

**EXHIBIT A**

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
FOR THE THIRTEENTH JUDICIAL CIRCUIT

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FILED-CLERK OF COURT  
PAUL B. WICKENSIMER  
GREENVILLE CO. SC

Case Number: 2008-CP-23-5739

Andrew P. (Andy) Ballard,

Plaintiff,

vs.

Tim Roberson, Rick Thoennes, Rick  
Thoennes III, and Warpath Development,  
Inc.,

Defendants.

**ORDER**

This case was tried on March 15, 16, and 17, 2010. This suit involves a corporation, the defendant Warpath Development, Inc. ("Warpath"). The plaintiff Andrew P. Ballard ("Ballard") is a minority shareholder in Warpath; the individual defendants are the controlling shareholders. Ballard's amended complaint alleges breach and anticipatory breach of a Stock Purchase Agreement, breach of the covenant of good faith and fair dealing, breach of Warpath's Articles of Incorporation, breaches of the individual defendants' fiduciary duties, and oppression of the minority shareholder by the defendants. The defendants brought counterclaims against Ballard alleging breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligent misrepresentation, and violation of S.C. Code § 35-1-501 in connection with the sale of securities.

The case was tried to a jury. As set out below, after the presentation of the plaintiff's case and the cross examination of the defendants' first witness, the defendant Tim Roberson ("Roberson"), the defendants dismissed their counterclaims with prejudice. The Court then

dismissed the jury, the trial was completed, and the Court took the plaintiff's equitable claims under advisement.

### FINDINGS OF FACT

1. Ballard is the organizer of the corporate defendant, Warpath.
2. Ballard worked several years to obtain a lease from Duke Power for property on Lake Keowee owned by Duke Energy Carolinas, LLC ("Duke") in Pickens County in order to develop a marina and associated facilities. In this connection, Ballard worked with Pickens County to approve his proposal for developing a marina on the property.
3. On January 3, 2007, Duke signed a lease with Warpath (the "Lease"), leasing the property to Warpath for use as a public park and/or public recreational area as shown on a Conceptual Plan attached to the Lease, which provided for a marina on the property.
4. After Warpath entered into the Lease with Duke, Ballard and the individual defendants entered into discussions concerning potential participation in Warpath.
5. The plaintiff and all the defendants are parties to a Stock Purchase Agreement dated May 29, 2007 (the "Agreement").
6. The Articles of Incorporation of defendant Warpath, dated September 8, 2004, authorize the issuance of 100,000 shares. Those articles have never been amended.
7. At the time the Agreement was entered into, Warpath had issued 40,000 shares, and Ballard owned all the shares.
8. Under the Agreement, the individual defendants received 80,000 shares of Warpath. They received 20,000 shares from Ballard, and they were issued an additional 60,000 shares from the corporation itself.
9. In paragraph 1, the Agreement provides that the individual defendants "will pay to Ballard upon closing the sum of \$1,000,000 in exchange for 20,000 shares of Ballard's 40,000

shares." Ballard received the \$1,000,000 personally; the corporation received no payment in connection with the closing. Roberson provided the \$1,000,000.

10. The Agreement further provides in paragraph 1 that the individual defendants "will receive from the corporation additional shares so that Ballard will hold 20% of the stock and the other 80% will be held" by the individual defendants "when all shares are finally issued."

11. The Agreement contains commitments by the individual defendants to provide funding and services to the corporation. In paragraph 6, "Roberson agrees to provide the necessary capital to obtain long term financing on the project." In paragraph 5, the defendant Rick Thoennes ("Thoennes") and Rick Thoeonnes III ("Thoennes III") agree to provide "development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate."

12. In paragraph 1, the Agreement also sets out the "final holdings" of the individual shareholders. Ballard's "final holding" is 20%. The Agreement further provides in paragraph 7 that Ballard will not be required to sign any personal guarantees. The Agreement provides for no obligation for Ballard to provide any additional contribution of capital or any additional funds to Warpath.

