25 percent of reporting companies in the grocery industry in benchmark industry comparisons and food marketing analyses.

2. Competition Facing Lund Entities

That said, competition for grocery dollars is keen. The grocery business is basically high volume and low margin. Profit margins may be as low as one or two cents on the dollar. Even a slight decline in revenue can create considerable challenges. Competition must be faced head-on in order for a grocery business to maintain its market share. Management's ability to reinvest in its business by differentiated food offerings within stores, refreshing store appearances, and opening new stores when opportunities arise, is essential to effectively compete and preserve the company's market share and return on investment within a given community, especially the highly competitive Twin Cities marketplace.

The Twin Cities has seen an influx of new competition in the grocery market in the last several years. The vast majority of grocery chains in the Twin Cities' market are non-union, and their presence has had and will continue to have a dramatic impact on established grocers, such as Lunds, who deal with higher overhead costs associated with employing unionized workers.[2] The shift from employing unionized workers in the grocery industry to employing non-union workers started about ten years ago – the market share of union employers dropped from 90 percent in 2000 to 50 percent in 2013 – and is associated with the entry into the marketplace of large, non-union employers including Target, Trader Joe's, Costco, Aldi's, Walmart, and Whole Foods. At trial, Defendants indicated that the recent entries of Fresh Thyme[3] natural food chain and Hy-Vee[4] supermarkets – both of which opened their first stores in the Twin Cities in 2014 – pose a significant threat to Lunds' market share. The emergence of these and other brick and mortar competitors named above is unexpected given the Twin Cities' relatively slow increase in population. Additionally, Lunds must compete with emerging technology-based rivals, such as online retailers (e.g. Amazon), food delivery services (e.g. Bite Squad), and meal delivery services

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[2] Employers with non-union employees have greater flexibility with respect to work rules and compensation that union grocers do not have. Further, union grocers have defined benefit pension liabilities (whereas non-union employers usually offer employees a 401k or other savings plan (i.e. defined contribution)), pay higher wages, and provide more comprehensive benefit packages than non-union employees. On average, Lunds, Inc. and LFHI pay their employees about $23.50 per hour in wages and benefits. In contrast, a typical non-union employer pays its employees about $15 per hour.

[3] According to the testimony offered by Defendants at trial, Fresh Thyme is a non-union employer, backed by Meijer, a Michigan company with billions of dollars in revenue per year. Tres testified that while Fresh Thyme initially announced in 2014 a plan to open seven or eight stores, the most recent plan includes opening 17 or 18 stores in the Twin Cities area.

[4] Hy-Vee is a large, Iowa-based, self-distributed grocery chain with billions of dollars in revenue per year. Hy-Vee is non-union and operates through an ESOP. The average Hy-Vee store is approximately twice the size of the average Lunds & Byerlys store. The prototype Hy-Vee store in the Twin Cities market includes a convenience store, gas station, and full wine and spirits store. Hy-Vee announced in 2014 its plans to add six to eight supermarkets in the Twin Cities. More recently, Hy-Vee forecasted opening 20 to 25 stores in the Twin Cities area.

(e.g. Blue Apron). The targeted consumer for these retailers and service-providers is highly educated and relatively affluent - similar to the Lund Entities' typical customer.

The influx of new and increased competition in the market has already slowed sales growth for the Lund Entities. The budgeting process conducted by Defendants' management team and consultants has taken into account these emerging competitive forces. Lunds has been proactive in mitigating the impact of competition – their response has included strategic acquisitions (most notably of several stores from competitor Rainbow/Roundy's), store remodeling, continuous investment in the "Lunds & Byerlys" brand differentiators, competitive pricing, and ensuring Lunds' existing and future stores have prime locations. [5] Through these efforts, Defendants have been successful in alleviating some of the effects of increased competition in the Twin Cities market. As one example, management explained at trial that when Hy-Vee signed a lease near the Lunds & Byerlys store in Eagan, their store was projected to lose about $120,000 per week in sales to Hy-Vee. By remodeling the Eagan store, the loss in sales has been reduced to only about $60,000 to $80,000 per week.

Despite their strategic investments and tireless management efforts, however, lost sales as a result of competition totaled $18.3 million in fiscal 2016 and are projected to increase to over $19.6 million in fiscal 2017. Looking to the future, the long-term effect of this surge in competition remains unclear. What is clear to Defendants (and to this Court)

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[5] One response to competition is to remodel a store in the immediate vicinity of a competitor's planned store opening, in an effort to make sure that the Lunds & Byerlys brand is positioned optimally to maintain market share. If the investment can be made "ahead of the curve," it may result in an uptick in profitability even in the face of new competition. Defendants indicate that the costs of a typical store remodel fall into the $3 to 5 million investment range. Industry standards suggest that a store remodel is appropriate every seven to ten years. The Eagan remodel, described infra, is an example of Lunds' success in employing this strategy.

is that maintenance of the Lund Entities' market share amidst this competition will require ongoing investment in the above-described strategies, and such investment will require significant continued management attention to operating excellence and careful deployment of operating cash flow.

3. Financial Forecasting and Performance

Both Kim's and Defendants' experts rely on the annual budgets and forecasts of the Lund Entities in forming their conclusions as to the companies' fair value. Accordingly, a brief overview of the entities' budgeting process is important. The Lund Entities' fiscal year ends on the Sunday closest to September 30 in each calendar year.

Each year, Lunds, Inc. and LFHI begin budgeting in June or July and complete the process in early fall with the adoption of the upcoming fiscal year operating plan, and ultimately, a final fiscal year annual budget. Fred Miller, VP of Finance for LFHI and Lunds, Inc. testified clearly, credibly, and in sufficient detail about Lunds' collaborative, ground-up budgeting process – starting with revenue and cost estimates from each of the store managers and concluding with a comprehensive operating plan for the business that is incorporated into a final budget. As staff make recommendations and numbers come together, Miller checks sales and operating cash flow as well as overall reasonableness before submitting an operating plan for the Board's approval and then sending a finalized budget to Lunds' lenders.

Typically the operating plans and annual budgets finalized by Miller predict actual sales results with remarkable accuracy. In fiscal years 2014, 2015, and 2016, for example, Lunds' budgeted net sales were within two percent of the actual net sales achieved.

The budgeting process for fiscal 2017 was completed by early fall 2016, and was conducted in the same manner, using the same bottom-up processes, as the budgets for recent previous fiscal years, including those during which this litigation has been pending. The net sales projected in the 2017 budget are $652,889,149. This number reflects a projected growth rate of 0.4 percent – considerably less than Lunds' growth, actual or budgeted, in the immediately preceding years.[6] While Lunds, Inc. and LFHI have enjoyed increasing revenues recently, much of the growth seen in fiscal 2014 and fiscal 2015 was directly related to Lunds' acquisition of several stores, most notably three Rainbow stores. No evidence was presented at trial that indicated an uptick in sales like that associated with these acquisitions will be repeated any time soon. Lunds' growth in fact slowed to less than one percent between fiscal 2015 and fiscal 2016, due in large part to competitive pressures and store closures. Defendants' case at trial, along with their audited financial statements and other documents underlying the experts' reports, demonstrated that, while revenues have increased, Lunds' profitability has nonetheless decreased in recent years and the business's operating cash flow has been flat for the last four years. Management's predictions of decelerated growth in the foreseeable future are not inconsistent with the realities Lunds currently faces.[7]

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[6] A sharp contrast can be seen in Lunds' actual year-over-year growth between 2015 (11.2%), the year Lunds acquired several stores, and 2016 (0.8%).

[7] Lunds' decreased profitability is corroborated by its EBITDA data from the last several years. The operating companies' EBITDA numbers, calculated by Defendants' experts from Lunds, Inc. and LFHI's consolidated financial statements, indicate a tightening of the margins: fiscal 2014 5.4%; fiscal 2015 5%; and fiscal 2016 4.7%.

4. Pension Liabilities

An issue at trial was the Lund Entities' liability with respect to the UCFW Local 653 Pension (The Minneapolis Retail Meat Cutters and Food Handlers Pension Plan) ("653 Pension Plan"), which covers employees at nearly all of their stores. Because of a general decline in union membership in the last several years, the 653 Pension Plan has become increasingly underfunded and its certification status has been poor, deteriorating from "endangered" to "seriously endangered" from 2013 to the present.[8] At the time of trial, the Lund Entities were actively participating in three pension plans, including the 653 Pension Plan. After the trial, the Lunds employees participating in the 653 Pension Plan voted to withdraw from the fund.

As of the valuation date set by the Court, the Lund Entities' management and auditors treated this obligation as a contingent liability – it was not disclosed as an actual liability on the balance sheet of their audited financials.[9] Kim's expert treated the liability as such, deducting the present value of the contingent liability (approximately $51 million as of December 2016, according to Mr. Miller) from the overall enterprise value of the

[8] The 653 Pension Plan saw some improvement in its status briefly during the plan year beginning in 2015. Fred Miller explained that this temporary improvement in the plan's certification was, at least in part, the result of a technicality – a plan design change that lowered the stated liabilities of the 654 Pension Plan. The changes had no long-term impact on the Pension's underfunded liability. In the Court's opinion, no credible evidence was presented to indicate that the 653 Pension Plan was less endangered than Defendants contend.

[9] Whether the 653 Pension Plan should be treated as an expense in 2016 was a point of dispute at trial. The withdrawal was approved in 2017, after trial and over four months after the Court-established valuation date. As of Oct. 2, 2016 it was a contingent liability. The Court finds that treating it as a contingent liability and deducting the total liability from the overall enterprise value at the terminal date, as Reilly did, is appropriate. In May of 2012, the Lund Entities decided to withdraw from a separate set of pension plans (the UFCW Local 1189 Plans). That liability was recorded as an expense in the 2012 audited financial statements, but not in prior years. Here, the same treatment is appropriate.

