THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739
Appellate Case No. 2013-002790

Andrew P. (Andy) Ballard, ...Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc., ...Appellants.

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR EXTENSION OF TIME TO SUBMIT PETITION FOR A WRIT OF CERTIORARI OR STAYING THE TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully submits this return to the motion by appellants for this Court to extend the time for appellants to petition for certiorari or to stay that time. Respondent opposes the motion on the ground that it is not supported by the South Carolina Appellate Court Rules. Further, this is but the latest delay tactic by appellants, who have prolonged this litigation for now over seven years. The motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

This is a suit by a minority shareholder against the majority shareholders and the corporation for oppression and to require the escrow of shares of the majority shareholders until they have fulfilled their obligations under a contract with the corporation. Respondent, Andy Ballard, filed suit in July 2008. After two years of discovery, Circuit Court Judge Edward Miller tried the case nonjury, and on May 4, 2010, entered an Order finding that the appellants had acted in a manner that was illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2)(ii). Judge Miller ordered the appellants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d)(4) and set up a procedure for determining a fair value at a later hearing. Judge Miller also ordered under S.C. Code § 33-6-210 that the appellants place in escrow the 60,000 shares issued to them by the company.

Before the valuation hearing was held, the appellants filed their first appeal. Respondent's counsel suggested to appellants' counsel that the parties proceed with the valuation hearing so that all issues could be dealt with in one appeal. Appellants refused, and stated that they would not engage in the valuation until they had exhausted their appeal. In 2012, the South Carolina Supreme Court affirmed and remanded the case for the valuation hearing. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012).

Following a number of delays, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. Testimony was given by two experts, Perry Woodside and Charles Alford, who appraised the present value of the company at various amounts ranging between $4.4 million and $12 million, depending on how the appraisal was calculated. Andy Ballard testified that, in his opinion, the company was worth $20 million.

Appellant Roberson testified that he thought the $1,000,000 he paid for Ballard's stock (representing 20% of the shares) in 2007 was a fair price. Evidence was presented that the appellants themselves had represented to third parties that the company was worth at least $6 million and as much as $37 million.

The appellants also "threw themselves on the mercy of the court" and claimed that they were impoverished would be unable to pay any significant amount of money to Ballard, not even the $1,000,000 that appellant Roberson had testified was a fair price. They asked Judge Miller to give them several years to buy out Mr. Ballard's interest. (Two years have now passed since then, and appellants have made no effort to pay any portion of the judgment – even what they agree is fair – in spite of having substantial financial resources with which to do so.)

On October 3, 2013, Judge Miller entered an Order of Judgment weighing all of the evidence and finding that a fair value of the company was $7,178,594. Judge Miller went on to hold that Andy Ballard's ownership interest should be treated as 50% of the whole, because the appellants still had not performed the services for which they received the shares of stock that are being held in escrow. Accordingly, Judge Miller ordered the appellants to buy out Ballard's shares at $3,589,297 (i.e., 50% of $7,178,594). He rejected appellants' request for a lengthy payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and gave appellants 90 days to pay the judgment.

Appellants appealed the judgment. On July 15, 2015, the Court of Appeals issued an unpublished *per curiam* opinion, in which the court engaged in its own weighing of the evidence, determined that $6,250,000 represents a fair value for the company, and

affirmed the Circuit Court's determination that Ballard's ownership should be treated as 50% of the whole. Appellants moved for rehearing on July 30, 2015, and on August 26, the Court of Appeals granted the motion, issued a substitute opinion, and denied appellants' request for a hearing. The substitute opinion changed nothing of substance from the original opinion, but merely added some minor clarifying language. Attached as Exhibit A is a redlined copy of the substitute opinion showing the very minor changes made in it from the original opinion.

On September 10, 2015, appellants filed a second motion for reconsideration that is virtually identical to their first motion for reconsideration. *Compare* Exhibit B (July 30 motion) *with* Exhibit C (September 10 motion).[1] Appellants did not petition this Court for a writ of certiorari by September 25, which is thirty days from the Court of Appeals' ruling on appellants' first motion for reconsideration. Instead, they have asked this Court to let them wait for the Court of Appeals to act on their second motion for reconsideration.

ARGUMENT

Rule 242(c), SCACR, governs the time for petitioning for certiorari to review a decision of the Court of Appeals. It states clearly that a decision of the Court of Appeals is "final for the purpose of review by the supreme Court" when a petition for rehearing "has been acted on by the Court of Appeals." This occurred on August 26. The rule goes on to provide that a petition for certiorari must be filed within thirty days after the petition for hearing "is finally decided by the Court of Appeals." Because the rule expressly defines finality as when the Court of Appeals "acts on" a petition for rehearing,

[1] The only substantive difference is that the second motion attempts to insert a ground for rehearing that could and should have been included in the first motion.

it precludes an appellant from filing successive petitions for rehearing in order to prolong the time in which to petition for certiorari. The Court of Appeals acted on appellants' motion for rehearing on August 26, and that is when the time to petition for certiorari began to run. The appropriateness of this conclusion is particularly strong here, where appellants' second motion for rehearing is essentially identical to their first.

Further, it is transparent that the only reason appellants are pursuing this appeal is to try to buy more time in order to postpone foreclosure against their assets, which in fact are substantial. They have availed themselves of every procedural opportunity to protract and prolong this litigation, and should not be allowed to continue to do so.

CONCLUSION

For the reasons stated above, respondent asks the Court to deny appellants' motion.

Respectfully submitted,

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Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR EXTENSION OF TIME TO SUBMIT PETITION FOR A WRIT OF CERTIORARI OR STAYING THE TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

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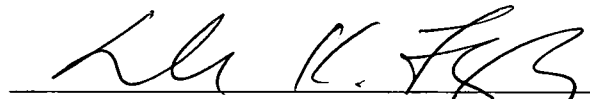

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Exhibit A

PER CURIAM. *1 Tim Roberson, Rick Thoennes, and Rick Thoennes III—majority shareholders of Warpath Development, Inc.—and Warpath appeal the circuit court's order determining the fair value of Andrew P. Ballard's ownership interest in Warpath. We affirm as modified.

I. Facts and Procedural History

In *Ballard v. Roberson*, 399 S.C. 588, 597–98, 733 S.E.2d 107, 112 (2012), the supreme court affirmed the circuit court's earlier order finding the individual appellants engaged in shareholder oppression toward Warpath's minority shareholder, Ballard, and ordering all appellants to buy Ballard's stock at fair value. The supreme court's opinion provides a detailed explanation of the facts relating to shareholder oppression. See 399 S.C. at 590–93, 733 S.E.2d at 108–09; see generallyS.C.Code Ann. § 33–14–300(2)(ii) (2006) ("The circuit courts may dissolve a corporation ... in a proceeding by a shareholder if it is established 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 (whether in his capacity as a shareholder, director, or officer of the corporation)...."). The facts important to the valuation of Ballard's stock are set out below.