13. The corporation issued 60,000 additional shares to the individual defendants.

14. The individual defendants argue that they paid \$1,000,000 for the entire 80,000 shares. However, the Agreement and the method of payment make clear that the individual defendants paid Ballard \$1,000,000 for 20,000 of his shares. In addition, they committed to provide funding and services to the corporation and received 60,000 shares from the corporation.

15. Consistent with the plain language of the Agreement, Thoennes testified that the individual defendants earned their shares by performing their obligations to the corporation set out in the Agreement.

16. The individual defendants received 60,000 shares from the corporation in exchange for their promises to provide the funding and services to the corporation as set out in the Agreement.

17. Upon the closing, the individual defendants controlled Warpath and owned 80% of its stock.

18. The individual defendants' attorney drafted the Agreement and handled the closing.

19. Warpath did not place in escrow the 60,000 shares received by the individual defendants from the corporation.

20. Those 60,000 shares have never been placed in escrow.

21. After the individual defendants acquired their shares, they became unhappy about the development of Warpath, because Duke would approve a plan for the marina that would accommodate 102 wet boat slips, whereas the individual defendants had planned for up to 200 wet boat slips and had made financial projections based on 200 wet slips. Further, it took longer to obtain approval for permits from the South Carolina Department of Health and Environmental Control ("SC DHEC") than the individual defendants had hoped for.

22. The individual defendants decided that they wanted Ballard out of the corporation. The individual defendants admitted at trial that at one point they wanted Ballard out of the corporation. In an email dated October 28, 2007, Thoennes III wrote Thoennes and

Roberson: "Don't we want to get [Ballard] out of the deal?" Roberson replied: "I think he will take his 1M and run . . . after a little threatening, posturing and whining."

23. The individual defendants came up with a plan to issue additional stock.

Roberson wrote Thoennes on December 28, 2007:

"When an investor realizes that an expected ROI [return on investment] is not forthcoming, his only viable option is acquire more equity at a reduced rate. In order to properly refinance the project, I would suggest that we increase the number of outstanding shares to 500,000 with a mixture of both preferred and common stock. As long as the outstanding shares remain in the treasury, there is no dilution of current shareholders. However, those outstanding shares could be used as tender (same as cash) to accomplish the needs of the corporation."

24. At the time this message was written, Roberson was the only investor who had made a cash investment, by providing the \$1,000,000 for the purchase of Ballard's 20,000 shares.

25. Under the Agreement, Roberson personally has the obligation to "provide the necessary capital to obtain long term financing for the project."

26. The individual defendants approached Ballard to ask him to take action to reduce his percentage ownership in Warpath or to repay funds he had received for his 20,000 shares, in order to improve the relative financial and/or ownership positions of the individual defendants. Ballard refused to agree to a change in the ownership of the corporation or the terms of the arrangement as set out in the Agreement.

27. On May 1, 2008, a meeting was held of the shareholders of Warpath. At the meeting, the individual defendants elected themselves directors and did not elect Ballard a director. Prior to this meeting, Ballard had been a director and officer of Warpath. Ballard asked to be elected a director, but none of the defendants seconded his nomination, and his nomination failed for lack of a second.

28. After they elected themselves directors, the individual defendants passed a Board resolution proposing that Warpath issue an additional 900,000 shares beyond the 100,000 shares outstanding and authorized by the Articles of Incorporation, "in order to raise capital, pay expenses and offer employee incentives." The Board then presented a resolution to the shareholders authorizing the issuance of the 900,000 shares "for the purpose of raising additional capital, paying expenses and offering employee incentives." That resolution was passed by the votes of the individual defendants, with Ballard dissenting.

29. The minutes of the shareholder meeting contain no authorization for amendment of the Articles of Incorporation.

30. At the meeting, Roberson was elected President of Warpath, Thoennes III was elected Vice President, and Thoennes was elected Secretary-Treasurer. They remain in those offices today.

31. After this meeting, Ballard was excluded from the management and planning for Warpath and was not kept informed concerning any plans for financing the development of the project.

