

2007

William Borghetti v. System and Computer Technolgy : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WILLIAM BORGHETTI, et al,	:	
	:	
Plaintiffs/Appellants,	:	
	:	Appellate Case No. 20070513-SC
vs.	:	
	:	District Court Case No. 040921012
SYSTEM & COMPUTER	:	
TECHNOLOGY, INC., et al,	:	
Defendants/Appellees.	:	
	:	

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
(ORAL ARGUMENT REQUESTED)**

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN
AND FOR SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE JOHN PAUL KENNEDY**

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**FILED
UTAH APPELLATE COURTS**

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ARGUMENT

The Trial Court erred when it failed to strike the testimony of Borghetti's expert, Avner Kalay.¹ If permitted to testify, Kalay will use the Black-Scholes method to analyze the common stock of Campus Pipeline as something that it is not—an option to purchase common stock. Borghetti did not satisfy his burden of showing that Kalay's use of the Black-Scholes method is generally accepted, or otherwise inherently reliable. In his opposition to the Motion to Strike, Borghetti touted the Black-Scholes method as a Nobel Prize winning technique in the options pricing context, but did nothing to show its appropriateness or acceptance when used to value the common stock of a privately held company. Furthermore, even if Borghetti had shown that the Black-Scholes method was generally accepted to value privately held companies, he still failed to show that Kalay's particular use of the Black-Scholes method in this case was inherently reliable. In particular, Borghetti has now had three opportunities (twice with the court below and once on appeal) to explain how a method that places a higher value on a company with lower revenue than on one with greater revenue can be inherently reliable. Borghetti has yet to even attempt an explanation of that bizarre result.

Without Kalay's testimony, Borghetti has absolutely no evidence of damages and cannot defeat summary judgment. Accordingly, upon a finding that the Trial Court should

¹ Continuing the pattern from Defendants' prior brief, for ease of reference "Borghetti" refers collectively to all Plaintiffs. The term "Defendants" refers collectively to the SCT and Campus Pipeline Defendants.

have struck Kalay’s testimony, this Court can affirm summary judgment on the independent ground that Borghetti has come forward with absolutely no evidence of damages.

I. BORGHETTI HAS NOT SHOWN THAT THE BLACK-SCHOLES METHOD IS A GENERALLY ACCEPTED METHOD FOR VALUING THE STOCK OF A PRIVATELY HELD COMPANY.

Although Borghetti suggests that both Delaware and Utah courts have liberal standards when it comes to the admissibility of valuation methods, he concedes that any proffered valuation method must still be generally accepted. (Reply Brief of Appellant, 5.) Indeed, Utah courts recognize that a party can demonstrate the inherent reliability of a particular methodology by showing its general acceptance in the expert community. *See e.g., State v. Rimmasch*, 775 P.2d 388, 397 (Utah 1989). However, it is not enough merely to show general acceptance of a methodology in the abstract; the specific manner in which the methodology was applied must also be generally accepted. *See Id.* at 398 n.7 (proper application of the proffered scientific technique must be shown); *see also* Utah R. Evid. 702(c) (“[t]he threshold showing [of reliability] . . . is satisfied if the principles or methods on which such knowledge is based, *including . . . the manner of their application to the facts of the case, are generally accepted by the relevant expert community*”) (emphasis added).²

² The recent amendment to Utah Rule of Evidence 702 was not effective at the time the trial court rendered its decision in this matter. Nevertheless, for the reasons described in Section V below, the treatment of “general acceptance” as a factor bearing on reliability is the same under amended Rule 702.

Defendants do not question that the Black-Scholes method is a generally accepted technique to price options. However, it is Borghetti's burden to show that Kalay's particular use of the Black-Scholes method in this case—to value the common stock in a privately held company—is generally accepted. Borghetti has fallen well short of carrying this burden.