Ballard incorporated Warpath for the purpose of developing a marina on Lake Keowee on property owned by Duke Energy Carolinas, LLC. 399 S.C. at 590, 733 S.E.2d at 108. Warpath's articles of incorporation authorized the issuance of 100,000 shares, and Warpath issued 40,000 shares to Ballard. *Id.* After Ballard leased property from Duke and obtained approvals from Duke and Pickens County to build the marina in accordance with Warpath's conceptual plans, he and the individual appellants entered into a stock purchase agreement. 399 S.C. at 590–91, 733 S.E.2d at 108. The agreement provided the individual appellants would pay Ballard $1,000,000 in exchange for 20,000 of his 40,000 shares of Warpath stock. *Id.* The agreement also provided Warpath would issue 60,000 shares to the individual appellants, which would result in Ballard owning 20% of the company's stock. *Id.* In addition, the agreement provided the duties of each party:

> Ballard was to enter into a separate agreement with Warpath outlining his duties, to include securing certain permits, leases, and services; Thoennes and Thoennes, III

> were to enter into an agreement defining their duties regarding development work, assistance with proformas and obtaining permanent financing, and executing loan documents; and Roberson was to provide the necessary capital to obtain long term financing. 399 S.C. at 591, 733 S.E.2d at 108.

After the individual appellants became unhappy about a decrease in the projected income of Warpath, they "collaborated in drafting an e-mail to convince Ballard to return some or all the money that he had been paid, or to return his 20,000 shares to the corporation and cease involvement with the development."399 S.C. at 591, 733 S.E.2d at 108–09. When Ballard refused to agree to a change in ownership structure, the individual appellants elected themselves as directors, removed Ballard from the board, and appointed themselves as officers. 399 S.C. at 591–92, 733 S.E.2d at 109. The board then "approved the issuance of an additional 900,000 shares" of Warpath. 399 S.C. at 592, 733 S.E.2d at 109. The resolution was "in direct conflict with the Articles of Incorporation, which only authorized 100,000 shares[,] and the [Stock Purchase] Agreement, which stated Ballard would ultimately own 20% of the corporation."*Id.*

*2 Ballard filed a lawsuit seeking an injunction against the issuance of new shares and asserting the individual appellants breached their duties to Warpath and engaged in shareholder oppression. *Id.* The circuit court ~~found~~ entered an order in 2010 finding Roberson personally paid $1,000,000 to Ballard in exchange for 20,000 of his shares. In addition, the circuit court ruled the 60,000 shares issued to the individual appellants by Warpath were issued "for a contract or contracts for future services" and ordered the shares "must be placed in escrow." *See* S.C.Code Ann. § 33–6–210(e) (2006) (providing a corporation "must place in escrow shares issued for a contract for future services"). The circuit court also found the individual appellants "acted oppressively towards Ballard as the minority shareholder and acted in a way that was unfairly prejudicial to him," and it ordered all appellants to purchase Ballard's shares of Warpath at fair value. The circuit court provided that the value of Ballard's stock would be determined at a subsequent hearing.

The individual appellants and Warpath appealed the 2010 order, and the supreme court affirmed. *See* 399 S.C. at 597–99, 733 S.E.2d at 112–13. The supreme court stated, "We ... affirm the circuit court's finding of oppression and its requirement

that Appellants purchase Ballard's stock at fair market value." 399 S.C. at 597–98, 733 S.E .2d at 112.

On remand, the circuit court found the individual appellants "have still not performed the services for which they received 60,000 shares of stock from the company."The circuit court determined the current ownership structure of Warpath was as follows: Ballard owned 20,000 shares; Roberson owned 40,000 shares, half of which were in escrow; Thoennes owned 20,000 shares, all of which were in escrow; and Thoennes III owned 20,000 shares, all of which were in escrow. The circuit court relied on subsection 33–6–210(e) to determine the shares in escrow should not be counted in calculating Ballard's ownership percentage. The circuit court provided the following explanation:

> 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.... 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 ... the escrowed shares should not be counted....

Thus, the circuit court found Ballard owned 50% of Warpath—20,000 of the 40,000 shares not in escrow.

Ballard and the individual appellants testified as to the value of Warpath. Ballard testified he believed the value of the company would be $20 million after obtaining the permits necessary to complete the project, and Rick Thoennes conceded he represented in 2011 on a loan application to a potential lender that the company was worth $6 million in its undeveloped state. In 2012, Warpath received an offer from a marina development company to purchase a 70% stake in Warpath for $4.5 million—an offer based on a total value for Warpath of $6.43 million. Ballard called Charles Alford, Ph.D.—an economist—who testified the value of Warpath was between $5,034,969 and $9,286,126. In addition, the circuit court appointed Perry Woodside, Ph.D., to appraise Warpath. Dr. Woodside valued Warpath based on the assumption that construction had not yet begun—but "would begin in 2013"—and determined the fair value of Warpath was $4,366,564. At Ballard's

request, Dr. Woodside supplemented his report and explained "the present value of the company would be $7,178,594 if construction of the project had begun in [July] 2010, when the final needed permit was obtained."

*3 The circuit court stated it considered all of the valuation evidence presented, but it concluded $7,178,594—the amount of Dr. Woodside's supplemental report—"is a fair and reasonable estimate of the total economic value of the company."Because the circuit court determined Ballard owned 50% of the stock of Warpath, it calculated the value of his share at $3,589,297. The court ordered "that [the appellants] pay [Ballard] $3,589,297 within 90 days" and "judgment in this amount is hereby entered for [Ballard] against the [appellants] jointly and severally."

II. Law and Analysis

An action for shareholder oppression is one in equity. 399 S.C. at 593, 733 S.E.2d at 109. "Therefore, we may find facts according to our own view of the preponderance of the evidence."*Id.*"However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. Furthermore, we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses."*Id.* (citation omitted).

The primary issue before this court is the value of Ballard's ownership interest in Warpath. *See* 399 S.C. at 597–98, 599, 733 S.E.2d at 112, 113 (affirming the circuit court's order finding the individual appellants engaged in shareholder oppression and requiring them to place 60,000 shares in escrow and buy out Ballard's shares). To determine the value of Ballard's interest, we must first calculate the fair value of Warpath. The court "must undertake to compute the fair value by establishing the fair market value of the corporate property as an established and going business" after considering "[e]very relevant fact and circumstance which enters into the value of the corporate property and which reflects itself in the worth of the corporate stock."*Santee Oil Co. v. Cox*, 265 S.C. 270, 273, 217 S.E.2d 789, 791 (1975) (internal quotation marks omitted).

We begin our analysis with the circuit court's appointed expert—Dr. Woodside. In his first report, Dr. Woodside estimated the fair value of Warpath at $4,366,564—

correctly assuming construction had not begun. However, his supplemental report was based on the assumption that construction of the marina began in July 2010. As Dr. Woodside stated in his report,

> If financing and construction had begun in July of 2010, as of December 31, 2012, the construction for both phases would be completed, phase I net operating income would be at approximately 90% stabilization, and phase II net operating income would be at approximately 60% stabilization. The equity holders of the company would be 2.5 years closer to both receiving the initial cash flow to equity and the net proceeds of the expected sale of the company. Based on those assumptions, the resulting value of 100% Equity of the Company is $7,178,594....