32. After this meeting, on July 30, 2008, Ballard filed suit seeking an injunction against the issuance of stock beyond the 100,000 shares already issued. In response, the defendants filed an answer and counterclaims, accusing Ballard of breach of contract and breach of contract with a fraudulent act and alleging promissory estoppel, based on Ballard's allegedly purposeful false statements regarding approvals from Duke and Pickens County.

33. During discovery, Roberson testified that he planned to employ the husband of his niece, his niece, two of his sisters, and a friend at the marina once it was operating.

34. After discovery, on August 25, 2009, Ballard amended his complaint to add claims of breach of fiduciary duty and oppression of the minority shareholder, among other things.

35. Thereafter, on August 27, 2009, after Ballard amended his complaint and while the litigation was pending, the defendants issued a notice of shareholder meeting where they proposed to elect a slate of directors that would include Ballard as a director.

36. On September 29, 2009, the shareholder meeting was held, and Ballard was elected one of four directors at the motion of the individual defendants, as were the individual defendants.

37. Subsequent to that election, there has been no meeting of the board of directors of Warpath. The individual defendants have not shared with Ballard any plans or proposals for the financing of the Warpath development, and Ballard has not received updates on the status of the development or the finances or financial plans of Warpath. The election of Ballard as a director was a litigation tactic and did not provide him any meaningful role in the governance of Warpath.

38. In response to the amended complaint, the defendants filed counterclaims that accused Ballard of breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligent misrepresentation, and violation of S.C. Code § 35-1-501 in connection with the sale of securities. The defendants alleged that Ballard made intentionally false representations regarding the marina in connection with the sale of the Warpath stock.

39. At trial, after the cross examination of Roberson by Ballard's counsel, it became clear that the evidence did not support the defendants' counterclaims and that, in particular, there was no evidence that Ballard had defrauded the defendants.

40. At trial, after the cross examination of Roberson by Ballard's counsel, the defendants dismissed their counterclaims with prejudice.

41. After dismissal of the counterclaims with prejudice, the Court dismissed the jury, heard the remaining evidence, and took Ballard's equitable claims under advisement.

42. Prior to trial, the Court had entered an order enjoining the defendants from issuing any additional stock until the entry of final judgment in this case.

### CONCLUSIONS OF LAW

1. S.C. Code § 33-6-210 (e) (emphasis added) provides that "[e]xcept as otherwise provided in subsection (f) [not relevant here], *the corporation must place in escrow shares issued for a contract for future services or benefits or for a promissory note.*"

2. By its plain language, this statute is mandatory and requires the corporation to place in escrow shares issued for a contract for future services or benefits.

3. In connection with the Agreement, the individual defendants obtained 80,000 shares of Warpath. The individual defendants were issued 60,000 shares by Warpath. Ballard owned 40,000 shares, and the individual defendants bought 20,000 of his shares. Ballard personally received \$1 million from the individual defendants for his 20,000 shares. The Agreement provides that Ballard received "\$1,000,000 for 20,000 shares of Ballard's 40,000 shares" and that the defendants "will receive from the corporation additional shares." The corporation received no payment from the defendants for the additional 60,000 shares.

4. Instead, in the Agreement, the individual defendants agreed to perform services for, provide capital to, and arrange for long term financing for the corporation. The \$1 million

was paid to Ballard personally. The remaining 60,000 shares obtained by the defendants were issued by the corporation, which received none of the \$1 million.

5. These 60,000 shares were issued for a contract or contracts for future services or benefits, as set out in S.C. Code § 33-6-210 (e). Under the plain language of the statute, they must be placed in escrow.

6. In his amended complaint, Ballard did not state a claim under S.C. Code § 33-6-210 (e). However, at trial, both parties argued this issue extensively and the Court received post-trial briefing on the issue. At trial, Ballard moved to amend his amended complaint to add this claim. The Court grants this motion. See SCRPC 15 (a) & (b).

7. The defendants are ordered to place in escrow the 60,000 Warpath shares that were issued to the individual defendants by Warpath.

8. Ballard's Twelfth Cause of Action seeks relief under S.C. Code §§ 33-14-300 and 310. Under those statutes, a Court may "provid[e] for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders" and may "direct[] or prohibit[] any act of the corporation or of shareholders, directors, [or] officers" upon a finding that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder." S.C. Code §§ 33-14-300 (2)(ii) and 310 (d)(3) and (d)(4).