Lund Entities.[10] The Court finds this approach appropriate. As of the valuation date, the possibility of withdrawal was on management's radar. Furthermore, the fact is that the Lund Entities *did* ultimately withdraw from the 653 Pension Plan – a prudent business decision given all the factors at play – and incurred a substantial liability that the Court, in determining the companies' fair value, must acknowledge. Subtracting the entire pension liability from the Lund Entities' overall value is the appropriate way to treat this obligation for the following reason: if there were an arms-length sale of the companies on October 2, 2016, under no circumstances would a willing buyer be willing to fund the withdrawal liability. In all circumstances it would remain with the seller, and the purchase price to which the seller is entitled would thus reflect a deduction equal to the amount of the liability the seller retained.

5. QMT Tax Liability

The Lund Entities will at some point be responsible for paying the federal and Minnesota estate taxes associated with the QMT, because, according to testimony at trial, that the QMT will have inadequate liquid resources to cover the taxes. No evidence was

[10] Defendants' expert, rather than subtracting the total pension expense from the enterprise value, "present-valued" the stream of payments under the estimated 653 Pension Plan withdrawal payment schedule. Defendants maintain that this approach results in a valuation of the Lund Entities that is more favorable to Kim than her own expert's approach. Such posturing is rather disingenuous, given that Defendants more than make up for this "favorable" treatment by integrating future 653 Pension Plan payments into their cash flow projections, dramatically deflating available cash during the projection period. The Court considers both facets of Defendants' approach unnecessarily complicated and speculative, particularly in light of its findings that no willing buyer would take on the debt associated with the withdrawal and that accordingly, in the open market, as of the valuation date, the withdrawal liability would not impact a buyer's future cash flows and need not be integrated into a DCF analysis to calculate the value of the Lund Entities as a going concern.

presented to demonstrate an alternative means of paying off these taxes. The Court considers the QMT tax obligation a contingent liability of the companies.

C. The Lund Family Trusts

In his testimony at trial, Mr. Stanley Rein credibly and reliably detailed the trust structures and the related ownership of the Lund Entities. In the 1960s, Lund Sr. established several trusts to maintain the family assets to provide for his son and grandchildren. These trusts were designed to provide favorable tax treatments for the value of the assets in the trusts in the event of growth, which seems to have been anticipated by Lund Sr. Each of the four grandchildren is a beneficiary of trusts that own parallel interests in the Lund Entities.

Kim is a beneficiary of the following trusts: (1) the Revocable Trust of Kim A. Lund (the "Revocable Trust"), of which Kim is trustee as well as beneficiary, holding 3,920 shares (16%) of Lunds, Inc.'s, 2,625 shares (7.836%) of LFHI, and a 25% interest in LREH; (2) two trusts created by the Trust Agreement of Russell T. Lund, Jr. dated February 14, 1990 for the benefit of Kim Lund (the "Jr. Trusts"), administered by co-trustees Kim and Tres, one generation-skipping transfer ("GST") tax exempt (which holds 4.275% of Lunds stock) and one non-GST exempt trust (which holds 4.725% of Lunds stock) (a total of 2,205 shares); and (3) two trusts created by the Irrevocable Trust Agreement of Russell T. Lund dated July 8, 1969 for the benefit of Kim Lund (the "Canadian Oil Trusts"), administered by co-trustees Tres and Mr. Rein, holding a combined total of 2,000 shares (5.970%) of LFHI. Additionally of significance in this lawsuit is the Qualified Marital Trust and Stock Trust under Complete Amendment to Trust Agreement of Russell T. Lund, dated September 21, 1984 (the "QMT"). The QMT in total holds 44.776% of the outstanding shares of LFHI stock, a quarter of which is Kim's remaining 11.194% interest in the entity. After the estate taxes associated with the QMT are paid, presumably by 2023, the residual assets of the QMT will be divided among four identical Credit Trusts, each one benefiting one of the Lund siblings and their issue.

The Court provisionally held in its Buyout Order that the equitable relief obtained by Kim in this matter would exclude the LFHI shares held by the QMT, "unless evidence to support a contrary structure is presented at trial."[11] The evidence offered by Kim and her witnesses did not provide the Court with any basis by which it should include the QMT's LFHI shares in the buyout award. The Court concludes that it cannot grant equitable relief to Kim as a beneficial owner of the LFHI stock held by the QMT at this time, due to the estate tax obligation of the QMT and the joint and several liability of the four beneficiaries for that tax obligation. The Court's holding with respect to the QMT is thus unchanged. Accordingly, the amount of the buyout includes 25% of Lunds, Inc. and 25% of LREH, but only 13.806% of LFHI.

The instruments establishing each of these trusts name contingent beneficiaries and each addresses trustee succession and replacement. Relevant to this case, Tres, Shauna, Rob, and their descendants are contingent beneficiaries of the Jr. Trusts and Canadian Oil Trusts for the benefit of Kim. Under the trust instruments, Kim does not have the power to appoint trustees of her choice. In the event a new trustee is required, U.S. Bank is the default successor trustee.[12] U.S. Bank is familiar with the Lund family, familiar with the Lund Entities, and has expertise in the administration of trusts.

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[11] *See* Buyout Order at 27.

[12] The trust instruments of the Jr. Trusts, the Canadian Oil Trusts, and the QMT each contain provisions for trustee succession and replacement. Acting trustees may appoint co-trustees and

PROCEDURAL HISTORY

Kim has sought liquidity of her shares in the Lund Entities and financial independence for over twenty years. She filed this case in Hennepin County District Court on December 8, 2014. On August 10, 2016, the Court heard Kim's motions for a buyout under section 302A.751, to amend her complaint to add a claim for punitive damages, and for other relief, and Defendants' motion for summary judgment and exclusion of evidence. The Court ruled on these motions on October 4, 2016, granting Kim's motion for a buyout, denying Kim's motions for leave to add a claim for punitive damages and for spoliation of evidence, dismissing Kim's claims for breach of fiduciary duties and civil conspiracy, granting Defendants' motion to exclude evidence, and staying consideration of Kim's claims for trustee removal and attorneys' fees.

In its October 4, 2016 Buyout Order and supporting Memorandum of Law, this Court held that the Defendants' failure to structure an exit strategy for Kim despite both Kim's requests and statements made by and on behalf of Defendants indicating that such requests would be accommodated frustrated Kim's reasonable expectations with respect to her shares in the Lund Entities and constituted unfairly prejudicial conduct under section 751. The Buyout Order and Memorandum, which include over twenty pages of findings of fact and conclusions of law in support of the Court's decision, are both incorporated by reference hereto. Paragraph 11 of the Buyout Order, sealing the Memorandum, is rescinded, and the Memorandum shall be made available to the public upon entry of this Order.

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successors in their discretion. The trust instruments specify that, "[i]n the event no trustee is acting with respect to any particular trust hereunder, such vacancy shall be filled by First National Bank of Minneapolis…" *See, e.g.*, Tr. Exs. 39 and 40 (Canadian Oil Trusts) at 8-9; and Tr. Ex. 43 at 9. U.S. Bank is the successor in interest to First National Bank of Minneapolis.

Following issuance of the Buyout Order, Defendants requested the Court's permission to file a motion for reconsideration, which was denied on October 18, 2016. In an Order dated November 3, 2016, the Court established a valuation date of October 2, 2016, the close of the Lund Entities' 2016 fiscal year.

A five-day trial to determine the fair value of the Lund Entities and Kim's claim for removal of Tres and Mr. Rein as trustees began on February 7, 2017. The Court declined to receive further briefing on Kim's request for attorneys' fees. Post-trial submissions were received on March 13, 2017, at which date the Court took the matter under advisement.

PARTIES' CONTENTIONS

The parties agree that, under Section 751, fair value is the appropriate standard in this case. Using similar methods and drawing from a finite pool of data, however, the parties posit wildly disparate values for the Court's consideration.

Kim contends that the fair value of the Lund Entities is $321.6 million and that her 25% interest in the Lund Entities is worth $80.4 million. Adjusted to exclude shares held in the QMT, Kim would value her interest at approximately $76 million, broken down as follows:

Lunds, Inc.	25%	$61,500,000
LFHI	13.806%	$5,467,176
LREH	25%	$9,000,000

In support of this valuation, Kim relies on expert Robert Reilly ("Reilly"), who is a certified public accountant, managing director of Willamette Management Associates, and who has performed many valuations and appraisals throughout the last forty years. In valuing the Lund Entities, Reilly performed a discounted cash flow ("DCF") analysis in application of the income approach (for all three companies), and applied the following market approach methods: guideline publicly traded company analysis (for all three companies), and merged and acquired company analysis (for Lunds, Inc. and LFHI, but not for LREH).

Defendants counter with a total fair value of the companies of $91.3 million, placing Kim's interest, minus shares held in the QMT, at $21,275,000. Defendants offer the following breakdown of Kim's trusts' ownership in the Lund Entities:

Lunds, Inc.	25%	$11,850,000
LFHI	13.806%	$3,550,000
LREH	25%	$5,875,000

In support of these figures, Defendants rely on the expert testimony and report of Roger Grabowski ("Grabowski"), a managing director at Duff & Phelps, LLC, who is also highly trained in valuation and appraisals. Like Reilly, Grabowski valued Lunds, Inc. and LFHI using an income approach and a market approach. For the income approach, Grabowski conducted a DCF analysis. For the market approach, Grabowski applied the guideline public company method. Grabowski did not use the merged and acquired company method. Grabowski weighted the results of his DCF analysis and guideline public company analysis equally. In calculating the value of LREH, unlike Reilly, Grabowski applied the adjusted net asset value method, which entails deducting liabilities of the business from the value of its assets.