In his Opposition, Borghetti has merely shown that the Black-Scholes method has obtained general acceptance in the option pricing context. Borghetti points to the Nobel Prize awarded to Scholes and Merton for their work on the Black-Scholes method; argues that option pricing models like Black-Scholes have been used in a variety of settings; states (without record citation) that “literature on the Black-Scholes model and its uses in the finance community is overwhelming”; and concludes that the Black-Scholes method “has been in use for over 30 years.” (Reply Brief of Appellant, 6.) None of this speaks to the question presented by Defendants' Motion to Strike and on appeal: whether the Black-Scholes method is a generally accepted technique to value the common stock of a privately-held company.

Borghetti also claims (without record citation)³ that he “provided over 8 pages of citations supporting the use of Black-Scholes in this context.” (Reply Brief of Appellant, 6.) That statement cannot survive scrutiny. Although Borghetti submitted many articles to the

³ Borghetti's brief continues his creative use of the record in this matter. For example, on page 14 of his latest brief, Borghetti states that Campus Pipeline directors Peterschmidt, Haskell, Chamberlain, and Friedman received compensation in connection with the merger. Borghetti provides no record citation for these “facts.” This is likely explained by the fact that if the Court were to turn to the record and examine Borghetti's “Statement of Genuine

court below, none stood for the proposition that the Black-Scholes method is a generally accepted technique for valuing the common stock of a privately-held company. A number of articles discussed Black-Scholes generally,⁴ a number noted that under-water common stock can be viewed as an option on the assets of the company,⁵ a smaller number calculated the value of a company based upon the value of its “options,”⁶ but none stood for the proposition that Borghetti bears the burden of proving: that Black-Scholes has become a generally accepted method to value the common stock of a private company.⁷

To the contrary, a number of Borghetti’s citations recognized that Black-Scholes is not a generally accepted technique when applied to common stock. For example, one of Borghetti’s articles stated that “[a]cademics have studied real options for the past thirty

Issues of Fact in Opposition to Defendants’ Motions for Summary Judgment,” it would find that he explicitly states “don’t have citation for” these propositions. (R. at 4365.)

⁴ See, e.g., Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, *The Journal of Political Economy*, Vol. 81, No. 3, pp. 637-654 (May-Jun. 1973) (R. at 3482).

⁵ See, e.g., Dale F. Gray, et al, *A New Framework for Analyzing and Managing Macrofinancial Risks*, prepared for the CV Starr/RED Conference on Finance and the Macroeconomy, October 11-12, 2002 (R. at 3519).

⁶ See, e.g., Aswath Damodaran, *Valuation: Tools and Techniques for Determining the Value of Any Asset*, 828-29 (John Wiley & Sons, Inc. 1996) (R. at 3502). Even these citations recognize that equity cannot always be treated as a call option. Damodaran states, “equity in distressed firms may *sometimes* take on options characteristics.” Aswath Damodaran, *The Cost of Distress: Survival, Truncation Risk and Valuation* (source information not provided by Plaintiffs) pp. 2, 36 (2006) (R. at 3513) (emphasis added).

⁷ Others simply highlight the problems with Black-Scholes that convinced courts to reject its use, such as in *Snyder v. Commissioner of Internal Revenue*, 93 T.C. 529 (1989). See, e.g., F. Peter Boer, *The Real Options Solutions: Finding Total Value in a High-Risk World* 100 (John Wiley & Sons, Inc. (publication date unknown)) (R. at 3509) (“However, one of the beauties of an option (unlike a money-losing operating business) is that it cannot have a negative value”).

years,” but admitted that “their use in merger and acquisition valuation has been limited.” Kenneth R. Ferris & Barbara S. Pecherot Petitt, *Valuation: Avoiding the Winners’ Curse*, 126 (Prentice Hall, Inc. 2002) (R. at 3526-27). The authors believe the method has not been used, in part, because “many analysts are unfamiliar with option pricing models and argue that the use of real options is too complex.” *Id.*

Borghetti cited another article that conceded, “the validity of these models is often questioned: the criticisms primarily focus on whether one can analyze non-traded assets using models that were formulated to evaluate assets that are traded in a financial market.” Michel Benaroch & Robert Kauffman, *A Case for Using Real Options Pricing Analysis to Evaluate Information Technology Project Investments*, *Information Systems Research*, Vol. 10, No.1, pp. 70-86, at *2 (1999) (R. at 3682).