9. Under Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 603-06, 541 S.E.2d 257, 266-68 (2001), the Court must evaluate whether the conduct and actions of the defendants toward Ballard are "oppressive" or "unfairly prejudicial"; the Court does not evaluate the "reasonable expectations" of the minority shareholder.

10. The Court examines and weighs the “totality of the circumstances” in determining whether a buyout or other relief is appropriate. Kiriakides, 343 S.C. at 606, 541 S.E.2d at 268.

11. In this case, the totality of circumstances demonstrates that the individual defendants acted oppressively towards Ballard as the minority shareholder and acted in a way that was unfairly prejudicial to him.

12. The evidence demonstrates that:

(a) After obtaining control of the corporation, the individual defendants determined they wanted Ballard out of the corporation;

(b) The individual defendants decided to have the corporation issue additional stock to increase their return on investment;

(c) The individual defendants removed Ballard as a director by refusing to elect him as one of four directors at the first stockholders meeting after they obtained control of the corporation, even though Ballard was the founder and organizer of the company and one of four shareholders;

(d) Even though Roberson had the contractual obligation to provide the necessary capital for the corporation to obtain long term financing, the individual defendants passed a corporate resolution to issue additional stock to raise capital;

(e) Upon the issuance of the additional 900,000 shares, Ballard’s ownership in Warpath would have been reduced to 2%, a tenth of his “final holdings” as provided in the Stock Purchase Agreement;

(f) After Ballard was no longer a director, he was excluded from the management of Warpath and was not provided information concerning the status of any efforts to finance the development or any periodic updates on the status of the development;

(g) While the litigation was pending and after Ballard filed additional claims alleging violations of fiduciary duty and corporate oppression, the individual defendants called a shareholder meeting and elected Ballard a director. Thereafter, they never held a meeting of the board of directors and did not provide Ballard with substantive information regarding the finances, financial plans, and development plans for the marina. The election of Ballard was a litigation tactic and did not provide Ballard any meaningful role in the governance of Warpath;

(h) Roberson, who is the President of Warpath, testified that he plans to employ his niece's husband, his niece, his two sisters, and a friend at Warpath. Ballard is not an employee of Warpath, and there was no testimony of any plans to make him an employee. The corporate resolution passed by the individual defendants also allows for stock to be issued to offer "employee incentives." Thus, Roberson intends to have Warpath employ members of his family and a personal friend, and the corporate resolution passed by the defendants provides that his family and friend may receive stock in the company. Ballard will not receive a salary from the company and will not receive stock as an employee incentive, since he is not an employee of Warpath and there are no plans for him to be an employee of Warpath;

(i) The Articles of Incorporation of Warpath provide for the issuance of 100,000 shares of stock; they have never been amended; and the stockholders of Warpath have never authorized an amendment of the Articles of Incorporation increasing the amount of authorized shares beyond 100,000. Thus, the resolution adopted by the shareholders authorizing the issuance of 900,000 additional shares is contrary to the Articles of Incorporation of Warpath, and any issuance of stock by Warpath beyond the 100,000 shares already issued would be in violation of the Articles of Incorporation;

(j) The defendants filed and pursued counterclaims against Ballard making serious allegations against him of intentional false statements in connection with the sale of securities. At trial, there was no evidence to support these claims of fraud, and the evidence presented at trial did not support the counterclaims asserted by the defendants. After Roberson's cross examination, it was apparent that there was no basis for the counterclaims. Roberson's testimony included admissions that Ballard had told the defendants exactly what Duke had told them regarding wet slips, that Ballard was not responsible for the period of time taken by SC DHEC to issue permits, and that the defendants knew that the issuance of the permits was uncertain. Thus, the individual defendants, who are officers, directors, and majority shareholders of Warpath, made baseless counterclaims against Ballard, the minority shareholder.

