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NO. 05-19-01303-CV

In the Fifth Court of Appeals
at Dallas, Texas

Gail Corder Fischer ("A.W.E."),
Appellant

vs.

Clifford R. Fischer ("D.M.F.N.")
Appellee

On Appeal from the
254th Judicial District Court, Dallas County, Texas
(Special Judge Hon. Frances Harris and Hon. Ashley Wysocki)
Cause No. DF-18-11265

CLIFF FISCHER'S APPELLEE'S BRIEF

ORSINGER, NELSON, DOWNING & ANDERSON, LLP
26th Floor, Tower Life Building
San Antonio, Texas 78205
Telephone: (210) 225-5567

Richard R. Orsinger
State Bar No. 15322500
richard@ondafamilylaw.com

Attorney for Clifford R. Fischer
("D.M.F.N."), Appellee

MCCLURE LAW GROUP

8115 Preston Rd., Suite 270
Dallas, Texas 75225
Telephone: (214) 692-8200

Kelly McClure
State Bar No. 07566150
kmcclure@mcclure-lawgroup.com
Robert Epstein
State Bar No. 24065206
repstein@mcclure-lawgroup.com

Oral Argument Requested

Record references used in this Brief

Clerk’s Record	[Vol.]CR[p.#]
Petitioner’s Exhibits	Px[#]
Respondent’s Exhibits	Rx[#]
Joint Exhibits	Jx[#]
Reporter’s Record	[Vol.]RR[#]
Supplemental Reporter’s Record	Supp.RR[#]

Abbreviations Used in this Brief

Clifford R. Fischer	Cliff
Gail Corder Fischer	Gail
Clifford Fischer & Co., Fischer Management Services, Inc., and Fischer VM Holdings, Ltd., and their affiliates (sometimes referred to individually)	“The Fischer Companies” or “the Companies”
The Agreement to Convert Separate Property to Community Property and Other Post-Nuptial Contracts	The Conversion Agreement

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Awarding the Fischer Ranch to Cliff without awarding Gail a judgment or offset for half of the community funds used to repair and improve the ranch was not an abuse of discretion. The value added by these repairs and improvements was included in the appraised value of the ranch. There is no reimbursement for using community funds to improve community property. Gail neither pled nor proved a claim for waste. 52

Response to Gail's Fourth Issue Presented

Gail listed the HighPeak investment in her Sworn Inventory at $1,000,000, and the balance of her line of credit at BNY Mellon at $1,980,000. The Trial Court used Gail's numbers in dividing the property. There was no evidence that the balance of Gail's line of credit was more than $1,980,000, and her sworn representations to this amount constitute judicial admissions that she cannot contradict on appeal. Gail's assertion (Appellant's Brief p. 40) that it is undisputed that she incurred an additional $1,000,000 in debt is incorrect. Her claim is disputed; the record does not support and indeed disproves her claim.

Cliff denies "depleting" five bank accounts and two brokerage accounts during the divorce. If that were true, Gail's remedy would be a waste claim and reconstitution of the community estate. Gail did not plead or prove a waste claim, so there was nothing to divide. 53

Response to Gail's Fifth Issue Presented

Gail joined the Fischer Companies into the divorce. The Companies filed a counterclaim for declaratory judgment that the profits participation agreements, including annual bonuses and change-of-control bonuses, with four key employees were valid obligations of the Companies. In the pretrial hearing and by stipulation in open court, Gail agreed that attorneys' fees would be decided by the Court based on affidavits. Fees are recoverable under the Declaratory Judgments Act. The Court acted within its discretion to award the Companies a judgment against Gail for attorneys' fees. 57

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RESPONSES TO GAIL'S ISSUES PRESENTED

Response to Gail's First Issue Presented

The Trial Court did not abuse its discretion by ordering that the Fischer Companies be sold and the net proceeds divided equally between the spouses.

Response to Gail's Second Issue Presented

The award of brokerage account 2355 and G&C Capital Investments to Cliff was not an abuse of discretion and did not constitute an unequal division of the net community estate. Gail was awarded other assets and the mix of assets and liabilities awarded to each spouse resulted in a 50-50 split of the net community estate.

Response to Gail's Third Issue Presented

Awarding the Fischer Ranch to Cliff without awarding Gail a judgment or offset for half of the community funds used to repair and improve the ranch was not an abuse of discretion. The value added by these repairs and improvements was included in the appraised value of the ranch. There is no reimbursement for using community funds to improve community property. Gail neither pled nor proved a claim for waste.

Response to Gail's Fourth Issue Presented

Gail listed the HighPeak investment in her Sworn Inventory at $1,000,000, and the balance of her line of credit at BNY Mellon at $1,980,000. The Trial Court used Gail's numbers in dividing the property. There was no evidence that that the balance of Gail's line of credit was more than $1,980,000, and her sworn representations to this amount constitute judicial admissions that she cannot contradict on appeal. Gail's assertion (Appellant's Brief p. 40) that it is undisputed that she incurred an additional $1,000,000 in debt is incorrect. Her claim is disputed; the record does not support and indeed disproves her claim.

Cliff denies"depleting" five bank accounts and two brokerage accounts during the divorce. If that were true, Gail's remedy would be a waste claim and reconstitution of the community estate. Gail did not plead or prove a waste claim, so there was nothing to divide.

Response to Gail's Fifth Issue Presented

Gail joined the Fischer Companies into the divorce. The Companies filed a counterclaim for declaratory judgment that the profits participation agreements, including annual bonuses and change-of-control bonuses, with four key employees were valid obligations of the Companies. In the pretrial hearing and by stipulation in open court, Gail agreed that attorneys' fees would be decided by the Court based on affidavits. Fees are recoverable under the Declaratory Judgments Act. The Court acted within its discretion to award the Companies a judgment against Gail for attorneys' fees.

STATEMENT OF FACTS

Introduction. The primary issues at trial were the value of the community estate's interest in Fischer Companies and how to divide that value in the divorce. The primary issue on appeal is whether the Trial Court abused its discretion in ordering the Companies sold and the net proceeds split 50-50 between the spouses, after paying the costs of sale and the companies's obligations. This Court must consider the property division in light of the entire trial court record, giving due regard to the Trial Court's role as the exclusive finder of fact and deference to the Trial Court's broad discretion in dividing the community estate in a manner that the Trial Court deemed just and right. This Statement of Facts will focus on the evidence relating to the Fischer Companies. The evidence regarding Gail's other complaints will be discussed under each Issue Presented.

The Companies Were Originally Cliff's Separate Property. Cliff founded the Fischer Companies in 1985. [Rx53, 12RR298] Cliff and Gail married on September 27, 1986. [4CR1740; 5RR62] Twenty-two years later, Cliff agreed to convert his

ownership interest in the Fischer Companies to community property, and on February 4, 2008, the parties acknowledged their signatures on an Agreement to Convert Separate Property to Community Property and other Post-Nuptial Contracts ("the Conversion Agreement"). [Jx1, 12RR8-20]

What Property Was Converted to Community? Cliff's separate property that was converted to community property was "Clifford Fischer & Company," but the conversion did not effect "any profits participation interest promised or awarded to Company employees in the past, which interests shall not be diminished or affected by the execution of this Agreement." [Jx1; 12RR19]

The Conversion was Subject to All Debts, Liabilities, or Obligations. The Conversion Agreement addressed debts, liabilities, and obligations:

> *4.1 Liabilities of the Converted Property*
>
> The liabilities and obligations described on Schedule B, which is attached to this Agreement and made a part of it for all purposes, and all other liabilities and obligations attributable to the converted property shall be satisfied and paid solely from the community estate of the parties. The parties agree that the community estate shall forever hold harmless, indemnify, and defend Cliff and his separate property from any claim arising from these liabilities and obligations. [12RR11]
>
> * * *
>
> Schedule B
> Liabilities Attributable to Separate Property
> Converted to Community Property
>
> 1. All debts and liabilities or obligations associated with the business known as Clifford Fischer & Company. [Jx1; 12RR20]

50-50 Division of the Community Estate Upon Divorce. The Conversion

Agreement provided that, upon divorce, “the assets and liabilities of the community estate shall be divided between them (whether by agreement or court order after a trial on the merits) so that Gail is allocated or awarded assets and liabilities totaling fifty percent (50%) of the net value of the community estate and Cliff is allocated or awarded assets and liabilities totaling fifty percent (50%) of the net value of the community estate. The net value of the community estate shall be determined by totaling the fair market value of all assets of the community estate and subtracting the total of all community liabilities then outstanding....” [Jx1, ¶9.1, 12RR12]

The Agreed-Upon Appraisal Process. The Conversion Agreement contained a dispute resolution procedure in the event that Cliff and Gail were divorcing and disagreed on the value of a community asset:

> ... If Gail and Cliff are unable to agree on the fair market value of any real estate or other community property, they shall jointly engage an appraiser to value the community property or the properties in question. If Gail and Cliff are unable to agree on an appraiser to be jointly engaged, each party shall select an appraiser to value the property in question. lf the appraised values of the property in question are more than ten percent (l0%) apart, the two appraisers for each property shall select a third appraiser to value the property. In such case, the fair market value set forth in the third appraisal and the appraisal for the same property closest in value shall be averaged and the resulting value shall be used as the fair market value. Neither party shall select an appraiser with whom he or she has a prior personal or business relationship. [Jx1, ¶9.2, 12RR12]

In this case, the parties followed a process similar to sealed bids, where each party’s appraiser worked independently to arrive at an opinion of value and, if those two appraisals were more than 10% apart, a third appraiser was engaged to do a third

independent appraisal. The third value was averaged with the closest of the two prior values, and the result was binding. The parties successfully adhered to this appraisal process in determining the fair market value of five real properties. [Gail's Trial Summary, Px5, 12RR263] However, Gail did not accept the result of this averaging process when applied to the Fischer Companies.

How the Appraisal Process Broke Down. The parties did not agree on the value of the Fischer Companies, nor did they agree on a single appraiser, so each party hired his or her own appraiser. The agreed valuation date was December 31, 2018. [3RR88] The parties exchanged appraisal reports on February 6, 2019. [6CR86; Kraus--Px 12, 12RR293-393; Rice--Rx53-56, 13RR296-409] Cliff's expert Bryan Rice ("Rice") valued the Fischer Companies at $30,494,700 [Rx53, 13RR296], and a separate value for Fischer VM Holdings, Ltd. [Px54, 13RR337]. Gail's expert Autumn Kraus ("Kraus"), of the accounting firm of Whitley Penn, arrived at a value of $74,220,000 for Clifford Fischer & Co. and Fischer Solutions, Inc. [Px12, 12RR323], with a separate valuation for Fischer Management Services, Inc. [12RR323] Because the two appraisers' valuations were more than 10% apart, a third appraiser was selected, Thomas J. Hope ("Hope") with the business valuation firm of Stout Risius Ross. Hope did not talk to Rice or Kraus. [3RR10] Hope valued Clifford Fischer & Companies at $50,522,000. [Px17, 12RR510]. Kraus was $23,898,000 above Hope; Rice was $20,027,297 below Hope; so pursuant to the terms of the Conversion

Agreement Rice's and Hope's values were averaged, resulting in a fair market value for the Fischer Companies of $40,508,350. [Rx19, 13RR91; App.1] The same occurred with Fischer Management Services, Inc., with Kraus at $4,650,000, Rice at $554,900, and Hope being closer to Rice at $2,503,000 [12RR323; Px10, Rx55, 13RR371; Rx20, 13RR92; App.2] Because Kraus's value was the outlier of the two parties' appraisals, her appraisals were not used in the value determination. *If* Kraus's values had been averaged with Hope's values, the averaged value would have been $62,471,000, instead of $40,508,000.

Gail did not rest after losing this valuation process. On May 20, 2019, Kraus issued a revised appraisal, lowering her valuation of Clifford Fischer & Co. and Fischer Solutions, Inc. from $74,220,000 to $67,630,000 [Px12 & 13, 12RR332 & 426], which was only $17,108,000 higher than Hope's value, bringing it closer to the Hope's valuation than Rice's valuation, thus flipping the averaged value from the two lowest appraisals to the two highest appraisals. Cliff filed a motion to exclude the revised Kraus valuation [3CR823-958] (and a Brief at 5CR1881) but the motion was denied [3CR966]. The Court gave Rice additional time to prepare a rebuttal report. Rice's rebuttal report [Rx58, 13RR420-425] criticized Kraus's using 12-31-2018 financial information for publicly-traded guideline companies for a 12-31-2018 valuation date, which Rice says violates a business valuation standard that an appraiser can use only information that is known or knowable (i.e., publicly available)

on the date of valuation, in this case 12-31-2018. (Year-end financials for large public companies are not known for several months after year-end.) Kraus admitted on cross-examination that she was unable to access the 12-31-2018 financials for her chosen guideline comparable companies like Jones Lang LaSalle, CBRE Group, or Marcus and Millichap, up through the time she finalized her 2-6-2019 appraisal. [2RR80-81] In defending her position that 12-31-2018 financials of publicly-traded companies were known or knowable on 12-31-2018, Kraus suggested that a hypothetical buyer could have called any of these companies on New Year's Eve and gotten someone to give them the company's 12-31-2018 financial information. [1RR81-82] In his rebuttal report, Rice observed that published information reflected that the multipliers drawn from guideline companies actually *increased* from 9-30-2018 to 12-31-2018, and yet Kraus *reduced* the supposedly market-derived multipliers she applied to on the Fischer Companies' revenues and EBITDA[1] in reaching her lower valuation. On cross-examination, Kraus admitted that, between 9-30-2018 and 12-31-2018, the EBITDA for Jones Lang LaSalle increased from $874 million to $975 million. [2RR67-68, 71] The revenue of CBRE Group increased from $16 million to $21 million. [7RR69] The revenue of Marcus & Millichap increased from $787 million

[1] "EBITDA, or earnings before interest, taxes, depreciation, and amortization, is a measure of a company's overall financial performance and is used as an alternative to simple earnings or net income in some circumstances.... This metric also excludes expenses associated with debt by adding back interest expense and taxes to earnings. Nonetheless, it is a more precise measure of corporate performance since it is able to show earnings before the influence of accounting and financial deductions." <https://www.investopedia.com/terms/e/ebitda.asp> .

to $815 million. [2RR69] The revenue of Savills increased by $120 million. [2RR69-70] The revenue of Newmark Group increased by $170 million. [2RR70] The revenue of HFF increased by $23 million. [2RR70] The revenues and EBITDAs of all of Kraus's guideline companies went *up*, but the guideline company value included in her second appraisal went *down*. [2RR72] Rice said that Kraus used multipliers based on a controlling interest while at the same time applying a control premium, which was double-counting the same downward adjustment. Rice criticized Kraus's use of Fischer Companies' EBITDA projections that were based on a possible partnership with another company, Savills, when the deal had fallen through before the valuation date. Rice criticized Kraus for increasing her Beta adjustment (reflecting the volatility of a company's stock price) from 1.07% to 1.2% (without explanation), which increased the discount rate used to determine the present value of future revenues, resulting in a lower valuation. All these adjustments lowered Kraus's valuation of the Companies. [Rx18, 13RR424] Gail unsuccessfully tried to get the Court to exclude Rice's rebuttal report as being filed too late. [4CR1288]

Before trial started, Cliff filed a Brief asking the Court to exclude evidence going behind the first three appraisals. [5CR1881] Gail responded that "this Court has the power to determine whether any mistake occurred and to review the experts' methodologies when performing their appraisals." [5CR2110] It was apparent that Gail intended to try to get the Court to disregard Rice's valuation and to average

Hope's appraisal with Kraus's second appraisal. Had the Court done so, it would have raised the averaged value from $40,508,350 to $59,076,000. [Rx106a, 13RR833] Conducting a second averaging utilizing a fourth valuation issued after the other appraisals are known was not contemplated in the Conversion Agreement. To allow either a party to revise its appraisal after the original appraisals were revealed would neutralize the built-in incentive for each appraiser to temper any tendency toward the extreme, and if both parties were allowed to submit revised valuations it could lead to successive rounds of recalculation that would cause the parties' values to converge on the third appraiser's value, effectively destroying the averaging process prescribed by the Conversion Agreement.

