

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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ON PETITION FOR WRIT OF CERTIORARI
From Greenville County Court of Common Pleas

S.C. Supreme Court

The Honorable Edward W. Miller, Circuit Court Judge

Circuit Court Case No. 2008-CP-23-05739
Appeal File No.: 2015-002036

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

v.

Of Whom Tim Roberson, Rick Thoennes, Rick Thoennes, III,
and Warpath Development, Inc., is Petitioners.

APPENDIX
VOLUME I

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Andrew P. Ballard, Respondent,

v.

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

Appellate Case No. 2013-002790

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2015-UP-364
Heard May 7, 2015 – Filed July 15, 2015

AFFIRMED AS MODIFIED

Joshua L. Howard, Haynsworth Sinkler Boyd, PA, of
Greenville, for Appellants.

Wallace K. Lightsey, Wyche Law Firm, of Greenville,
for Respondent.

PER CURIAM: 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 generally S.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.*

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 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, 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."

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)).

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 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]

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.

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.

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 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.

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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JUL 30 2015

SC Court of Appeals

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=jJgXU6&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.

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 219(a), SCACR. "[W]hile 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

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

JUL 30 2015

Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Case No. 2008-CP-23-05739

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

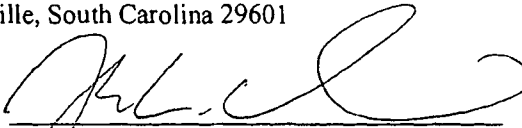
v.

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

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* was served upon all counsel of record on this the 28th day of July, 2015, by depositing a copy in the United States Mail, postage prepaid addressed as follows:

Wallace K. Lightsey
WYCHE, P.A.
44 East Camperdown Way
Greenville, South Carolina 29601



Joshua L. Howard, (S.C. Bar No.: 70260)
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W Y C H E RECEIVED

Attorneys at Law

AUG 05 2015

SC Court of Appeals

August 3, 2015

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

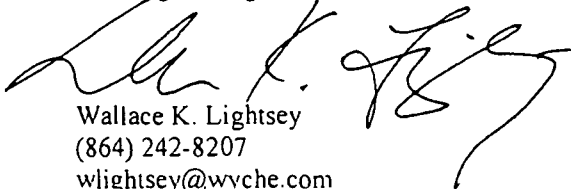
RE: *Ballard v. Roberson*
Appellate Case No. 2013-002790

Dear Ms. Kitchings:

I am submitting this letter in response to the Appellants' Petition for Rehearing and Rehearing *En Banc*. I do not intend to submit a formal return to the petition, unless of course the Court would like for me to address all or any particular part of the Petition.

In short, we stand by the final Brief of Respondent filed in this appeal, and the Court's unpublished *per curiam* opinion of July 15, 2015. For the reasons stated therein, the Court's decision is correct and well supported by the record evidence. Appellants' arguments to the contrary either misconstrue or misrepresent the Court's reasoning, and also significantly misrepresent the record. I would be glad to elaborate further on these points if the Court wishes, but otherwise do not want to take up more court time on this matter, which has been ongoing for seven years and has already been the subject of two appeals.

With highest regards,



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wlightsey@wyche.com

Cc: Joshua L. Howard, Esq.
Andy Ballard

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Andrew P. Ballard, Respondent,

v.

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

Appellate Case No. 2013-002790

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2015-UP-364
Heard May 7, 2015 – Filed July 15, 2015
Withdrawn, Substituted and Refiled August 26, 2015

AFFIRMED AS MODIFIED

Joshua L. Howard, Haynsworth Sinkler Boyd, PA, of
Greenville, for Appellants.

Wallace K. Lightsey, Wyche Law Firm, of Greenville,
for Respondent.

PER CURIAM: 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 generally S.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.*

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 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."

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)).

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.

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.