13. The defendants have argued that Ballard has preemptory rights to purchase stock when stock is issued pursuant to the resolution adopted by the individual defendants. However, that argument disregards the provisions of the Agreement. The Agreement provides that Roberson has the obligation to provide the necessary capital to obtain long term financing and specifically provides that Ballard will not even be required to sign any personal guarantees. The Agreement likewise provides that Ballard's "final holding" will be 20% of the company. The authorization to issue stock to raise capital was thus contrary to the terms of the Agreement, which places that obligation on Roberson, and Ballard specifically has no obligation under the Agreement to provide additional capital to the corporation in order to maintain his final holding of 20%.

14. Therefore, the Court finds the defendants acted in a manner that is illegal, oppressive, and unfairly prejudicial to Ballard, within the meaning of S.C. Code § 33-14-300 (2)(ii).

15. The Court has observed the parties during pretrial proceedings and during the trial and has reviewed materials regarding their business relationships during pretrial motions and at trial. From the evidence and the Court's observation of the trial proceedings and based on the findings set out above, the Court concludes that the proper equitable remedy is to provide for the purchase of Ballard's shares at their fair value by the defendants, jointly and severally, as set out in S.C. Code § 33-14-310 (d)(4). This remedy is the appropriate one given the conduct of the defendants as found above. It also is apparent that the plaintiff and the individual defendants are no longer compatible as co-owners of Warpath.

16. In order to provide for the purchase of Ballard's shares, the Court must determine the fair value. The Court directs the parties to communicate and attempt to agree on an appraiser or valuation expert for the valuation of Ballard's shares, taking into account the Agreement. If the parties are unable to agree on an appraiser or valuation expert by May 10, 2010, the parties are instructed to separately provide to the Court by May 17, 2010, the names of three proposed appraisers or valuation experts, without either party disclosing its list to the other. The Court will then select an appraiser or valuation expert to value Ballard's shares, taking into account the Agreement. Thereafter, the Court will consult with the parties to set a date for a valuation proceeding.

17. The Court has previously entered an injunction against the issuance of further shares of Warpath until the entry of final judgment. That injunction remains in place, according to its terms, and is also reaffirmed in order to preserve the status quo pending the purchase of Ballard's shares.

18. Ballard's remaining causes of action seek an injunction against the issuance of additional shares and the return by the individual defendants to Warpath of the 60,000 shares

they received from the corporation. Since the Court orders the defendants to buy Ballard's shares and since the existing injunction will stay in place until that purchase is complete, the Court need not and will not address Ballard's other claims at this time.

IT IS SO ORDERED.



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The Hon. Edward W. Miller  
Circuit Judge

Greenville, South Carolina

5-3, 2010

**EXHIBIT B**

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

FOR THE THIRTEENTH JUDICIAL CIRCUIT

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

**ORDER OF JUDGMENT**

vs.

Tim Roberson, Rick Thoennes, Rick  
Thoennes III, and Warpath Development,  
Inc.,

Defendants.

This matter is before the Court for the determination of the fair value of the plaintiff's ownership interest in Warpath Development, Inc., for purposes of the judicially forced buyout ordered by the Court in its Order of May 4, 2010. Based upon the evidence presented to the Court by both parties and by the court-appointed appraiser at the hearing held on August 6, 2013,<sup>1</sup> the pre-hearing submissions of the parties and the appraiser, and the post-trial submissions of the parties and the appraiser, the Court finds the fair value of the plaintiff's ownership interest is \$3,589,297. The Court orders defendants, jointly and severally, to pay plaintiff this amount within 90 days of the date on which this Order is entered, in exchange for which the plaintiff shall relinquish his shares of common stock of Warpath Development, Inc., and hereby enters judgment to this effect.

The plaintiff, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc., and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, a

<sup>1</sup> Prior to and at the hearing, the plaintiff moved to incorporate the record of the 2010 trial into the record of the valuation hearing. No objection was made to this request, and the prior record was so incorporated.

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restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through Mr. Ballard's efforts obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina.<sup>2</sup> All necessary permits to construct and develop the marina and related properties were obtained by the summer of 2010.