Gail asked the Court to disregard Bryan Rice's appraisal, because he relied upon an unaccepted offer from Savills to purchase the Companies, made in April of 2018. [Motion to Exclude...., 4CR1263-1286] Gail's motion was argued at the pretrial hearing. [Supp.RR51-66] Rice prepared a responsive report, citing to Laro and Pratt, BUSINESS VALUATION AND TAXES, PROCEDURE, LAW AND PERSPECTIVE, which endorsed the use of offers to buy if they were "(1) firm, (2) at arm's length, (3) with sufficient detail of terms to be able to estimate the cash equivalent value, and (4) from a source with the financial ability to consummate the offer (i.e., a bona fide offer)." [Rx71, 13RR754-758] Hope also considered the Savills offer, but gave more credence to the conditional "earnout payments" than Rice did. [Px17, 12RR532] Revealingly,

Gail did not attack the Hope appraisal for relying on the same Savills offer, suggesting that Gail's real intent was not to exclude the Savills offer but rather to exclude Rice's valuation from the averaging process.

The Annual Bonus and Change-of-Control Bonus Agreements. The Conversion Agreement specifically excluded from the conversion the profits participation interests promised or awarded to Company employees before February 4, 2008. [Jx1, ¶4.1, 12RR11] The Conversion Agreement also provided that all liabilities and obligations attributable to the converted property (i.e. the Fischer Companies) must be satisfied and paid solely from the community estate, and the community estate must indemnify Cliff and his separate property from all such liabilities and obligations. [12RR11] Gail acknowledged on cross-examination that "sometimes companies have to award key employees financial incentives – incentives to stay with the company ...." [4RR77] For example, Gail has a profits participation agreement with an employee of a company she controls. [4RR78-79] Gail acknowledged that the Fischer Companies has done so with its employees, as well. [4RR79] Four employees of the Fischer Companies have agreements providing for annual and change-of-control bonuses that are obligations of the Fischer Companies: Ted Uzelac, Larry Teel, Chris Joyner, and Jeff Kernochan. (The operative terms of these agreements are presented in table form at 3CR961-962, App.10). The Companies' independent director Jim Carreker testified that he was informed about these agreements before he joined the Board in 2017; he

said that they were consistent with arrangements that existed at other companies he had run. [7RR91] The Companies' accountant testified that the profits participation interests include an interest in the proceeds from sale of the Companies. [7RR121]

Ted Uzelac is president of the Fischer Companies. [8RR12] He has been with the Companies since November of 1996. [4RR90; 5RR121; 8RR13] According to Hope's appraisal, "Mr. Uzelac has managed the portfolio of 52 key client alliances and is instrumental to Fischer's relationship with its largest client, FedEx." [Px17, 12RR512] Uzelac has the second-largest interest in the Companies outside of Cliff and Gail. [8RR18] The Companies' independent director Jim Carreker called Uzelac "the third most important person to the success of Fischer Companies." [7RR94] Uzelac's current annual bonus agreement and change-of-control agreement were dated 8-2-2017 [Jx7 & Jx10, 12RR204 & 225], but Gail acknowledged that she saw the forerunner bonus agreements years before the Conversion Agreement. [4RR94-95] Gail agreed that Uzelac's profits participation agreements included both annual bonuses and a percentage of proceeds from the sale of the Companies. [4RR96, 99] Gail admitted that she became involved with Companies' lawyer in trying to finalize Uzelac's agreements. [Rx83, 13RR763; Rx87, 13RR768; Rx91, 13RR782; Rx99, 13RR803; 4RR107-113] Gail even requested the Companies' attorney to add her signature line to Uzelac's agreements. [Rx96, 13RR790 & 797; 4RR121-123] Under these agreements, Uzelac is entitled to 10% of the earnings and proceeds from sale of

Fischer Solutions, while Cliff and Gail get 90% [7RR120], and he gets 15% of the first million in annual income or proceeds from sale of the main company and 20% of the excess over $1 million. [7RR121]

Chris Joyner is the executive vice-president of Fischer & Company and president of Fischer Financial. [7RR112] He has been with the company for 23 years. [4RR87; 5RR128-129; 7RR113] "Mr. Joyner personally manages some of Fischer's largest client relationships...." [Hope appraisal, Px17, 12RR513] Director Carreker ranked Joyner right below Uzelac in terms of contributing to the success of the Companies. [7RR95] Joyner's profits participation interest originated in December of 2000, and was originally reflected in a handwritten note [7RR113; Rx45, 13RR95] that was reduced to a formal writing in 2017. [5RR129; Jx9 & Jx12; 12RR218 & 239] Joyner said the agreement applies to both annual profits and sales proceeds. [7RR114] Joyner gets 25% of the profits and sale proceeds from Fischer Financial, while Cliff and Gayle get 75% [7RR120], and Joyner gets 2-1/2% of the first million in annual income or proceeds from sale of the main company and 2-1/2% of the excess over $1 million. [7RR121] Gail agreed that Joyner "helped to make you and Cliff Fischer millions of dollars." [4RR87] Gail admitted that she was involved in trying to finalize Joyner's agreement. [4RR101-104; Rx87 & Rx89; 13RR775-777]

Larry Teel has been with the Fischer Companies 25 years. [5RR126-127; 7RR105] He manages the Fischer Companies' "most important clients." [4RR100] Teel runs

the Companies' Pittsburgh office and is the lead account manager for the FedEx relationships of the Companies, except for two divisions. [5RR126; 7RR105] Teel moved his family to Pittsburgh to manage the FedEx account, and Cliff agreed to give him a 25% participation in the Pittsburgh office, as well as 2-1/2% interest in the Fischer Companies. The agreement originated before Teel moved to Pittsburgh. [7RR206] Initially Teel's agreement was verbal, but is was later reduced to writing. [5RR127-128; 7RR107 & 120; Jx8 & Jx11, 12RR211 & 232] Director Carreker testified that Teel had been significant to the success of the Companies. [7RR94] Under his agreements, Teel receives a 25% annual operating bonus and a change-of-control bonus equal to 25% of the sales price of the Pittsburgh office [5RR131-132], plus 2-1/2% of the first million in income or proceeds from sale of the main company and 2-1/2% of the excess over $1 million. [7RR121] Gail admitted that she knew about Teel's agreement before she signed the Conversion Agreement. [4RR100] Gail also admitted that she was involved in trying to finalize Teel's agreement. [4RR101-104, 118; Rx83, Rx87 & Rx89, 13RR763, 768 & 775]

Jeff Kernochan is the managing director and executive vice-president of Fischer Pacific, located in California. He started to work there in the early 1990s. He manages the office and produces 100% of the revenue for that entity. [6RR6-7] His profits participation agreement, which includes a percentage of proceeds from sale of Fischer-Pacific, Inc., dates back to a letter agreement signed in 1997 [6RR8; Rx85,

13RR764], modified by a letter agreement signed in 2000 [Rx104, 13RR826]. Kernochan says that “[t]he intent was everything as if it was ownership, but no stock.” [6RR9] His profits participation interest includes an annual bonus and a share of the sale proceeds. [6RR9] His percentage was adjusted over the years, and he now is entitled to receive 41% of the profits of Fischer Pacific and Cliff and Gail get 59%. [6RR10; 7RR120] Kernochan’s existing agreement is dated 1-5-2000. [Rx104, 12RR826] Gail admitted that she was aware of the obligation to Kernochan at the time she signed the Conversion Agreement. [4RR84; Rx83, 13RR763]

Gail’s attorney stipulated that “some of these employees have made them millions and millions of dollars....” [4RR91]

Gail Joined the Fischer Companies into the Divorce. The Companies’ former CFO Mike Nichols testified that Gail told him that “before she would let Cliff and Ted run that business without her, she would blow the company up.” [8RR9] He asked her if she meant by dissolving the company and she said: “No, I meant blow it up with a bomb so I could kill all these motherfuckers.” [8RR9] Two months before trial, Gail amended her pleadings naming as defendants Clifford Fischer & Company, Inc. (with eight sub-entities), Fischer VM Holdings, Ltd. ((misnamed in the pleading) with four associated entities), and Fischer Management Services, Inc. (with two sub-entities). [2CR408; amended at 2CR419] An organizational chart is at 2CR428. Gail asserted that the Companies were necessary parties, but stated no specific claims against them.

[2CR421-422] The Companies hired an attorney who filed a general denial and sought reimbursement for costs. [2CR441] Kraus's 5-31-2019 2nd appraisal said that the change-of-control bonus agreements "may have been executed without the knowledge or consent of Ms. Fischer. Consequently, these bonus payments may not be valid." [12RR499] That same day the Companies filed an amended pleading seeking a declaratory judgment that the annual and change-of-control bonus agreements were enforceable. [2CR959] On 6-13-2019, Gail filed a general denial to the Companies' claims [4CR1739], and challenged whether the term "profits participation interest" included the change-of-control bonus agreements. [4CR1747-50] Gail testified at trial that Uzelac, Joyner, Teel, and Kernochan did not have profits participation agreements with the Companies. [12RR79] Even as late as the hearing on Gail's Motion for New Trial, in referring to the profits participation interest agreements, Gail's attorney said: "This lady never agreed or approved any of that." [10RR32]

<u>The Parties' Positions at Trial.</u> Gail's Inventory and Appraisement ("I&A") valued Clifford Fischer & Company at $62,502,000, and Fischer Solutions, Inc. at $1,500,000 [Jx2; 12RR27, 32; Px6, 12RR264], for a total of $64,002,000. Gail's $64,002,000 figure for Clifford Fischer Companies was near the average between Hope's appraisal and Kraus's second appraisal. [2RR24] Gail testified that she believed the Companies are worth in excess of $100 million. [4RR53, 56] In opening argument Gail's attorney asked the Court to award the Fischer Companies to Cliff, which he said would not

trigger the change-of-control bonuses. [2RR28-29, 30-31] Gail's attorney said Gail didn't want a fire sale, and wanted to avoid any distress sale. [2RR29] He commented on Cliff's most recent pleading asking that the change-of-control bonuses be taken into account even if the business was awarded to one spouse or, if the Court declined to do so, then order the Companies sold. [2RR29] Gail's attorney then said: "Well, obviously, this Court needs to do what this Court feels is best for this case." [1RR29] Gail's attorney also argued that the Court should add $5.8million to Hope's appraisal because there was $5.8million in cash on the Companies' books on December 31, 2018, or alternatively to subtract that amount from the Rice's and Kraus's valuations. [2RR30] Unstated was the fact that the $5.8million adjustment would make Kraus's value closer than Rice's value to Hope's value, causing the two highest appraisals to be averaged instead of the two lowest appraisals. Gail's attorney also asked that the Park Lane property, which had been appraised in accordance with the Conversion Agreement [2RR26-27; 4RR26; Px5, 12RR260], be sold and the proceeds divided 50-50. [2RR31] He asked that the Court leave Cliff and Gail as 50-50 owners of several real estate investments, an oil and gas investment, and the brokerage accounts. [2RR31, 33-34] He asked that the Court award Gail a money judgment against Cliff for half of the fair market value of the Companies, to be paid over a 4-year period bearing 3% interest, secured by the stock in the Fischer Companies, and by the real estate investments and the ranch awarded to Cliff, with the collateral to step down as

the debt is paid down. [2RR32-33] At Gail's proposed values, Cliff would have to pay Gail $8 million per year, plus interest, for four years.

Cliff's I&A is Jx3. [12RR36] Cliff valued the Fischer Companies at $40,508,350, the average between the Hope and Rice values. He valued Fischer Management Services, Inc. at the Hope-Rice average of $1,528,950. [12RR37] Cliff made a downward adjustment of $10,077,086 for the change-of-control bonuses that must be paid when the Companies are sold. [12RR37, line 3] Gail's attorney repeatedly told the Trial Court that the Conversion Agreement established the value of the Fischer Companies. [4RR50, lines 18-20; 4RR56, lines 15-18; 4RR60, lines 4-10] (This was Gail's stated position even though she was trying to exclude Rice's opinion and add $5.8 million to Hope's opinion.) Gail asked the Court to award to Cliff the business that she controlled, Fischer Management Services Company, even if Cliff didn't want it. [4RR39-40] Gail said she wouldn't buy the Companies from Cliff for half of $60 million, or $50 million, or $40 million, or $30 million, or even $20 million. When asked what price she would pay to buy the Companies, Gail said $1.00. [4RR40-41]

Gail asked the Court to order the Park Lane house sold by appointing a real estate agent to list it, and if it did not sell by 12-31-2019, then the agent would switch from agent to receiver to sell the property. [2RR26-27; 4RR26; Px5, 12RR260]

At the start of the second day of trial, Gail's attorney offered to stipulate that the annual and change-of-control bonus agreements were enforceable, and he offered a

declaratory judgment to that effect. [4RR6-15] This stipulation was accepted and it was agreed that the Companies' attorney would exit the trial and that the issue of the Companies' recovery of attorneys fees would be submitted to the Court based on affidavits. [4RR9-10] Gail's attorney also stipulated that the change-of-control agreements were an obligation of the Companies. [4RR74] (This had already been agreed upon in the pretrial hearing. [Supp.RR49])

Gail's attorney told the Court that the change-of-control agreements were "valid and enforceable in a company sale if it's sold to a third party." [4RR12] He also told the Court: "Your Honor, the proceeds of the sale would go to the company. The company is to distribute the proceeds of any sale as it is required to do. This Court, and this Court only, has the authority to deal with the disposition of the community estate as the Court finds it, and that is, in no way, inhibits the Fischer Company in undertaking to satisfy its contractual obligations." [4RR13-14] He also agreed that the change-of-control bonuses are not an obligation of Cliff's 50% of the Companies, but instead are an obligation of the Companies. [4RR14]

<u>Disputes Over the Company Valuations.</u> Despite the fact that the Conversion Agreement provided for the simple averaging of two valuations of the Fischer Companies, Gail approached the trial as if the value of the Fischer Companies was an issue to be tried to the Court. Gail's first witness at trial was her business appraiser Autumn Kraus, who testified to her two appraisals, despite the fact that her first

appraisal was disregarded in the averaging prescribed by the Conversion Agreement and her second appraisal was not authorized by the Conversion Agreement. What ensued was a "donnybrook" of business valuation disputes that dominated the rest of the trial.

The Savills Offer to Buy the Company. At trial, there was great controversy over the Savills offer. [12RR902] On April 6, 2018, Savills offered to purchase the Fischer Companies for $35,000,000 in cash, plus an additional "earnout" payment of $32,000,000 at the end of three years if the Companies' average EBITDA for 2018 through 2020 was at least $44,800,000. [Hope appraisal, Px17 12RR532] The earnout portion of the Savills offer was highly questionable. Former CFO Mike Nichols said the offer was "very unrealistic." [8RR8] The three-year delay in payment reduced the present value of the potential earnout down to $21,040,519. [Hope appraisal, 12RR532] The earnout raised the offer to 6.8 times the Companies' 2017 EBITDA [Hope appraisal, 12RR532], implausible considering the fact that companies like the Fischer Companies normally sell for between 3 times and 3.5 times EBITDA. [See p. 43 below.] Cliff testified that he gave no credence to the earnout portion of the offer, and that the Companies' CFO Mike Nichols said there was no realistic expectation that they would see any money from the earnout. [7RR120]

Whitley Penn's Discounted Cash Flow Projections. Kraus's initial appraisal contained a Discounted Cash Flow ("DCF") analysis, projecting cash flows of the

Companies through 2023, stated in dollar figures. [Px12, 350, App.7] Rice created a chart reflecting the percentage changes in Kraus's projections from year to year. [Rx75, 13RR760, App.7] This percentage analysis revealed that Kraus's DCF projections assume that the Companies' revenues are going to decrease by an arbitrary 0.5% each year starting in 2020. [7RR16] This is not a factually-driven company-based assessment. Instead it is what Rice called "an arbitrary model that's constructed with no support...." [7RR17] Rice criticized Kraus's terminal-year income of $72 million, which is almost 31% higher than the Companies' overall historical average. [7RR18] Rice concluded: "There is zero merit to this ... discounted cash flow analysis." [7RR18] Rice noted that future profits projected were 47% higher than the average of all historical periods, and higher than any single year in the Companies' history. [7RR20]

<u>$5.8 Million in Year-End Cash.</u> Rice and Kraus included $5.8 million in cash in the Companies accounts on 12-31-2018 as an asset of the business. [7RR29] The Hope appraisal did not include $5.8 million in cash the Companies had on the books on 12-31-2018, because that sum actually was distributed to the Fischers in early 2019. [3RR9] Gail's attorney suggested that Court should add $5.8 million to Hope's appraisal or, alternatively should subtract that amount from Rice's and Kraus's valuations. [2RR30] Rice confirmed that historically the Companies distribute all cash other than a small amount of working capital, primarily as a mechanism to pay taxes.