Both experts are highly trained and experienced professionals. Both have testified and provided valuation reports in many trials and contested valuation situations. While the Court finds that both Reilly and Grabowski are unquestionably qualified to testify on the issue of valuation, the obvious, zealous advocacy in which they engaged on behalf of their respective clients compromised their reliability in this instance.

ANALYSIS

I. Valuation of the Lund Entities

A. Fair Value under Minnesota Law

In a court-ordered buyout under Section 751 of the Minnesota Business Corporations Act (MBCA), where the parties cannot agree on the fair value of the shares, it shall be determined by the court. In determining the fair value of the shares, the court may take into account "any and all factors the court finds relevant, computed by any method or combination of methods that the court, in its discretion, sees fit to use, whether or not used by the corporation or by a dissenter. The fair value of the shares as determined by the court is binding on all shareholders, wherever located."[13] The MBCA entitles oppressed minority shareholders to the fair value of their shares as of the date of the commencement of the action or "as of another date found equitable by the court."[14] "Fair value" in Minnesota is defined as "the pro rata share of the value of the corporation as a going concern."[15] The Court is given broad discretion to determine fair value, and "may rely on proof of value by any technique that is generally accepted in the relevant financial

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[13] Minn. Stat. § 302A.473, subd. 7.

[14] Minn. Stat. § 302A.751, subd. 2.

[15] *Advanced Communication Design, Inc. v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000).

community and should consider all relevant factors."[16] The value must be "fair and equitable" to all parties – and in this case, to interested nonparties as well.[17]

In a valuation proceeding, both sides have the burden of proving their respective valuations by a preponderance of the evidence.[18] In Minnesota, parties can show value by "either direct or circumstantial evidence."[19] They can, and in this case did, call expert witnesses to support their positions at trial – though the Court is bound by neither expert's opinion.[20] When expert witnesses offer conflicting opinions, both of which have a reasonable basis in fact, "the trier of fact must decide who is right."[21] In some circumstances, neither expert is right.[22]

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[16] *Id.*

[17] *Id.*

[18] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520-21 (Del. Supr. 1999).

[19] *Lehman v. Hansford Pontiac Co.*, 74 N.W.2d 305, 310 (1955).

[20] *Rainforest Café, Inc. v. State of Wisconsin Inv. Bd.*, 677 N.W.2d 443, 451 (Minn. Ct. App. 2004); *see also Shymanski v. Nash*, 251 N.W.2d 854, 857 (1988) (the weight and credibility of expert testimony is for the judge to determine); *Lehman*, 74 N.W.2d at 310 (where valuation of a closely held business is concerned, the trial court is not bound by the opinion of the experts).

[21] *Thomas v. Thomas*, 407 N.W.2d 124, 126 (Minn. Ct. App. 1987).

[22] The Court's obligation to determine the fair value of the Lund Entities is met in this instance *despite* rather than *because of* the expert opinions provided at trial. Chief Justice Leo Strine of the Delaware Supreme Court, when serving in the Court of Chancery and faced with a task similar to the one before this Court, characterizes the roles of judge and experts in a valuation trial pertinently as follows:

> But I cannot shirk my duty to arrive at my own independent determination of value, regardless of whether the competing experts have provided widely divergent estimates of value, while supposedly using the same well-established principles of corporate finance. Such a judicial exercise, particularly insofar as it requires the valuation of a small, private company whose shares do not trade in a liquid and deep securities market, using a record shaped by adversaries whose objectives have

B. Appropriate Valuation Approaches

Valuation of closely-held corporations is not an exact science.[23] The Court may consider "proof of value by any techniques or methods which are generally considered acceptable in the financial community" and otherwise admissible in court.[24] The income (DCF), market (guideline public company), and asset-based (adjusted net asset value) approaches are all considered acceptable in the financial community and thus admissible. Here, the Court finds that the DCF approach, applied by both experts, is the most appropriate technique for calculating the value of Lunds, Inc. and LFHI. The adjusted net asset value method – applied by Grabowski and unrebutted by Reilly – is most appropriate for valuing LREH.

The Court rejects the results of both experts' market approaches. The validity of the guideline public company approach fundamentally depends "on the similarity between the company the court is valuing and the companies used for comparison."[25] The Lund Entities constitute a unique set of companies and finding comparable companies – particularly in the publicly traded arena – poses a challenge. The Court cannot definitively speak to whether there exists a set of comparable companies on which a reliable market

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> little to do with reaching a reliable valuation, has at best the virtues of a good faith attempt at estimation. That is what I endeavor here.

Delaware Open MRI Radiology Associates, P.A. v. Kessler, 898 A.2d 290, 311 (Del. Ch. 2006).

[23] *See Balsamides v. Protameen Chemicals, Inc.*, 734 A.2d 721, 729-34 (N.J. 1999) ("there is no inflexible test for determining fair value" and, in a business valuation proceeding, "[t]here is no right answer").

[24] *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 382 (Minn. 2011).

[25] *In re Radiology Associates, Inc. Litigation*, 611 A.2d 485, 490 (Del. Ch. 1991)

analysis could be based. It can and does note, however, that the companies considered by the parties' experts are definitively *not* comparable.[26] The differences between Lunds and both experts' guideline public companies as to business models, revenues, profit margins, growth rates, level of risk, type and amount of assets, size, and location combine to make any comparison meaningless.[27]

C. DCF Analysis of Lunds, Inc. and LFHI

Both experts in this case are well versed in the Lund Entities' history, present operating reality, and prospects moving forward. Reilly was initially engaged by Kim in April 2014 and he has opined on the value of the Lund Entities several times. He stated the Lund Entities' fair value as of January 5, 2014 to be $305.3 million; as of January 4, 2015 to be $340.5 million; and as of the valuation date (October 2, 2016) to be $321.6 million. Grabowski's initial report on the Lund Entities had a January 5, 2014 valuation date and a fair value, prior to the application of discounts, of $186.7 million. He subsequently valued

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[26] The companies chosen by the experts in conducting their guideline publicly traded company analyses are comprised of a wide, somewhat random array of grocery-related businesses. Grabowski includes, for example, as his only Midwest-based company, Casey's General Stores which operates 1,878 convenience stores, which bear no resemblance to a Lunds & Byerlys store. The five-year average revenues of the companies discussed in Reilly's analysis range from over $500 million on the low end (Natural Grocers by Vitamin Cottage, Inc.) to $3.6 billion on the high end (Ingles Markets, Inc.), with four of the five companies' revenues exceeding $1.5 billion and three exceeding $2.7 billion. There is no reasonable comparison between these companies and Lunds, based on five-year revenues, which Reilly quotes at just over $300 million. Only a few, namely Weis Markets, Village Super Market, and Fairway, can be said to be comparable to the Lund Entities in size and strategy – focusing on the higher end customer – but none of them is located in the highly competitive Minneapolis-St. Paul grocery environment, and one of them recently emerged from bankruptcy. Reilly's guideline merged and acquired company method is unreliable for the same reasons. It is further flawed by Reilly's failure to separate the value of synergies in his application of multiples in his analysis, therefore inadequately accounting for the artificial inflation of his selected acquired companies.

[27] Because the companies selected by the experts preclude any reliable market analysis, the Court need not consider the experts' disparate treatment of multiples, control premiums, synergies, et cetera.

the Lund Entities, prior to the application of discounts, at $164.6 million as of January 4, 2015, and at $170.1 million as of January 3, 2016. At trial, he proposed a fair value as of October 2, 2016 of $91.3 million – just over half the amount of his appraisal from ten months before. Grabowski offered a written rebuttal report with specific critiques of Reilly's opinion and approach. Reilly's rebuttal was conducted on the record at trial. Each side also presented the Court with copies of other court opinions wherein each expert was roundly criticized for the particular assumptions made and parameters used in their respective valuations.

1. Overview of DCF Approach

Both experts rightly employed the DCF approach to value Lunds, Inc. and LFHI. The basic premise underlying the discounted cash flow analysis is that the value of a company is equal to the present value of its projected future cash flows.

The first step in a DCF analysis is to estimate future cash flows over a specified period of time – typically, as here, a period of five (Reilly) or ten (Grabowski) years. Without reliable projections, a DCF valuation approach is without merit. The reliability of the DCF analysis depends, critically, "on the reliability of the inputs to the model."[28]

The second step in the DCF analysis is to calculate a terminal value, generally defined as the present value of all of the company's cash flow beginning after the projection period.

[28] *In re US Cellular Operating Co.*, 2005 WL 43994 (Del. Ch. Jan 6, 2005) at *10; *see also Harris v. Rapid-American Corp.*, 1990 WL 146488 (Del. Ch. Oct. 2, 1990) at *6, *aff'd in relevant part, and rev'd on other grounds*, 603 A.2d 796 (Del. 1992) ("Inputs in a discounted cash flow are predictions which are necessarily speculative in nature. The quality of these predictions is therefore central to the reliability of the underlying methodology.").

The third step is to derive a discount rate to determine the present value of the annual cash flows for the projection period and the terminal value based on the company's weighted average cost of capital ("WACC").[29] The WACC is based on certain assumptions regarding a company's cost of debt and cost of equity, as described in more detail below.