Under a Stock Purchase Agreement dated May 29, 2007, defendant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard for \$1 million, and he and the other two individual defendants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. Mr. Ballard retained ownership of 20,000 shares. Over the course of the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, only a few months after signing the Stock Purchase Agreement, the individual defendants began discussions among themselves of how to force Mr. Ballard out of the company. When they began to take steps to do so, Mr. Ballard filed suit in July 2008. The operative pleading, the Amended Complaint filed in August 2009, alleged that the defendants had engaged in majority shareholder oppression of the minority, and also sought to require the individual defendants to place in escrow or disgorge the 60,000 shares issued to them by the company, on the ground that they had not provided the services that were the consideration for the shares.

This Court tried the case and on May 4, 2010, entered an Order finding that the defendants had engaged in shareholder oppression of Mr. Ballard and ordering them to buy out his stock at fair value. The 2010 Order provided that the value for Mr. Ballard's stock would be determined at a subsequent hearing. Before that hearing occurred, however, the defendants

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<sup>2</sup>The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease agreement. Lease Agreement, ¶ 1. In effect, therefore, it is a perpetual lease.

appealed, and this Court's 2010 Order was affirmed by the Supreme Court. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The matter was then remanded for the valuation hearing.

In its 2010 Order, the Court also concluded that the individual defendants had not performed the services they had contractually agreed to perform in return for the stock issued to them by the company, and ordered them to place those 60,000 shares in escrow. That holding was affirmed by the Supreme Court as well. Those shares remain in escrow, and the evidence clearly shows that the individual defendants have still not performed the services for which they received 60,000 shares of stock from the company. Thus, the current ownership structure of the company is as follows:

Andy Ballard: 20,000 shares;

Tim Roberson: 40,000 shares, half of which is in escrow;

Rick Thoennes: 20,000 shares, all of which is in escrow;

Rick Thoennes III: 20,000 shares, all of which is in escrow.

In an action such as this one for judicial dissolution, the Court, sitting in equity, has broad powers to "make such order or grant such relief, other than dissolution, as in its discretion is appropriate." S.C. Code Ann. § 33-14-310(d). Such relief expressly includes the Court ordering the majority shareholders to "purchase at their fair value [the] shares of any shareholder." *Id.* In fact, this remedy is often granted where "oppression" and the related grounds for dissolution have been found.

Although the dissolution section of the South Carolina Corporate Code does not define the phrase "fair value", the dissenters' rights section defines "fair value" to mean an equitable value "determined by techniques that are accepted generally in the financial community." S.C. Code Ann. § 33-13-101(3); see Note, *Buyout Remedy for Oppressed Minority Shareholders*, 47

S.C.L. Rev. 195, 223 (1995) (“[I]t seems likely that the definition of fair value [in section 33-13-101(3)] would also be used in dissolution cases.”). The seminal case in South Carolina determining fair value in the dissenters’ rights context is *Santee Oil Co. v. Cox*, 217 S.E.2d 789 (S.C. 1975). In that case, the Court held that “fair value means ‘intrinsic value,’” which the trial court must undertake to compute by determining the “value of the corporate property as an established and going business.” *Id.*, 217 S.E.2d 791 (emphasis added). The Court further held that “the three major factors to be considered are: (1) net asset value; (2) market value; and (3) the earnings or investment value ....” *Id.* Finally, “[a]fter these various factors have been considered and determined in a given case they should then be weighed as to their relative bearing upon the ultimate question of the fair value of the dissenting stock ... and a final determination of value made.” *Id.* 217 S.E.2d at 792.