[7RR28-32] Judy Durbin has been the accountant for the parties and the Companies since the early 1990s. [7RR119] She testified that normally at year-end she distributes money from the Companies to Cliff and Gail in the form of a bonus sufficient to pay what they owe the IRS. However, in 2018 she decided to keep the money in the Companies at year-end and pay it to the IRS as a large estimated tax payment on January 15, 2019, as a tax-saving measure. [7RR128] Durbin confirmed Hope's justification for not including the excess cash on hand at year-end, because it was paid out to the parties shortly after December 31st and in fact was not a permanent asset of the business. Apart from all that, there little reason for a buyer to pay cash to buy cash, so excess cash in the Companies on the day of sale (i.e., 12-31-2018) added no value to the business. Significantly, if the Court were to add this $5.8 million to Hope's appraisal, it would bring Hope's appraisal closer to Kraus's appraisal with the result that the new averaged value of the Companies would increase by $24 million, from $40,508,350 to $64,300,953. [Rx106a, 13RR833, App.6; 7RR40-55]

Three Different Figures for Personal Goodwill. In *Nail v. Nail*, 486 S.W.2d 761, 763-64 (Tex. 1972), the Supreme Court wrote that personal goodwill of a married individual is not a community property asset subject to division in a divorce. This principle was applied by this Court in *Finn v. Finn*, 658 S.W.2d 735, 741-42 (Tex. App.--Dallas 1983, writ ref'd n.r.e.) (en banc). Rice allocated 50% of the Companies' intangible value to Cliff's personal goodwill, thereby reducing the value of the

community estate's interest in the Companies by $12,800,261. [Rx53, 13RR327; 7RR21-25] Kraus allocated 25% of intangible value to Cliff and Gail's personal goodwill, thus excluding $22,960,000 from the community estate's share of the value of the Companies. [Px12, 12RR321-322] Hope did not exclude any value for the personal goodwill of either Cliff or Gail. [Px17, 12RR 533-34] On cross-examination, Hope indicated that he had never worked on a Texas divorce valuation and had never had to allocate between personal and enterprise goodwill. [93RR12]. Hope said that he used a "compensation-for-contribution" principle, known inside his company but not outside of it, to determine that no set-aside was needed for personal goodwill. [3RR11-35]. Rice testified he had never heard of this approach to determining personal goodwill, and that the explanation Hope gave did not make sense. [7RR25-26] Hill Johnson, co-author of the Rice appraisals, testified that he had never heard of this approach to excluding personal goodwill and thought it was incorrect. [3RR13] Hope's failure to exclude any personal goodwill caused the Hope appraisal to overstate the community estate's interest in the value of the Companies. [3RR81-83]

<u>The Effect of the Proposed Adjustments to Appraisals.</u> Respondent's Exhibit 106 summarizes the main disputes over adjustments that could be made to the business appraisals, and the effect that each adjustment would have on the averaging process prescribed by the Conversion Agreement. [Rx106, 13RR832, App.5] Exhibit 106a additionally shows how the two appraisal being averaged changes depending on

adjustments made. [Rx106a, 13RR833, App.6] Rice explained these exhibits in his testimony. [7RR40-50] In Exhibit 106a, Line 1 averages Rice and Hope for a value of $40,508,350. Line 2 averages Kraus's 2nd appraisal and Hope for a value of $58,181,000. Line 3 adjusts all three original appraisals downward to reflect the bonuses paid to the four key employees, leaving Rice and Hope being averaged at $33,334,380. Line 4 reduces Hope by a 25% personal goodwill adjustment, leaving Rice and Hope being averaged at $36,318,066. Line 5 reduces Hope by a 50% personal goodwill adjustment, leaving Rice and Hope being averaged at $33,577,828. Line 6 increases the Hope value by the $5.8 million on the books on 12-31-2018, leaving Hope and Kraus being averaged at $64,300,953. Line 7 combines the reduction to Hope due to annual bonuses and the reduction for personal goodwill at 25% and 50%, leaving Rice and Hope being averaged at a value of $30,630,901 (at 25% personal goodwill) or $27,927,422 (at 50% personal goodwill). Line 8 combines the reduction to Rice and Hope for the annual bonuses and adding $5.8 million in cash to Hope, leaving Rice and Hope being averaged at a value of $32,805,901 (at 25% goodwill) or $29,377,422 (at 50% goodwill). All of this is a far cry from Paragraph 9.2 of the Conversion Agreement which says "the fair market value set forth in the third appraisal and the appraisal for the same property closest in value shall be averaged and the resulting value shall be used as the fair market value."

At trial the Court had to decide whether to factor Kraus's revised appraisal in a

second averaging process that supplanted the first averaging process, and whether to make one or more of the adjustments to the various appraisals before averaging. We do not know what the Trial Court decided about these contentions because we do not have findings of fact or conclusions of law. In the end, however, these disputes were not determinative because the Trial Court ordered that the Companies be sold in an orderly process, and the net proceeds divided 50-50. Ted Uzelac said that the best way to determine the value of the Companies was to "[t]ake the business to the market." He said that "[t]here are a lot of companies that would love to buy us...." [8-RR-21]

SUMMARY OF THE ARGUMENT

First Issue: The Trial Court has broad discretion to make a just and right division of the community estate. With regard to stock in a closely-held corporation, a trial court can award some shares to each spouse, or it can award all shares to one spouse and offsetting property or an offsetting money judgment to the other spouse, or it can order the stock sold and the proceeds divided in an equitable manner. The trial court's exercise of discretion will not be reversed if some evidence supports the trial court's exercise of discretion. The Conversion Agreement specifying an appraisal mechanism and a 50-50 split of the community estate does not prohibit the court from ordering that a community asset be sold. In fact, Gail herself asked the Court to order the Park Lane house listed for sale, and if not sold within 6 months for the realtor to become receiver to sell the property. Gail's position that the court can order one asset sold but

not another is inconsistent. It is a matter for the Trial Court's discretion, and the Court did not abuse its discretion.

Second Issue: The Conversion Agreement does not require that each community property asset be divided 50-50 in kind. It requires that the court total the fair market value of all community property assets and subtract the total of all community liabilities and then award assets and debts in such a way that each spouse receives 50% of that net community estate. The Court did exactly this. There is no error in awarding more brokerage accounts to Cliff. Gail received more real estate than Cliff. The Court divided the net community estate 50-50. There is no error here.

Third Issue: The Court did not err in awarding Cliff the Fischer Ranch without awarding Gail a judgment for half of community property funds used to repair and improve the community property Ranch. The value added by the repairs and improvements were included in the appraisal used in the property division. The parties agreed on the value of the Ranch. There is no reimbursement for using community money to improve community property. Gail did not plead or prove waste, nor did she list this item as an asset or claim in her inventory or her proposed property division that was used by the Court in arriving at a 50-50 division of the community estate. Gail has not preserved error; no error is shown.

Fourth Issue: There is no evidence in the record that Gail incurred a $1 million debt on her Bank of New York Mellon brokerage account that was not accounted for

in the property division. The Court used the balances Gail gave in her Sworn Inventory and proposed property division for the brokerage account and the balance of the line of credit associated with that brokerage account, and for the value of the HighPeak Energy Partners investment. Gail's sworn inventories are a judicial admission about these amounts and values and she is not free to contradict them on appeal. If a debt was overlooked, which is not apparent from the record, it was invited error on Gail's part.

Gail also claims that Cliff "depleted' five bank accounts and two brokerage accounts. Gail did not plead or prove waste of community property. There is no evidence that Cliff did anything wrong or actionable in spending money from these accounts. Gail did not mention the five bank accounts in her Motion for New Trial [5CR2520], and her Motion for New Trial mentions the two brokerage accounts only in the context of her complaint that she should have been awarded half of all brokerage accounts. [5CR22520] See Gail's Second Issue discussed above. Gail raised no complaint in the trial court about Cliff's supposed depletion of these accounts. No error was preserved and no error is presented.

Fifth Issue: Gail joined the Fischer Companies as defendants in this divorce. The Companies filed a general denial and then a counter-claim for declaratory judgment. Gail filed a responsive pleading challenging the enforceability of the change-of-control bonus agreements and all agreements signed in 2017. On the second

day of trial, Gail stipulated that all the agreements were enforceable, and she agreed that the question of attorneys' fees would be submitted to the Court by affidavit. An award of fees in a declaratory judgment action is reviewed on appeal for an abuse of discretion. Since Gail sued the Companies, and the Companies counter-sued Gail, and Gail contested the enforceability of some agreements between the Companies and key employees, then in trial stipulated to enforceability, it was not an abuse of discretion to award the Companies a judgment for their fees. Since Cliff was not a party to the suit or counter-suit between Gail and the Companies, it was not an abuse of discretion to provide that the award of fees was against Gail and not Cliff.

ARGUMENT AND AUTHORITIES

Response to Gail's First Issue Presented

> The Trial Court did not abuse its discretion by ruling that the Fischer Companies be sold and the net proceeds divided equally between the spouses.

The idea of selling the Fischer Companies in the property division was included in Cliff's Third Amended Counterpetition [5CR1873], and was suggested by Cliff's attorney in the pretrial hearing held on June 14, 2019. Cliff's attorney argued: "The Court I believe has the option to order the company sold, and then the valuation issues all vanish because these estimates, these appraisals, are nothing but an educated guess as to what a fair market value is what a willing buyer will pay. If you order the business sold, appoint a broker or a receiver to do it, the market will tell us what the

fair market value is and by definition it's 100 percent accurate. So all of the appraisers right now are estimating, guesstimating, but you can eliminate all of that uncertainty [by] ordering the business sold, and we know that justice will be done. No one will be getting more or less than they're entitled to if you order the business sold." [Supp.RR37] In response three different times Gail's attorney agreed that the Court had the power to order the Fischer Companies sold. [Supp.RR 38-39, line 3; p. 40, lines 13-14, 21-23] In the hearing on Gail's Motion for New Trial, Gail's attorney said: "And I agree neither Mr. Fischer nor Ms. Fischer should be required to work. We're not here trying to require anybody to work. We just want the company sold methodically.... We agree to sell but not to a highest bidder at a distressed price." [10RR91-92] Gail's attorney suggested that the Companies be marketed, "then bring back whatever offers are made, if any, and let the Court then look at it." [10RR97] On appeal, however, Gail now argues that the Court could not or should not have ordered the Fischer Companies sold. [Appellant's Brief, p. 6] Having taken the position that the Court could order the Companies, sold Gail cannot now claim that it was error for the Court to do so. Also, Gail requested that the Court order the house on Park Lane sold. [2RR26-27; 4RR26; Px5, 12RR260] It is inconsistent for Gail to claim that the Court can order the Park Lane properties sold but cannot order the Companies sold.

Gail also argues for the first time in Appellant's Brief that the doctrines of estoppel, quasi-estoppel, and judicial admission, preclude the Court from ordering the

sale of the Fischer Companies. [Appellant's Brief, p. 23] These claims were not included in Gail's pleading [2CR419], nor were they otherwise raised in the trial court and these contentions cannot be raised for the first time on appeal. Tex. R. App. P. 33.1 (the record must show that a complaint was made to the trial court); *Rossa v. Mahaffey*, 594 S.W.2d 618,626 (Tex. App.--Eastland 2019, no pet.) (appellate courts do not consider issues that were not raised in the trial court); *Matter of Marriage of Tyeskie*, 558 S.W.3d 719, 726 (Tex. App.--Texarkana 2018, pet. denied) (to preserve error, "[c]omplaints and arguments on appeal must correspond with the complaint made at the trial court level." *See Ferrara v. Moore*, 318 S.W.3d 487, 496 (Tex. App.--Texarkana 2010, pet. denied) (a complaint in a motion for new trial that is not the same as that urged on appeal presents nothing for review). Also, the division of the community estate upon divorce is not like a personal injury or property damage claim requiring the plaintiff to prove liability, causation, and damages. Unlike a claim of separate property or a claim for reimbursement, where the burden of proof is on the proponent, neither party is assigned a burden of proof with regard to the just and right division of the community estate. In a divorce, *the court* has a duty to divide the estate of the parties "in a manner that the court deems just and right," regardless of the positions urged by the spouses. Tex. Fam. Code § 7.001; *Moroch v. Collins*, 174 S.W.3d 849, 855 (Tex. App.--Dallas 2005, pet. denied) ("A *trial court* is charged with dividing the community estate in a 'just and right' manner, considering the rights of

both parties") (emphasis added); *LaFrensen v. La Frensen*, 106 S.W.3d 876, 878 (Tex. App.--Dallas 2003, no pet.) ("The *trial court* has wide latitude to divide the marital estate in a manner that *the court* deems 'just and right'") (emphasis added). The doctrines of estoppel, quasi-estoppel, and judicial admission do not inhibit a trial court from dividing the community estate in a manner that the court deems just and right.

Apart from the fact that the trial court must exercise its own discretion in making a just and right division, the elements of estoppel are not met in this case. The Texas Supreme Court set out the elements of estoppel in *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471, 486 (Tex. 2017):

> The elements of equitable estoppel are "(1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations."

There is no evidence of any of these elements in this case.

Nor does the doctrine of quasi-estoppel apply on these facts. "Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken.... The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Here, Gail claims quasi-estoppel because of a statement

in one of Cliff's trial briefs that the averaging process in the Conversion Agreement cannot be modified by the Court. [Appellant's Brief, p. 21] That this is true is a matter of simple contract law. However, the valuation provision in the Conversion Agreement does not address the Court's power to order community property assets sold. In Cliff's Third Amended Counterpetition, Cliff requested that the Court order a sale of the Fischer Companies if (i) the Court determined to use Kraus's 2nd appraisal in the averaging process, or (ii) if the Court decided not to subtract the profits participation interest in calculating the community estate's value of the Fischer Companies, or (iii) if the Court determined to award the Companies to him at a fair market value in excess of $31,840,406. [5CR1873]. Before trial started, Cliff's attorney suggested that the Court might wish to order the Fischer Companies sold. [Supp.RR37] Cliff testified during trial that he thought the Court should order the Companies sold "and solve the issues that we're addressing today." [7RR131-32]. He testified that he would not take the Companies at a value of $40 million or even $30 million if the Court disregarded the change-of-control bonuses and capital gains tax, but he would take them at a value of $20 million. [7RR132] Cliff did not previously acquiesce in the position that the Companies should not be sold, nor did he receive a benefit from advocating that the Companies not be sold. Furthermore, Gail's attorney indicated that the Court could order the Companies sold. See p. 28 above. And Gail herself asked the Court to order the Park Lane house sold [2RR26-27; 4RR26; Px5,

12RR260], thus contradicting with her position on appeal that the Court cannot order a community asset sold. There is nothing unconscionable about Cliff asking the Court to order the sale of the companies, an outcome that Gail's attorney also agreed was a possible outcome, and an exercise of discretion that Gail herself advocated for the Park Lane house.

The doctrine of judicial admission has no application either. "A true judicial admission is a formal waiver of proof and is usually found in the pleadings or in a stipulation of the parties."*Gevinson v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 466 (Tex. 1969). Cliff has cited cases on pp. 56-57 below that a sworn inventory and appraisement operates as a judicial admission. However, a statement in a trial brief that the Court could not alter the valuation procedure set out in the Conversion Agreement does not foreclose a request for the Court to order certain properties sold in connection with the division of the community estate.

These legal arguments aside, the Court should take note of Gail's evident motive in attacking the Trial Court's decision to order the Fischer Companies sold. Gail wanted the Trial Court to award the companies to Cliff at a value of $59,602,500 [Px62, 12RR1911], without regard to the fact that Cliff alone would eventually have to shoulder the costs of sale and the burden of paying 25% of the sales proceeds to the four key employees. Additionally, upon eventual sale Cliff alone would have to shoulder the capital gain tax on 100% of the community estate's share of the value of

the Companies. Gail wants to transfer to Cliff 100% of the costs of sale, 100% of the change-of-control bonuses, and 100% of the capital gain tax when the Companies are sold, while she gets a cost-free, bonus-free, and tax-free judgment for half of the value of the Companies at the highest possible value.

A trial court abuses its discretion in dividing the community estate "when it acts arbitrarily or unreasonably, or without any reference to guiding rules and principles." *Tellez v. Tellez*, 345 S.W.3d 689, 690 (Tex. App.--Dallas 2011, no pet.). "A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision." *Garza v. Garza*, 217 S.W.3d 538, 549 (Tex. App.--San Antonio 2006, no pet.).