After the inputs to the DCF method have been determined, the cash flows and terminal value are discounted to present value using the discount rate and added together, resulting in an enterprise value. The value of non-operating assets is then added. Because the discounted cash flow method purports to represent the present value of the company's cash flow, the result fully reflects the value of the company as a going concern and no adjustments are necessary to compensate for a minority discount or other valuation discount or any premium.[30]

2. The Experts' Inputs and Assumptions

As observed in several Delaware cases, which offer guidance to this and other jurisdictions where business appraisals are concerned,

> Valuation decisions are impossible to make with anything approaching complete confidence. Valuing an entity is a difficult intellectual exercise, especially when business and financial experts are able to organize data in support of wildly divergent valuations for the same entity. For a judge who is not an expert in corporate finance, one can do little more than try to detect gross distortions in the experts' opinions. This effort should, therefore, not be understood, as a matter of intellectual honesty, as resulting in the fair value of a corporation on a given date. ... A corporation's value is not a point on a line, but rather a range of reasonable values, and the judge's task

[29] *Radiology Associates*, 611 A.2d at 492.

[30] *Id.* at 494.

> is to assign one particular value within this range as the most reasonable value... based on considerations of fairness.[31]

Here, neither Kim nor Defendants have met their burden of proving the Lund Entities' value by a preponderance of the evidence. The Court thus makes its own independent judgment of the companies' fair value by analyzing the record before it. In making its determination, the Court's emphasis henceforth is on the competing contentions underlying Reilly's and Grabowski's respective DCF analyses. This is an elaborate undertaking, given that the experts – presumably to advance the incentives of their respective clients – disagree as to essentially every input and assumption contemplated in their DCF calculations. Looking at their contentions at a high level, it is abundantly clear that their valuations are tailored to suit the party who is paying them. This cold fact cuts against both experts' credibility in equal measure.[32]

Reilly, on one side of the aisle, inflates the value of the companies by taking an overly optimistic view of the Lund Entities' future. He restricts his analysis of Lunds'

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[31] *In re US Cellular Operating Co.*, 2005 WL 43994 at *10 (internal quotations and citations omitted).

[32] Suffice it to say that this Court endorses the following cogent views of Chancellor Steele, in his opinion from the Delaware Chancery Court:

> Typically both sides in an appraisal proceeding present expert opinions on the fair value of the petitioner's shares. In theory, these opinions facilitate judicial fact-finding and conclusions by wrapping the experts' factual assumptions in complicated financial models with which they, and usually not the court, are conversant. One might expect the experts' desire to convince the Court of the reasonableness and validity of their assumptions and financial models would produce a somewhat narrow range of values, clearly and concisely supported, despite the individual parties' obvious conflicting incentives. Unfortunately, as this case and other cases most decidedly illustrate, one should not put much faith in that expectation, at least when faced with appraisal experts in this Court.

Gilbert v. MPM Enterprises, Inc., 709 A.2d 663, 666-67 (Del. Ch. 1997).

growth to an oversimplified, generic consideration of market forces, which fails to take into account the unique opportunities and challenges that will impact the companies moving forward, given their small size and business model. Emphasizing national trends with respect to population, GDP, and inflation, he minimizes the impact of the local competition confronting Lunds. When the Court asked Reilly at trial about the expansion of specialty and high-end grocery chains in the area and other disruptions in the market, he answered that the influx of competitors is a "good thing" for Lunds, but failed to elaborate on how that possibly could be true.

Grabowski, on the other side, undervalues Lunds by improperly considering the QMT and pension obligations in calculating the companies' future cash flows[33], inadequately contemplating a hypothetical sale in his determination of fair value, and applying a discount for lack of liquidity, which is, as a matter of law in Minnesota, inappropriate in this case. Additionally, where Reilly ignores the impact of competition in his cash flow analysis, Grabowski downplays several measures of Lunds' recent success

[33] As a general rule, management projections available as of the valuation date and made in the ordinary course of business are more reliable than, and thus preferable to, "litigation-driven forecasts," which "have an untenably high probability of containing hindsight bias and other cognitive distortions." *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218 (Del. Ch. Dec. 31, 2003) at *7. *See also Agranoff v. Miller*, 791 A.2d 880, 892 (Del. Ch. 2001) ("When management projections are made in the ordinary course of business, they are generally deemed reliable. Experts who then vary from management forecasts should proffer legitimate reasons for such variance."); *In re Emerging Communications Shareholders Litigation*, 2004 WL 1305745 (Del. Ch. May 3, 2004) at *14 (criticizing valuation expert's reliance upon "unsworn, post-merger conversations with management"). This Court is skeptical of the after-the-fact adjustments made to Lunds' management projections during litigation, especially those relating to the impact of the QMT and the underfunded pensions on the companies' future cash flows, which lead to reduction in "value" of approximately $50 million. These contingent liabilities were not included in management's budgeting or forecasting as of the Oct. 2, 2016 valuation date established by this Court. Furthermore, no other valuation of the companies – and there have been at least four performed in the last three years – treats the estate tax or pension liability in the manner proposed by Grabowski.

as well as the company's impressive history of maintaining its market share even amidst enhanced competition.[34]

Both experts' approaches are laden with internal inconsistencies, and together they offer apples and oranges for the Court to compare. Reilly uses a 5-year projection period and values the operating companies individually, despite the availability of consolidated financials and the fact that the operations and finances of the business are intricately intertwined. Grabowski, in contrast to Reilly and the DCF analyses conducted by FMV and Ernst & Young in 2014, considers a 10-year projection period and consolidates his valuation of Lunds, Inc. and LFHI. Ultimately, the gap between their conclusions is associated in particular with their conflicting inputs regarding cash flow projections, long-term growth rate (LTGR), and capital structure (which dictates the discount rate)[35], and their divergent views as to whether a discount for lack of marketability should apply in this case. The Court now turns to those disputed inputs and assumptions, addressing them each in turn.

a. Cash flow projections

In forming his cash flow projections for the operating Lund companies, Reilly reviewed historical financial statements of the Lund Entities dating back to 1998, including the separate companies' financial statements and consolidated statements, general economic conditions in which the companies operated, and industry resources. Reilly

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[34] Grabowski testified at trial that he considers himself more of an economist than an accountant, and that his job in valuing a business is to look forward, not backward.

[35] According to Defendants, the difference between Reilly's and Grabowski's discount rates accounts for over 35% of the differential between the experts' valuations of the operating companies.

reviewed previous valuation reports and related files from FMV Opinions and Ernst & Young, board of directors meeting minutes and materials, market studies prepared for the Lund Entities by Burke & Associates, historical budgets and forecasts, bank records, and deposition testimony of FMV Opinions, Ernst & Young, and Lunds' management, among other materials.

What Reilly failed to consider sufficiently in his analysis of the Lund Entities' future growth is the competitive environment in which it now operates. Reilly did not visit any Lunds & Byerlys stores in connection with the preparation of his valuation, nor did he investigate the competition. He cited articles highlighting Lunds' success as a company but failed to mention any publications or announcements referencing expansion of Hy-Vee and other grocery chains into the Twin Cities market after 2014. Reilly ignored or inappropriately downplayed the changes to the Twin Cities grocery market place, including increased, non-union competition. He mischaracterized Lunds' recently increased current market share – stressing its considerable increase in 2016, but never explaining that the main reason for the increase was acquisition of three Rainbow stores and the loss of a competitor in 2015.

Reilly discounted management's own projections which more adequately accounted for this competition, despite acknowledging that management's projections in recent years "were generally in line with performance" and that 2017 projections were made in the same manner as in previous years. Although Reilly claimed that he had taken management projections into account, he did not use them in establishing his long-term growth rate.

Reilly assumed inadequate capital expenditures of approximately 1.6 to 1.7 percent of sales. Although Reilly's sales growth estimates appear to reflect the addition of new stores to propel growth, his capital expenditure estimates are insufficient to fund the acquisition or opening of new stores.

Grabowski's cash flow projections were more reliable than Reilly's. His data sources were similar to those used by Reilly. For the most part, he based his estimations and forecasts on the reports of management prepared in the ordinary course of business, and the Court finds management's expectations were reasonable. Grabowski's cash flow projections more adequately considered the competitive environment of the Twin Cities grocery industry and the level of capital expenditures that will be required in the future as Lunds reinvests in its business. The Court nonetheless cannot accept Grabowski's cash flow projections in their entirety, because they improperly take into account the 653 Pension Plan as well as the Lund Entities' payment of QMT estate taxes. Grabowski's treatment of the pension liability relied on post-valuation date developments which would not have impacted the value of the company as of October 2~~, 2016. And as for~~ the QMT estate taxes, they are not an obligation that a hypothetical buyer of Lunds would take on and it is inappropriate for them to be factored into a cash flow forecast for purposes of valuation.

b. Long-term Growth Rate

As a result of their conflicting views on the Lund Entities' cash flow projections, the experts disputed the appropriate long-term growth rate for the companies. Reilly applied a relatively aggressive LTGR of 4 percent, which he maintained was consistent with historical performance and industry projections and research. As mentioned above, Reilly's analysis on this point was flawed and at odds with management projections. He noted that, on average "the various sets of management projections from fiscal 2014 through fiscal 2016 were generally in line with actual performance in terms of revenue," but proceeded to disregard management's 2017 projections, referring to them as "downward biased" and unsupportable. The Court finds the assumptions Reilly made in developing his own forecast are unsupportable. Reilly's forecast assumed capital expenditures of 1.7 percent of revenue – just under the 1.9 percent that Defendants assert is the Lund Entities' average maintenance level of capital expenditures (i.e. the level necessary simply to maintain existing stores). The problem with Reilly's LTGR is that it could only be reached with considerable expansion – new stores, acquisitions, and remodels – all of which require additional capital expenditures. Thus, there is a disconnect between Reilly's LTGR (which necessarily includes new stores) and his capital expenditure forecast of 1.7 percent (which does not).