The South Carolina Court of Appeals

Andrew P. (Andy) Ballard, Respondent,

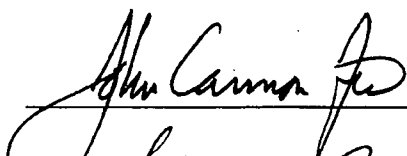
v.

Tim Roberson, Rick Thoennes, Rick Thoennes III, and
Warpeth Development, Inc., Appellants.

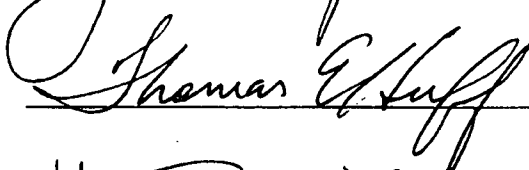
Appellate Case No. 2013-002790

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.



C.J.



J.



J.

Columbia, South Carolina

cc:
Joshua L. Howard, Esquire
Wallace K. Lightsey, Esquire
The Honorable Edward W. Miller

FILED

August 26, 2015

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ORIGINAL

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

RECEIVED

SEP 10 2015

SC Court of Appeals

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 its 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

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

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.

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 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

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.

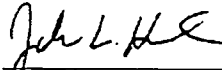
II. Basis for Rehearing *En Banc*

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 219(a), SCACR. "[While 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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September 10, 2015
Greenville, South Carolina

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

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SEP 10 2015

SC Court of Appeals

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

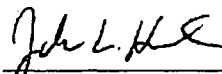
v.

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

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the APPELLANTS'
PETITION FOR REHEARING AND REHEARING *EN BANC* was served upon all
counsel of record on this the 10th day of September, 2015, by depositing a copy in the
United States Mail, postage prepaid addressed as follows:

Wallace K. Lightsey
WYCHE, P.A.
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Greenville, South Carolina 29601



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September 10, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
SEP 10 2015
SC Court of Appeals

Re: Andrew P. (Andy) Ballard v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and
Warpath Development, Inc.; C.A. No.: 2008-CP-23-5739
Appellate Case No. 2013-002790

Dear Ms. Kitchings:

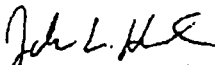
Enclosed for filing in the above referenced case are the original and seven copies of the Petition for Rehearing. I have also enclosed our firm's check in the amount of \$25 to cover the cost of the filing fee. I would appreciate your returning clocked copies to me via my courier.

By copy of this letter, I am serving a copy of the same on counsel for Respondent.

Thank you for your assistance in this matter.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.



Joshua L. Howard

JLH::mlw

Enclosures

cc: Wallace K. Lightsey, Esquire

The South Carolina Court of Appeals

Andrew P. (Andy) Ballard, Respondent,

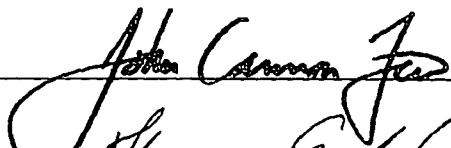
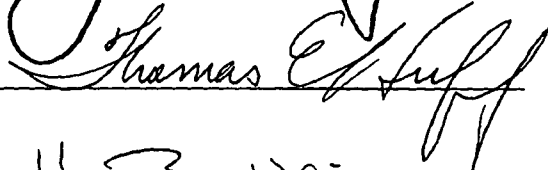
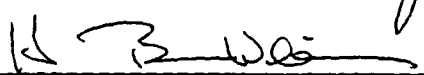
v.