Standard of Review of the Property Division. In *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981), the Supreme Court wrote: "In exercising its discretion the trial court may consider many factors and it is presumed that the trial court exercised its discretion properly." In *Reisler v. Reisler*, 439 S.W.3d 615, 619 (Tex. App.--Dallas 2014, no pet.), this Court wrote: "The trial court is afforded broad discretion in dividing the community estate and an appellate court must indulge every reasonable presumption in favor of the trial court's proper exercise of its discretion.... A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision." *Accord*, *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.--Dallas 2005, pet. denied). In *LaFrensen v. LaFrensen*, *supra* at

877, this Court wrote: "The trial court has wide latitude to divide the marital estate in a manner that the court deems 'just and right.' *See* Tex. Fam. Code Ann. § 7.001 (Vernon 1998) ...."

The Absence of Findings and Conclusions. In *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986), the Supreme Court said: "In the absence of findings of fact or conclusions of law, the trial court is presumed to have found facts in favor of its order if there is any probative evidence to support the order.... It is equally true that when findings of facts and conclusions of law are not requested or filed, appellate courts must affirm the judgment of the trial court on any legal theory that finds support in the evidence." In this case, we have no findings of fact and conclusions of law. It is presumed that the trial court considered the entire circumstances of the parties in dividing their property. *Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App.--Tyler 1977, writ dism'd); *Whittenburg v. Whittenburg*, 523 S.W.2d 797 (Tex. Civ. App.--Austin 1975, no writ).

Here are some of the factors that the Trial Court could have considered in arriving at a just and right division of the community estate.

The Ages of the Parties and Key Employees. Cliff Fischer turned 60 years old during 2019. [8RR19] Gail was age 57 or 58. [Rx53, 13RR299] Ted Uzelac was 60; Chris Joyner was 57 or 58; Larry Teel was 64; and Jeff Kernochan was 55 to 56 years old. [8RR12] According to Uzelac, a significant number of the Companies' brokers

were aging as well. There is a gap between the older employees and the newer ones. [8RR19] Uzelac testified: “I think it would be an ... ideal opportunity to sell and reap the benefits of what we’ve done.” [8RR19] Uzelac testified that selling the company in connection with the divorce would be acceptable to him. His plan was to join the company, grow it, and reap the benefits. But it’s a tough and demanding business. He also noted that a buyer would want management to stay on for a period of time. Given the ages of management, management would be well-suited to do that now. [8RR19] Cliff testified “when somebody buys you, they’re buying your people. And so a buyer needs to see that somebody is going to help carry this business on to their company and make a transition. And I think we have -- the timing is right to take advantage of that and allow us -- because typically we’re going to have to make a commitment of three years -- at least one to three years, maybe five years, to -- to help transition a business to another company. And ask people, once they get into their mid 60s, to say, give me five more years or in their 70s, you’re asking a lot of a lot of people that I’m hopeful that we can be able to do this now, take advantage of it, share in what we’ve built 50/50 and be able to move on at this age of our lives and both enjoy our lives as we -- as we are able to.” [8RR33] Additionally, Gail valued the community estate at $158,746,694 [Px62, 12RR911], while Cliff valued it at $130,602,239 [12RR40]. Neither of these parties has to work to enjoy the rest of their lives in comfort.

Neither Party Wanted to Receive The Companies in the Divorce. Gail testified that

she wouldn't take the Companies in the divorce at more than one dollar. [4RR40-41] Before trial started, Cliff filed a pleading saying that he wanted the Court to sell the company if Kraus's 2nd appraisal would be used to determine the value of the Companies, or if the change-of-control bonuses were ignored, or if the fair market value of the community estate's interest exceeded $31,840,406. [5CR1873] Cliff testified that he wished for the Court to order the Companies sold to avoid protracted litigation and out of concern that the business could be awarded to him at an unrealistic value. [5RR99]

Costs of Sale. Gail asked the Court to award the Companies to Cliff and a judgment to her for half of $59,602,500. [Px62,12RR911] This would effectively allow Gail to sell her half of the community portion of the business without paying any costs of sale. In selling a business with the size and reach of the Fischer Companies, the costs of sale will be substantial. If the Companies were awarded to Cliff, with an offsetting judgment awarded to Gail for half of the appraised price, when Cliff eventually sells the Companies the costs of selling the former community estate's interest would fall on his shoulders alone. The reverse would be true if the Companies were awarded to Gail. If the Companies are sold as part of the property division, and the community's share of the net proceeds is divided equally, the costs of sale will be shared by the spouses equally. Considering the ages of the parties and their key employees, whichever spouse is awarded the Companies will likely have to

sell them in the not-too-distant future. Given that the Conversion Agreement requires an equal division of the net community estate, awarding one spouse the Companies and the other spouse a judgment for half of the appraised value would not be an equal division of the net community estate.

The Change-of-Control Bonuses. Under the Conversion Agreement, the community estate's interest in the Companies is subordinate to the profits participation interest promised or awarded to Company employees. [Schedule A, ¶ 1, 12RR19] Additionally, the Conversion Agreement provides that the obligations of the Fischer Companies would be paid solely from the community estate, not from Cliff or his separate property. [12RR11, ¶4.1] Michael Van Amburgh, a business valuator with an MBA from SMU who has done approximately 3,500 business appraisals, testified that the change-of-control bonus agreements reduced the value of the community estate's interest in the Companies because the obligation "is treated as a liability against the assets that the community estate holds." [8RR22-25] Were the Court to ignore the change-of-control bonuses in dividing the community estate, it would violate both the subordination and the indemnification provisions of the Conversion Agreement. The business appraisers estimated only the price at which the Companies could be sold to a willing buyer. They did not determine how the proceeds from sale would be allocated between the community estate and the four employees with change-of-control bonuses. In a subsequent report Bryan Rice set out the change-

of-control formulas and how they applied to the averaged value. [Rx56, 13RR408, App.10] Rice calculated that if the Rice-Hope average of $40,508,350 were the selling price, the change-of-control bonus would be $10,127,087.50 [Rx78, 13RR762, App.4], and if the Hope-Kraus 2nd opinion average of $58,181,000 were the selling price, the change-of-control bonus would be $14,545,250.00. [Rx78, 13RR762] Kraus issued a report saying that "[a] more appropriate analysis to determine the dilutive effect of the change of control bonuses would be to apply a probability-weighted expected return method (PWERM) to these potential future payments." [12RR499] This concept was not further explained. Kraus also said that, after subtracting closing costs, the change-of-control bonuses would lower Rice's numbers. Cliff agrees that the closing costs must be subtracted before the sale proceeds are split, and that subtracting closing costs would lower both the community estate's share and the four employees' share of the net proceeds. But the reduction would be in the same proportion, and whatever the sale price ends up being, the community (or former community) estate will receive 75% of the net proceeds and the four employees will receive 25% of the net proceeds. If the Companies are sold as part of the property division, with the net proceeds divided equally between the spouses, the cost of the change-of-control bonuses would be borne by the spouses equally. To award the Companies to Cliff, and a judgment to the Gail for 50% of the appraised price, would not be an equal division of the net community estate and it would violate the

requirement in the Conversion Agreement that the community estate must pay and hold Cliff and his separate property harmless from the Companies' obligations.

Capital Gain Tax. Under Internal Revenue Code Section 1041, a transfer of a capital asset between spouses, even in divorce, is not a taxable event. [7RR39] However, the recognition of taxable gain is not avoided; it is merely delayed. In *Baccus v. Baccus*, 808 S.W.2d 694, 700 (Tex. App.--Beaumont 1991, no writ), the court said: "Repeatedly, appellate courts have held that tax consequences stemming from the division of property as well as any unpaid tax liabilities are proper factors to be considered by the trial court in arriving at a fair and just division of the community properties. *McCartney v. McCartney*, 548 S.W.2d 435 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ history)." Additionally, Texas Family Code Section 7.008, Consideration of Taxes, provides:

> In ordering the division of the estate of the parties to a suit for dissolution of a marriage, the court may consider:
>
> (1) whether a specific asset will be subject to taxation; and
>
> (2) if the asset will be subject to taxation, when the tax will be required to be paid.

Upon sale of the Fischer Companies, a capital gain will be realized, and a Federal income tax will be due. Rice calculated that if the Rice-Hope averaged value of $40,508,350 is the sale price, the capital gain tax would be $9,164,987.30 which, after an offset for tax deduction for the bonuses paid to employees, would reduce the

spouses' net proceeds to $23,342,963.58. [Rx78, 13RR762; 7RR38]. If the Hope-Kraus 2nd opinion average of $58,181,000 is the sale price, the capital gain tax would be $13,371,078.00 which, after an offset for the deduction for bonuses paid to employees, would reduce the spouses' net proceeds to $33,319,174.50. [Rx78, 13RR762; 7RR-34] Kraus agreed that the current practice among knowledgeable family lawyers regarding future tax liability is to "give the information to the Court to consider since they can consider it." [8RR55] If the Companies were awarded to one spouse and offsetting assets or an offsetting judgment were awarded to the other spouse, the tax burden realized on the subsequent sale of the business would fall exclusively on the spouse who received the Companies in the divorce. If the Companies are sold as part of the property division, the tax burden would be shared equally by the spouses. Cliff believes that this $9 to $13 million capital gain tax was a motivating factor in Gail not wanting the businesses and trying to force Cliff to take them, so that Gail could cash out right away or over time – either way she would avoid the capital gain tax. Gail's attorney suggested that a capital gain tax could be avoided by passing the Companies down to the parties' children. [8RR41-42] To do that, however, would require that spouse to hold the Companies until s/he died. [8RR55]

Balancing the Foregoing Factors. Because we have no findings of fact and conclusions of law, we don't know how the foregoing considerations influenced the

Court's decision to order the Fischer Companies sold. However, this Court must presume that the Trial Court determined that it would not be just and right to make one spouse alone shoulder the burden of the costs of sale, change-of-control bonuses, and capital gain tax due upon sale of the Fischer Companies, and to give the other spouse a cost-free, bonus-free, and tax-free liquidation of their interest. That would not be an equal split of the net community estate. By ordering the Companies sold, these costs and obligations will be shared equally by both spouses, and will be paid by the community estate as the Conversion Agreement requires. The Trial Court did not abuse its discretion by ordering the Companies to be sold.

<u>The Need for a Balanced Portfolio.</u> Tyler Bethea is an investment advisor, with an MBA from the University of Texas, eight years with JPMorgan, now working for Crow Holdings. Bethea has been Cliff and Gail's portfolio manager since 2015. [8RR27] Bethea testified that, given Cliff and Gail's ages, their wealth should be moving to liquid assets. To award the Companies to one spouse and offset that by awarding more of the investment securities to the other spouse would reduce liquidity for the spouse receiving the Companies and "would increase the risk profile pretty substantially for the one with no liquidity in a private company." [8RR29-30] If the Companies were awarded to one spouse with an offsetting money judgment to the other, "you'd be adding leverage where it wasn't previously. And so that, in turn, would increase the risk profile" of the spouse receiving the Companies. [8RR29]

Bethea testified that, if you sell the business to a third party, the risk profile would stay the same for both spouses. [8RR31]

Concern About Possible Overvaluation. An independent company director, Jim Carreker, testified by deposition. He had been president of Wyndham Hotels, CEO of Trammel Crow Company, and CEO of the Bombay Company. [7RR86] He is currently the senior asset advisor to an equity firm that buys companies about the size of the Fischer Companies. [7RR96] While at Trammel Crow, Carreker studied the Fischer Companies for a possible acquisition. [7RR87] He joined the Fischer Companies as an independent director in 2017. [7RR86] Carreker related a conversation he had with an executive at JLL, a broker in the real estate field, about what JLL might pay to acquire a company like the Fischer Companies. The executive said 3.5 times EBITDA. [7RR97-98] Carreker said that he thought the Fischer Companies would sell from 3 to 3.5 times trailing EBITDA. [7RR98-99] Cliff also testified that the value of the Companies was 3x to 3.5x EBITDA. [7RR131] Exhibits Rx107 and Rx108 show EBITDA multiples applied to the Companies' 2017, 2018 and 2019 EBITDA (the 2019 figure is annualized based on the Companies' performance through April of 2019 [7RR122]) and the resulting values:

Year	EBITDA	3x	3.5x
2017	$11.9 million	$35.2 million	$41.69 million
2018	$8.9 million	$26.7 million	$31.15 million
2019	$6 million	$18 million	$21 million

The Companies' accountant projected an annualized EBITDA for 2019 of $4,251,000 *before* bonuses, about half of the 2018 EBITDA. [7RR122-123] The value of the Fischer Companies indicated by the views of two experienced businessmen, who acquire companies like the Fischer Companies using a multiple of EBITDA without all the complicated mathematics of the valuation experts, suggests that the estimates of value put forth by all three of the business valuators may be significantly too high.

<u>The Concern About Business Risk.</u> The parties' investment advisor Tyler Bethea noted that commercial real estate is a cyclical asset class with a higher risk profile. [8RR31] Brokerage fees have historically contributed the vast majority of the Companies' total revenue. [Hope appraisal, Px17, 12RR515] Kraus's first appraisal reflected that the Company's revenues dropped from 2016 to 2017 and then again from 2017 to 2018, and EBITDA margins had fluctuated and were expected to drop to a 5-year low in 2019. [12RR309-210] Rice testified that gross revenue went up 11% from 2013 to 2014, up 1.2% in 2015, up 7% in 2016, down 11% in 2017, and down 5.33% in 2018. [7RR13-14] Ted Uzelac testified that the Fischer Companies' revenue was down for the first half of 2019, due to their largest customer, Federal Express, deferring projects from which the Companies generate commissions. [8RR17] Larry Teel said that FedEx has deferred about 90 projects and that the account is "way down this calendar year." [7RR110] Chris Joyner said that revenues are down in 2019, "primarily due to our main account, FedEx." [7RR117] The

Companies' accountant Judy Durbin said that if the first four months of 2019 were annualized, then the Companies' performance during 2019 would be "far under" prior years. [7RR122] Independent director Jim Carreker indicated that the Companies' profitability had been less since he joined the Board in 2017. [7RR90]. He said that a buyer would be concerned about the Companies' concentration of revenue to a single customer. [7RR99] He also remarked that Federal Express had had several declining years. [7RR99] Hope testified that Federal Express has accounted for roughly 40 to 50 percent of business in recent years. [3RR37] Uzelac and Teel have the primary relationship with Fed Ex, and loss of Fed Ex as a customer is a risk if either of them left. [3RR38] Hope elevated the Companies' risk profile "due to CFC's high customer concentration and less diversified operations relative to the guideline companies ...." [Px17,12RR521] Rice elevated the Companies' risk profile due to "managerial discord, lack of succession planning, and high client concentration." [Rx53, 13RR386] Rice testified that awarding the Companies to one spouse and more liquid assets to the other increased risk, and given that three business appraisers are tens of millions of dollars apart on value, and two businessmen value the Companies at 3.5x EBITDA, "[t]here's a huge amount of uncertainty and risk associated with the business." [7RR80] Cliff testified that the most devastating outcome in the divorce would be for the business to be overvalued and forced on him or Gail, and if there was a downturn and the former spouse was unable to make the required payments, it would

destroy that person's financial situation. [8RR35]

The Jeopardy of High Corporate Debt. The Company president, Ted Uzelac, expressed concern about the Companies being burdened with a high debt as a result of the divorce. The Companies have been debt-free from 1985 to today. [8RR20] The Companies' independent director Jim Carreker also expressed a concern at a divorce outcome that created unbearable debt loads or lack of cash. [7RR91] If the Court were to award the Companies to one spouse and give a promissory to the other spouse for half the appraised value, such an order would immediately encumber the Companies with a liability equal to 50% of total equity. The Hope appraisal evaluated comparable "guideline" companies from the same industry [see 12RR544-545] and a debt-to-equity percentage of 50% would approach the highest of the comparable companies (54.8%), while the median percentage of debt-to-equity was 24.5% and the lowest was 0.8%. [Px17, p. 42; 12RR522 & 544; App.8] The Hope appraisal was premised on the Companies having a capital structure of 20% debt-to-equity. [Px17, pp. 20 & 41; 12RR522, 543; App.8] If the Court were, through the property division, to suddenly raise the Companies' percentage debt-to-equity from zero to 50%, it would invalidate an important premise of the Hope opinion of value. In a similar vein, the first Kraus appraisal evaluated comparable companies from the same industry and found the median debt-to-equity percentage was 27%. [Px12, 12RR352] The Kraus appraisal stated: "In this case, we compared the Company's capital structure to other companies

in the industry. We noticed that the capital structures among the industry varied greatly, whereas the Company's capital structure is debt-free as of the valuation date. For the purposes of this valuation, we have assumed that the Company will continue to operate on a debt-free basis." [Px12, 2RR319] Were the Court to suddenly change the Companies' debt-to-equity percentage from zero to 50%, it would invalidate an important premise of the Kraus appraisal.