Ballard's counsel appropriately conceded during oral argument that a "tension" exists between an assumption that construction began in 2010 for the purpose of valuing Warpath, and the circuit court's finding that the individual appellants did not perform their obligations to make Warpath operational for the purpose of determining Ballard's ownership share. Because Warpath did not begin financing and construction of the marina in July 2010, an appraisal based on the assumption that it did cannot be correct. *See Santee Oil*, 265 S.C. at 273–74, 217 S.E.2d at 791 ("Every relevant fact and circumstance which enters into the value of the corporate property and which reflects itself in the worth of the corporate stock must be considered."(citation omitted)).

*4 While we do not accept the figure $7,178,594, we do not reject the testimony of Dr. Woodside. Rather, we rely on it. However, we also rely on other evidence in the record, including Thoennes's statement Warpath was worth $6 million, and the offer from the marina development company that contemplated a value for Warpath of $6.43 million.

Finally, we rely on the opinion of Dr. Alford. Dr. Alford explained he agreed with everything Dr. Woodside did in valuing Warpath, except as to one important variable. Dr. Woodside assumed a purchaser would insist on a 22% return on investment, and thus Dr. Woodside used 22% as the discount rate on Warpath's cash flow in its future operational state for purposes of valuation. Dr. Alford explained, however, that a purchaser would likely "leverage" its investment by

using borrowed money—in addition to cash—to purchase Warpath. With this leverage, a purchaser would be able to earn a much higher return on the capital portion of its investment. Thus, Dr. Alford concluded, a purchaser would accept a smaller return on overall investment in order to attain a return on capital investment in the range Dr. Woodside assumed an investor would require. Based on these assumptions, Dr. Alford explained an 11.01% discount rate would be appropriate, which resulted in a valuation of $5,034,969 if construction began in 2013, and $9,286,126 if construction began in 2010.[1]

In making the assumption a purchaser would accept an 11.01% return on overall investment, Dr. Alford relied on a December 2012 "Conditional Loan

[1] Dr. Alford provided a report that included the figures $9,268,126 and $12,034,969. At trial, however, he gave the figures $5,034,969 and $9,286,126.

Commitment" for $24 million "to provide capital for the development of a mixed use project" on the property owned by Warpath. Dr. Alford stated the loan commitment "is highly relevant in a consideration of value" because it "express[es] the interest of a real, identifiable investor within two weeks of the valuation date."Dr. Alford explained the investor who made the commitment "would have itself leveraged its own investment into Warpath, so that, while the *total* return on the project would have been at most 11.01%, the return on [the investor's] *capital*, after meeting its own debt service requirements, would have been higher."Dr. Alford reasoned that if an investor was willing to accept an 11.01% return on its overall investment, as opposed to the 22% return Dr. Woodside assumed an investor would require, a purchaser would be willing to pay more to purchase Warpath—resulting in a higher value than provided by Dr. Woodside.

We have carefully considered all the evidence offered as to the value of Warpath. We find the value of Warpath was not $7,178,594; instead, we hold the fair value of Warpath was $6.25 million.

After determining the fair value of Warpath, we must determine the percentage of shares owned by Ballard. We agree with the circuit court that Ballard owned 50% of the company. A corporation "must place in escrow shares issued for a contract for future services or benefits."§ 33–6–210(e)."The shares and distributions escrowed must remain in escrow until the services are performed ... or the benefits are received. If the services are not performed ... or the benefits are not received,

the shares escrowed ... may be canceled in whole or in part...."*Id.* The circuit court found 60,000 shares of Warpath remained in escrow because the individual appellants had not performed the services for which the shares were issued, and the supreme court affirmed the decision. *See Ballard*, 399 S.C. at 599, 733 S.E.2d at 112–113. The necessary result of that finding is that the shares in escrow did not count toward ownership for purposes of calculating Ballard's ownership interest. On remand, the parties presented no evidence the individual appellants had taken any steps toward performing the services they promised to perform in exchange for the 60,000 shares. Therefore, we hold the escrowed shares did not count toward ownership for purposes of calculating Ballard's ownership interest, and Ballard owned 50% of Warpath.

*5 The individual appellants also argue the circuit court erred in ordering them to complete the buyout within ninety days and entering judgments against them in the amount of the buyout. The gist of these arguments is that the buyout "failed" because it was impossible for the individual appellants to comply with the ninety-day provision. However, the record contains little evidence regarding the financial status of the individual appellants, and in particular, contains no financial statements for any appellant. The record actually indicates the buyout did not occur because the appellants chose not to complete it—not because it was impossible.

When pressed at oral argument, counsel was careful not to say the individual appellants do not have the ability to comply with the ninety-day provision. Therefore, if a mandatory buyout, instead of a voluntary buyout, is appropriate—a ruling the trial court made in 2010 and the appellants did not appeal—then the imposition of a time limit on the buyout is also appropriate. Without any evidence that the individual appellants cannot comply within the time limit, we find the time limit is appropriate. We also find that if a mandatory buyout is appropriate, then the court must have some way to enforce it. Because appellants did not appeal the mandatory buyout, we decline to hold the circuit court erred in imposing judgments on them to enforce its order.

III. Conclusion

We find Warpath had a fair value of $6.25 million and Ballard owned 50% of the company. The value of Ballard's share of Warpath, therefore, was $3.125 million. Accordingly, we **AFFIRM AS MODIFIED**.

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

Exhibit B

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-CP-23-002790

Andrew P. (Andy) Ballard, ... Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. ..... Appellants/Petitioners.

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rule 221, SCACR, Appellants Warpath Development, Inc., Tim Roberson, Rick Thoennes and Rick Thoennes, III hereby petition the Court to rehear and reverse its July 15, 2015, Opinion on the basis that the Court erred in the following respects:

1. The court's opinion fails to address and/or misperceived the first argument presented by Appellants on appeal. Specifically, Appellants asserted that the lower court's October 3, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout enforced by a personal judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

2. The court's opinion fails to address and/or misperceived the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.

3. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent. Dr. Woodside's valuation was the only reliable opinion of value presented in the record and his valuation was dependent upon the happening of all events necessary to complete the development, which would trigger the release of all shares from escrow. Dr. Alford's opinion accepted Dr. Woodside's methodology. The methodology of all other evidence of value is unknown. It is inequitable for the court to base overall company value on the happening of all events of financing and development that would trigger the release of shares from escrow, but then ignore those events for purposes of finding 50% share ownership for the respondent.

4. The court's opinion improperly assigns a value of $6,250,000 to Warpath. While the court correctly notes the impropriety of the lower court's assigned value of $7,178,594 in adjusting the value of Warpath downward, the court nevertheless relies upon unreliable statements of value in reaching its decision. The only reliable opinion of value presented is that of the court's appraiser, Dr. Woodside. Dr. Woodside

was presented with and considered all of the facts and information of value, including all statements of value and offers of purchase and financing in concluding a total company value of $4,360,000.