Even if the Court agreed with Reilly's cash flow projections – which it does not – they still do not support a 4 percent growth rate. Reilly calculated his LTGR by assuming an inflation rate of 2 percent and added to that an assumed increase in GDP of 2.1 percent. This information is not specific to the Twin Cities and disregards the realities of the area's highly competitive grocery industry. Reilly provided no evidence that a 4 percent LTGR in the grocery industry, either nationally or locally, is reasonable.

Grabowski applied a more conservative terminal growth rate of 3 percent. Grabowski's growth rate was based on management's predictions, and acknowledges the competition Lunds faces as well as the impact this competition will have on future cash flows. As mentioned previously, the Court recognizes that Lunds will require substantial capital to reinvest in its business as it seeks to stay relevant in the Twin Cities' competitive grocery market. Fred Miller, Tres, and Mitch Avery credibly testified about the efforts that will be required to maintain Lunds' market share as Hy-Vee, Fresh Thyme, and other chains expand, and as meal- and food-delivery services may engage a broader audience – the same audience that currently patronizes Lunds & Byerlys stores. Because the Court's opinion on Lunds' growth projections is more consistent with the views of management and Grabowski of what lies ahead for Lunds, it finds Grabowski's terminal growth rate of 3 percent to be the most reasonable.

c. Discount Rate

It is important to point out that Lunds, Inc. and LFHI have been operated very conservatively, with, since 2010, essentially zero long-term debt. This capital structure was the subject of much controversy at trial and in the parties' briefs.[36]

In order to discount the cash flow projections for Lunds, Inc. and LFHI, Reilly computed a WACC of 9%, compared to Grabowski's 12%. To calculate the WACC, consideration of the company's capital structure – what proportion of a company is financed by equity and what proportion is financed by debt – is primary. The variation between the experts' WACC calculations is mainly derived from their different

[36] As noted *supra*, the guideline companies selected by the experts in both their income and market analyses bear little resemblance to Lunds. A look at these companies' capital structures is nonetheless instructive to the Court in contemplating the discount rates proposed by the parties' experts. The guideline companies relied upon by Reilly have an average debt to capital rate of 17%. Those considered in Grabowski's guideline company analysis have an average debt rate of 21%. These averages offer limited guidance, given the wide variation among the capital structures considered (ranging from 0% to 53% debt). Relatedly, FMV Opinions and Ernst & Young, who reported on the Lund Entities' value in 2014, considered guideline public companies in selecting the appropriate capital structure for their discounted cash flow method, and settled on debt ratios of of 15/85 and 50/50, respectively. (*See* Trial Exhibits 1-2 (FMV Opinions Valuations) and 3 (E&Y Valuation).)

assumptions regarding what they believed to be the appropriate capital structure for Lunds. Reilly assumed a capital structure consisting of 75% equity and 25% debt, and asserted that this ratio aligns with industry standards. Grabowski, conversely, chose to use Lunds' actual capital structure, consisting of 100% equity and 0% debt. The effect of determining the right ratio is substantial – according to Grabowski, assuming actual debt rather than Reilly's hypothetical debt reduces the total enterprise value by approximately $100 million.

Whether the ratio used should be the company's actual capital structure or one closer to the industry average is the subject of considerable debate in the valuation community.[37] As Lunds' capital structure differs significantly from the industry norm, this is an issue the Court must address. Minnesota's appellate courts have not taken a stance, and the rare cases which tackle the issue in other jurisdictions have reached different conclusions.[38] In Delaware, the *Radiology Associates* court held that using the industry average rather than company's capital structure was improper.[39] The court noted that its obligation was to value the company as it actually was – not "to determine the potential maximum value of the company."[40] In *Steiner Corp. v. Benninghoff*, the U.S. District Court

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[37] *Steiner Corp. v. Benninghoff*, 5 F.Supp.2d 1117, 1125 (D. Nev. 1998).

[38] *See, e.g., Minn. Energy Res. Corp. v. Comm'r of Revenue*, No. 8041 et al., 2017 WL 1430663, at *3-4 (Minn. T.C. Apr. 18, 2017) (applying industry average capital structure for purposes of appraising gas distribution system, "because most properties are purchased with debt and equity capital, the overall capitalization rate must satisfy the market return requirements of both investment positions"); *Tri County Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC*, 112 F. Supp.2d 639, 654 (S.D. Ohio June 24, 2015), *reversed on other grounds in Tri County Wholesale Distributers, Inc. v. Labatta USA Operating Co., LLC*, 828 F.3d 421, 431 (2016) (industry average); *but see Radiology Associates*, 611 A.2d at 493 (actual capital structure); *Horn v. McQueen*, 353 F.Supp.2d 785, 821 (W.D. Kentucky Dec. 1, 2004) ("actual" capital structure, as calculated by special master).

[39] *Radiology Associates*, 611 A.2d at 493.

[40] *Id.*

in Nevada held the opposite, finding that using the subject company's actual capital structure, which was "established as a result of the particular needs and desires" of the family that owned the business, "would be as improper as using the specific capital structure of any other particular investor."[41] Under the present circumstances, the Court finds the logic in *Steiner* more persuasive.

"While 'fair value' is not the same as 'fair market value,' 'fair value' is still obtained by considering the behavior of market forces."[42] As Reilly correctly pointed out at trial, the value of a company *to itself* is not the value of the company *to the marketplace.* "The market places a value on how it expects a company to perform in the future. And over time, market participants will expect a company to move to its optimal position in terms of variables like debt structure."[43] While the Court need not delve into what "optimal" financing would look like, nor is it meant to determine the "potential maximum value" of Lunds in this case, it must value the companies fairly and reasonably, and in so doing must consider market forces. Using the companies' actual capital structure in calculating a discount rate ignores market forces and is thus inconsistent with a realistic assessment of Lunds' fair value.[44]

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[41] *Steiner*, 5 F.Supp.2d at 1125.

[42] *Id.*

[43] *Id.*

[44] A capital structure with no long-term debt is atypical in the grocery industry. Lunds has been able to grow while being debt free in large part because of its ownership structure – the record in this case indicates that the acquisition of Byerly's, for example, was funded with trust assets rather than external borrowings – which, by definition, would change were a sale to occur.

Reilly's hypothetical debt is no more appropriate than Lunds' actual debt, however. The industry standard – based on the guideline companies selected in this case – is not a capital structure comprised of 25 percent debt, or even the 17 percent that Reilly stated would be on the low end of reasonable. The median of the debt-to-capital ratios of the companies selected by Reilly in his guideline company analysis was 9 percent, not 25 percent. The Court finds that reducing Reilly's proposed debt-to-capital ratio from 25 percent to 10 percent is appropriate. For purposes of calculating the discount rate, the Court treats the operating companies' capital structure as if it was composed of 10 percent debt and 90 percent equity. The use of this capital structure in determining a discount rate results in a difference in the value of the operating companies of approximately $45 million.

3. The Fair Value of Lunds, Inc. and LFHI

To summarize, Lunds, Inc. and LFHI should be valued assuming the following: (1) a discount rate of 10 percent (based on capital structure composed of 10 percent debt and 90 percent equity) and (2) a long-term growth rate (LTGR) of 3 percent. In applying these inputs, and omitting the QMT and 653 Pension Plan obligations from its estimation of the operating companies' free cash flow, the Court finds the total enterprise value of Lunds, Inc. is $144.5 million and the value of LFHI is $23.5 million. Admittedly, these figures are not derived using DCF software available to the parties' experts. The Court does its best with what it has been provided.[45]

[45] The Court's obligation here is to determine the Lund Entities' fair value independently. In so doing, it has tested the soundness of its conclusions against the 2014 valuations of Ernst & Young and FMV Opinions contained in the record – both of which estimate the operating companies' combined worth to be about $175 million before application of discounts. (*See* Tr. Exs. 1-3). The purpose of these valuations was to determine a price per share that would apply to any of the four shareholders desiring a redemption of a portion of their trusts' interests in Lunds. These reports were not entirely unbiased, as they were requested and paid for by management, calculated fair market value rather than fair value, and imposed sizable discounts for lack of marketability (E&Y

D. Asset Based Value Analysis to Calculate LREH

As indicated above, the Court finds the proper approach to valuing Lund Real Estate Holdings is the asset based value method conducted by Grabowski. "The asset-based approach is more appropriate when valuing a capital-intensive business, meaning the business relies on its assets to generate income. This approach can also be used when valuing holding companies."[46] The adjusted net asset value method estimates the fair value of a business by estimating the value of its underlying assets and deducting its liabilities. The method is an accepted valuation technique and the parties do not dispute its admissibility.

It is unclear why Reilly applied the income and market approaches in valuing LREH, which is both a capital-intensive business and a holding company. A consideration of the underlying real estate assets owned by LREH is essential to finding the best estimate of the entity's value. Reilly did not conduct real estate appraisals on the properties, engage an appraiser to do so, or work from existing appraisals. Kim offered no evidence regarding the LREH real estate. Furthermore, even if the income and market approaches were appropriate methods for calculating LREH's valuation, Reilly's inputs would render his proffered analyses unreliable. LREH holds and leases grocery stores and other retail space in the Twin Cities – a concentrated geographic area. In conducting the guideline company

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applying a 20% discount, FMV applying 17%) and control (9% and 12%, respectively). The Court nonetheless considers these reports corroborative evidence, adjusted to exclude discounts for lack of marketability and control. The Court's conclusion of a value of $168 million for the operating companies is consistent with the 2014 calculations by E&Y and FMV. Grabowski's conclusion is half this amount, while Reilly's is nearly double.