If the Companies were to be awarded to Cliff, and Gail were to be awarded a promissory note for half of the Hope-Kraus second opinion average at $58,181,000, payable over four years, Cliff would be required to pay Gail $7,272,625 per year, plus interest of $872,715 in the first year, $654,536.25 in the second year, $436,357.50 in the third year, and $218,178.75 in the fourth year. This would fulfill Jim Carreker's fear of a "divorce outcome that created unbearable debt loads or lack of cash."

Relief Requested at the Close of Trial. Gail's attorney's closing argument is at 8RR60-71, 106-113. Cliff's attorney's closing argument is at 8RR71-106. Gail's attorney said that he would not touch on attorney fees: "we'll do that in writing." [8RR60] He also said that the Fischers have a $160 million estate. [8RR62 & 64] He indicated that Gail would be satisfied if the Companies were awarded to Cliff and for Gail to receive a payout or offsetting "cash and liquidity." [8RR64] He commented on the revenue projections used by the Companies in connection with the Savills offer and the Companies' reaction that the offer was too low. [8RR65-66] He also offered

for the Court to stretch Cliff's payout to Gail to whatever length of time the Court picked, even ten years, and for the Court to pick the interest rate, for the loan on her half of the Companies valued at $59 million. [8RR69] He also suggested the alternative of taking $10 million out of Cliff's share of the other community assets and reducing the promissory note to be paid to Gail over ten years. [8RR70] He noted that the Fischers' 2017 tax return showed income of just under $16 million. [8RR70]

Cliff's attorney described how awarding the Companies to Cliff and giving Gail offsetting property or a money judgment for half of their appraised value, without factoring in closing costs, bonuses, and capital gains tax, would violate two provisions of the Conversion Agreement: the clause saying that the conversion from separate to community property would not affect the rights of employees under the profits sharing agreements that were existing or had been promised to them, and the clause saying that the community estate would pay the obligations of the Companies and would hold Cliff and his separate property harmless therefrom. [8RR72-79] He also touched on debt burden of a large judgment, the imbalance in the parties' comparative risk profiles if the Companies were awarded to one spouse, the un-diversifying of Cliff's wealth if the Companies were awarded to Cliff, concerns about the three appraisers having overvalued the Companies considering EBITDA-based valuations coming from knowledgeable businessmen, the impact of the change-of-control bonuses, and the latent capital gain tax associated with the Companies. [8RR83-88, 102-104] He

pointed out that these imbalances and concerns were wiped away if the Companies were ordered sold as part of the property division. [8RR88-89, 101] He also pointed out that Gail's requested lien was abnormal, because normally a lien is imposed only on the seller's interest that is being conveyed (i.e., Gail's one-half of the Companies), while Gail is asking for a lien on her half of the Companies, plus Cliff's half of the Companies, plus all the non-homestead real estate awarded to Cliff. [8RR99]

Cases on Partitions Upon Divorce. Gayle has cited in her Brief several cases to support her argument that the Court could not properly order the Companies sold as part of the property division. [Appellant's Brief, p. 25-27]

Gail first cites *Hailey v. Hailey*, 331 S.W.2d 299 (Tex. 1960), for the proposition that a divorce court cannot compel a spouse to divest himself or herself of title to land. That case interpreted old Article 4638, V.A.T.S., which was repealed when Title 1 of the Texas Family Code became effective on January 1, 1975. Acts 1969, 61st Leg., p. 2707, ch. 888, § 1, eff. Jan. 1, 1970. The prohibition against divesting a spouse of title to land was not carried forward into the Family Code. The Court indicated that the prohibition of divestiture of title under Art. 4638 applied only the separate property land. *Hailey*, at 303. The case has no application to our facts or current law.

Gail next cites *Rayson v. Johns*, 524 S.W,2d 380 (Tex. Civ. App.–Texarkana 1975, writ ref'd n.r.e.), a trespass to try title action coupled with a partition proceeding. The appellate court ruled that the defendants were improperly denied their right to a jury

trial on the question of whether the land was incapable of a fair division in kind. *Id.* at 381-83. Trespass to try title cases are uniquely different from other litigation, and they even have their own Rules of Procedure. See Tex. R. Civ. P. 783-809. *Rayson v. Johns* has no application to the power of a court to order property sold incident to a divorce.

Gail next cites *Braswell v. Braswell*, 476 S.W.2d 444 (Tex. Civ. App.–Waco 1972, writ dism'd w.o.j.), a divorce where the court equally divided shares the spouses owned in a closely-held corporation. The wife cross-appealed, arguing that the husband always aligned with a third shareholder to achieve a majority vote, effectively making her a minority shareholder. *Id.* at 447. The appellate court quoted *Hailey*'s language that the court has a duty to determine if community property is subject to partition in kind. The appellate court then said that dividing company stock where the ex-husband is president and general manager and might retain control is not, standing alone, inequitable. The appellate court concluded, in light of the whole record, that there was no abuse of discretion. *Braswell* underscores the wide scope of the trial court's discretion in dividing the community estate in a manner that is just and right. It does not suggest that a different ruling, such as ordering the sale of husband's or wife's stock, would have been an abuse of discretion.

Gail next cites *Bowman v. Stephens*, 569 S.W.3d 210 (Tex. App.–Houston [1st Dist.] 2018, no pet.), a suit to partition realty between three adult children. The court

said that a co-owner seeking a partition by sale must demonstrate that a partition in kind is impractical or unfair, and if proven that the court should order a sale if partition in kind is "'not feasible, fair, practical, or equitable' given the parties' interests in the property." *Id.* at 220-21. The court cited *Carter v. Harvey*, 525 S.W.3d 420, 435 (Tex. App.--Fort Worth 2017, no pet.) which said that the "trial court is in [the] best position to determine equities between the parties." *Id.* The court wrote that "a trial court exercises broad discretion in balancing the equities involved in a case seeking equitable relief," and that "[w]hen facts are disputed, a trial court does not abuse its discretion if some of the conflicting evidence supports its decision." *Id*. at 223.

Gail next cites *Beavers v. Beavers*, 675 S.W.2d 296 (Tex. App.--Dallas 1984, no writ), where a divorce court awarded stock in a closely-held corporation to the husband and a disproportionate share of other property to the wife, including a money judgment payable over time. *Id* at 299-300. The appellate court found no abuse of discretion. *Id.* at 300. The case does not suggest that it would have been an abuse of discretion to make a different division, such as leaving spouses as co-owners or ordering the stock sold. (In this instance, other shareholders had an option to buy the stock at book value. *Id*. at 299.)

Gail next cites *Carter v. Harvey*, *supra* at 420, a partition suit between co-tenants in real estate. The trial court ordered partition by sale, and one party appealed. The

appellate court endorsed the trial court's implied determination that "a partition in kind was not feasible, fair, practical, or equitable," and said that "the trial court, being in the best position to determine the equities of the parties, had sufficient evidence from which it could decide that the interests of both parties would be best served by selling the property and dividing the proceeds.... The trial court could have rationally determined under these facts that any workable, practical in-kind partition would not have served either party's desire or best interest." *Id.* at 435-36.

In *Young v. Young*, 765 S.W.2d 440, 444 (Tex. App.--Dallas, 1988, no writ), a post-divorce enforcement suit, this Court held that the Civil Practice and Remedies Code provisions for receivers do not apply to divorce judgments and that "the appointment of a receiver is left to the discretion of the trial court." *Accord*, *Norem v. Norem*, 105 S.W.3d 213, 216 (Tex. App.--Dallas 2003, no pet.) ("the family code controls the appointment of receiver in a divorce suit").

Response to Gail's Second Issue Presented

> The award of brokerage account 2355 and G&C Capital Investments to Cliff was not an abuse of discretion and did not constitute an unequal division of the net community estate. Gail was awarded other assets and the mix of assets and liabilities awarded to each spouse resulted in a 50-50 split of the net community estate.

The Conversion Agreement provides that the assets and liabilities of the community estate shall be divided so that each spouse receives 50% of the net value of the community estate. The net value of the community estate is determined by

totaling the fair market value of all assets of the community estate and subtracting the total of all community liabilities then outstanding. [Jx1, 9.1, 12RR12] There is no requirement that each asset or each account be divided between the spouses. The Court's division was a 50-50 split of the net value of the community estate. [13RR860, line 239] No error was committed.

Response to Gail's Third Issue Presented

> Awarding the Fischer Ranch to Cliff without awarding Gail a judgment or offset for half of the community funds used to repair and improve the ranch was not an abuse of discretion. The value added by these repairs and improvements was included in the appraised value of the ranch. There is no reimbursement for using community funds to improve community property. Gail neither pled nor proved a claim for waste.

Gail complains on appeal that the Court abused its discretion by awarding the Fischer Ranch to Cliff without making an award to Gail of one-half of $1,884,482 of community funds used for repairs and improvements at the Ranch. [Appellant's Brief, p. 38] This claim was not pled and was not presented to the Court before rendition of judgment. Gail's attorney said that Gail was not making a waste claim. [10RR94] Both Cliff and Gail valued the Fischer Ranch in their respective Sworn Inventories at $4,875,000. [Cliff--12RR38, line 14; Gail--12RR26, "Real Property - Personal Residences] Gail's Proposed Division asked the Court to award the Ranch to Cliff at a value of $4,875,000. [Px8, 12RR274, line 7] This is exactly what the Court did. [13RR850] Neither Gail's Sworn Inventory [Jx2, 12RR25] nor her Proposed Division [Px8, 12RR275] listed an asset or a claim for half of $1,884,482 to compensate Gail

for community funds spent on the Ranch during marriage. Because Gail asked the Court to do what it did, awarding the Ranch to Cliff without an award to Gail for half of $1,884,482 was invited error, which cannot be used to attack the Court's judgment. In *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005), the Supreme Court wrote:"As we explained in *Hodges*, a party cannot complain on appeal that the trial court took a specific action that the complaining party requested, a doctrine commonly referred to as 'the invited error' doctrine").

Gail attached to her Motion for New Trial an Exhibit 5, entitled "Mr. Fischer's Spending From July 2017 - May 6, 2019. [5CR2591] This exhibit was not offered into evidence during trial. On its face, Exhibit 5 lists $92,133 in furniture and $1,759 for a saddle, neither of which constitutes repairs or improvements to the land. [5CR2591] Cliff made repairs to mitigate severe flood damage to a dam at the Ranch. [6RR59] Cliff also had a swimming pool and putting green constructed on the Ranch. [5RR55]. The value restored or added by these expenditures was included in the value of the Ranch. [5RR58] To include the value added by these expenditures and also award recovery to Gail for half of these expenditures would amount to double recovery. Gail did not plead or prove a claim of waste, or ask the Court to reconstitute the community estate under Tex. Fam. Code § 7.009. Gail has no grounds to claim error.

Response to Gail's Fourth Issue Presented

Gail listed the HighPeak investment in her Sworn Inventory at $1,000,000, and the balance of her line of credit at BNY Mellon at $1,980,000. The Court used

> Gail's numbers in dividing the property. There was no evidence that the balance of Gail's line of credit was more than $1,980,000, and her sworn representations to this amount constitute judicial admissions that she cannot contradict on appeal. Gail's assertion (Appellant's Brief p. 40) that it is undisputed that she incurred an additional $1,000,000 in debt is incorrect. Her claim is disputed; the record does not support and indeed disproves her claim.
>
> Cliff denies "depleting" five bank accounts and two brokerage accounts during the divorce. If that were true, Gail's remedy would be a waste claim and reconstitution of the community estate. Gail did not plead or prove a waste claim, so there was nothing to divide.

Gail claims on appeal that she financed an investment of $1,000,000 in HighPeak Energy Partners by drawing on a line of credit at BNY Mellon account 5500. The Court divided the HighPeak investment 50-50 [6CR2672, line 181], and allocated the BNY Mellon assets of $4,235,334 and debt of $1,980,000 to Gail [6CR2668, lines 99-100], all as part of an overall 50-50 division of the net community estate. Gail asserts that the Court failed to allocate $1,000,000 that she borrowed to invest in HighPeak, and therefore the entire interest in HighPeak should have been awarded to her. [Appellant's Brief, pp. 39-41]

Gail testified that she "pulled" a million dollars on her BNY Mellon line of credit to invest $1,000,000 in High Peak Energy Partners sometime around April. [5RR30-31] Gail asked that the HighPeak investment be awarded to her. [5RR22] Gail's Trial Summary listed the investment in HighPeak Energy Partners at $1,000,000 [Px5, 12RR267] and her line of credit at BNY Mellon at $1,870,000. [12RR270] Gail's Sworn Inventory and Appraisement dated May 7, 2019, listed her BNY Mellon line

of credit at $1,870,000. [Jx2, 12RR34] Gail's second Inventory and Appraisement listed HighPeak Energy Partners at a value of $1,000,000 [Px8, 12RR281, line 161], and her BNY Mellon line of credit at $1,980,000. [Px8, 12RR283, line 199] The Court, in the property division, adopted both numbers from Gail's Sworn Inventory (Px8), and awarded Gail her BNY Mellon account worth $4,235,334 along with the BNY Mellon line of credit balance of $1,980,000. [6CR2668], and divided the High Peak Energy Partners investment 50-50. [6CR1672, line 181] There is no evidence that the $1,000,000 Gail claims she drew on her BNY Mellon account was not included in the credit balance of $1,980,000, and thus was part of the Court's calculation of the net community estate. Beyond the lack of evidence to support this claim, Gail is judicially estopped by her Sworn Inventory from claiming that her BNY Mellon line of credit was greater than $1,980,000 at the time of trial, since both her Sworn Inventory and Trial Summary attested to the $1,980,000 number, resulting in that number being used by the Court in making the property division. In *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. Civ. App.--El Paso 1985, writ dism'd), the court wrote: "... as to those items which were listed as community property the sworn inventory and appraisement was a judicial admission as to the characterization of that property which would be accepted as true by the court and binding upon the party making it." In *Taylor v. Taylor*, No. 2-05-435-CV *2 n. 4 (Tex. App.–Fort Worth Aug. 31, 2007, pet. denied) (mem. op.), the court wrote: "Appellate courts have given

preclusive effect to admissions made in sworn inventories and appraisements filed with the trial court." In *Dutton v. Dutton*, 18 S.W.3d 849, 852 (Tex. App.--Eastland 2000, pet. denied) the court said: "In the present case, Jess filed a sworn inventory and appraisement listing the property as community property. That statement met the criteria set forth in *Griffin* and *Carr*, and it constituted a judicial admission." *See Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 n. 1 (Tex. App.--Austin 1994, no writ) ("Like pleadings, however, inventories may constitute judicial admissions.... A judicial admission establishes the issue in dispute as a matter of law on behalf of the adversary of the one making such admission.... The party making a judicial admission may not introduce evidence contrary to the admission.") (citations omitted). There is no evidence in the record to support Gail's claim that $1,000,000 in debt was not taken into account, and in fact she is judicially estopped from claiming that on appeal.

Under her Fourth Issue Presented Gail also complains that Cliff depleted five Independent Bank accounts and two brokerage accounts during the divorce proceedings. [Appellant's Brief at 41-42]. We cannot tell the date of the balances listed as "Pretrial" in Gail's Brief. The "Post-Trial" numbers are what the Court actually awarded to Cliff. [13RR852, line 68 & 853, lines 76-78] Gail did not plead or prove that Cliff committed waste of community assets or ask the Court to reconstitute the community estate under Tex. Fam. Code § 7.009. She did not raise this issue in her Motion for New Trial. [5CR2511] Gail did not preserve error. Tex.

R. App. P. 33.1(a) (as a prerequisite to presenting a complaint on appeal, the record must show a timely request, objection or motion that states the grounds and is overruled). Also, no error is shown.

Response to Gail's Fifth Issue Presented

> Gail joined the Fischer Companies into the divorce. The Companies filed a counterclaim for declaratory judgment that the profits participation agreements, including annual bonuses and change-of-control bonuses, with four key employees were valid obligations of the Companies. In the pretrial hearing and by stipulation in open court, Gail agreed that attorneys' fees would be decided by the Court based on affidavits. Fees are recoverable under the Declaratory Judgments Act. The Court acted within its discretion to award the Companies a judgment against Gail for attorneys' fees.