Appellants respectfully submit that the Court overlooked or misapprehended the following points.[1]

I. Argument for Rehearing

1. The court's opinion fails to address or misperceived the first argument presented by Appellants on appeal. Specifically, Appellants asserted that the lower court's October 3, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout enforceable by personal judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

Outside of the issues of value and percentage ownership, Appellants presented two arguments to set aside and reverse the court's entry of judgment. The first argument which was presented in Sections 2(A), (B), and (C) of Appellants' Final Brief presented a question of law addressing the propriety of the lower court's October 2, 2013 Order. Specifically, Appellants argue that the lower court's order was legally deficient and fatally flawed on its face and on entry because it went beyond what was statutorily permitted, was a remedy more drastic than dissolution, and dissolution is the default remedy. The second argument presented in Section 3 concerned the issue of the "appropriateness" of the 90-day buyout and the court's equitable obligation to consider the ability of the parties to complete the terms before the entry of judgment.

[1] Appellants incorporate their earlier briefs and the record on appeal by reference.

In the court's July 15, 2015 opinion, the court fails to address Appellants' arguments concerning the legal propriety of the court's October 2, 2013 order. The court instead lumps Appellants' argument together concluding that the "gist of these arguments is that the buyout 'failed' because it was impossible for the individual Appellants to comply with the ninety-day provision." The court's finding is inaccurate and misapprehends Appellants' arguments. Further, the court misapprehends Appellants assertions in stating that the Appellants did not appeal the propriety of the court's October 2, 2013 ordered buyout and imposition of personal judgment. Section 2 of the Final Brief, the first argument presented in the appeal by the Appellants, is entirely devoted to the legal question of whether the lower court's imposition of a buyout enforceable by a personal judgment was permitted by South Carolina law.

Specifically, Appellants asserted on page 4 of its final brief that the court's October 2, 2013 "order is legally deficient and fatally flawed at entry because the lower court unlawfully imposed a personal judgment in violation of South Carolina law to address the failure of the Appellants to complete the buyout." Appellants further argue on page 5 of their Final Brief,

> Specific to this matter, the court may choose to remedy oppression by issuing an order "providing for the purchase at their fair value of shares" § 33-14-310(d)(4) (emphasis added). According to the Oxford English Dictionary, "provide" means to "make provision for the future", "to make adequate preparation", "to prepare", "to make available", etc. See OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com/view/Entry/153448?rskey=iJgXU6&result=2&isAdvanced=false#eid. The legislature could have, but, did not use the words "order the purchase", "compel the purchase", or "command the purchase". As in this case, to "provid[e] for the purchase" the court may set the value, terms and conditions of sale, but neither §§33-14-300 or 310 permit the court to enter an order also entering a personal judgment.

Appellants make further arguments concerning the drastic nature of the lower court's remedy and the proper reversion to dissolution in the event of the failure of the buyout on pages 6-9 of the Appellants' Final Brief. Regardless of whether the terms "voluntary" or "mandatory" are

employed, Appellant's arguments on appeal make it very clear that a buyout enforced by personal judgment is improper and dissolution is the only option available in the event of a failed buyout. The court failed to address the issues presented regarding the ability of the lower court to impose a buyout forcibly enforced by a personal judgment exposing Appellant's assets beyond their investment in Warpath.

Regardless of the labels one seeks to apply to the question, the Appellants plainly present arguments addressing the legality of the entirety of lower court's order with respect to the order of buyout. The question of the legal propriety of the October 2, 2013 order of buyout is certainly before the court and must be addressed. Appellants request a rehearing to address this question before the court.

2. **The court's opinion fails to address or misperceived the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.**

This appeal addresses legal and equitable questions concerning the propriety of the lower court's October 2, 2013 order at entry and the evidence in the record before the court at that time. The court in its opinion makes reference to oral argument where questions concerning the ability of the Appellants to complete the court ordered buyout were asked. In response, Appellants' counsel referenced testimony offered at trial that the parties were unable to complete a buyout during an arbitrary time period set out by the court or suggested by respondent and submitted themselves to the court for further financial examination on the question of the appropriateness of the buyout remedy. The failure of the court to properly consider the "appropriateness" of its

remedy at or before entry was placed at issue before the court on appeal. The argument is presented in Section 3 of Appellants' Final Brief on pages 9-13 of the brief.

The court's July 15, 2015 opinion only vaguely references this argument in stating that "[w]ithout any evidence that the individual Appellants cannot comply within the time limit, we find the time limit is appropriate". First, the court's finding fails to account for the evidence in the record on pages 223-224 and 231 of the Record on Appeal where both Mr. Roberson and Mr. Thoennes Sr. both plainly state that neither had the ability to immediately fulfill a buyout and were willing to submit to an examination of their financial condition in order to properly structure a buyout or determine whether the buyout was at all appropriate. Therefore, despite the court's finding, there is evidence before the court that the individual Appellants cannot comply with the buyout.[2] Second, the court does not address the question presented, which is when presented with testimony that the individual parties cannot complete a buyout, must the lower court determine ability and therefore the "appropriateness" of its remedy as required by statute prior to issuing its order. This question was presented to the court in this appeal, but never addressed by the court in its July 15, 2015 opinion. Appellants request a rehearing to address this question before the court.

3. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent.

With respect to valuation, the question before the court is the value of the 20,000 shares held by respondent. It is undisputed that at present, Warpath is a nonoperational, raw lease of land. As has been accepted by all parties, there are only two ways to value Warpath: (1) Warpath can be valued as an operational entity in which its financing, development and

[2] Because Mr. Thoennes III is protected by a bankruptcy discharge and not obligated to participate in a buyout, his testimony was unnecessary.

operations are assumed and value is reached by reducing to present value the potential investment and return, or (2) a valuation of Warpath's assets "as is" in its present condition. To date, Warpath has not any point been valued in its "as is" condition. There is no evidence in the record of a value of the leasehold interest of Warpath. Dr. Woodside as well factually was unable to make such a valuation of leasehold interest or other assets of Warpath. Therefore, the only known methodology for valuing Warpath has been a discounted cash flow method assuming in the future that Warpath would be financed, developed and operational over an 8-year period. It then would have a terminal value that would be the value of Warpath. However, that terminal value 8 years in the future is not accurate of its present value which was required to be reduced. That summarizes the evidence of value in the record presented by Dr. Woodside and accepted by Dr. Alford. All other methodologies are unknown.