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

Appellate Case No. 2013-002790

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
Joshua L. Howard, Esquire
Wallace K. Lightsey, Esquire
The Honorable Edward W. Miller

FILED

November 19, 2015

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-23-05739

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

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

APPELLANTS' FINAL BRIEF

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DEC 03 2014

SC Court of Appeals

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QUESTIONS PRESENTED

1. Did the lower court err by ordering a personal judgment be entered against Appellants in an amount equal to the assessed value of shares?
2. Did the lower court err in failing to consider whether the terms of its ordered buyout was “appropriate” and arbitrarily ordering the purchase of the shares within 90 days from the date of the order?
3. Did the lower court err in assessing the value of Plaintiff’s 20,000 shares at \$3,589,297, as opposed to the \$873,000 stated in the court’s appraiser’s report?
 - A. Did the lower court err in assessing the value of Plaintiff’s 20,000 shares as representing 50% of company as opposed to the 20% bargained for in the Stock Purchase Agreement?
 - B. Did the lower court err in assessing value premised on a fictional past event that served to only arbitrarily increase the present value of Plaintiff’s shares?

STATEMENT OF THE CASE

This matter comes before the court on Appellants Tim Roberson (“Roberson”), Rick Thoennes Sr. (“Thoennes Sr.”), Rick Thoennes III (“Thoennes III”), and Warpath Development, Inc.’s (“Warpath”) (collectively the “Appellants”) appeal of the lower court’s October 2, 2013 order arising out of August 6, 2013 hearing on the valuation of the outstanding 100,000 shares of Warpath as scheduled by the court. This matter has been previously on appeal with respect to the issue of liability for shareholder oppression. In a 3-2 decision the Supreme Court of South Carolina affirmed the lower court’s finding and remanded the matter for further consideration of remedy. See Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012).

In furtherance of a buy-out of Plaintiff's 20,000 shares, the lower court appointed Dr. Perry Woodside ("Dr. Woodside") to serve as the court's business appraiser. Dr. Woodside completed his work in April 2013 and submitted his opinion to the court that the Plaintiff's *pro rata* 20% share of Warpath Development, Inc. represented by 20,000 shares was worth \$873,000. (Dr. Woodside's Report, R. pp. 601-722) In coming to this conclusion, Dr. Woodside testified that he "developed a discounted cash flow for the primary needs in determining the value of the [Warpath] stock." (R. 238, lines 4-5.) "The model that I developed reflects the agreements that [were] reached among the parties where capital was to be provided by Mr. Roberson sufficient to obtain financing. None of that has happened to this point so what I did was to look at what lending requirements generally were in April of 2012." (R. p. 238, lines 11-16.) Dr. Woodside further assumed construction of all phases of the marina project beginning by the end of 2013, a period of stabilization upon construction, long-term financing and an eventual sale of the project 8 years later. (See *id.* R. p. 238, line 21-p. 240, line 23; p. 256, lines 7-11.) The resulting value at the time of sale after all debts were paid was then reduced to present value leaving an overall stock value as of December 31, 2012 as \$4,360,000. Taking 20% of the overall company value, Plaintiff's shares were then properly valued at \$873,000. (Dr. Woodside's Report, R. pp. 601-722)

After the hearing on August 6, 2013, the lower court went against the appraisal of Dr. Woodside and entered an order dated October 2, 2013 assigning a value of \$3,589,297 to Plaintiff's 20,000 shares of stock, which is over four times the value assigned by Dr. Woodside. (October 2, 2013 Order; R. p. 22) The lower court did so by improperly assuming Plaintiff's interest accounted for 50%, as opposed to the 20% actually held, and improperly imposing a fictional start to construction in 2010 without any factual or legal support. (R. p. 21) The court

further ordered that the buyout be arbitrarily accomplished within 90-days without any inquiry into the ability of Appellants' ability to accomplish that task and entered personal judgment for the purchase price. [Id.] In so ordering, the court ignored the facts and the law, as well as defied all notions of equity in reaching its conclusion and so ordering.

The Defendants are appealing to this Court to be the fair, equitable and reasonable arbiter of these issues. Plaintiff has not proven any loss or damage, has not asserted a claim of loss or damages, therefore is not entitled to damages. The court's entry of judgment is an unlawful exercise of judicial authority. Plaintiff is only entitled to a remedy for oppression, which may be one that permits him to remove his investment either through dissolution or buyout, or another statutorily enumerated remedy short of money exchanging hands. The law recognizes a distinct difference between fashioning a remedy for the Plaintiff and a *de facto* award of damages. The lower court, however, has been unwilling to consider the difference and, regardless of whether it was the original intent or the inevitable result, ultimately issued a grossly inequitable order that amounts to penalty, punishment and damages as opposed to reasonable remedy for the oppression.