Kraus's 5-31-2019 appraisal said that the change-of-control bonus agreements "may have been executed without the knowledge or consent of Ms. Fischer. Consequently, these bonus payments may not be valid." [12RR499] On May 31st the Companies filed an amended pleading seeking a declaratory judgment that the annual and change-of-control bonus agreements were valid and enforceable. [2CR959] On June 13, Gail filed a general denial to these claims [4CR1739], and challenged whether the term "profits participation interest" as used in the Conversion Agreement included the change-of-control bonus agreements. [4CR1747-50] In her pleading, Gail asserted that the six agreements signed in 2017 were signed without her consent or knowledge [4CR1749], and she reserved the right to attack any agreements signed in 2017. Gail testified at trial that Uzelac, Joyner, Teel, and Kernochan did not have profits participation agreements with the Companies. [12RR79]

All parties, including the business defendants, agreed at the pretrial hearing that "the issues of attorneys' fees in connection with all parties' claims, including the business Defendants, will be submitted by affidavit." [Supp.RR49]

On the second day of trial, Gail stipulated that all of the bonus agreements were valid and enforceable [4RR6-15], and she agreed to a declaratory judgment to that effect. [4RR77] She also agreed that the question of the Companies' recovering attorneys' fees would decided on submitted affidavits. [4RR10-11] The Court had the discretion to award attorneys' fees to the Companies under the Declaratory Judgments Act. Tex. Civ. Prac. & Rem. Code § 37.009. The award of fees under the Act is reviewed under an abuse of discretion standard. *Oake v. Collin Cty.*, 692 S.W.2d 454, 455 (Tex. 1985). The Companies' attorney filed an affidavit in support of the fee request. [5CR2141] The Court acted within its discretion in assessing the Companies' attorneys' fees against Gail.

Gail also argues that the Companies' attorneys' fees should be assessed half against Cliff "so as to be equitable and just." [Appellant's Brief, p. 47] Cliff did not challenge the validity of the change-of-control bonus agreements or agreements signed in 2017. Cliff did not sue the Companies, nor did the Companies sue him. There is no basis on which to assess against Cliff the Companies' fees incurred in connection with their declaratory judgment action against Gail. It was not an abuse of discretion for the Court to make Gail and not Cliff liable for the Companies' fees.

PRAYER

Clifford Fischer prays that the Trial Court's judgment be affirmed, and for general relief.

/s/ *Richard R. Orsinger*

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this document was produced on a computer using Corel WordPerfect X8, and contains 14,914 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(3).

/s/ *Richard R. Orsinger*

CERTIFICATE OF SERVICE

I certify that a true copy of this Appellee's Brief was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or that party's lead counsel as follows:

Party: Gail Corder Fischer ("A.W.E.")

Date of service: June 23, 2020
Method of service: Via efile service and email
Lead attorney: Donald E. Godwin
Texas State Bar No. 08056500
Dgodwin@GodwinBowman.com
Shawn M. McCaskill
Texas State Bar No. 24007633
SMcCaskill@GodwinBowman.com
Stefanie M. McGregor
Texas State Bar No. 24037019
SmcGregor@GodwinBowman.com

Party: Counsel for Clifford Fischer & Company, et al.

Lawrence J. Friedman
Texas State Bar No. 07469300
lfriedman@fflawoffice.com

FRIEDMAN & FEIGER, L.L.P.
5301 Spring Valley Road, Suite 200
Dallas, Texas 75254
Telephone: (972) 788-1400

/s/ *Richard R. Orsinger*
Richard R. Orsinger
Attorney for Appellee,
Clifford R. Fischer ("D.M.F.N."), Appellee

APPENDIX

		Reference
1. Rx19	Clifford Fischer & Company Comparison of Appraised Values	13RR91
2. Rx20	Fischer Management Services, Inc. Comparison of Appraised Values	13RR92
3. Rx83	Gail Fischer's email re: Larry Teel's Profit Sharing Agreement	13RR763
4. Rx78	Calculation of Tax Upon Sale of Clifford Fischer & Company	13RR762
5. Rx106	Showing Effect of Changing Parameters on Valuations	13RR832
6. Rx106a	Showing Effect of Changing Parameters on Pairing of Appraisals	13RR833
7. Px12 Rx75	Kraus Appraisal Exh. B.6 Income Approach: Discounted Cash Flow Method Rice's Analysis of Kraus's Discounted Cash Flow Projections	12RR350 13RR760
8. Px17	Hope's Appraisal: Fischer Companies' debt-to-equity percentage	12RR505, 522, 543 & 544
9. Pleading	Table Summarizing Profits Sharing Percentages of Four Key Employees	3CR961-962
10. Rx56	Rice Report on Effect of Change-of-Control Bonuses on Valuations	13RR408

App. 1

Clifford Fischer & Company (CFC)

CLIFFORD R. FISCHER's independent appraisal report

(Bryan Rice – February 6, 2019):

$30,494,700.00

GAIL CORDER FISCHER's independent appraisal report

(Whitley Penn – February 6, 2019):

$74,420,000.00

Third, neutral appraisal report

(Stout – April 15, 2019):

$50,552,000.00

Independent appraisal values compared to third, neutral appraisal value:

Appraiser	Value		Proximity to Stout's Value		
Bryan Rice	$	30,494,700.00	$	20,027,300.00	under
Whitley Penn	$	74,220,000.00	$	23,698,000.00	over

Calculation of fair market value of 100% equity interest in the CFC entities:

<u>$30,494,700.00 (Rice's Value) + $50,552,000.00 (Stout's Value)</u>
2 **= $40,508,350.00**

Profits Participation Interests: $10,720,394.00

$40,508,350.00 (Binding Value) - $10,720,394.00 (Profits Participation Interests)
=$29,787,956.00

EXHIBIT
R-19

App. 2

Fischer Management Services, Inc. (FMSI)

CLIFFORD R. FISCHER's independent appraisal report

(Bryan Rice – February 6, 2019):

$554,900.00

GAIL CORDER FISCHER's independent appraisal report

(Whitley Penn – February 6, 2019):

$4,650,000.00

Third, neutral appraisal report

(Stout – April 15, 2019):

$2,503,000.00

Independent appraisal values compared to third, neutral appraisal value:

Appraiser	Value	Proximity to Stout's Value	
Bryan Rice	$ 554,900.00	$ 1,948,100.00	under
Whitley Penn	$ 4,650,000.00	$ 2,147,000.00	over

Calculation of fair market value of 100% equity interest in the FMSI entity:

$$\frac{\$554,900.00 \text{ (Bryan Rice's)} + \$2,503,000.00 \text{ (Stout's Value)}}{2} = \$1,528,950.00$$

App. 3

Pam Kirychuk

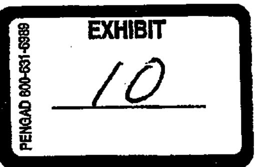
From: Gail Corder Fischer
Sent: Monday, November 16, 2015 8:59 AM
To: Coleman, Russ
Subject: RE: Help!

Thank you. Also, on another note, what are your thoughts about preparing bonus documents to Larry now versus waiting on Ted...Ted shouldn't be the driver of whether everyone gets their agreement in writing... If you agree, that we could/should move forward, I will give you Larry's bonus participation business terms...

Gail Corder Fischer
Executive Vice Chairman

FISCHER
D: 972.980.6117 | F: 972.980.7110
13727 NOEL ROAD, SUITE 900 | DALLAS | TX | 75240
fischercompany.com | fischertechnology.com | whyfischer.com

From: Coleman, Russ [mailto:rcoleman@meadowscollier.com]
Sent: Monday, November 16, 2015 8:56 AM
To: Gail Corder Fischer
Subject: RE: Help!



GAIL - On it. Regards,

MEADOWS COLLIER
ATTORNEYS AT LAW
MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

Russ Coleman
Russell F. Coleman, P.C., Partner

Meadows, Collier, Reed, Cousins,
Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202

Phone:	214.744.3700	BIO
Direct:	214.749.2406	E-MAIL
Toll Free:	800.451.0093	WEB SITE
Fax:	214.747.3732	VCARD

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6-25-19
Exhibit
R-83
Cause No. DF-18-11265

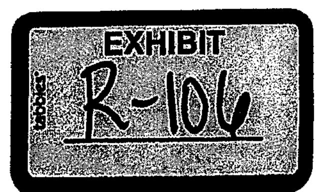
App. 4

Net Proceeds from Sale of Businesses	Adjustment	Value per Contract	Value Using WP's 2nd Opinion
Value of Business		40,508,350.00	58,181,000.00
Capital Gains Tax (after $2MM basis adjustment)	23.80%	(9,164,987.30)	(13,371,078.00)
Change of Control Obligation (25% of Gross Value)	25.00%	(10,127,087.50)	(14,545,250.00)
Tax Benefit for Change of Control Payment	21.00%	2,126,688.38	3,054,502.50
Net Proceeds to Fischer Estate		**23,342,963.58**	**33,319,174.50**

App. 5

CFC Values with and Without Adjustments; effect of changes

		BCR	SRR	WP	AVG
1	Original Values	$30,494,703	$50,522,000	$72,280,000	$40,508,350
2	WP Supplemental	$30,494,703	$50,522,000	$ 65,840,000	$58,181,000
3	Original; Factor in Annual Bonus to all appraisals	$28,040,926	$38,627,833	$54,260,698	$33,334,380
4	Original Value less 25% Personal Goodwill to Stout	$30,494,703	$42,141,429	$72,280,000	$36,318,066
5	Original Value less 50% Personal Goodwill to Stout	$30,494,703	$36,660,953	$72,280,000	$33,577,828
6	Add $5.8MM Cash to Stout	$30,494,703	$56,321,906	$72,280,000	$64,300,953
7	Factor in Annual Bonus				
	with: 25% Personal GW to Stout	$28,040,926	$33,220,875	$54,260,698	$30,630,901
	with: 50% Personal GW to Stout (Lines 3 & 4)	$28,040,926	$27,813,917	$54,260,698	$27,927,422
8	Factor in Annual Bonus; add back $5.8MM to Stout				
	with: 25% Personal GW to Stout	$28,040,926	$37,570,875	$54,260,698	$32,805,901
	with: 50% Personal GW to Stout	$28,040,926	$30,713,917	$54,260,698	$29,377,422



App. 6

CFC Values with and Without Adjustments; effect of changes

		BCR	SRR	WP	AVG
1	Original Values	$30,494,703	$50,522,000	$72,280,000	$40,508,350
2	WP Supplemental	$30,494,703	$50,522,000	$ 65,840,000	$58,181,000
3	Original; Factor in Annual Bonus to all appraisals	$28,040,926	$38,627,833	$55,799,143	$33,334,380
4	Original Value less 25% Personal Goodwill to Stout	$30,494,703	$ 42,141,429	$72,280,000	$36,318,066
5	Original Value less 50% Personal Goodwill to Stout	$30,494,703	$36,660,953	$72,280,000	$33,577,828
6	Add $5.8MM Cash to Stout	$30,494,703	$ 56,321,906	$72,280,000	$64,300,953
7	Factor in Annual Bonus				
	with: 25% Personal GW to Stout	$28,040,926	$ 33,220,875	$55,799,143	$30,630,901
	with: 50% Personal GW to Stout (Lines 3 & 4)	$28,040,926	$ 27,813,917	$55,799,143	$27,927,422
8	Factor in Annual Bonus; add back $5.8MM to Stout				
	with: 25% Personal GW to Stout	$28,040,926	$37,570,875	$55,799,143	$32,805,901
	with: 50% Personal GW to Stout	$28,040,926	$30,713,917	$55,799,143	$29,377,422

App. 7

In the Matter of the Marriage of Fischer
CFC Entities (CFC, FPA, FPI, FFI)
Exhibit B.6: Income Approach: Discounted Cash Flow Method

	Adjusted						Forecasted					
For the Period Ended	**12/31/2013**	**12/31/2014**	**12/31/2015**	**12/31/2016**	**12/31/2017**	**12/31/2018**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Terminal**
Revenue	47,144,644	57,424,869	58,100,070	62,083,123	55,280,604	52,335,678	55,952,009	59,588,889	63,164,223	66,638,255	69,636,976	72,422,455
Cost of Goods Sold	21,409,339	26,275,829	30,614,502	29,868,481	24,692,755	33,248,137	34,484,134	35,753,334	37,266,891	38,650,188	39,693,077	40,918,687
Gross Profit	25,735,305	31,149,040	27,485,568	32,214,643	30,587,849	19,087,540	21,467,874	23,835,556	25,897,331	27,988,067	29,943,900	31,503,768
GP Margin	*54.6%*	*54.2%*	*47.3%*	*51.9%*	*55.3%*	*36.5%*	*38.4%*	*40.0%*	*41.0%*	*42.0%*	*43.0%*	*43.5%*
Labor Expenses	12,308,152	16,336,082	14,351,265	17,494,257	14,947,259	6,097,316	8,795,372	9,117,100	9,600,962	10,062,376	10,445,546	10,790,946
Other Operating Expenses	3,009,750	3,185,886	3,554,691	4,068,291	4,017,717	4,043,240	4,521,390	4,767,111	4,989,974	5,197,784	5,362,047	5,504,107
EBITDA	10,417,403	11,627,072	9,579,612	10,652,094	11,622,873	8,946,984	8,151,112	9,951,345	11,306,396	12,727,907	14,136,306	15,208,716
EBITDA Margin	*22.1%*	*20.2%*	*16.5%*	*17.2%*	*21.0%*	*17.1%*	*14.6%*	*16.7%*	*17.9%*	*19.1%*	*20.3%*	*21.0%*
Depreciation	128,703	539,807	491,917	167,683	43,622	158,708	112,279	118,779	125,169	119,099	124,458	129,437
Amortization	-	-	-	-	-	-	-	-	-	-	-	-
Operating Income (Loss)	10,288,700	11,087,265	9,087,695	10,484,412	11,579,251	8,788,276	8,038,833	9,832,565	11,181,227	12,608,808	14,011,848	15,079,279
Other Income (Expense)	-	-	-	-	-	-	-	-	-	-	-	-
EBIT	10,288,700	11,087,265	9,087,695	10,484,412	11,579,251	8,788,276	8,038,833	9,832,565	11,181,227	12,608,808	14,011,848	15,079,279
Interest Expense	-	-	-	-	-	-	-	-	-	-	-	-
Pre-Tax Income (Loss)	10,288,700	11,087,265	9,087,695	10,484,412	11,579,251	8,788,276	8,038,833	9,832,565	11,181,227	12,608,808	14,011,848	15,079,279
Income Tax Expense (Benefit)	2,160,627	2,328,326	1,908,416	2,201,726	2,431,643	1,845,538	1,688,155	2,064,839	2,348,058	2,647,850	2,942,488	3,166,649
Net Income (Loss)	8,128,073	8,758,940	7,179,279	8,282,685	9,147,608	6,942,738	6,350,678	7,767,727	8,833,169	9,960,958	11,069,360	11,912,630
Plus: Depreciation							112,279	118,779	125,169	119,099	124,458	129,437
Less: Increases in Working Capital							(112,609)	(72,738)	(71,507)	(69,481)	(59,974)	(55,710)
Less: Capital Expenditures							(100,000)	(106,500)	(112,890)	(119,099)	(124,458)	(129,437)
Cash Flow to Invested Capital							6,250,349	7,707,268	8,773,942	9,891,477	11,009,385	11,856,921
Discount Rate							15.72%					
Less: Sustainable Growth Rate							4.00%					
Capitalization Rate							11.72%					
Terminal Value												101,136,012
Future Values of Cash Flows							6,250,349	7,707,268	8,773,942	9,891,477	11,009,385	101,136,012
Number of Discount Periods							0.50	1.50	2.50	3.50	4.50	4.50
Present Values of Cash Flows							5,810,226	6,191,085	6,090,299	5,933,113	5,706,398	52,420,939
Value of Operating Invested Capital							82,152,059					
Less: Interest-Bearing Debt							-					
Indication of Value							82,152,059					
Indication of Value - DCF Method							**82,152,000**					

5% 5% 5% 5%

Whitley Penn Discounted Cash Flow Review

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Gross Rev	$ 47,144,644	$ 57,424,869	$ 58,100,070	$62,083,123	$ 55,280,604	$ 52,335,678	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Change from Year to Year		21.81%	1.18%	6.86%	-10.96%	-5.33%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
					Avg	$ 55,394,831				[illegible]		[illegible]
Net ncome	$ 8,182,073	$ 8,758,940	$ 7,179,279	$ 8,282,685	$ 9,147,608	$ 6,942,738	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
					Avg	$ 8,082,221				[illegible]		[illegible]
Change from Year to Year		7.05%	-18.03%	15.37%	10.44%	-24.10%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Whitley Penn Discounted Cash Flow Review

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Gross Rev	$ 47,144,644	$ 57,424,869	$ 58,100,070	$62,083,123	$55,280,604	$ 52,335,678	$ 55,952,009	$ 59,588,889	$ 63,164,223	$ 66,638,255	$ 69,636,976	$ 72,422,455
Change from Year to Year		21.81%	1.18%	6.86%	-10.96%	-5.33%	6.91%	6.50%	6.00%	5.50%	4.50%	4.00%
					Avg	$ 55,394,831				% point change 2024 from historical average		30.74%
Net ncome	$ 8,182,073	$ 8,758,940	$ 7,179,279	$ 8,282,685	$ 9,147,608	$ 6,942,738	$ 6,350,678	$ 7,767,727	$ 8,833,169	$ 9,690,958	$ 11,069,360	$ 11,912,630
					Avg	$ 8,082,221				% point change 2024 from historical average		47.39%
Change from Year to Year		7.05%	-18.03%	15.37%	10.44%	-24.10%	-8.53%	22.31%	13.72%	9.71%	14.22%	7.62%

App. 8

The Fischer Companies

Valuation of a 100% Interest in Clifford Fischer & Company Inc., Fischer Management Services, Inc., and Fischer Visual Manager, LLC as of December 31, 2018

Issued: April 15, 2019

PRIVILEGED AND CONFIDENTIAL

EXHIBIT
P-17
6-24-19

STOUT

Capital Structure (Debt / EV)	
Guideline Companies	
High	54.8%
Median	17.5%
Average	24.5%
Minimum	0.8%
Company Actual Capital Structure	0.0%
Selected	**20.0%**

Source: Exhibit C.3

An owner of 100% of the equity of the CFC Entities would have the ability to alter the capital structure of the business. As such, based on the industry data presented in the previous table, we selected a capital structure of 20.0% debt and 80.0% equity for the purpose of determining the CFC Entities' WACC.