On its face, the buyout remedy presumes that the company will remain in the hands of the shareholders that complete the buyout. The company is not being sold in total. Only the value of respondent's 20,000 out of a total of 100,000 issued shares are being valued. Regardless of whether shares are in escrow or not, all of the shareholders not named Ballard were to remain with the entity to carry on. In affirming that Respondent's 20,000 shares should be valued as 50% of the value of the company, the court has committed error. First, the court has committed legal error in failing to account for the shares in escrow in valuing Warpath. There is no citation and no basis in law for the court to ignore the shares in escrow. The citation to S.C. Code Ann. § 33-6-210 only addresses the requirement and conditions of escrow. Whether shares remain in escrow or not is left to the good business judgment of the board of directors. § 210 does not justify the court ignoring the escrowed shares in valuing respondent's shares. In fact, the law supports an opposite conclusion. At law, the shares in escrow are not ignored as the court has

ignored them in its opinion. Holders of escrowed shares are still shareholders with all of the fundamental rights of a shareholder being retained. For instance, S.C. Code Ann. § 33-6-210(e) provides that the shares in escrow have the same distributional rights as all other shares, *i.e.* they share equally. There is no prohibition on a shareholder of escrowed shares being elected to the board of directors. The South Carolina Reporter's Comments to § 33-6-210 specifically provided that a shareholder of escrowed shares has the right to "exercise all voting rights to which the shares would be entitled in they were not held in escrow." Legally, the interests of the escrowed shares cannot be ignored or forfeited as the court has done in affirming the lower court. For these reasons, Appellants request a rehearing to address this question before the court.

Second, as argued in brief and in oral argument, because the value assigned to Warpath is premised directly upon the happening of the events that would trigger the release of the shares from escrow, it is fundamentally unfair and inequitable for the court to ignore those assumptions in forfeiting or ignoring the shares in escrow in assigning a percentage value. The valuation and the percentage value of the shares cannot be addressed separately. Given the manner in which Warpath was valued, they must be jointly considered. As set forth in their Final Brief on page 13 -14,

> On the one hand, in reaching the value of 100% of the outstanding 100,000 shares of Warpath as of December 31, 2012, the lower court assumed for purposes of reaching that value that all contractual obligations of Appellants' Roberson, Thoennes and Thoennes III to secure funding and build the marina had been met and the marina had operated for 8 years into the future. On the other hand, in reaching a value for Plaintiff's individual 20,000 shares, which according to the law and all testimony offered was a bargained for 20% of the total, without any reasonable, factual or equitable basis, the lower court assumed that none of the events justifying the value of the company, *i.e.* funding, construction and 8 years of operation, occurred, forfeited the shares of Roberson, Thoennes and Thoennes III, and valued Plaintiff's interest at 50% of the total company value.

To repeat the same inequitable result of the lower court is fundamentally unfair, inequitable and in error.

Finally, the court appears to find justification for its conclusion in a finding that "on remand, the parties presented no evidence the individual Appellants had taken any steps toward performing the services they promised...." This finding is inaccurate. Beginning on page 216 and carrying on through page 221 of the Record on Appeal, Mr. Roberson summarizes all of his efforts during the previous few years to finance and build the project. Continuing on, beginning on page 226 and carrying on through page 231 of the Record on Appeal, Mr. Thoennes Sr. summarizes efforts during the previous few years to finance and build the project. These efforts are further illustrated by the communications, bank submittals, offers and conditional loan offers the court reviewed in assessing value. All of the testimony and documents presented demonstrate the continuous efforts of these individuals to bring this project to fruition. The court cannot simply ignore this evidence in reaching its findings and making blanket statements that there is "no evidence the individual Appellants had taken any steps toward performing the services they promised...." For these reasons, Appellants request a rehearing to address this question before the court.

4. The court's opinion improperly assigns a value of $6,250,000 to Warpath. While the court correctly notes the impropriety of the lower court's assigned value of $7,178,594 in adjusting the value of Warpath downward, the court nevertheless relies upon unreliable statements of value in reaching its decision on value.

While the court properly recognized the error in the lower court's reliance on the value assigned in the October 3, 2013 Order, the court nevertheless has relied on wholly unreliable and flawed numbers in reaching its independent determination of a value of $6,250,000 for 100% of

the shares of Warpath. In reaching its conclusion, the court relies upon (1) Dr. Woodsides' opinion that Warpath was worth $4,360,000, (2) a representation by Rick Thoennes Sr. to a bank that Warpath was worth $6,000,000,[3] (3) a conditional offer by a marina group to purchase a super majority stake in Warpath for $4.5 million, (4) Dr. Alford's opinion which is based entirely on a complicated financing arrangement at a rate of around 11% that never made it beyond an initial qualified offer.

Factually, the only qualified and reliable opinion of value in front of the court is that of Dr. Woodside. To consider the other "values" submitted invited error, confusion and fundamental unfairness into the process. Specifically, Dr. Woodside, the court's neutral appraiser, reached a value as to 100% of the shares by employing a 22% discount rate using the established "build up" method and employs objective, empirical data to reach the amount. Further, the rate was checked and confirmed against the actual market by polling various marina entities and investors. Dr. Alford has stated in testimony and multiple times that he agrees with and would have come to the same 22% rate as Dr. Woodside. Dr. Alford, however, assigns an 11% rate based upon a 4 page form Conditional Loan Commitment issued by lender Dakota Holdings (R. at 499-502) in December 2012 that neither progressed beyond that letter and is subject to substantial additional due diligence before final commitment.[4] The Conditional Loan Commitment is far from a reliable document to base an entire valuation.

The valuation of Respondent's 20,000 shares is of a high risk investment. There are no guaranteed rates of return as a loan commands. The discount rate considers what an investor

[3] This reference is to a document in the Record at page 477. It is contained in a section entitled Property Information. The purpose of this document identified in the Record on page 476 is the seeking of financing. The description of the real estate includes "102 floating docks; 200 boat storage in dry stacks; 34 camp & RV sites; 10 cabins; 9 cottages; 120 room Lodge and Conference Center; 1 free standing restaurant and 1 located in Lodge; 1 marina store." This description and value concerns the future of Warpath not the present.

[4]

would require as a reasonable rate of return on his capital contribution for taking the risk of losing it all in this high risk investment. Without dispute, as testified and presented in Dr. Woodside's report, which is part of the record herein (R. at 601-722), the empirical data indicates that the average investor is willing to invest in a large capitalized public company, *i.e.* a company listed on the New York Stock Exchange, with the expectation that the return will be on average 9.2%. Further, an investor is willing to invest in a small capitalized public company at an expected average rate of return of 15.2 %. It does not take an expert to explain that common sense suggests that a person investing in a four-person, high risk investment is going to expect a far greater return than an investment in a public company. Certainly, an equity investor would expect a return far greater than the 11% as set forth by Dr. Alford. The reality is that an investment may return more or less than expectation. However, it is unreasonable to expect that a person would invest in the high risk investment if the expected return is less than investing in public companies with all of the legal protections accorded.