Equity requires consideration of all involved, including the corporation itself. It is the court's task to weigh all interests, including the survival of Warpath, the preservation of the Defendant's interest and the Plaintiff's interest in receiving the fair value for his shares. The Plaintiff requested and the court has ordered a buyout. However, assuming a buy-out remains a reasonable and appropriate remedy; equity does not demand that the buyout be immediate. Equity demands that the value and the terms be fair and reasonable.

ANALYSIS

1. Standard of Review

This appeal is as to an order of the trial court sitting in equity. As such, the Court reviews this matter *de novo* and may find facts in accordance with its view of the evidence. Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).

2. The lower court erred by ordering a personal judgment be entered against Appellants in an amount equal to the assessed value of shares.

In the matter of Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012), the Supreme Court affirmed the lower court's order of oppression pursuant to S.C. Code Ann. § 33-14-300(2)(ii), the judicial dissolution statute. As a remedy for such finding, the court is granted the ability to either dissolve the corporation or, if an alternative remedy is "appropriate", order relief short of dissolution as set out in § 33-14-310(d). See S.C. Code § 33-14-310(e). The lower court chose to enter an order for relief pursuant to § 33-14-310(d)(4), which provides "the court may make such order ... (d) providing for the purchase at their fair value of shares of any shareholder" On October 3, 2013, the lower court entered an order stating as follows: "it is hereby ordered and decreed that defendants pay the plaintiff \$3,589,297 within 90 days of the date of this Order, and judgment in this amount is hereby entered for the plaintiff against the defendants jointly and severally." (October 2, 2013 Order; R. p. 22) This 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. Equity must follow the law. See Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375 (1938). The law does not permit a personal judgment exposing assets beyond those of the corporation or invested in the corporation to secure a failure to complete a buyout.

A. A personal judgment is not within the enumerated remedies for oppression set forth within The South Carolina Business Corporations Act.

A claim for oppression under South Carolina law is grounded in statute. See S.C. Code Ann. §33-14-300(2)(ii). The only means by which the plaintiff may bring an action for “oppression” is through § 33-14-300 entitled “Grounds for judicial dissolution”. By statute, dissolution is the default remedy of shareholder oppression. A party bringing a claim for “oppression” must ask the court to find grounds for dissolution. Dissolution is, however, considered a “drastic remedy” under South Carolina law. See In re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002); see also S.C. Code Ann. 33-18-430 (entitled “Extraordinary relief: dissolution”). As such, the legislature provided alternatives to dissolution in §33-14-310(d) with the caveat that the alternatives must be “appropriate”. However, all of the remedies of §33-14-310(d) are short of the “drastic remedy” of dissolution.

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.¹ For these reasons, because the lower court improperly

¹ The time for personal judgment has passed. As the record reflects, prior to trial in 2010, Plaintiff had stated legal causes of action for breach of fiduciary duty and breach of contract, which, if successfully proven, would have

imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for further consideration.

B. A personal judgment is a more drastic remedy than dissolution.

As set forth above, according to South Carolina law, dissolution is the "drastic remedy" for oppression. The South Carolina Business Corporations Act governs the creation, the existence and the end of a corporation formed pursuant to its terms. See S.C. Code Ann. §33-1-101 *et seq.* Appellants submit that dissolution is the drastic remedy under the Act because it is a final end to the corporation. Business ceases, the assets are gathered and sold, creditors are paid and what remains is distributed to the shareholders. Once dissolved, a corporation ceases to exist. Dissolution is avoided, if appropriate, to allow the corporation and its remaining shareholders to continue business into the future.