Yet another of Borghetti’s citations opined, “[i]t is not clear that option pricing will replace [discounted cash flow] techniques for valuing whole companies except in limited circumstances.” Tom Copeland, et al, *Valuation: Measuring and Managing the Value of Companies*, 399 (McKinsey & Co., Inc. 3d ed. (publication date unknown)) (R. at 3565). That article further declared, “[i]t may be that the bundles of assets and opportunities that companies own cannot be practically viewed as options—at least not yet.” *Id.* In other words, not only did Borghetti fail to prove that Black-Scholes is a generally accepted method for

valuing the common stock of a privately held company, his own articles demonstrated that the academic community does not believe it is a generally accepted methodology.⁸

In fact, it appears that the Black-Scholes method may not even be “generally accepted” by Kalay. Kalay has worked for more than twenty-five years in the financial community. Kalay has been retained as an expert witness on sixteen different occasions. Despite this resume, Kalay could not recall another occasion when he had used the Black-Scholes method to value all of the common stock of a company outside the classroom setting. (R. at 1847, 1852-54.) The Trial Court should have struck Kalay’s testimony because Borghetti did not prove that Kalay’s use of the Black-Scholes method is generally accepted, and, as discussed below, cannot otherwise show that Kalay’s work is inherently reliable.

II. BORGHETTI HAS NOT SUSTAINED HIS BURDEN OF SHOWING THAT THE BLACK-SCHOLES METHOD IS INHERENTLY RELIABLE.

For Kalay’s opinion to be admissible, it must be more than just “generally accepted,” Borghetti must show that it is “inherently reliable.” *State v. Crosby*, 927 P.2d 638, 640-41 (Utah 1996); *Rimmasch*, 775 P.2d at 396-97.⁹ Borghetti did not satisfy this burden.

⁸ Borghetti also argues that Roger Grabowski (the expert retained by Defendants Jeff Williams and Bendinger Crockett) supports Kalay’s use of Black-Scholes. Borghetti mischaracterizes Grabowski’s deposition testimony. Although Grabowski testified that he had used Black-Scholes to value publicly traded equity, he unequivocally testified that it is inappropriate to use Black-Scholes to value privately held companies where the company is experiencing operational distress. (R. at 4918-19.)

⁹ As described in Section V below, reliability remains the ultimate test of admissibility under the amended Rule 702.

Not only has Borghetti failed to show that the expert community has accepted Black-Scholes in this context, he has also failed to present this Court with even a single judicial opinion permitting an expert to use Black-Scholes to value the common stock of a privately held company. In contrast, several courts have ruled that although Black-Scholes is a reliable method for pricing options, it is unreliable, and therefore inadmissible, when used to value common stock. *See, e.g., Snyder v. Commissioner of Internal Revenue*, 93 T.C. 529, 545 (1989) (“reject[ing] the application of the Black-Scholes model to the valuation of common stock.”); *see also In re Med Diversified, Inc.*, 334 B.R. 89, 103 (Bankr. E.D.N.Y. 2005) (“[t]he Black-Scholes Method has simply not been shown to provide a reliable measure of the value of an option to purchase 100% of controlled shares in a privately held company”). Borghetti unsuccessfully attempts to distinguish the cases that reject Black-Scholes outside the options-pricing context.

For example, Borghetti argues that the *Snyder* decision can be distinguished because Campus Pipeline had more shareholders than the company at issue in *Snyder*. (Reply Brief of Appellant, 8.) However, Borghetti makes no effort to explain why this is an important, or even relevant, distinction. Apparently Borghetti must believe that the Black-Scholes method is reliable when applied to value a privately held company with many shareholders, but is not reliable when applied to value a privately held company with few shareholders. Borghetti does not point to any expert testimony in the record, or otherwise, that suggests that the number of shareholders makes a material difference in the application of the Black-Scholes method.