WACC Conclusion

Based on the selected required return on equity, cost of debt, and capital structure, we estimated a WACC of 15.0% for the CFC Entities.

Long-Term Growth Rate

An estimated long-term growth rate should reflect the anticipated long-term growth rates of the industry and the economy, as well as other relevant company-specific factors. We considered a 10-year forecasted inflation rate of 2.2% as an initial lower bound for a long-term growth rate, and a nominal GDP growth rate of 4.3% as an initial upper bound. It is important to note that the durations of the forecast periods for the nominal GDP growth rates vary, and the longest period is ten years. The long-term growth rate assumption, in contrast, is intended to be a rate of growth into perpetuity. We then compared our initial range of long-term growth rates to the expected real growth rate of the real estate sales and brokerage industry over the next five years of 2.8%, which indicates a nominal growth rate of approximately 5.0%.

Finally, we considered the CFC Entities' historical revenue CAGR from 2014 to 2018 of negative 1.9% and relevant factors impacting its long-term growth potential such as hiring a new CRO that will focus on client growth and delivery, and the geographic expansion to Europe.

Based on consideration of the factors described above, we estimated the long-term growth rate of the free cash flows to be 3.0%.

CCF Method Conclusion

Our application of the CCF Method indicated the CFC Entities' Enterprise Value to be $50.4 million. Refer to Exhibit A.7.

Weighted Average Cost of Capital

Exhibit A.8

Required Return on Equity

Modified Capital Asset Pricing Model

		Notes		
1	Risk-Free Rate of Return	[a]		2.9%
2	Long-Term Market Equity Risk Premium	[b]	6.0%	
3	Selected Equity Beta	[c]	1.05	6.3%
4	Small Stock Risk Premium	[b]		5.2%
5	Company-Specific Risk Premium	[d]		3.0%
6	**Concluded Required Return on Equity**			**17.4%**

Cost of Debt

Long-Term Cost of Debt

7	Risk-Free Rate of Return	[a]		2.9%
8	Add: Credit Spread	[e]		3.0%
9	Long-Term Cost of Debt			5.9%
10	Less: Income Tax Factor		21.0%	-1.2%
11	**Concluded Cost of Debt**			**4.6%**

Weighted Average Cost of Capital

12	Equity Allocation of Capital Structure	[c]	80.0%	13.9%
13	Debt Allocation of Capital Structure	[c]	20.0%	0.9%
14	**Weighted Average Cost of Capital (Rounded)**			**15.0%**

[a] 20-year U.S. Treasury bond yield as of the Valuation Date.
[b] Based on: *Valuation Handbook: U.S. Guide to Cost of Capital,* Duff & Phelps, LLC.
[c] Based on the results of comparable public companies. Refer to Exhibit A.9.
[d] Reflects customer concentration risk and producer concentration risk.
[e] Based on the historical spread between the prime rate and the 90-day Treasury Bill (approximately 300 basis points).

Capital Structure and Beta Analysis

Exhibit A.9

In Millions of U.S. Dollars

	Guideline Companies [a]	Notes	Ticker	LTM Net Sales	LTM EBITDA	LTM EBITDA Margin	Current Debt & Pfd. to EV [b]	Current Debt & Pfd. to Equity [c]	Current Cash to TIC [c]	Beta [d][e] β_L	β_U	β_{RL}
1	CBRE Group, Inc.		CBRE	$ 21,340.1	$ 1,578.3	7.4%	19.8%	23.3%	4.7%	1.16	1.06	1.26
2	Colliers International Group Inc.		CIGI	2,825.4	302.1	10.7%	17.5%	22.8%	3.2%	0.84	0.76	0.91
3	Cushman & Wakefield plc		CWK	8,219.9	303.2	3.7%	54.8%	86.7%	15.3%	0.95	0.60	0.72
4	Jones Lang LaSalle Incorporated		JLL	9,089.5	974.6	10.7%	15.9%	17.4%	7.1%	1.14	1.09	1.30
5	Marcus & Millichap, Inc.		MMI	814.8	118.8	14.6%	0.8%	0.6%	26.4%	1.05	1.43	1.71
6	Newmark Group, Inc.		NMRK	2,047.6	322.0	15.7%	46.2%	106.7%	5.0%	0.68	0.38	0.45
7	Savills plc	[f]	SVS	2,244.9	190.7	8.5%	16.7%	15.5%	20.0%	0.66	0.75	0.89
8	Upper Quartile			8,654.7	648.3	12.7%	33.0%	55.0%	17.7%	1.09	1.07	1.28
9	Median			2,825.4	303.2	10.7%	17.5%	22.8%	7.1%	0.95	0.76	0.91
10	Average			6,654.6	541.4	10.2%	24.5%	39.0%	11.7%	0.93	0.86	1.03
11	Lower Quartile			2,146.3	246.4	7.9%	16.3%	16.5%	4.9%	0.76	0.67	0.81
12	**Selected**	[g]					**20.0%**					**1.05**

[a] Source: S&P Capital IQ, Inc.
[b] EV is presented on a cash-free basis.
[c] Equity and TIC (Total Invested Capital) are presented on a cash-inclusive basis.
[d] Betas represent five-year betas based on weekly volatility measurements.
[e] Unlevered and relevered betas are calculated using the following formulas:

Where:
β_u = Unlevered beta
β_L = Levered beta
β_{RL} = Relevered beta
D = Debt plus preferred stock of Guideline Company
E = Market value of equity of Guideline Company
t = Applicable Tax rate
Cash = Cash and cash equivalents of Guideline Company
TIC = Total invested capital (i.e., EV plus cash)
Target D/E = 25.0%

$$\beta_u = \left[\frac{\beta_L}{1 + Actual\frac{D}{E}(1-t)}\right] \div \left[1 - \frac{Cash}{TIC}\right]$$

$$\beta_{RL} = \beta_u \times \left(1 + Target\frac{D}{E}(1-t)\right)$$

[f] Reported results are converted to USD at the prevailing exchange rate as of the Valuation Date.
[g] We selected inputs to the CAPM model based on the factors described below:
Debt Weighting: Selected based on the median and average of the guideline public companies
Beta: Selected based on the median and average of the guideline public companies

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10. On or about August 2, 2017, the CFC Entities executed *Annual Operating Bonus Agreements* with Ted Uzelac, Larry Teel, and Chris Joyner. These *Annual Operating Bonus Agreements* memorialize the agreements reached between these three executives and the CFC Entities prior to February 4, 2008 regarding their annual operating bonuses.

11. That same day, the CFC Entities also executed *Change in Control Bonus Agreements* with Ted Uzelac, Larry Teel, and Chris Joyner. These *Change in Control Bonus Agreements* memorialize the agreements reached between these three executives and the CFC Entities prior to February 4, 2008 regarding their change in control bonuses.

12. Ted Uzelac, Larry Teel, Chris Joyner, and Jeff Kernochan have been employed with the CFC Entities since prior to the execution of the Post-Nuptial Agreement on February 4, 2008. Prior to that date, the CFC Entities agreed to annual bonuses and a change in control bonus with each of these four executives. The annual bonuses and mandatory one-time bonus to be paid in the event of a change in control of the CFC Entities are collectively "profits participation interests." These profits participation interests can be summarized as follows:

Executive	Annual Bonus	Change in Control Bonus
Ted Uzelac	15% of first $1,000,000 in annual profits 20% of annual profits of CFC in excess of $1,000,000 10% of annual profits of Fischer Solutions, Inc.	15% of first $1,000,000 of proceeds from sale of CFC 20% of proceeds from sale of CFC in excess of $1,000,000 10% of proceeds from sale of Fischer Solutions Inc.
Larry Teel	2.5% of annual profits of CFC	2.5% of proceeds from sale of CFC

Larry Teel, Cont'd.	25% of annual profits of Fischer Pennsylvania, Inc.	25% of proceeds from sale of Fischer Pennsylvania, Inc.
Chris Joyner	2.5% of annual profits of CFC 25% of annual profits of Fischer Financial, Inc.	2.5% of proceeds from sale of CFC 25% of proceeds from sale of Fischer Financial, Inc.
Jeff Kernochan	41% of annual profits of Fischer Pacific, Inc.	41% of proceeds from sale of Fischer Pacific, Inc.

13. In accordance with the terms of the profits participation interests, the annual bonuses have been faithfully paid in their current form each and every year since at least 2003. In fact, GAIL CORDER FISCHER, herself, has often approved and authorized the annual bonuses paid to Ted Uzelac, Larry Teel, and Chris Joyner in this manner. Moreover, the Post-Nuptial Agreement – signed and consented to by GAIL CORDER FISCHER over a decade ago – expressly references and preserves these profits participation interests:

SCHEDULE A

Separate Property Converted to Community Property

1. The business known as Clifford Fischer & Company, a Texas corporation, its successors or assignees, including all assets of the business whether tangible or intangible, and all rights and privileges, past, present, or future, arising out of or in connection with the business, but not including any profits participation interest promised or awarded to Company employees in the past, which interests shall not be diminished or affected by the execution of this Agreement.

14. By signing the Post-Nuptial Agreement, GAIL CORDER FISCHER acknowledged the existence of these profits participation interests. Therefore, although the terms of three of these profits participation interests were not memorialized in writing until August 2, 2017, GAIL

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Bryan C. Rice, CPA-ABV, ASA, CFP, MST

7 Burton Hill, Weatherford, Texas 76087
Office/Cell: 817-602-0413 Facsimile: 817-887-4137
brice@bcrbvl.com

May 17, 2019

Mr. Robert Epstein, Esq.
McClure Family Law
8115 Preston Road, Suite 270
Dallas, Texas 75225

Re: Cause No. DF-18-11265; In the 254th Judicial District Court of Dallas County; In the Matter of the Marriage of A.W.E. and D.M.F.N.

Dear Mr. Epstein,

In relation to the above-referenced matter, we understand that Stout determined a divisible fair market value (FMV) for Clifford Fischer & Company (the "Company") as of December 31, 2018 at $50,522,000 after accounting for any of Mr. Fischer's personal goodwill. Compared to Whitley Penn's opinion of $72,280,000[1], our (BCR) opinion of $34,494,700[2] is closer to Stout's opinion as calculated below:

Appraiser	FMV	Difference
Stout	$50,522,000	
BCR	$30,494,700	$ 20,027,300
Whitley Penn	$72,280,000	$ 21,758,000

Thus, the prior agreed-to calculation to determine divisible FMV for the Fischer estate is the average of Stout and BCR as follows:

Appraiser	Divisible FMV
Stout	$50,522,000
BCR	$30,494,700
Average	$40,508,350

It should be noted that *all* these opinions of value were determined on a non-diluted basis, assuming that all 100% of the value of Company's equity was available to Mr. and Mr. Fischer.

The Company has a long-standing and prior agreed to "Change in Control Bonus" agreement with three key executives - Ted Uzelac, Larry Teel, and Chris Joyner. Among other things, this agreement promises a one-time bonus (in the form of "profit participation interests") in the event of a change in control of the Company.

[1] This opinion of divisible fair market value is *also* after accounting for any personal goodwill in the Company.
[2] Ibid.

Schedule A of the *Agreement to Convert Separate Property to Community Property and Other Post-Nuptial Contracts* notarized and dated February 4, 2008 that was entered into by you and Mrs. Fischer voluntarily, after each receiving advice of independent counsel, states the following:

SCHEDULE A
Separate Property Converted to Community Property

> *The business known as Clifford Fischer & Company, a Texas corporation, its successors or assignees, including all assets of the business whether tangible or intangible, and all rights and privileges, past, present, or future, arising out of or in connection with the business,* ***but not including any profits participation interest promised or awarded to Company employees in the past, which interests shall not be diminished or affected by the execution of this Agreement.***

While we are not opining to the validity or enforceability of the post-nuptial agreement, we are assuming this provision should be taken account in a determination of the value of Clifford Fischer & Company on a fully diluted basis. In essence, Mr. and Mrs. Fischer agreed to consider the Company as a community property asset *subject to dilution by the three key executives' change in control payment.* Nothing has come to our attention that would support the notion that this obligation is not still in effect as of this day. Moreover, upon the divorce of one of the key executives, this the executive's change in control payment would most likely be considered an asset of his marital estate.

Based on our review of "Section 3: Agreement and Term" of the *Annual Operating Bonus Agreement* for Ted Uzelac, Larry Teel, and Chris Joyner, the profit participation interests when a change of control occurs are as follows:

1. Ted Uzelac receives 15% of the first $1,000,000, then 20% of the remainder value.
2. Larry Teel receives 2.5% of the first $1,000,000, then 2.5% of the remainder value.
3. Chris Joyner receives 2.5% of the first $1,000,000, then 2.5% of the remainder value.
4. Clifford and Gail Fischer receive 80% of the first $1,000,000 and 75% of the remainder value.

Based on the standard of fair market value that stipulates both the hypothetical buyer and seller have reasonable knowledge of *all the relevant facts*, these profit participation interests materially affect the amount of value available to the community estate as a result of the sale of company. In short, the Average Divisible Fair Market Value must be considered net of the one-time change of control of bonus, on a "fully diluted basis." Should a buyer purchase the Company, the monies available to the community estate of Fischer will not be 100% of the purchase price, but rather approximately 75% calculated as follows:

Agreed Upon Value of CFC:		$40,508,350
Profit Participation Interests Percentages		
Allocation of first $1,000,000:		$ 1,000,000
Ted Uzelac	15.0%	$ 150,000
Larry Teel	2.5%	$ 25,000
Chris Joyner	2.5%	$ 25,000
Clifford & Gail Fischer	80.0%	$ 800,000 (A)
Allocation of Remainder of Value:		$39,508,350
Ted Uzelac	20.0%	$ 7,901,670
Larry Teel	2.5%	$ 987,709
Chris Joyner	2.5%	$ 987,709
Clifford & Gail Fischer	75.0%	$29,631,263 (B)
Total Value to Clifford & Gail Fischer		$30,431,263 (A) + (B)

Math Check		
Total Value to 3 Key Executives:	*$10,077,088*	24.9%
Total Value to Clifford & Gail Fischer:	*$30,431,263*	75.1%
Total Value:	*$40,508,350*	100.0%

Based on consideration of all the facts, circumstances, and analyses outlined in this letter, it is our opinion that the divisible fair market value of the Fischer's Interest in the Company on a fully-diluted basis is:

THIRTY- MILLION FOUR HUNDRED THRITY-ONE THOUSAND DOLLARS

$30,431,000 (rounded)

My work in this matter is ongoing and my opinion is subject to change based on newly produced facts and data. If any new facts and data regarding the Company are produced, it may alter my valuation opinion.

