

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA

**BENZ RESEARCH AND DEVELOPMENT  
CORPORATION, a Florida Corporation,**

**Plaintiff,**

vs.

**CASE NO. 2001-CA-3635**

**DENNIS J. MCGILLICUDDY, D. STEVENS  
McVOY, and BARRY SILVERSTEIN,**

**Defendants.**

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FILED FOR RECORD  
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CLERK OF CIRCUIT COURT  
MANATEE COUNTY, FLORIDA

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**DENNIS J. MCGILLICUDDY, D. STEVENS  
McVOY, and BARRY SILVERSTEIN,**

**Counterclaim Plaintiffs,**

Vs.

**BENZ RESEARCH AND DEVELOPMENT  
CORPORATION, a Florida Corporation,  
PATRICK H. BENZ, ALICE CHRISTENSEN,  
and JOSE A. ORS,**

**Counterclaim Defendants.**

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**FINAL JUDGMENT**

**THIS CAUSE** was tried before the Court. Plaintiff, Benz Research and Development Corp. (BRD), filed an Amended Complaint seeking the adjudication of the fair value of the corporation's stock as of September 19, 2000. The Defendants, Dennis McGillicuddy, D. Stevens McVoy, and Barry Silverstein, were minority stockholders in BRD who were "squeezed out" of the corporation as a result of a statutory merger that

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took place on September 20, 2000. The Defendants filed an Amended Counterclaim against BRD, Patrick Benz, Alice Christensen and Jose A. Ors, for breach of fiduciary duty. The Amended Counterclaim was voluntarily dismissed against Alice Christensen and Jose A. Ors during the trial. Upon the evidence presented, the Court finds that the Counterclaim against BRD and Patrick Benz fails on its merits, and so judgment is for BRD and Patrick Benz on the issue and the Counterclaimants shall take nothing on their Counterclaim.

As to the valuation of the Defendant stockholders' shares of BRD on September 19, 2000, the Court concludes that minority and marketability discounts on account of a minority status are not applicable. The fair value of the stock shall be determined per corporation share, not on any so-called dissenter share calculation. Furthermore, prejudgment interest shall be awarded to the Defendants on the fair value of their stock from September 19, 2000.

This case is born from a divergence of opinion driven by greatly differing perceptions. The fair value of BRD stock on September 19, 2000, depends on whether as of that date Benz Research and Development was either on the brink of a breakthrough or the brink of a breakdown. Extensive evidence on this issue was introduced at trial. That evidence established that in the fall of 2000, BRD had introduced into the marketplace an innovative and potentially very valuable product in the contact lens field, the Extreme H<sub>2</sub>O Lens. At the same time the company was suffering serious financial problems that, if unabated, could have led to severe problems with creditors and the necessary cash flow to keep the company going. In addition, there were significant issues with the soundness of the new lens itself and the company did not have the ability to commercialize the

product in a way that would make it generate income above cost. Fortunately for Benz Research and Development there was a confluence of events between the end of 2000 and the end of 2002 that worked to change not only the economic fortune of the company but to transform its essential structure. As result of two business deals, the Rhome America contract and, later, the Walman Optical Company contract, BRD gained critical capital which allowed it to work its way into a position to take advantage of a wholly new management team led by Steve Schuster which put into place a marketing strategy that made economic sense. Perhaps even more importantly, Benz Research and Development finally figured out how to mold the lens it had developed in a way that made production commercially viable. The distinction between the portrait of BRD in the Fall of 2000 and even six months later is fundamentally important to the issue of the fair valuation of its stock on September 19, 2000.

Two expert witnesses testified on the valuation issue. One, Michael Mard, is a Certified Public Accountant and business appraiser. The other, Professor Gregg Jarrell, is a highly respected econometrician. Even though each used widely accepted protocols in their respective fields in reaching their opinions, their methodologies were very different. Mard's analysis is, for the most part, dependant on historical data and basic accounting and appraisal principles. Professor Jarrell's work is predictive in nature and operates out of a sophisticated theoretical economic model based on assumptions that may or may not be borne out in the real world. For example, Professor Jarrell conceded that in order for his model projections to be valid, the company had to have the necessary capital to make it go. No capital, no projections. No projections, model fails. The fact is that in the fall of 2000 Benz Research and Development was hemorrhaging money. The

marketplace was not accepting its new product, the Extreme H<sub>2</sub>O Lens, for various reasons having to do with its quality and the manner in which it was being marketed, and these facts are important factors in the calculus of the fair value of BRD stock in September 2000 considering what was known and knowable and reasonably foreseeable at that time.

After considering all of the evidence, the Mard approach makes sense in this case. In arriving at a final fair valuation of the stock the Court is mindful of the fact that since both experts' opinions incorporate subjective elements, the final calculation is not simply a matter of choosing one opinion over the other. According to Mard, the fair value of the corporation shares on September 19, 2000, without taking into consideration any information made known for the two years after the valuation date, using a capitalization factor of 5.1, is \$476.81 per share or a total value of the dissenters' stock of \$890,204.27. If the analysis does use subsequent information that takes into account what actually occurred in 2001 and 2002, the fair value increases to \$613.14 per share or a total value of the dissenters' stock of \$1,144,471.00. While it is true that the specifics of the material events in 2001 and 2002 were not known or knowable on September 19, 2000, it was reasonably foreseeable then that the innovation of the Extreme H<sub>2</sub>O Lens would become commercially successful given financing and Dr. Patrick Benz's genius. So, a fair valuation of the stock has to take these expectations into account. The fair value is certainly closer to the \$1,144,471.00 figure than to \$890,204.27. The realistic market potential of the Extreme H<sub>2</sub>O Lens makes it so. However, some discount needs to be taken into account because the higher range figure does in fact depend on the inclusion of

specific events which were not known or knowable or reasonably foreseeable on the date of valuation. So, the final calculation has some subjective quality to it.

Accordingly, it is hereby

**ORDERED AND ADJUDGED** that the fair value of the dissenters' stock on September 19, 2000, was \$1,000,000.00, or \$535.62 per share. Plaintiff is ordered to pay to the Defendants that sum plus interest from September 19, 2000. The Court reserves jurisdiction to determine all issues concerning the calculation of the legal interest owed. The Court also finds that Benz Research and Development Corporation offered the dissenter stockholders \$811,267.00 for their shares of stock. The offer was substantially less than the fair value of the stock on September 19, 2000. However, there is no evidence that Benz Research and Development Corporation acted arbitrarily, vexatiously or in bad faith with respect to the statutory rights of the Defendants. The Court reserves jurisdiction to determine all issues regarding Defendants' entitlement to attorneys fees and costs and the amount of those if an award is appropriate.

Finally, the Court reserves jurisdiction to enter a Final Judgment in proper form for which execution may issue.

**DONE AND ORDERED** at Bradenton, Manatee County, Florida this 18<sup>th</sup> day of November, 2005.

  
**DURAND J. ADAMS**, Circuit Judge

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*DA*