Borghetti also argues that the *Med Diversified* decision is distinct from the instant matter. Borghetti quotes from the *Med Diversified* decision that the court was reluctant to “embark on a cruise down this unexplored river . . . to discover the application of this Method outside the principal context in which it has been customarily applied.”¹⁰ (Reply Brief of Appellant, 9) (quoting *Med Diversified*, 334 B.R at 103). Borghetti also quotes that “[t]he Black-Scholes Method has simply not been shown to provide a reliable measure of the value of an option to purchase 100% of the controlled shares in a privately held company and the parties failed to set forth any credible evidence.” (*Id.*) Borghetti argues that this case is different and that the Court can embark on a cruise down the unexplored Black-Scholes river because he has provided evidence that the Black-Scholes method is generally accepted as a technique to value the shares in a privately held company. (*Id.*) However, as described above, Borghetti has shown no such thing.

Borghetti also argues that *Med Diversified* is distinct because the expert in that case was unqualified. (Reply Brief of Appellant, 9.) Although the *Med Diversified* court found that the expert in that case was unqualified, it independently held that, even where the parties stipulated to its use, the court would not allow the Black-Scholes method as a valuation tool because “the parties have not cited a single case, either in a federal bankruptcy or federal

¹⁰ For this proposition, the *Med Diversified* court cited *Mathias v. Jacobs*, 238 F. Supp. 2d 556, 573-74 (S.D.N.Y. 2002) (Black-Scholes “is used pervasively by virtually all publicly held companies, and pervasively in option trading”) and *Cramer v. Comm’r Internal Revenue*, 101 T.C. 225, 242, 1993 WL 369030 (1993) (Black-Scholes was specifically designed to place a value on publicly traded options).

district court, in which that court accepted as a recognized methodology the application of the Black-Scholes Method to valuing an option in 100% of controlled shares in a privately held company.” *Med Diversified*, 334 B.R. at 102-03. Likewise, in this case, Borghetti has not pointed the Court to a single case where a court has recognized the Black-Scholes method as a reliable technique to value privately held companies. Indeed, the only cases before the Court expressly reject its use for that purpose.

Additionally, to demonstrate that the Black-Scholes method is not viewed as a reliable technique outside of its designed purpose to value options, Defendants cited to other cases where courts rejected Black-Scholes in the non-option pricing context. (Brief of Appellee, 39 (citing *In re Apple Computer, Inc. Sec. Litig.*, 243 F. Supp. 2d 1012 (N.D. Cal. 2002); *In re Marriage of Robinson*, 35 P.3d 89 (Ariz. Ct. App. 2001); and *Louisiana State Employees Ret. Sys. v. Citrix Sys., Inc.*, No. Civ. A. 18298, 2001 WL 1131364 (Del. Ch. Sept. 19, 2001)). Borghetti does not cite to a single case where the Black-Scholes method was found to be reliable outside of the options context. Instead, apparently missing the point of these cases, Borghetti simply argues that these additional cases are factually distinct from the instant matter because they do not involve the valuation of a privately held company. (Reply Brief of Appellant, 10.)¹¹ To be clear, Defendants cited those cases because other courts

¹¹ Borghetti also makes a curious attempt to distinguish the *Orban v. Field* decision (1997 WL 153831 (Del. Ch. Apr. 1, 1997)). (Reply Brief of Appellant, 10.) However, *Orban v. Field* had nothing to do with the Black-Scholes method, and Defendants did not cite it to demonstrate that the Black-Scholes method is unreliable. Instead, Defendants cited *Orban v. Field* to show that Delaware law has expressly rejected Borghetti’s argument that companies

have rejected Black-Scholes in the non-options pricing context. This Court should do the same.