The above is the approach that the court-appointed appraiser, Dr. Perry Woodside, utilized in making his calculations. Dr. Woodside determined that the present value<sup>3</sup> of the company would be \$7,178,594 if construction of the project had begun in June 2010, when the final needed permit was obtained. The plaintiff presented substantial evidence, including statements made by the defendants themselves to third parties, tending to prove that Dr. Woodside’s valuation is, if anything, on the low side. For example, evidence introduced at the hearing showed that defendants represented to a third party in 2011 that the “current value” of the company’s property was \$6,000,000 “in its present condition.” Pl. Ex. 4(B), p.2. Defendants also repeatedly represented to third parties that the value of the company upon completion of construction would be in the range of \$28 million to \$37 million. Pl. Ex. 4(A) – 4(D). Plaintiff’s

<sup>3</sup> More precisely, Dr. Woodside calculated what the present value of the company would have been in December 2012 if construction of the project had begun then, and alternatively what it would be at that time if construction had begun in June 2010.

appraisal expert, Dr. Charles Alford, demonstrated that the present value of a future value of this magnitude is in the range of \$9.3 million to \$12 million.

The courts uniformly recognize that the valuation of shares in a forced buyout of stock in a closely held company is a flexible, context-specific process that should be guided by the overarching goal of reaching a result that is fair to the parties. *See, e.g., Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 124, 522 S.E.2d 357, 365 (Ct. App. 1999) ("Appraisal is not an exact science, and the precise weight to be given to any factor is necessarily a matter of judgment for the court in the light of circumstances in each case." (citation omitted)); *Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) ("Obviously, the ultimate issue is what is fair between the parties in each case."). Based on all of the evidence presented to the Court, and considering the equities of the case, the Court concludes that, for purposes of S.C. Code section 33-14-310(d), \$7,178,594 is a fair and reasonable estimate of the total economic value of the company and that it is supported by the preponderance of the evidence.

It remains to determine whether to count the defendants' shares of stock that are held in escrow in determining the fair value of the plaintiff's ownership interest. Section 33-6-210(e) of the South Carolina Code states that "the corporation must place in escrow shares issued for a contract for future services." S.C. Code Ann. § 33-6-210(e) (emphasis added). The shares must remain in escrow until "the services are performed ... or the benefits are received." *Id.* Further, "[a]ny share dividends in respect of the shares escrowed also must be placed in escrow." *Id.* (emphasis added). If the contract for future services is not completed, the escrowed shares "may be canceled in whole or in part, and the corporation may reclaim the distributions." *Id.* (emphasis added). South Carolina's statute differs from the Model Business Corporation Act and the statutes of most other states, which provide that a "corporation may place in escrow shares issued

for a contract for future services." See, e.g., Model Bus. Corp. Act § 6.21(e) (emphasis added); Conn. Gen. Stat. § 33-672(e).

The South Carolina General Assembly's substitution of "must" for "may," and the resulting statutory mandate that shares issued in consideration for future services and any dividends issued thereon be held in escrow, shows that the General Assembly intended to prohibit the value of a shareholder's investment from being unfairly diluted through the issuance of stock to other shareholders in exchange for future services which may be never delivered. As the commentary for Section 33-16-210 notes, "this problem is particularly acute if the persons providing [future] services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors," which is exactly the case here. Furthermore, Section 33-16-210(e) specifically provides that "if the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed and the distributions credited may be canceled in whole or in part and the distributions escrowed may be reclaimed by the corporation."

In light of these provisions of the South Carolina Code, the Court finds that Mr. Ballard's stock ownership should not be diluted by giving the individual defendants the benefit of the escrowed shares in determining the value of the plaintiff's shares. The parties' Stock Purchase Agreement was a binding contract in which the individual defendants committed themselves to provide certain elements of value to the company in exchange for the shares of stock issued to them. As to defendant Roberson, he was to supply the capital necessary to obtain long-term financing for the company; as to the Thoennesses, they were to assist with obtaining long-term financing and carry out the development of the project once the financing had been obtained. It is undisputed that these defendants have failed to carry out those contractual commitments.

They have failed to bring the value to the company that they agreed to provide in exchange for their shares. Accordingly, for purposes of assessing the fair value of Mr. Ballard's stock ownership under section 33-14-310(d), the escrowed shares should not be counted, and plaintiff's ownership percentage should be treated as 50% of the value of the company as a whole. As a result, the fair value of his stock is 50% of \$7,178,594, or \$3,589,297.