Without having the benefit of the testimony of Dakota Holdings upon which Dr. Alford's opinion is premised, we cannot know their true intent or how its interest rates were calculated. However, we do know that Dakota Holdings and its offer do not fit the profile of what is being evaluated in this hearing. Dakota Holdings was not offering to invest in Warpath. They made no offer to purchase and run Warpath as a going concern. The face of the document provides that it is Conditional Loan Commitment and they are lending money to Warpath at a specified rate of return and taking the stock of Warpath as collateral. Dakota Holdings was not risking their capital in an investment. Dakota Holdings was lending the money, and through the control accorded by the collateralized stock would have control over how their money is appropriated, the build out, the management of Warpath, and would see the return of their investment in loan

payments with interest ahead of all others. Dakota Holdings has structured a deal in which they have a tight control over their risk and do not take near the chance of the mere capital investor that the investment may not perform as expected. Dakota Holdings does not have an expected rate of return. Dakota Holdings has a guaranteed rate of return which is far different from the equity investment being evaluated in this matter.

Appellants request that the court reconsider its assignment of value to 100% of the shares of Warpath. The lower court recognized that the only reasonable and reliable opinion of value was that of Dr. Woodside. As recognized by this court, the lower court's error was in accepting the higher and factually strained value that was unilaterally obtained by the respondent. As such, Appellants urge the court on petition for rehearing to accept Dr. Woodside's assignment of $4,360,000 value to 100% of Warpath's shares. For these reasons, Appellants request a rehearing to address this question before the court.

II. Basis for Rehearing *En Banc*

An *en banc* rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 2 1 9(a), SCACR. "[Wlhile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc 'ordinarily* will not be ordered' except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]" Williamson v. Middleton, 83 S.C.490, 494, 681 S.E.2d 867, 869 (2009).

Appellants submit that Section 2 (A) – (C) of Appellants' appeal as presented in its Final Brief warrant a rehearing *en banc* as such involves significant questions of statutory

interpretation and judicial authority. For these reasons, Appellants request a rehearing *en banc* to address these questions before the court.

Conclusion

For the reasons set forth above, the court should grant the Petition for Rehearing and Rehearing *En Banc*, reconsider this matter and reverse the decision of the trial court.

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Attorneys for Appellants/Petitioners

July 28, 2015
Greenville, South Carolina

Exhibit C

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-005739
Appellate Case No.: 2013-002790

Andrew P. (Andy) Ballard, ... Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. ..... Appellants/Petitioners.

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rule 221, SCACR, Appellants Warpath Development, Inc., Tim Roberson, Rick Thoennes and Rick Thoennes, III hereby petition the Court to rehear and reverse its August 26, 2015, Opinion on the basis that the Court erred in the following respects:

1. The court's opinion errs in failing to completely address the first argument presented by Appellants on appeal or in reversing the trial court on the basis of Appellants' assertions on appeal. Specifically, Appellants asserted that the lower court's October 2, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout and a personal

judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

2. The court's opinion errs in applying a law of the case doctrine in addressing the first argument presented by Appellants on appeal.

3. The court's opinion fails to address the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.

4. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent. Dr. Woodside's valuation was the only reliable opinion of value presented in the record and his valuation was dependent upon the happening of all events necessary to complete the development, which would trigger the release of all shares from escrow. Dr. Alford's opinion accepted Dr. Woodside's methodology. The methodology of all other evidence of value is unknown. It is inequitable for the court to base overall company value on the happening of all events of financing and development that would trigger the release of shares from escrow, but then ignore those events for purposes of finding 50% share ownership for the respondent.

5. The court's opinion improperly assigns a value of $6,250,000 to Warpath. While the court correctly notes the impropriety of the lower court's

assigned value of $7,178,594 in adjusting the value of Warpath downward, the court nevertheless relies upon unreliable statements of value in reaching its decision. The only reliable opinion of value presented is that of the court's appraiser, Dr. Woodside. Dr. Woodside was presented with and considered all of the facts and information of value, including all statements of value and offers of purchase and financing in concluding a total company value of $4,360,000.

Appellants respectfully submit that the Court overlooked or misapprehended the following points.[1]

I. Argument for Rehearing

1. The court's opinion errs in failing to completely address the first argument presented by Appellants on appeal or in reversing the trial court on the basis of Appellants' assertions on appeal. Specifically, Appellants asserted that the lower court's October 2, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout and a personal judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

Appellants' first argument was presented in Sections 2(A), (B), and (C) of Appellants' Final Brief. Appellants presented a question of law addressing the propriety of the lower court's October 2, 2013 Order. Specifically, Appellants argue that the lower court's order was legally deficient and fatally flawed on its face and on entry because it went beyond what was statutorily permitted, was a remedy more drastic than dissolution, and dissolution is the default remedy.

[1] Appellants incorporate their earlier briefs and the record on appeal by reference.

In the court's August 26, 2015 opinion, the court summarily addresses Appellants' arguments concerning the legal propriety of the court's October 3, 2013 order. The court instead lumps Appellants' argument together concluding that the "gist of these arguments is that the buyout 'failed' because it was impossible for the individual Appellants to comply with the ninety-day provision." The court's finding is inaccurate and misapprehends Appellants' arguments. Section 2 of the Final Brief, the first argument presented in the appeal by the Appellants, is entirely devoted to the legal question of whether the lower court's imposition of a buyout enforceable by a personal judgment was permitted by South Carolina law.

Specifically, Appellants asserted on page 4 of its final brief that the court's October 2, 2013 "order is legally deficient and fatally flawed at entry because the lower court unlawfully imposed a personal judgment in violation of South Carolina law to address the failure of the Appellants to complete the buyout." Appellants further argue on page 5 of their Final Brief,

> Specific to this matter, the court may choose to remedy oppression by issuing an order "providing for the purchase at their fair value of shares" § 33-14-310(d)(4) (emphasis added). According to the Oxford English Dictionary, "provide" means to "make provision for the future", "to make adequate preparation", "to prepare", "to make available", etc. See OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com/view/Entry/153448?rskey=iJgXU6&result=2&isAdvanced=false#eid. The legislature could have, but, did not use the words "order the purchase", "compel the purchase", or "command the purchase". As in this case, to "provid[e] for the purchase" the court may set the value, terms and conditions of sale, but neither §§33-14-300 or 310 permit the court to enter an order also entering a personal judgment.

Appellants make further arguments concerning the drastic nature of the lower court's remedy and the proper reversion to dissolution in the event of the failure of the buyout on pages 6-9 of the Appellants' Final Brief. Regardless of whether the terms "voluntary" or "mandatory" are employed, Appellant's arguments on appeal make it very clear that a buyout enforced by personal judgment is improper and dissolution is the only option available in the event of a failed

buyout. Even assuming that a buyout is "mandatory" (a descriptive term that has never been employed at any level prior to this court's order) as the court did, the buyout must still comply with the law which as set forth by Appellants on appeal does not permit the imposition of a personal judgment. Using terms employed by this court, a "mandatory" buyout may still be enforced by dissolution, which is the statutory default. The court failed to address the issues presented regarding the ability of the lower court to impose a buyout forcibly enforced by a personal judgment exposing Appellant's assets beyond their investment in Warpath. Appellants request a rehearing to address this question before the court and seek a reversal of the trial court's October 2013 Order.

2. The court's opinion errs in applying a law of the case doctrine in addressing the first argument presented by Appellants on appeal.