III. BORGHETTI HAS NOT SUSTAINED HIS BURDEN OF SHOWING THAT KALAY RELIABLY APPLIED THE BLACK-SCHOLES METHOD.

A particular expert methodology must not only be reliable in the abstract, it must be reliably applied to the facts of the particular case. *Crosby*, 927 P.2d at 641; *Rimmasch*, 775 P.2d at 398. Accordingly, even if the Black-Scholes method was recognized as an inherently reliable technique to value privately held companies, Borghetti still bears the burden to show that Kalay's use of the Black-Scholes method in this case meets the inherent reliability standard. However, given the unjustified assumptions that Kalay made the foundation of his opinion, Borghetti cannot do so.

According to Kalay, lower revenue and higher volatility translate into a greater valuation of the company than if the company enjoyed greater revenues and less volatility. (R. at 1802-03.) In fact, Kalay opined that his valuation was conservative, because if he had predicted less revenue, the Company would be worth even more. (R. at 1803 (“[n]ote that projections of more modest growth of revenues would have increased the estimate of damages as a longer time to expiration of the option increases its value”)). Perhaps Kalay's most telling admission is his concession that unlike common stock which can lose all of its value, “option always have [sic] positive value.” (R. at 2441.) In other words, Kalay started

have a duty to remain in business for the benefit of common shareholders as long as there is a shred of hope that the company will one day have value. (Brief of Appellee, 21-22.)

with a methodology that would always yield a positive value for Borghetti's common stock and then increased that value by inputting revenue estimates that, in his view, were modest.¹²

However, these "modest" estimates were anything but conservative. Kalay assumed that between the years 2004-2015, Campus Pipeline would have enjoyed year after year annual growth of 20%. (R. at 1802.) Kalay admitted that he had conducted no research on Campus Pipeline's industry to justify that assumption. (R. at 1850-51.) Kalay made no attempt to justify these estimates in the face of the undisputed evidence that the Company had met its revenue target for only one quarter of its entire corporate history. (R. at 1872, 4310.)

Kalay also assumes that Borghetti's "option" would expire in eleven years because that is the time it would take the Company to pay the preferred shareholders' liquidation preferences if the preferred shareholders were willing to be cashed out of the company with no return on their more than \$80 million investment. (R. at 1801.) Kalay assumes the preferred shareholders would jump at the chance to get just their original money out of the deal (without any return) even though the company was finally, in Kalay's world, enjoying consistent double-digit revenue growth. Borghetti did not explain these unjustified assumptions to the Trial Court, and has not attempted to explain them now.¹³

¹² Borghetti's Reply was his third opportunity to explain how a methodology that places a higher value on a company with lower revenues can be inherently reliable. Borghetti's failure to even attempt to justify this result speaks volumes.

¹³ In the language of the amended Utah Rule of Evidence 702, Kalay has not based his opinion upon "sufficient facts and data."

Accordingly, even if the Black-Scholes method could theoretically be applied to value the common stock of a privately held company, Kalay's unrealistic and speculative assumptions undercut the reliability of its use in this case.

IV. KALAY'S TESTIMONY IS MORE PREJUDICIAL THAN PROBATIVE.

Kalay's opinion does not pass *Rimmasch*'s third prong—that expert testimony be more probative than prejudicial—because it has no probative value whatsoever. *See Crosby*, 927 P.2d at 641. Borghetti did not dispute that Campus Pipeline was contractually obligated to pay the first \$80.9 million in merger proceeds to the preferred shareholders. (R. at 1860-61, 4296-97.) Nor did Borghetti dispute that Kalay's adjusted opinion values the Company at the time of the SCT merger at between \$63.6 and \$72.9 million. (R. at 1844-46.) As such, Borghetti's damages expert proves no damages. Even if Kalay were correct in his valuation estimate, any additional funds that should have been paid would belong to the preferred shareholders and not Borghetti. A damages opinion which proves that Borghetti suffered no damages cannot possibly be more probative than prejudicial.¹⁴

¹⁴ Like the prior version of Utah Rule of Evidence 702, the amended Rule 702 makes no express reference to the probative-value prong of the *Rimmasch/Crosby* analysis. However, no such express reference in the amended rule is necessary to carry this prong forward because it is merely a restatement of Utah Rule of Evidence 403. All otherwise admissible evidence, including expert evidence, is subject to exclusion under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." Utah R. Evid. 403.