[46] Courtney Sparks White, Comment, *S Corporations: A Taxing Analysis of Proper Valuation*, 37 CAP. U. L. REV. 1117, 1127-28 (2009).

method, Reilly selected five "comparison companies" that look nothing like LREH. Reilly used large, publicly-traded real estate operating companies and REITs. They ranged in average revenue from $17.4 million to $970 million, and focused their businesses on managing a diverse array of properties, including commercial, industrial, and residential, located throughout the United States. There was no reasonable basis to consider these entities comparable to LREH for valuation purposes. Reilly also used a business discount rate rather than the more appropriate real estate discount rate in conducting his DCF analysis. The hypothetical capital structure he applied to his analysis seems arbitrary to this Court and makes his valuation of LREH internally inconsistent. Grabowski aptly describes this discrepancy on page 30 of his rebuttal report, as follows: "Reilly calculates the TEV of LREH to be $50.0 million and assuming a 25% hypothetical debt to total capital structure, its debt should be $12.5 million. This implies an equity value of approximately $37.5 million. Reilly's hypothetical analysis does not match the actual facts impacting the values of LREH (the debt of LREH equals $26.5 million) and does not provide for a reliable indicator of Fair Value."[47] The end result of Reilly's failure to not use the more appropriate asset-based approach was an inflated valuation of LREH's properties 41.6 percent higher than their 2016 tax-assessed values.[48]

Reilly did not rebut Grabowski's analysis. Kim's primary critique of Defendants' proposed value of LREH is that, in conducting his asset-based value analysis, Grabowski

[47] Tr. Ex. 525 at 30.

[48] *Id.*

relied upon real estate appraisals of the underlying properties that Kim deems outdated.[49] The Court does not share Kim's opinion on this issue. The properties held by LREH are commercial properties, which generally do not fluctuate in price in the same manner as residential real estate. The property values are unlikely to have so significantly changed in the last three years as to meaningfully affect LREH's total enterprise value. Furthermore, the burden of proof rests equally among the parties and in this instance Defendants have met their burden much more satisfactorily than has Kim.[50] Whereas Reilly did not even consider the value of the underlying properties in conducting his flawed DCF and market analyses, in conducting a more suitable asset-based value analysis, Grabowski used the most current data available and tested for reasonableness by comparing the data to the properties' most recent tax-assessed values. Grabowski's adjusted net asset value approach is reliable and the Court finds the fair value of LREH is $23.5 million.

E. Discounts

The Court next addresses the issue of discounts and finds that, under Minnesota law, a discount for lack of marketability or control is improper in this case.

The MBCA is silent on whether and under what circumstances discounts for lack of control or marketability should be applied in valuing a minority shareholder's interest under the buyout statute. In 1992, the Minnesota Court of Appeals took the position that

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[49] Grabowski relied on real estate appraisals prepared by Ernst & Young nearly three years prior to the valuation date.

[50] Kim's expert criticizes the appraisal data used by Grabowski without offering evidence to disprove its accuracy. Perhaps the properties have increased in value in the last three years, but we could just as easily speculate that they have remained stable. Neither party enlisted the services of a licensed real estate appraiser to offer current property values at trial. The Court can only work with the evidence actually offered.

discounts for lack of control were prohibited when valuing a minority shareholder's interest.[51] In 2000, the Minnesota Supreme Court took a more nimble approach when it considered the validity of discounts for lack of marketability. After acknowledging that "almost all courts addressing fair value for dissenters' shares have declined to apply a marketability discount," the court held in *Advanced Communication Design, Inc. v. Follett* that such a bright-line rule was inappropriate given the flexibility embedded in Section 751, and that a marketability discount in the context of a court-ordered buyout may be applicable "in extraordinary circumstances." [52] Extraordinary circumstances include wrongdoing on the part of the minority shareholder that has caused a reduction in the value of the corporation, the availability of other remedies to the oppressed shareholder, and an unfair transfer of wealth.[53] "The overarching policy ... is to ensure the buyout is fair and equitable to all parties."[54]

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[51] *See MT Properties, Inc. v. CMC Real Estate Corp.,* 481 N.W.2d 383, 388 (Minn. Ct. App. 1992) (minority discounts are improper "because the legislature has enacted the statute with the evident aim to protect the dissenting shareholder"); *see also Spinnaker Software Corp. v. Nicholson*, 495 N.W.2d 441, 445 (Minn. Ct. App. 1993) (reiterating holding of MT Properties); *Pooley v. Mankato Iron & Metal, Inc.,* 513 N.W.2d 834, 838 (Minn. Ct. App. 1994) (even dissenting shareholder's criminal conduct did not justify application of a minority discount of his shares).

[52] *Follett*, 615 N.W.2d 285, 291-92 (Minn. 2000) (adopting the A.L.I. standard for court-ordered buyouts and holding that, "absent extraordinary circumstances, fair value [under Section 751] means a pro rata share of the value of the corporation as a going concern without discount for lack of marketability").

[53] *Id.* at 292-93.

[54] *Id.* at 293 (internal quotations omitted). Also persuasive to the Court is the following passage from *Cavalier Oil Corp. v. Hartnett*, in which the Delaware Supreme Court explained its basis for excluding discounts:

> Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly

Defendants argue that a 10 percent discount in this case is appropriate to prevent an unfair transfer of wealth to Kim's trusts.[55] The Court disagrees. An example of an "unfair wealth transfer" is a situation in which "the exercise of a minority shareholder's appraisal rights in a financially strained corporation with illiquid assets would yield a price far greater than the price that would actually be paid for the shares in a market transaction."[56] Here, that is not the case. Kim's trust interests, even as calculated by her own expert to be in excess of $80 million, unlike the shareholder's in *Follett*, is not exponentially greater than the Lund Entities' net worth.[57] Moreover, in *Follett*, an unfair wealth transfer was likely given the fact that the remaining shareholders were to be left with stock in a business that had "extremely doubtful potential for growth."[58] The Lund Entities' status is not so dire. This Court has already noted that Lunds faces substantial competition at present, notwithstanding Reilly's failure to adequately consider it in his

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> enriches the majority shareholders who may reap a windfall from the appraisal process by chasing out a dissenting shareholder, a clearly undesirable result.

564 A.2d 1137, 1146 (Del. 1989). Though Delaware does not recognize a buyout remedy for an unduly prejudiced shareholder, its valuation jurisprudence where dissenting shareholders are concerned is more robust than Minnesota's and is instructive in this instance. Also, the Delaware courts have expressly held that the valuation approaches applied in breach of fiduciary duty cases, which may be governed by Section 751 in Minnesota, are the same in appraisal proceedings. *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988).

[55] Reilly testified that, were the Court to impose a discount for lack of marketability, a 7.5% discount would be reasonable.

[56] *See Follett*, 615 N.W.2d at 292 n. 10 (citing 2 A.L.I., Principles of Corporate Governance: Analysis and Recommendations § 7.22, at 325 (1994)).

[57] *See id.* at 293 (noting minority shareholder's ownership interest in the corporation was more than five times the total net worth of the corporation as of the valuation date, "almost seven times its average annual operating cash flow for the preceding five years, and more than eight times its average net income over the same period").

[58] *Id.* at 293.

valuation analysis. This will indeed have a meaningful impact on the companies' cash flow for the foreseeable future. These facts, however, do not suggest that the Lund Entities have "extremely doubtful potential for growth." As recognized by trade publications and the local press, sometimes quoting Tres Lund himself, and as indicated by the consistently generous dividends provided to the shareholders on an annual basis, the management team behind Lunds, Inc. and LFHI is very good at what they do. Their business strategies amidst competition have been indisputably successful and there is no evidence that the changing market in the Twin Cities will be the end of Lunds as we know it. Furthermore, nothing in the record demonstrates that Kim's trusts will receive "a price far greater than the price that her shares would receive in a market transaction" as a result of this buyout. In this particular setting, a family business, where the buyout is essentially an intra-family transfer, the members remaining do not want outsiders having ownership of the business, which one could say may enhance the value of their interest.[59]

For these reasons, the Court does not impose a discount on the shares. The circumstances of this case are not extraordinary. On the contrary, they are expected where a family business's ownership is undergoing a court-ordered transition. A marketability discount cuts against the philosophy and purpose of the buyout statute, which is to facilitate

[59] The record in this case indicates that Kim would willingly sell her shares in a market transaction if she were afforded the opportunity. She has been open to the option of an external buyer since the shareholders first enlisted the services of J.P. Morgan and attempted to engage in meaningful dialogue about an exit strategy. She should not be penalized on account of her siblings' unwillingness to consider an outside buyer as a means of meeting Kim's expectations of independence and liquidity, which this Court has already held to be reasonable. Additionally, assuming Tres, Shauna, and Rob absorb Kim's interest in the businesses in equal shares, the potential for an unfair wealth transfer is more likely to occur in favor of them than Kim. As the Court observes elsewhere in this Order, the record does not suggest that Lunds is going out of business any time soon.

a means for minority shareholders to obtain the fair value of their interest. The proper way to grant the equitable relief to which Kim, through her trusts, is entitled in a manner that is fair and equitable to all parties is in setting the terms and conditions of the buyout, not in applying a discount for lack of marketability.

F. Fairness to All Parties

In granting the buyout and determining the fair value of the Lund Entities and, consequently, the amount of the award to Kim's trusts, the Court must also be mindful of the statutory obligation to ensure that the value is "fair and equitable to all parties."[60] Accordingly, the Court has reviewed the feasibility of the award and finds that the Lund Entities are capable of paying the award through a cash down payment of 5% and the issuance of unsecured subordinated promissory notes to the trusts for the remainder, payable over 20 years with a modest interest rate, so long as the notes include features to protect the trusts, and the Lund Entities' operating cash flow, and preserve the companies' ability to defer principal and interest payments when the leverage ratio exceeds 4.0x.