In its August 26, 2015, Opinion, without an consideration of statutory authority, common law or equity, the court holds that a personal judgment is proper in this case. The court premises it's holding on a finding that in its May 3, 2010, order the trial court entered an order of "mandatory" buyout that was not appealed. While not specifically stated, the court apparently bases its conclusion solely on a law of the case analysis. For the following reasons, the court's analysis is in error and should be reconsidered and reversed.

First, there has been no order issued at any point in time, in any court in this matter that employs the term "mandatory" when describing the buyout. The order upon which this court bases its reasoning is the trial court's May 3, 2010 Order. In pertinent part, the trial court's order provides as follows: "[T]he 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)." (R. at 13.)

The law of the case doctrine only applies to lower court orders that are subject to being appealed and decided. See Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486 (2014) (holding that any issues that could have been presented in a voluntarily abandoned appeal become the law of the case.); Bone v. U.S. Food Svc, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal."). In this matter, the trial court's 2010 Order specifically refers to the order as equitable, tracks the language of S.C. Code Ann. § 33-14-310(d)(4), makes no mention of personal judgment, and makes no mention of or employs the terms "voluntary" or "mandatory". Arising from the trial court's 2010 Order there were a number of questions remaining to be determined such as adequacy, amount, would the remedy remain acceptable to the Plaintiff, the timing of the buyout, the structure of the buyout, economic viability, would the remedy remain equitable for all parties, and what happens if the buyout could not be completed. However, what is unequivocally missing from the trial court's 2010 order is the notice necessary to put the Appellants on alert in 2010 that the court would later amend and add to its order the imposition of a personal judgment creating a forced investment and exposing their assets beyond their equity in Warpath to levy and execution.

Further, the 2010 order specifically contemplates additional proceedings, additional findings and additional orders. Outside of the findings on the question of oppression, the trial court's 2010 order cannot be said to be final with respect to the remedy. If fact, the trial court's 2010 order was not final as the trial court's October 2013 order added the imposition of a personal judgment to the remedy. For these reasons and as set forth in Appellants' final brief, the propriety of a court imposed personal judgment and forced investment is not the law of the

case coming out of the trial court's 2010 Order. As such, the court's August 26, 2015 Opinion is in error and should be reconsidered and reversed. Therefore, Appellants request a rehearing on these matters.

3. The court's opinion fails to address the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.

This appeal addresses legal and equitable questions concerning the propriety of the lower court's October 2, 2013 order at entry and the evidence in the record before the court at that time. The court in its opinion makes reference to oral argument where questions concerning the ability of the Appellants to complete the court ordered buyout were asked. In response, Appellants' counsel referenced testimony offered at trial that the parties were unable to complete a buyout during an arbitrary time period set out by the court or suggested by respondent and submitted themselves to the court for further financial examination on the question of the appropriateness of the buyout remedy. For reasons specific to timing and others, the failure of the court to properly consider the "appropriateness" of its remedy at or before entry was placed at issue before the court on appeal. The argument is presented in Section 3 of Appellants' Final Brief on pages 9-13 of the brief.

The court's July 15, 2015 opinion only vaguely references this argument in stating that "[w]ithout any evidence that the individual Appellants cannot comply within the time limit, we find the time limit is appropriate". First, the court's finding fails to account for the evidence in the record on pages 223-224 and 231 of the Record on Appeal where both Mr. Roberson and Mr.

Thoennes Sr. both plainly state that neither had the ability to immediately fulfill a buyout and were willing to submit to an examination of their financial condition in order to properly structure a buyout or determine whether the buyout was at all appropriate. Therefore, despite the court's finding, there is evidence before the court that the individual Appellants cannot comply with the buyout.[2] Second, the court does not address the question presented, which is when presented with testimony that the individual parties cannot complete a buyout, must the lower court determine ability and therefore the "appropriateness" of its remedy as required by statute prior to issuing its order. This question was presented to the court in this appeal, but never addressed by the court in its July 15, 2015 opinion. Appellants request a rehearing to address this question before the court.

4. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent.

With respect to valuation, the question before the court is the value of the 20,000 shares held by respondent. It is undisputed that at present, Warpath is a nonoperational, raw lease of land. As has been accepted by all parties, there are only two ways to value Warpath: (1) Warpath can be valued as an operational entity in which its financing, development and operations are assumed and value is reached by reducing to present value the potential investment and return, or (2) a valuation of Warpath's assets "as is" in its present condition. To date, Warpath has not any point been valued in its "as is" condition. There is no evidence in the record of a value of the leasehold interest of Warpath. Dr. Woodside as well factually was unable to make such a valuation of leasehold interest or other assets of Warpath. Therefore, the only known methodology for valuing Warpath has been a discounted cash flow method

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assuming in the future that Warpath would be financed, developed and operational over an 8-year period. It then would have a terminal value that would be the value of Warpath. However, that terminal value 8 years in the future is not accurate of its present value which was required to be reduced. That summarizes the evidence of value in the record presented by Dr. Woodside and accepted by Dr. Alford. All other methodologies are unknown.

On its face, the buyout remedy presumes that the company will remain in the hands of the shareholders that complete the buyout. The company is not being sold in total. Only the value of respondent's 20,000 out of a total of 100,000 issued shares are being valued. Regardless of whether shares are in escrow or not, all of the shareholders not named Ballard were to remain with the entity to carry on. In affirming that Respondent's 20,000 shares should be valued as 50% of the value of the company, the court has committed error. First, the court has committed legal error in failing to account for the shares in escrow in valuing Warpath. There is no citation and no basis in law for the court to ignore the shares in escrow. The citation to S.C. Code Ann. § 33-6-210 only addresses the requirement and conditions of escrow. Whether shares remain in escrow or not is left to the good business judgment of the board of directors. § 210 does not justify the court ignoring the escrowed shares in valuing respondent's shares. In fact, the law supports an opposite conclusion. At law, the shares in escrow are not ignored as the court has ignored them in its opinion. Holders of escrowed shares are still shareholders with all of the fundamental rights of a shareholder being retained. For instance, S.C. Code Ann. § 33-6-210(e) provides that the shares in escrow have the same distributional rights as all other shares, *i.e.* they share equally. There is no prohibition on a shareholder of escrowed shares being elected to the board of directors. The South Carolina Reporter's Comments to § 33-6-210 specifically provided that a shareholder of escrowed shares has the right to "exercise all voting rights to

which the shares would be entitled in they were not held in escrow." Legally, the interests of the escrowed shares cannot be ignored or forfeited as the court has done in affirming the lower court. For these reasons, Appellants request a rehearing to address this question before the court.