V. WITHOUT KALAY’S TESTIMONY, BORGHETTI CANNOT SUSTAIN ANY CAUSE OF ACTION BECAUSE HE WILL BE LEFT WITH NO EVIDENCE OF DAMAGES.

Borghetti argues that even if the testimony of his expert were struck, he would still be entitled to a trial on all of his claims. Borghetti argues that, in *appraisal* actions, ““if *neither party* adduces evidence” concerning the value of the company, it is left to the court to make an independent evaluation. (Reply Brief of Appellant, 11) (quoting *Highfields Capital, Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 42-43 (Del. Ch. 2007)) (emphasis added). This argument fails for at least two reasons.

First, as to the Campus Pipeline and SCT Defendants, Borghetti has not brought an appraisal action. Instead, Borghetti asserts causes of action for breach of fiduciary duty, fraud, and unjust enrichment. Second, even if he had brought an appraisal action against Defendants, this is not a case where both parties failed to adduce evidence of the value of Campus Pipeline. Rather, without Kalay’s testimony, the Trial Court would have five undisputed expert valuations that put the value of Campus Pipeline millions of dollars below the company’s liquidation preferences. Tucker Allen, a valuations firm hired by Borghetti, analyzed the value of Campus Pipeline at the time of the merger and did not see a valuation in excess of \$40 million. (R. at 1883, 4323.) The TWP valuation performed at the time of the merger placed the Company’s value as no more than \$44.8 million. (R. at 1883, 4324.) The ThinkEquity valuation, also performed at the time of the merger, opined that the proposed \$42 million price for Campus Pipeline was fair. (R. at 1883, 4324.) Defendants expert, LECG, opined that the value of Campus Pipeline at the time of the merger was approximately \$36.28 million. (*Id.*) The expert retained by Defendants Jeff Williams and

Bendinger Crockett, Roger Grabowski, opined that CP's value at the time of the merger was approximately \$35 million. (*Id.*)

Defendants also presented the Trial Court with undisputed evidence concerning efforts to sell the Company. This evidence showed that the Company contacted dozens and dozens of potential buyers, and, despite receiving some offers, no would-be buyer offered anything close to the \$42 million SCT paid. (R. at 1866, 1877-78, 4317.) Presented with this evidence, the Trial Court would not need to conduct the independent evaluation suggested in *Highfields Capital*.

Thus, without Kalay's testimony, Borghetti not only has absolutely no evidence of damages to present, he cannot dispute the overwhelming evidence before the Court that the Company was worth less than its liquidation preferences, and that, as a result, Borghetti's common stock was worthless.

Without citing any legal authority, Borghetti also argues that damages on his "other causes of action" are determined by the value of his shares "on the date of the merger, plus interest." (Reply Brief of Appellant, 12.) Presumably, Borghetti's "other causes of action" refer to his breach of fiduciary duty, fraud, and unjust enrichment claims. However, without an expert opinion on the matter, Borghetti has no evidence that his shares held any value on the date of the merger.

Furthermore, at least with respect to Borghetti's fraud and unjust enrichment claims, the value of Borghetti's shares at the time of the merger is simply not the appropriate measure of damages. As to his fraud claim, Borghetti has asserted a "holders claim" that he was induced to hold his shares when, with hindsight, he would have preferred to sell. (R. at

2585, 2608-10.) Although Utah courts have never recognized “holders” fraud claims, the courts that have recognized such claims require proof of “how many shares the plaintiff would have sold, and when the sale would have taken place.” *See Small v. Fritz Cos., Inc.*, 65 P.3d 1255, 1265 (Cal. 2003). Borghetti has produced no evidence concerning the number of shares he would have sold, when these sales would have taken place, and the price he could have obtained for his shares. Accordingly, with or without Kalay’s opinion, Borghetti has adduced no evidence of fraud damages.