Both the experts testified that providing subordinated notes to the shareholder is the most common form of financing in this setting. The terms of the notes set out in the Order below thus conform to this testimony. Kim also testified that she was comfortable accepting a 10 to 20 year buyout note, subordinated to company debt and to the shareholder distributions required to cover their individual tax obligations.

These note terms are prudent and reasonable in the face of the financial circumstances and projections of the Lund Entities, particularly considering the projected

[60] *Follett*, 615 N.W.2d at 290.

EBITDA.[61] To protect the Lund Entities' ability to reinvest in the business as needed, deferral of principal and interest payments if leverage becomes unmanageable is also reasonable. The interest rate of 2.75% on the note, as designated by the Court, is also reflective of the nature of the buyout, the related party aspect, and the cash flow needs of the Lund Entities. The Court notes this is the stated long-term applicable federal rate for May 2017 as announced by the Internal Revenue Service and also approximates the 20-year U.S. Treasury rate.

II. Trustee Removal Claims

Kim seeks the removal of Tres Lund and Stanley Rein as the trustees for her trusts. As noted previously herein, Tres and Mr. Rein serve as co-trustees of Kim's Canadian Oil Trusts, the QMT, and Kim Lund's Credit Trust. Tres and Kim are co-trustees of Kim's Jr. Trusts. The Court finds that the evidence and testimony presented at trial support removal of Tres Lund as co-trustee of Kim's Canadian Oil Trusts and Jr. Trusts under Minn. Stat. § 501C.706.[62]

The Court's holding does not extend to the removal of Mr. Rein. The equitable relief obtained by Kim through her trusts in this case will have significant consequences on the trusts. As the trust structures for the four siblings are identical, it is important to maintain consistent administration of the trusts even as the nature of the assets in Kim's trusts change. Mr. Rein is best equipped to tackle the challenges that lie ahead as the result

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[61] *See* Tr. Ex. 502, Appendix D at 10.

[62] It is unclear to the Court whether Kim seeks removal of Mr. Rein and Tres as trustees of the QMT and her Credit Trusts. If Kim indeed does, this Court expressly rejects Kim's claim with respect to the QMT for the same reasons that it declines to grant a buyout of Kim's shares held in the QMT.

of this litigation. The substantial change in circumstances described below does not bear on Mr. Rein's trusteeship. The Court finds that removal of Mr. Rein as a trustee is neither in the best interests of the beneficiaries nor consistent with the material purposes of the trusts.

A. Minnesota Trust Law

The Minnesota Trust Code, enacted in January 1, 2016, applies in this case.[63] Section 501C.0706 of the statute authorizes the Court to remove a trustee if "there has been a substantial change in circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available."[64] Ultimately, "the determination of what constitutes sufficient grounds for removal of a trustee is within the discretion of the court."[65] Here, the Court finds that the removal of Tres Lund as co-trustee of Kim's trusts is warranted.

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[63] *See* Minn. Stat. § 501C.0101 *et seq.; see also* Christopher Hunt, *A New Day in Minnesota Trust Law*, Bench & B. Minn. (July 10, 2015), *available at* http://mnbenchbar.com/2015/07/trustlaw/ ("The new statute … will apply to all judicial proceedings commenced on or after the effective date of the new statute. As to judicial proceedings concerning trusts commenced before the effective date, the new law applies unless the court finds that the application of a particular provision would substantially interfere with the judicial proceedings or unfairly prejudice the parties' rights."). This Court held in its Feb. 6, 2017 Order on Motions to Exclude Evidence and Testimony that the new statute applies in this case.

[64] Minn. Stat. § 501C.0706(b)(4).

[65] *In re Will of Gershcow,* 261 N.W.2d 335, 338 (Minn. 1977).

B. Substantial change in circumstances

As the Court noted in its Buyout Order, "the relationship among the Lund siblings has steadily and sadly deteriorated. ... Family discussions, which once appeared candid and collegial, have devolved into an entrenched legal battle."[66] These observations were corroborated by the testimony of the Lund family members offered at trial. It is undisputed that Kim and her adult children presently have no relationship with Tres – as trustee or otherwise. Kim stated she had not had a conversation with Tres in over two years. She did not receive any information about her trusts in 2016 or 2017. These facts on their own constitute a substantial change in circumstances. Additionally, once final judgment has been entered in this matter, as a result of this Order, Kim's trusts will be divested of Lund Entities stock. The alteration of the Lund Entities' ownership structure and character of Kim's trusts represents a separate, equally significant change in circumstances negating any reasons for Tres's involvement in the administration of Kim's trusts.

C. Interests of the Beneficiaries and Purpose of the Trusts

The evidence presented at trial sufficiently established that removal of Tres as co-trustee best serves the interests of the qualified beneficiaries and is not contrary to a material purpose of the trusts.[67] The sad truth in this case is that the bitterness defining the

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[66] Buyout Order at 24-25.

[67] At trial, Shauna McFeeley, Tres Lund, and Rob Lund testified that they did not agree to the removal of Tres and Mr. Rein as trustees of Kim's trusts. The Minnesota Trust Code defines "qualified beneficiary" as "a beneficiary who, on the date the beneficiary's qualification is determined: (1) is a distributee or permissible distributee of trust income or principal; (2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in clause (1) terminated on that date without causing the trust to terminate; or (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date." Minn. Stat. § 501C.0103(m). Under this definition, Shauna, Tres, and Rob are merely

current relationship between Kim and Tres, in conjunction with the fact that they have been litigating against one another for nearly three years, has eradicated their ability to collaborate and their ability to rely on each other in any capacity. The purpose of the trusts, as dictated by the trust instruments themselves and described by Mr. Rein at trial, is to provide lifetime benefits to Kim without exposing the assets to taxes after her death. Once the assets in Kim's trusts are "converted to non-strategic non-closely held family assets," by Tres's own admission he will no longer be needed to serve as trustee. The Court finds that a non-family member would be better able to serve Kim's and her children's interests moving forward, and that appointment of such a disinterested trustee is in no way inconsistent with the purposes of the trusts to provide benefits to Kim while minimizing the underlying assets' exposure to taxation.

D. Suitable Successor Trustees

Kim did not persuade the Court that Lee Roper-Batker and Paul Dinzeo are suitable replacement trustees. Neither Ms. Roper-Batker nor Mr. Dinzeo appeared at trial to attest to their suitability, or to respond to Defendants' or the Court's enquiries regarding their qualifications. No evidence was presented with respect to their knowledge of the Lund Entities or family, or their experience in the administration of trusts generally. Most importantly, there were indications that Ms. Roper-Batker may have a serious conflict of interest, given that she is the CEO of an organization to which Kim has made significant financial contributions and which has honored Kim.

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contingent beneficiaries, not qualified beneficiaries of Kim's trusts. Consequently, as a matter of law, the Lund siblings' agreement is not necessary in order for the Court to remove Tres as a trustee.

It is uncontroverted by the parties, however, that U.S. Bank is a suitable successor trustee for the trusts at issue in this case. In the event of a vacancy, the trust instruments expressly name First National Bank of Minneapolis as the default replacement trustee, and U.S. Bank is its successor in interest. U.S. Bank has extensive experience administering trusts and is familiar with the Lund Entities and the Lund family.

E. Removal of Tres Lund as Trustee

For these reasons, the Court holds that Tres Lund should be removed as trustee of Kim's Jr. Trusts and Canadian Oil Trusts, effective after entry of a final non-appealable judgment in this case. U.S. Bank shall at that time be appointed co-trustee of Kim's Jr. Trusts. Consistent with the language of the relevant trust instruments, the Court leaves to Mr. Rein the determination of whether U.S. Bank should be appointed co-trustee for Kim's Canadian Oil Trusts.[68] Trusteeship of the QMT and Credit Trusts are to be undisturbed by this litigation.

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[68] Paragrah 5.01 of the Canadian Oil Trust instruments, captioned "Successor Trustees", as amended September 15, 1992, provides in relevant part as follows:

> I hereby confer on the individual trustees or trustee (as distinguished from the corporate trustee) who are acting hereunder at any time the power to appoint one or more individual trustees, or a corporate trustee, or one or more individual trustees and a corporate trustee, as the case may be, to act with the trustee or trustees then acting, and also the power to determine that any successor to John W. Windhorst then acting, or any such successor who might otherwise have acted in the future, shall not serve as trustee. ... I recommend that the foregoing powers of appointment and removal be exercised only after due consideration has been given to all applicable income, gift, estate, inheritance and other tax laws or rules in existence from time to time. ... Any trustee acting hereunder shall have the power to resign and thereby to terminate his powers and duties forthwith or at such time as he shall prescribe in the instrument of his resignation, and it shall be possible to have different trustees as to different trusts hereunder. In the event no trustee is acting with respect to any particular trust hereunder, such vacancy shall be filled by First National Bank of Minneapolis, Minneapolis, Minnesota.

See Tr. Ex. 540.

III. Attorneys' Fees and Costs

Kim seeks attorneys' fees under Minn.Stat. § 302A.751, subd. 4, which provides as follows:

> If the court finds that a party to a proceeding brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including attorneys' fees and disbursements, to any of the other parties.

The Minnesota Supreme Court has stated often that the allowance of attorney fees rests within the trial court's discretion.[69]

What constitutes arbitrary, vexatious, or bad-faith conduct under this statute has not been defined in great detail in our state's courts.[70] A bad faith award of attorneys' fees has required elsewhere a finding that the conduct by the penalized party rises "to a high level

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[69] *See, e.g., In re Estate of Balafas*, 225 N.W.2d 539, 541 (1975).