Second, as argued in brief and in oral argument, because the value assigned to Warpath is premised directly upon the happening of the events that would trigger the release of the shares from escrow, it is fundamentally unfair and inequitable for the court to ignore those assumptions in forfeiting or ignoring the shares in escrow in assigning a percentage value. The valuation and the percentage value of the shares cannot be addressed separately. Given the manner in which Warpath was valued, they must be jointly considered. As set forth in their Final Brief on page 13 -14,

> On the one hand, in reaching the value of 100% of the outstanding 100,000 shares of Warpath as of December 31, 2012, the lower court assumed for purposes of reaching that value that all contractual obligations of Appellants' Roberson, Thoennes and Thoennes III to secure funding and build the marina had been met and the marina had operated for 8 years into the future. On the other hand, in reaching a value for Plaintiff's individual 20,000 shares, which according to the law and all testimony offered was a bargained for 20% of the total, without any reasonable, factual or equitable basis, the lower court assumed that none of the events justifying the value of the company, *i.e.* funding, construction and 8 years of operation, occurred, forfeited the shares of Roberson, Thoennes and Thoennes III, and valued Plaintiff's interest at 50% of the total company value.

To repeat the same inequitable result of the lower court is fundamentally unfair, inequitable and in error.

Finally, the court appears to find justification for its conclusion in a finding that "on remand, the parties presented no evidence the individual Appellants had taken any steps toward performing the services they promised...." This finding is inaccurate. Beginning on page 216 and carrying on through page 221 of the Record on Appeal, Mr. Roberson summarizes all of his efforts during the previous few years to finance and build the project. Continuing on, beginning

on page 226 and carrying on through page 231 of the Record on Appeal, Mr. Thoennes Sr. summarizes efforts during the previous few years to finance and build the project. These efforts are further illustrated by the communications, bank submittals, offers and conditional loan offers the court reviewed in assessing value. All of the testimony and documents presented demonstrate the continuous efforts of these individuals to bring this project to fruition. The court cannot simply ignore this evidence in reaching its findings and making blanket statements that there is "no evidence the individual Appellants had taken any steps toward performing the services they promised...." For these reasons, Appellants request a rehearing to address this question before the court.

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While the court properly recognized the error in the lower court's reliance on the value assigned in the October 3, 2013 Order, the court nevertheless has relied on wholly unreliable and flawed numbers in reaching its independent determination of a value of $6,250,000 for 100% of the shares of Warpath. In reaching its conclusion, the court relies upon (1) Dr. Woodsides' opinion that Warpath was worth $4,360,000, (2) a representation by Rick Thoennes Sr. to a bank that Warpath was worth $6,000,000,[3] (3) a conditional offer by a marina group to purchase a super majority stake in Warpath for $4.5 million, (4) Dr. Alford's opinion which is based entirely

[3] This reference is to a document in the Record at page 477. It is contained in a section entitled Property Information. The purpose of this document identified in the Record on page 476 is the seeking of financing. The description of the real estate includes "102 floating docks; 200 boat storage in dry stacks; 34 camp & RV sites; 10 cabins; 9 cottages; 120 room Lodge and Conference Center; 1 free standing restaurant and 1 located in Lodge; 1 marina store." This description and value concerns the future of Warpath not the present.

on a complicated financing arrangement at a rate of around 11% that never made it beyond an initial qualified offer.

Factually, the only qualified and reliable opinion of value in front of the court is that of Dr. Woodside. To consider the other "values" submitted invited error, confusion and fundamental unfairness into the process. Specifically, Dr. Woodside, the court's neutral appraiser, reached a value as to 100% of the shares by employing a 22% discount rate using the established "build up" method and employs objective, empirical data to reach the amount. Further, the rate was checked and confirmed against the actual market by polling various marina entities and investors. Dr. Alford has stated in testimony and multiple times that he agrees with and would have come to the same 22% rate as Dr. Woodside. Dr. Alford, however, assigns an 11% rate based upon a 4 page form Conditional Loan Commitment issued by lender Dakota Holdings (R. at 499-502) in December 2012 that neither progressed beyond that letter and is subject to substantial additional due diligence before final commitment. The Conditional Loan Commitment is far from a reliable document to base an entire valuation.

The valuation of Respondent's 20,000 shares is of a high risk investment. There are no guaranteed rates of return as a loan commands. The discount rate considers what an investor would require as a reasonable rate of return on his capital contribution for taking the risk of losing it all in this high risk investment. Without dispute, as testified and presented in Dr. Woodside's report, which is part of the record herein (R. at 601-722), the empirical data indicates that the average investor is willing to invest in a large capitalized public company, *i.e.* a company listed on the New York Stock Exchange, with the expectation that the return will be on average 9.2%. Further, an investor is willing to invest in a small capitalized public company at an expected average rate of return of 15.2 %. It does not take an expert to explain that common

sense suggests that a person investing in a four-person, high risk investment is going to expect a far greater return than an investment in a public company. Certainly, an equity investor would expect a return far greater than the 11% as set forth by Dr. Alford. The reality is that an investment may return more or less than expectation. However, it is unreasonable to expect that a person would invest in the high risk investment if the expected return is less than investing in public companies with all of the legal protections accorded.

Without having the benefit of the testimony of Dakota Holdings upon which Dr. Alford's opinion is premised, we cannot know their true intent or how its interest rates were calculated. However, we do know that Dakota Holdings and its offer do not fit the profile of what is being evaluated in this hearing. Dakota Holdings was not offering to invest in Warpath. They made no offer to purchase and run Warpath as a going concern. The face of the document provides that it is Conditional Loan Commitment and they are lending money to Warpath at a specified rate of return and taking the stock of Warpath as collateral. Dakota Holdings was not risking their capital in an investment. Dakota Holdings was lending the money, and through the control accorded by the collateralized stock would have control over how their money is appropriated, the build out, the management of Warpath, and would see the return of their investment in loan payments with interest ahead of all others. Dakota Holdings has structured a deal in which they have a tight control over their risk and do not take near the chance of the mere capital investor that the investment may not perform as expected. Dakota Holdings does not have an expected rate of return. Dakota Holdings has a guaranteed rate of return which is far different from the equity investment being evaluated in this matter.

Appellants request that the court reconsider its assignment of value to 100% of the shares of Warpath. The lower court recognized that the only reasonable and reliable opinion of value

was that of Dr. Woodside. As recognized by this court, the lower court's error was in accepting the higher and factually strained value that was unilaterally obtained by the respondent. As such, Appellants urge the court on petition for rehearing to accept Dr. Woodside's assignment of $4,360,000 value to 100% of Warpath's shares. For these reasons, Appellants request a rehearing to address this question before the court.

II. Basis for Rehearing *En Banc*

An *en banc* rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 2 1 9(a), SCACR. "[Wlhile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc 'ordinarily* will not be ordered' except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]" Williamson v. Middleton, 83 S.C.490, 494, 681 S.E.2d 867, 869 (2009).

Appellants submit that Section 2 (A) – (C) of Appellants' appeal as presented in its Final Brief warrant a rehearing *en banc* as such involves significant questions of statutory interpretation and judicial authority. For these reasons, Appellants request a rehearing *en banc* to address these questions before the court.

Conclusion

For the reasons set forth above, the court should grant the Petition for Rehearing and Rehearing *En Banc*, reconsider this matter and reverse the decision of the trial court.

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