Sincerely yours,

Bryan C. Rice, CPA·ABV, CFP, ASA

ATTACHMENT A

STATEMENT OF GENERAL ASSUMPTIONS & LIMITING CONDITIONS

This appraisal report has been made with the following general assumptions and limiting conditions:

1. Information furnished by others, upon which all or portions of this report are based, is believed to be reliable, but has not been verified in all cases. No warranty is given as to the accuracy of such information.
2. This report has been made only for the purpose stated and shall not be used for any other purpose. Neither this report nor any portions thereof (including without limitation any conclusions as to value, the identity of Bryan C Rice, CPA (BCR) or any individuals signing or associated with this report, or the professional associations or organizations with which they are affiliated) shall be disseminated to third parties by any means without the prior written consent and approval of BCR.
3. This report cannot be included, or referred to, in any Securities and Exchange Commission filings or other public documents.
4. Neither BCR nor any individuals signing or associated with this report shall be required by reason of this report to give testimony or appear in court or other legal proceedings unless specific arrangements therefore have been made.
5. The allocation, if any, in this report of the total appraisal between components of the property, applies only to the program of utilization stated in this report. The separate values for any component may not be applicable for any other purpose and must not be used in conjunction with any other appraisal.
6. No investigation has been made of, and no responsibility is assumed for, the legal description or for legal matters, including title or encumbrances. Title to the property is assumed to be good and marketable unless otherwise stated. The property is further assumed to be free and clear of any or all liens, easements, or encumbrances unless otherwise stated.
7. The opinion of value is predicated on the financial structure prevailing as of the date of appraisal.
8. No responsibility is taken for changes in market conditions and no obligation is assumed to revise this report to reflect events or conditions that occur subsequent to the date of appraisal.
9. Full compliance with all applicable federal, state, and local zoning, use, environmental, and similar laws and regulations is assumed, unless otherwise stated.
10. It is assumed that all required licenses, certificates of occupancy, consents, or other legislative or administrative authority from any local, state, or national government or private entity or organization have been or can be obtained or renewed for any use on which the value estimate contained in this report is based.

ATTACHMENT C
APPRAISER'S CERTIFICATION

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the specified assumptions and limiting conditions and is my personal, impartial, and unbiased professional analyses, opinions and conclusions.
3. I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest with respect to the parties involved.
4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
5. My engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. My compensation for completing this assignment is fee based and is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. My analyses, opinions and conclusions were developed and this report has been prepared in conformity with *The Uniform Standards of Professional Appraisal Practice 2018-2019* of The Appraisal Foundation, and the *Principles of Appraisal Practice and Code of Ethics* of the American Society of Appraisers.
8. I have not performed prior appraisals of the Subject Interest within the three-year period preceding acceptance of this appraisal assignment.
9. I understand that a false or fraudulent overstatement of the property value as described in this appraisal report may subject me to the penalty under Internal Revenue Code §6701(a). In addition, I understand that a substantial or gross appraisal misstatement resulting from the appraisal of the property that I know, or reasonably should know, would be used in connection with a return or claim for refund may subject me to the penalty under Internal Revenue Code §6695A.
10. Other than those listed below, no one provided significant assistance to the persons signing this certification.

Bryan C. Rice, CPA·ABV, CFP, ASA

Hill Johnson, ASA

Bryan C. Rice, CPA-ABV, ASA, CFP, MST

7 Burton Hill, Weatherford, Texas 76087
Office/Cell: 817-602-0413 Facsimile: 817-887-4137
brice@bcrbvl.com

May 22, 2019

Mr. Robert Epstein, Esq.
McClure Family Law
8115 Preston Road, Suite 270
Dallas, Texas 75225

Re: Cause No. DF-18-11265; In the 254th Judicial District Court of Dallas County; In the Matter of the Marriage of A.W.E. and D.M.F.N.

Dear Mr. Epstein,

In relation to the above-referenced matter, we understand that Stout determined a divisible fair market value (FMV) for Clifford Fischer & Company (the "Company") as of December 31, 2018 at $50,522,000 after accounting for any of Mr. Fischer's personal goodwill. Compared to Whitley Penn's opinion of $74,220,000[1], our (BCR) opinion of $30,494,700[2] is closer to Stout's opinion as calculated below:

Appraiser	FMV	Difference
Stout	$50,522,000	
BCR	$30,494,700	$ 20,027,300
Whitley Penn	$74,220,000	$ 23,698,000

Thus, the prior agreed-to calculation to determine divisible FMV for the Fischer estate is the average of Stout and BCR as follows:

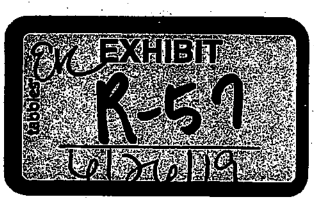
Appraiser	Divisible FMV
Stout	$50,522,000
BCR	$30,494,700
Average	$40,508,350

It should be noted that *all* these opinions of value were determined on a non-diluted basis.

The Company has a long-standing and prior agreed to "Change in Control Bonus" agreement with four key executives - Ted Uzelac, Larry Teel, Chris Joyner, and Jeff Kernochan. Among other things, this agreement promises a one-time bonus (in the form of "profit participation interests") in the event of a change in control of the Company.

---

[1] This opinion of divisible fair market value is *also* after accounting for any personal goodwill in the Company.
[2] Ibid.



Schedule A of the *Agreement to Convert Separate Property to Community Property and Other Post-Nuptial Contracts* notarized and dated February 4, 2008 that was entered into by Mr. and Mrs. Fischer voluntarily, after each receiving advice of independent counsel, states the following:

SCHEDULE A
<u>Separate Property Converted to Community Property</u>

> *The business known as Clifford Fischer & Company, a Texas corporation, its successors or assignees, including all assets of the business whether tangible or intangible, and all rights and privileges, past, present, or future, arising out of or in connection with the business,* ***but not including any profits participation interest promised or awarded to Company employees in the past, which interests shall not be diminished or affected by the execution of this Agreement.***

This provision must be taken account in a determination of the value of Clifford Fischer & Company on a fully diluted basis. In essence, Mr. and Mrs. Fischer agreed to consider the Company as a community property asset *subject to dilution by the key executives' change in control bonus.* Nothing has come to our attention that would support the notion that this obligation is not still in effect as of this day. Moreover, upon the divorce of a key executive who has a profit participation interest in the Company, his or her change in control bonus would be an asset of his or her marital estate.

Based on our review of "Section 3: Agreement and Term" of the *Annual Operating Bonus Agreement* for the key executives, the profit participation interests when a change of control occurs are as follows:

Profit Participation Interest Percentages

Entity	Executive	Threshold	%
Clifford Fischer & Company	Ted Uzelac	$ 1,000,000	15%
	Ted Uzelac	> $1,000,000	20%
	Larry Teel	N/A	2.5%
	Chris Joyner	N/A	2.5%
	Cliff & Gail Fischer	$ 1,000,000	80%
	Cliff & Gail Fischer	> $1,000,000	75%
Fischer Solutions, Inc.	Ted Uzelac	N/A	10%
	Cliff & Gail Fischer	N/A	90%
Fischer Pennsylvania	Larry Teel	N/A	25%
	Cliff & Gail Fischer	N/A	75%
Fischer Financial, Inc.	Chris Joyner	N/A	25%
	Cliff & Gail Fischer	N/A	75%
Fischer Pacific, Inc.	Jeff Kernochan	N/A	41%
	Cliff & Gail Fischer	N/A	59%
Fischer Visual Manager	Cliff & Gail Fischer	N/A	100%
Fischer Management Solutions, Inc.	Cliff & Gail Fischer	N/A	100%

Based on the standard of fair market value that stipulates both the hypothetical buyer and seller have reasonable knowledge of *all the relevant facts*, these profit participation interests materially affect the amount of value available to the community estate as a result of the sale of Company. In short, the Average Divisible Fair Market Value must be considered net of the one-time change of control of bonus, on a fully diluted basis. Should a buyer purchase the Company, the monies available to the community estate of Fischer will not be 100% of the purchase price, but rather approximately 74% calculated as follows.

We determined the allocation of the $40,508,350 value to each entity by percentage of 2018 net profit (i.e., net income).

Entity	2018 Net Profit	% of Net Profit	Allocation of Value
Clifford Fischer & Company	7,029,621	79.0%	31,982,132
Fischer Solutions, Inc.	(241,887)	-2.7%	(1,100,495)
Fischer Pennsylvania	1,497,463	16.8%	6,812,893
Fischer Financial, Inc.	(5,024)	-0.1%	(22,857)
Fischer Pacific, Inc.	574,498	6.5%	2,613,750
Fischer Visual Manager	43,677	0.5%	198,714
Fischer Management Solutions, Inc.	5,322	0.1%	24,213
Total	**8,903,670**	**100.0%**	**40,508,350**

Then, we applied the executive's profit participation interests to each entity's allocation of value considering their individual stated thresholds. There was no allocation of value for the entities that reported net losses.

May 22, 2019

Allocation of Value to Executives

Entity and Executive	One-Time Bonus	Notes
Clifford Fischer & Company		
- Ted Uzelac	$ 150,000	$1M x 15% (Valuation amt is greater than $1M)
- Ted Uzelac	$ 6,196,426	Amount of valuation for CFC exceeding $1M x 20%
- Larry Teel	$ 799,553	Valuation amount for CFC x 2.5%
- Chris Joyner	$ 799,553	Valuation amount for CFC x 2.5%
- Cliff & Gail Fischer	$ 800,000	
- Cliff & Gail Fischer	$ 23,236,599	
Fischer Solutions, Inc.		
- Ted Uzelac	$ -	Net loss, as such, no value
- Cliff & Gail Fischer	$ (1,100,495)	100% of negative value
Fischer Pennsylvania		
- Larry Teel	$ 1,703,223	Valuation amount for FPA x 25%
- Cliff & Gail Fischer	$ 5,109,670	
Fischer Financial, Inc.		
- Chris Joyner	$ -	Net loss, as such, no value
- Cliff & Gail Fischer	$ (22,857)	
Fischer Pacific, Inc.		
- Jeff Kernochan	$ 1,071,637	Valuation amount for FPI x 41%
- Cliff & Gail Fischer	$ 1,542,112	
Fischer Visual Manager		
- Cliff & Gail Fischer	$ 198,714	No executive profit share agreement
Fischer Management Solutions, Inc.		
- Cliff & Gail Fischer	$ 24,213	No executive profit share agreement
Total Value Allocated to Executives	$ 10,720,394	26%
Total Value Allocated to Cliff & Gail Fischer	**$ 29,787,956**	**74%**
Total Value Allocated	40,508,350	100%

Based on consideration of all the facts, circumstances, and analyses outlined in this letter, it is our opinion that the divisible fair market value of the Fischer's Interest in the Company on a fully diluted basis is:

TWENTY- NINE MILLION SEVEN HUNDRED EIGHTY-EIGHT THOUSAND DOLLARS

$29,788,000 (rounded)

My work in this matter is ongoing and my opinion is subject to change based on newly produced facts and data. If any new facts and data regarding the Company are produced, it may alter my valuation opinion.

Sincerely yours,

Bryan C. Rice, CPA·ABV, CFP, ASA

ATTACHMENT A

STATEMENT OF GENERAL ASSUMPTIONS & LIMITING CONDITIONS

This appraisal report has been made with the following general assumptions and limiting conditions:

1. Information furnished by others, upon which all or portions of this report are based, is believed to be reliable, but has not been verified in all cases. No warranty is given as to the accuracy of such information.
2. This report has been made only for the purpose stated and shall not be used for any other purpose. Neither this report nor any portions thereof (including without limitation any conclusions as to value, the identity of Bryan C Rice, CPA (BCR) or any individuals signing or associated with this report, or the professional associations or organizations with which they are affiliated) shall be disseminated to third parties by any means without the prior written consent and approval of BCR.
3. This report cannot be included, or referred to, in any Securities and Exchange Commission filings or other public documents.
4. Neither BCR nor any individuals signing or associated with this report shall be required by reason of this report to give testimony or appear in court or other legal proceedings unless specific arrangements therefore have been made.
5. The allocation, if any, in this report of the total appraisal between components of the property, applies only to the program of utilization stated in this report. The separate values for any component may not be applicable for any other purpose and must not be used in conjunction with any other appraisal.
6. No investigation has been made of, and no responsibility is assumed for, the legal description or for legal matters, including title or encumbrances. Title to the property is assumed to be good and marketable unless otherwise stated. The property is further assumed to be free and clear of any or all liens, easements, or encumbrances unless otherwise stated.
7. The opinion of value is predicated on the financial structure prevailing as of the date of appraisal.
8. No responsibility is taken for changes in market conditions and no obligation is assumed to revise this report to reflect events or conditions that occur subsequent to the date of appraisal.
9. Full compliance with all applicable federal, state, and local zoning, use, environmental, and similar laws and regulations is assumed, unless otherwise stated.
10. It is assumed that all required licenses, certificates of occupancy, consents, or other legislative or administrative authority from any local, state, or national government or private entity or organization have been or can be obtained or renewed for any use on which the value estimate contained in this report is based.

ATTACHMENT C
APPRAISER'S CERTIFICATION

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the specified assumptions and limiting conditions and is my personal, impartial, and unbiased professional analyses, opinions and conclusions.
3. I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest with respect to the parties involved.
4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
5. My engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. My compensation for completing this assignment is fee based and is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. My analyses, opinions and conclusions were developed and this report has been prepared in conformity with *The Uniform Standards of Professional Appraisal Practice 2018-2019* of The Appraisal Foundation, and the *Principles of Appraisal Practice and Code of Ethics* of the American Society of Appraisers.
8. I have not performed prior appraisals of the Subject Interest within the three-year period preceding acceptance of this appraisal assignment.
9. I understand that a false or fraudulent overstatement of the property value as described in this appraisal report may subject me to the penalty under Internal Revenue Code §6701(a). In addition, I understand that a substantial or gross appraisal misstatement resulting from the appraisal of the property that I know, or reasonably should know, would be used in connection with a return or claim for refund may subject me to the penalty under Internal Revenue Code §6695A.
10. Other than those listed below, no one provided significant assistance to the persons signing this certification.

Bryan C. Rice, CPA-ABV, CFP, ASA

Hill Johnson, ASA

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Richard Orsinger
Bar No. 15322500
richard@ondafamilylaw.com
Envelope ID: 43978720
Status as of 06/23/2020 16:37:34 PM -05:00

Associated Case Party: GailCorderFischer

Name	BarNumber	Email	TimestampSubmitted	Status
Donald E.Godwin		DGodwin@GodwinBowman.com	6/23/2020 4:26:16 PM	SENT
Shawn M.McCaskill		SMcCaskill@GodwinBowman.com	6/23/2020 4:26:16 PM	SENT
Kristin Burns		KBurns@GodwinBowman.com	6/23/2020 4:26:16 PM	SENT
Laurel Hoisager		LHoisager@GodwinBowman.com	6/23/2020 4:26:16 PM	SENT

Associated Case Party: CliffordR.Fischer

Name	BarNumber	Email	TimestampSubmitted	Status
Richard R. Orsinger	15322500	richard@ondafamilylaw.com	6/23/2020 4:26:16 PM	SENT
Robert Epstein	24065206	repstein@mcclure-lawgroup.com	6/23/2020 4:26:16 PM	SENT
Kelly Gaffney McClure	7566150	kmcclure@mcclure-lawgroup.com	6/23/2020 4:26:16 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Nura Al-Maleh		nalmaleh@fflawoffice.com	6/23/2020 4:26:16 PM	SENT
Lawrence JFriedman		lfriedman@fflawoffice.com	6/23/2020 4:26:16 PM	SENT
Seymour Roberts, Jr.		sroberts@fflawoffice.com	6/23/2020 4:26:16 PM	SENT
Carla Williamson		lfpara@fflawoffice.com	6/23/2020 4:26:16 PM	SENT
Tracy Head		lfsec@fflawoffice.com	6/23/2020 4:26:16 PM	SENT