However, by the very nature of the limits of liability at the core of the corporate form, the drastic remedy of dissolution at worst only exposes a shareholder's investment within the corporation to loss. Dissolution, in and of itself, does not expose a shareholder to a personal judgment to remedy oppression. If dissolution is the "drastic remedy", under no circumstance is the Plaintiff entitled to a remedy more "drastic" than dissolution. Appellants would submit that the court ordered compulsion to invest \$3,589,297 in an undeveloped, non-operating marina on 90-days' notice without any inquiry into the ability to do so accompanied by a joint and several (including the corporation itself²) personal judgment for the same amount that exposes assets

entitled Plaintiff to recover damages secured by a personal judgment. The Plaintiff, however, chose to pursue equitable remedies for oppression pursuant to S.C. Code Ann. §33-14-300. As a result of this choice, South Carolina law does not now permit the Plaintiff's claim to reduce to damages and personal judgment. Damages cannot be recovered in an equitable action such as involuntary dissolution. See McLeod v. Stevens, 617 F.2d 1038 (4th Cir. 1980).

² As the corporation is presently encumbered with the judgment, the majority shareholders cannot even sell the stock to a party who may be inclined to further the development.

beyond the loss of an investment in Warpath is decidedly more drastic than dissolution. For these reasons, because the lower court improperly imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for further consideration.

C. Dissolution is the default remedy.

While §33-14-310(d)(4) permits the court to "provide" for the purchase of the shares, it does not explicitly direct what happens when shares cannot or will not be purchased. While §§33-14-300 and 310 are silent on the particulars of how to address a matter where the corporation or majority does not have the resources to further invest in the company or simply chooses not to further invest, the solution is that the court seeks another enumerated remedy or reverts to default remedies and dissolves the corporation. The minority shareholder gets their relief from further participation and their *pro rata* resulting share. While certainly not controlling in this matter, Appellant's find analogous support for this position in S.C. Code Ann. §33-18-420 of the Statutory Close Corporation Supplement. Section 33-18-420(b)(5) specifically provides that "if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under Section 33-18-430...." §33-18-430 further provides that "[t]he court may dissolve the corporation if it finds: (1) there are grounds for judicial dissolution under Section 33-14-300; or (2) all other relief ordered by the court under Section 33-18-410 or 33-18-420 has failed to resolve the matters in dispute."

In this matter, the lower court's remedy has failed and Warpath sits in limbo with its stock and shareholders tied up in Plaintiff's efforts to execute on the very "judgment" under challenge.³ Appellants cannot meet the arbitrary terms of the court's buyout. (R. pp. 224, 231)

³ The court ordered 90 days expired in early January 2014. As we sit here today, Appellants' request to stay execution has been declined and Plaintiff has pressed forward with executing on the judgment. The court has

Under these terms, there is no "appropriate" reason to avoid dissolution in this matter. Unlike other matters where dissolution was rejected, Warpath has no income, is not developed and does not operate. Contra Hendley v. Lee, 676 F.Supp. 1317, 1324 (holding dissolution improper where the company was profitable and growing).

Dissolution is the only available remedy for oppression here. It allows the Plaintiff to release his trapped investment. Warpath's assets are its lease with Duke Energy, development rights, trademarks and architectural and engineering drawings. In a properly managed dissolution those assets could be sold to an interested party with Duke Energy's permission. According to the lower court's October 2, 2013 Order, as of December 31, 2012, Warpath was worth \$7,178,594. The result of dissolution would be the fair and equitable *pro rata* distribution to the shareholders. Dissolution would allow the plaintiff to release his trapped investment, which, according to our Supreme Court, is the "concern and focus in shareholder oppression cases." Ballard, 733 S.E.2d at 110. Appellants anticipate that the Plaintiff would object. However, Plaintiff cannot state a viable objection. Plaintiff simply wants his windfall and personal judgment.