[70] Minn. Stat. § 302A.473, subd. 8(b) imposes the following, somewhat different, standard for an assessment of attorneys' fees:

> If the court finds that the corporation has failed to comply substantially with this section, the court may assess all fees and expenses of any experts or attorneys as the court deems equitable. These fees and expenses may also be assessed against a person who has acted arbitrarily, vexatiously, or not in good faith in bringing the proceeding, and may be awarded to a party injured by those actions.

This is somewhat broader than the attorneys' fees and costs available under section 751. Nonetheless, the Court notes the connection between the two provisions and finds further support of its holding in the Reporter comment from the Advisory Task Force on Corporation Law, which states that:

> Expert fees and counsel fees may also be assessed under 8(b). No attempt has been made to define when a 'corporation has failed to comply substantially with this section' as the failure may be merely a procedural omission, or it may be the offering of an estimated fair value which substantially underestimates the actual fair value of the shares. In either case, the discretion of the court, in light of the facts of each case, should control.

Here, where the Court has found that neither party has properly offered "fair value," the Court is not willing to assess these fees to either party.

of egregiousness."[71] Behavior that rises to the level of bad faith has included altering testimony, changing positions repeatedly throughout a proceeding, falsifying evidence at trial, or litigating defenses that had no factual or legal merit.[72] Here, Defendants have engaged in no such egregious conduct, and the Court does not find their actions, or the positions they have taken in this case, to be of the arbitrary, vexatious, or bad-faith sort that would merit an award of attorneys' fees. Both sides could and did differ on the valuation in both directions: too high and too low. Proposing extreme appraisal values, evidently, is standard operating procedure in these cases and therefore cannot be classified as arbitrary, vexatious, or bad faith.

While these proceedings have been extended in time, energy, and cost to both sides, the Court finds no basis to assess attorneys' fees to either side. The divide between Kim Lund and the rest of her family runs deep; much of the family drama and relational dysfunction that underpins this proceeding remain unknown to the Court, and the Court will not attempt to divine or explain the complex family dynamics at play here.[73] However, Kim Lund is considered the prevailing party, and as such, she is entitled to seek costs and disbursements in accordance with standard court procedures.

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[71] *In re Sunbelt Beverage Corp. Shareholder Litigation,* 2010 WL 26539 (Del. Ch. Jan. 5, 2010) at *15.

[72] *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225 (Del. Ch. 1997), aff'd 720 A.2d 542 (Del. 1998); *Abex Inc. v. Koll Real Estate Group, Inc.,* 1994 WL 728827 (Del. Ch. Dec. 22, 1994) at *20.

[73] "Family quarrels are bitter things. They don't go according to any rules. They're not like aches or wounds; they're more like splits in the skin that won't heal because there's not enough material." F. Scott Fitzgerald, *Babylon Revisited*, THE SATURDAY EVENING POST, February 21, 1931.

Based on the foregoing, the Court enters the following:

ORDER

1. The fair value of the Lund Entities as of October 2, 2016 was $191,500,000 (Lunds, Inc. $144,500,000; LFHI $23,500,000; LREH $23,500,000). Accordingly, the fair value of the subject interest in this case amounts to $45,225,000. Kim Lund's trusts are thus awarded $45,225,000, divided as follows:

Entity	Interest	Value
Lunds, Inc.	25%	$36,100,000
LFHI	13.806%	$3,250,000
LREH	25%	$5,875,000

2. This award shall be allocated in accordance with the respective shareholdings and interests in the Lund Entities and paid to The Revocable Trust of Kim A. Lund; the Trusts created by the Trust Agreement of Russell T. Lund, Jr. dated February 14, 1990 for the benefit of Kim A. Lund; and the Trusts created by the Irrevocable Trust Agreement of Russell T. Lund date July 8, 1969 for the benefit of Kim A. Lund, as follows:

    a. Five percent (5%) of the total amount of the award (i.e. $2,261,250) shall be due and payable within ninety (90) days of the entry of a final, non-appealable order.

    b. Unless the parties mutually agree otherwise, payment of the remainder of the award shall be made through the issuance of subordinated, unsecured promissory notes ("Promissory Notes" or "Notes") containing the following provisions:

i. Aggregate principal amount of $42,963,750 in Notes, issued to the appropriate trust(s) and derived from the fair value set forth above.

ii. Interest shall be paid at the rate of 2.75% per annum, calculated on a daily basis, on the outstanding unpaid principal amount. The Borrowers (as defined below) will accrue interest payments in years in which the Leverage Ratio exceeds 4.0x. All accrued and unpaid interest will be paid when the Lund Entities' leverage ratio is less than 4.0x.

iii. Principal and interest shall be amortized in annual payments over a period of twenty (20) years, with the first annual payment to be made one year after the issuance date of the Promissory Notes.

iv. Lunds, Inc.; Lunds Food Holdings, Inc.; and Lunds Real Estate Holdings, LLC (the "Borrowers") shall be jointly and severally liable as obligors on the Promissory Notes.

v. Principal and interest payments shall be deferred for any payment due in a fiscal period in which the Lund Entities' leverage ratio exceeds 4.0x.

vi. Any outstanding balance remaining unpaid on the maturity date will be due and payable in full on the date of maturity of the Promissory Notes.

vii. The Notes shall be pre-payable in whole or in part at any time, without prepayment penalty.

viii. The Notes shall accelerate and the unpaid principal amount, together with all accrued and unpaid interest, shall be paid in full in the following circumstances:

(1) A sale of the Lund Entities, either by a sale of shares or all or substantially all the assets thereof; or

(2) The complete liquidation of the Lund Entities.

ix. A mandatory partial prepayment on the Notes (allocated pro rata on all Notes based on the remaining unpaid principal amount of each) shall be made in an amount equal to fifty percent (50%) of the Lund Entities' annual consolidated excess cash flow beginning with fiscal year 2023, provided that the total leverage ratio as of the last day of the applicable fiscal year is less than or equal to 3.50x; in the event the total leverage ratio as of the last day of the applicable fiscal year is greater than 3.50x, then no such mandatory prepayment shall be made for such fiscal year. The definition of "excess cash flow" is to be defined in a matter mutually acceptable to the Borrowers and Plaintiff, but in any case must be based on EBITDA for such period minus, inter alia, interest expense, taxes, tax distributions, pension payments, scheduled amortization of existing indebtedness, voluntary prepayments of existing indebtedness, shareholder dividend distributions to the extent permitted, capital expenditures, and adjusted (both positively and negatively) for changes in working capital from the prior period and other deductions to be agreed.

x. The Lund Entities may make distributions to their equity holders so long as (1) no default or event of default has occurred and is continuing under the Promissory Notes or under any credit or loan agreement of the Lund Entities, and (2) the total leverage ratio of the consolidated Lund Entities tested on a pro forma basis as of the last day of the most recent fiscal year for which financial statements have been delivered is less than 4.0x. In addition, the Lund Entities may make payments or distributions in respect of taxes without a default qualifier or other financial performance requirements.

xi. Promissory Note payments shall be subordinated to any third party debt incurred by any of the Lund Entities for business purposes.

xii. None of the Lund Entities or their wholly-owned subsidiaries will undertake any corporate reorganization or sale of assets (excluding any sale of immaterial assets in the ordinary course of business), without the written consent of the trusts, which are the obligees on the Promissory Notes, but their consent shall not be unreasonably withheld.

c. The trusts for the benefit of Kim Lund, with the exception of the Qualified Marital Trust, shall no longer be shareholders or owners of Lunds, Inc., LFHI, or LREH stock or membership interests, after the cash down payment is made to those trusts consistent with the terms of this Order.

3. Plaintiff's claims against Mitch Avery, Gene Gerke, and Stanley Rein are **dismissed with prejudice**.

4. Tres Lund shall be removed as a trustee of the Trusts created by the Trust Agreement of Russell T. Lund, Jr. dated February 14, 1990 (the "Jr. Trusts") for the benefit of Kim A. Lund; and the Trusts created by the Irrevocable Trust Agreement of Russell T. Lund dated July 8, 1969 (the "Canadian Oil Trusts") for the benefit of Kim A. Lund, effective thirty (30) days after the entry of a final, non-appealable order. U.S. Bank is appointed successor trustee of the Jr. Trusts coincident with Tres Lund's removal.
5. Plaintiff's motion for attorney's fees under Minn. Stat. § 302A.751, subd. 4 is **denied**.
6. Plaintiff is the prevailing party and is entitled to statutory costs and disbursements as provided by law (Minn. Stat. § 549.02) in an amount to be determined by court administration in accordance with Minn. R. Civ. P. 54.04.
7. Certain errata in the trial transcripts were identified by Kim Lund and the record will note the corrected transcript as follows:
    a. 2/8/17 Tr. (Kim Lund) at 359:15 says "fight" but it should say "spite".
    b. 2/8/17 Tr. (Kim Lund) at 362:19 says "state" but it should say "estate".
8. The Lund Entities' financial condition and the designated terms of the Promissory Notes are sufficient to satisfy the Court that the full amount of the award will be paid as and when due. Defendants shall not be required to post a bond with the Court.

9. This is a final appealable Order. This Order, together with the October 4, 2016 Buyout Order and the Memorandum attached thereto, which is hereby unsealed[74], decides and disposes of all claims by all parties in this action.

10. Any other relief not specifically addressed in this Order is **denied**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: June 2, 2017

Ivy S. Bernhardson
Judge of District Court

[74] Minnesota jurisprudence requires the Court, in determining whether to make certain documents inaccessible to the public, to balance the public's presumptive interest in access against the interests asserted for denying access. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 206 (Minn. 1986). Here, the Court no longer finds it appropriate to restrict access to the Memorandum of Law dated October 4, 2016 (Document No. 190). The parties' right to privacy does not outweigh the presumption of public access to this document.