The Court finds that 90 days is a fair and reasonable period of time for the defendants to meet the terms of the buyout hereby ordered. While they have requested a lengthy payout period, the Court finds that this would be neither equitable nor practical. The defendants have had over six years now to satisfy their contractual obligations under the Stock Purchase Agreement, and have known for at least three years (since the 2010 Order) that they were facing the possibility of having to buy out the plaintiff. Thus, they have had enough time already to prepare for this moment. Instead of attempting to find ways to squeeze out the founder of the company, if they had merely done what they had agreed to do in the first place, or alternatively marshaled their assets so as to be ready to pay a reasonable buyout price, they would not now be in the predicament they claim to face. He who seeks equity must do equity, and it would be unfair to the plaintiff to allow this 5-year-old dispute to continue to drag on through a lengthy pay-out period.

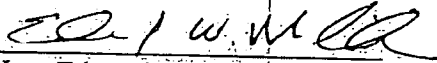
Moreover, after the Court issued its 2010 Order, the plaintiff attempted to proceed with the valuation hearing ordered by the Court. Defendants refused to do so, however, and stated that they would not engage in the valuation until they had exhausted their appeal. They had the right to pursue their appeal, but having done so and lost, they should not be allowed to benefit from further delay, particularly since they have failed to prove that having more time will make any difference. Indeed, given the history of the parties' relations, it is highly likely that allowing

them additional time to buy out Mr. Ballard under a structured payment arrangement, including provisions for interest, security, and remedies on default, will simply end up in further litigation.

Therefore, it is hereby ordered and decreed that defendants pay the plaintiff \$3,589,297 within 90 days of the date of entry of this Order, and judgment in this amount is hereby entered for the plaintiff against the defendants jointly and severally. Upon receipt of such payment, the plaintiff shall relinquish his shares of stock in Warpath Development, Inc., to the defendants, and the judgment shall be satisfied.

It is so ordered.

Dated: 10/2, 2013  
Greenville, SC

  
Hon. Edward W. Miller  
Judge, South Carolina Circuit Court

A Certified Copy  
Paul B. Waldensiein  
Clerk of Court C.P. & G.S.  
Greenville County, SC  
Dated 10/3/13

**EXHIBIT C**

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2008CP235739

Andrew P. Ballard

Tim Roberson, Rick  
Thoennes, Rick  
Thoennes III, and  
Warpath Development,  
Inc.

FILED-CLERK OF COURT  
GREENVILLE, S.C.  
PAUL B. WICKENS  
2013 NOV 8 PM 2:00

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRCP;
  - Rule 41(a), SCRCP (Vol. Nonsuit);
  - Rule 43(k), SCRCP (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRCP;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

Defendants' Motion for Reconsideration, To Alter or Amend, and/or for a New Trial/Hearing is DENIED.

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk:

ENTERED COMPUTER



**EXHIBIT D**



Office of the Clerk of Court

Paul B. Wickensimer  
Clerk of Court for Greenville County  
Greenville, South Carolina

[www.greenvillecounty.org](http://www.greenvillecounty.org)

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2014 JAN 17 PM 3:20

January 17, 2014

Wallace K. Lightsey  
44 East Camperdown Way  
Greenville, SC 29601

Re: 2008-CP-23-05739 Form 4 Order

Dear Mr. Lightsey,

Our office received the above referenced order from Judge Miller's office on November 8, 2013 and it was entered on that day at 2:19pm. However, since November 8<sup>th</sup> was on a Friday and our mail service picks up courthouse mail at 2:00pm, it was not mailed out to the attorneys of record until November 12<sup>th</sup> at 2:00pm due to November 11<sup>th</sup> being a federal holiday. I do apologize for failing to indicate the date of entry and date of mailing on the original form 4 as well as your copies. Our policy is to process all orders no later than two days after we receive them from the judge and therefore, in my haste to get the orders processed, I failed to indicate the entry and mailing dates.

Again, please accept my apology and if you have any questions, please feel free to call me.

Sincerely,

  
Sandra Mansel

Administrative Coordinator

A Certified Copy  
Paul B. Wickensimer  
Clerk of Court C.P. & D.C.  
Greenville County, SC  
Dated 1/17/14