The issue is clear. The Plaintiff abandoned legal claims and remedies in exchange for equitable under the judicial dissolution provision of the Business Corporations Act. Therefore, the only means of redress is through the statute and remedies available in §§33-14-300 and 310. Neither of those provisions permits a judgment to be entered and most certainly do not permit a remedy more "drastic" than dissolution. For these reasons, because the lower court improperly imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for

appointed a receiver with authority to take Appellants' property and required no bond nor provided any protections in the event of damage to the property itself, loss of use, etc. Further, the receiver has demanded that Appellants

further consideration.

3. **The lower court erred in failing to consider whether the terms of its ordered buyout was “appropriate” and arbitrarily ordering the purchase of the shares within 90 days from the date of the order.**

The evidence presented before the lower court established that the defendants, Warpath included, are not in a financial position to buyout the 20,000 shares of the Plaintiff at any amount absent reasonable buyout terms. (R. pp. 224, 231) Defendants stated on the record that they are willing to have their financial conditions examined by the court or someone appointed by the court to determine a reasonable structure for the buyout. (R. p. 224) In its Order, the court wholly rejected Appellants offer on the basis that the judicial process, including discovery, trials and appeals, has been lengthy and on speculation that Appellants would default regardless of what the court ordered. (R. pp. 21-22)

The court's order and reasoning is improper and inequitable. It also further illustrates the fundamental problems inherent with the court's decision. The court only seeks to penalize and punish. The interests of the Appellants and the survival of Warpath were not even considered in the Court's order. The court made no inquiry as to whether its order was “appropriate” as required by §33-14-310. In fashioning this order and making its decision, the lower court only considered one party, the Plaintiff. The lower court made no inquiry or gave any consideration to the equity due to the Appellants. The lower court references that “[h]e who seeks equity must do equity.” (Id. at 21-22) However, the lower court makes no reference to what lack of equity the court is referencing. The issue of oppression was decided. The Supreme Court has spoken and the Plaintiff is due a remedy. Oppression is no longer at issue or open to inquiry. The Appellants have not been found to have engaged in a frivolous act or appeal. The Appellants have not been found to have engaged in any improper delays. Liability was decided, appealed,

turn over their shares of Warpath yet Plaintiff still retains his shares.

highly contested at oral argument and after deliberation was affirmed on a 3-2 decision favoring the Plaintiff. That is our judicial process.

In its Order, the lower court found that "having more time will [not] make any difference" and "a structured payment arrangement, including provisions for interest, security and remedies on default, will simply end up in further litigation." (R. pp. 21-22) If the lower court believed that more time will make no difference and the buyout will nevertheless end up in default and further litigation, the lower court cannot fairly state that "90 days is a fair and reasonable period of time for the defendants to meet the terms of the buyout hereby ordered." (R. p. 21) This internal inconsistency evidences everything the court failed to do, but was nevertheless required to do if it was to meet its statutory required obligation to determine that the terms of its remedy were "appropriate". Despite multiple efforts to engage the court in this exercise, Appellants' appeals to equity and reason were consistently rejected.

In matters such as these, the law of South Carolina supports a court's inquiry and continued jurisdiction in matters raised under the judicial dissolution statutes. See Hendley v. Lee, 676 F.Supp. 1317 (D.S.C. 1987). In Hendley, after a thorough court inquiry into the matter brought pursuant to former S.C. Code Ann. §33-21-155 (now S.C. Code Ann. §33-14-310), the court ordered the purchase of shares by the Plaintiff to occur on December 15, 1987. However, the court did not enter judgment for the shareholder, as it was improper, or rigidly adhere to a closing date. See id. ("Therefore, the sale shall occur December 15, 1987. If the Hendleys experience difficulty in obtaining financing by this date, they may apply to the court for a reasonable extension."). Recognizing the lack of certainty in such a solution, the court remained flexible, as justice obligated, and retained jurisdiction to see that its remedy was accomplished or whether it must be reevaluated. See id. at 1331-32. Such judicial intervention and fair

consideration would have been welcomed by the Appellants.