With respect to Borghetti’s unjust enrichment claim, disgorgement of allegedly unjustly received benefits would be the appropriate remedy. *See, e.g., Teachers Ret. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654, 672 n.25 (Del. Ch. 2006) (disgorgement of unearned benefits is remedy for unjust enrichment claim); *see also Hess v. Johnston*, 2007 UT App 213, ¶ 21, 163 P.2d 747 (“Unjust enrichment occurs when a person has and retains money or benefits that in justice and equity belong to another”). However, with or without Kalay’s testimony, Borghetti cannot show that any benefits allegedly received by Defendants were taken out of merger consideration that would have otherwise flown to him.

The Company was acquired for a value far less than the \$80.9 million of liquidation preferences held by preferred shareholders. (R. at 1860-61, 4296-97.) Borghetti alleges that the director Defendants received improper bonuses at the time of the merger. However, the bonuses were paid based on a pre-approved plan that set aside 12.5% of the merger proceeds as retention incentives to keep certain managers and employees employed with the company through any merger transaction. (R. at 1879-80, 4319-20.) Borghetti further alleges that Defendant SCT received improper benefits because it acquired Campus Pipeline at an

allegedly undervalued price. (R. at 17.) However, even at the high end of Kalay's valuation—\$72 million—Campus Pipeline would not have returned any value to the common shareholders. As such, even if the Defendants received unjust benefits (in the form of retention payments or by paying less than the Company was worth); any restitution payments would belong to the preferred shareholders, not Borghetti. Simply stated, Borghetti has presented no evidence of damages on his causes of action.

VI. KALAY'S TESTIMONY SHOULD BE STRUCK UNDER AMENDED RULE 702.

Kalay's testimony is also inadmissible under the recent amendment to Rule 702 of the Utah Rules of Evidence. Under amended Rule 702, the proponent of expert testimony must show that the testimony is: 1) reliable, 2) based upon sufficient facts or data, and 3) is reasonably applied to the facts of the case. Utah R. Evid. 702(b). As the Advisory Committee Note instructs, "[i]n performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. . . . [T]he gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support." Utah R. Evid. 702, Advisory Committee Note. In other words, the expert testimony must reliably address the "work at hand." *Id.*

In this case, Kalay's testimony does not reliably address the "work at hand." Here, the "work at hand" involves determining the value of Campus Pipeline's common stock at the time of its merger with SCT. For sake of brevity, Defendants will not repeat the arguments above that the Black-Scholes method is not appropriately applied to value the common stock of privately held company. Suffice it to say, Borghetti has not shown that the Black-Scholes

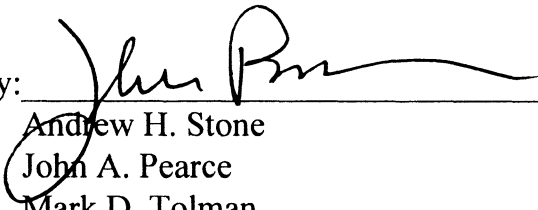
method is generally accepted to value privately held companies; and Borghetti has not otherwise shown its reliability in this case. Thus, under amended Rule 702, Kalay's testimony would not be admissible either.

CONCLUSION

Kalay's opinion fails to meet the reliability standards of the Utah Rules of Evidence and should not be admitted into evidence. Defendants ask this Court to reverse the Trial Court's decision to deny the Motion to Strike, and to affirm the grant of summary judgment on the independent ground that Borghetti failed to come forward with any evidence of damages on any of his causes of action.

DATED this 7th day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2008, I caused to be mailed, postage prepaid, two correct copies of the foregoing **BRIEF OF APPELLEE** to the following:

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