Further, Appellants reference the matter of Kaplan v. First Hartford Corporation, 671 F.Supp.2d 187 (D. Maine 2009) as it represents as a well-considered and well-reasoned example of a court reasonably and orderly evaluating the feasibility of a majority buyout and putting a structured plan into place. In Kaplan, following a determination of oppression and valuation, the court proceeded as follows: "In this corporate oppression case, I appointed Attorney George J. Marcus as Special Master to determine whether the corporation is financially able to purchase the oppressed shareholder's shares and under what circumstances; and, if the corporation cannot do so, whether the controlling shareholder can." Id. at 189. The Special Master determined that a 5-year structured buy-out was reasonable. Id. at 191. Similar to this matter, the Plaintiff in Kaplan objected to the buy-out stating that the Special Master "should have determined what is reasonably speedy from [Plaintiff's] point of view: "an oppressed shareholder who has had to resort to extraordinarily costly litigation over a period of [four] years." Id. Considering such assertion, the court responded as follows:

While recognizing that Kaplan had prevailed at trial and was entitled to a remedy, I charged the Special Master with creating a remedy that recognized other interests as well. Specifically, my Order precluded any schedule so speedy as to affect adversely "the corporation's ability to . . . continue as a viable company in its business pursuits for the benefit of other shareholders." It was therefore wholly appropriate for the Special Master to consult both the Bankruptcy Code and commercial practice for guidance on standards of commercial reasonableness. He noted, for example, that it is customary for shareholders in close corporations to be bought out over time and that it is a reasonable commercial expectation that a shareholder buyout will typically be funded over "five to ten years with no security or junior security and with modest interest if any." He also considered how current economic conditions affect First Hartford's core business and First Hartford's financial condition as he assessed the schedule by which First Hartford could buy Kaplan's shares at the 2005 price, a price far above that supported by today's market. The Special Master noted that First Hartford's "operating performance . . . has been marginal and unsteady," that it has a "very thin margin of available working capital" and that it must rely on "opportunistic" liquidations and refinancings to meet its "existing obligations." I agree with his conclusion

that, given its business model, First Hartford needs flexibility in meeting its existing business obligations and its obligations to Kaplan. Given current economic conditions, the Special Master found that five years would provide reasonable confidence in First Hartford's ability to perform. He quite reasonably did not speed up the buyout by assigning net sales proceeds to Kaplan because of the consequences for First Hartford's operations and because the five-year schedule is already on the speedier end of the spectrum of shareholder buyouts. I agree with the Special Master that the five-year buyout is reasonably speedy for a shareholder buyout, and I conclude that the Special Master has crafted a reasonably speedy, commercially reasonable buyout schedule.

(Id. at 192.) As the court in Kaplan recognized, and the courts of South Carolina similarly recognize, a finding of oppression "entitled" Plaintiff to a remedy, but that is all. Appellants seek no more than a fair consideration of all interests, a reasonable inquiry into the ability to fund a buyout, and a reasonable amount of time to act. Appellants assert that principles of equity and South Carolina law demand such engagement by the court.

Absent such action by the lower court, based on the evidence presented of Appellants' inability to fund a buyout in that short a time period, such an order calls into question the equity of the buyout and creates questions as to whether such remedy is "appropriate" under §33-14-310(e). An order providing 90 days to accumulate nearly \$3.6 million without any inquiry into the ability of Appellants to do so accompanied by a personal judgment for an equal amount that exposes assets beyond the investment in Warpath is punitive. A finding of oppression under §33-14-300 does not allow for such punitive action.

The courts "remedy" and judgment opens the door to inequity. The Plaintiff wants the corporation without paying anything for it. However, Plaintiff can present no legal support for the court to order the Defendants to sign over their shares of Warpath to the Plaintiff for no value. Plaintiff nevertheless seeks to achieve that result indirectly through default of the court ordered buyout secured by a personal judgment. Plaintiff's counsel stated as such on the record. (R. p. 177, lines 17-19 ("One of the first things we will seize to satisfy the judgment is their stock

in the company. Mr. Ballard would like to take the company back over.”.) This “backdoor” tactic is wholly inequitable. It is the court that must protect against these tactics. The lower court’s order fails in all such respects.

A buyout only makes sense as an “appropriate” remedy if it is structured in a manner that is reasonably achievable. The court has refused to take such reasonable steps. As such, the court’s October 2, 2013 order must be vacated and remanded for further proceedings consistent with the statutory obligation to “provide” for the purchase of the shares if such remedy remains “appropriate.”

4. The lower court erred in assessing the value of Plaintiff’s 20,000 shares at \$3,589,297 as opposed to the \$873,000 stated in the court’s appraiser’s report.

The valuation of Warpath and Plaintiff’s shares is premised around the legal concept of “fair value”. In South Carolina, “fair value” means “intrinsic value,” which is computed by establishing the fair market value at a fixed moment in time as an established and going business. See Metromont Materials Corp. v. Pennell, 270 S.C. 9, 19, 239 S.E.2d 753, 758 (1977). Historically, South Carolina has focused on three factors to consider in establishing “fair value”: (1) net asset value, (2) market value, and (3) the earnings or investment value of the stock. See Santee Oil Co. v. Cox, 265 S.C. 270, 272-73, 217 S.E.2d 789, 791 (1975). The Santee method is substantially similar to the well-known “Delaware Block Method”.

A. The lower court erred and rendered a gross inequity in assessing the value of Plaintiff’s 20,000 shares as representing 50% of the company as opposed to the 20% bargained for in the Stock Purchase Agreement.

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. There is no reasonableness or equity in this result. This is pure penalty and punishment. The lower court's order must be reversed.

i. The record lacks a factual basis to justify the lower court forfeiting 60,000 of Appellants' shares for purposes of valuing Plaintiff's 20,000 shares.

The record lacks a factual basis for forfeiting 60,000 of the shares held by Appellants in reaching a value of the 20,000 shares held by the Plaintiff. In justifying its conclusion to forfeit 60,000 shares for purposes of valuing 20,000 shares, the court solely relies upon the current escrow of those 60,000 pursuant to S.C Code Ann. § 33-6-210. The escrow was required by the court due to the need to complete future services, *i.e.* achieve funding and construct the marina, in order to fulfill consideration for those escrowed shares. See Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012). The court's reasoning is without merit as follows.

The escrow of the shares is inconsequential for purposes of valuation because Dr. Woodside's opinion assumes that all contractual obligations to fund and build were met with the further addition of 8 years of successful operation. (R. 256, lines 17-23) (Woodside's Report; R. pp. 601-722) Therefore, the court's reliance on the present escrow to justify its forfeiture of Appellants' shares for purposes of valuing Plaintiff's shares is illogical when the company value relies on contractual obligations being met in full. Here, Appellants and the Plaintiff agree. In memorandum and argument to the lower court, Plaintiff interjected the issue of whether his

20,000 shares represent 20% or 50% of the company. On this issue, Plaintiffs own Memorandum submitted prior to the hearing provides that "if the defendants are to receive the economic benefit of their escrowed shares for purposes of determining ownership percentages, in fairness [the company should] be valued under the hypothetical assumption that they had already done what they agreed to do in order to receive those shares." (R. pp. 92-107) As set forth above, Dr. Woodside's appraisal that was accepted by the lower court does assume that the development is funded, constructed and operational for 8 years. Given the assumptions of Dr. Woodside accepted by the court coupled with the Plaintiff's representations to the court, the issue of 20% or 50% is moot.⁴

Plaintiff's 20,000 shares should be valued as representing 20% of the value of Warpath. To do otherwise is *de facto* forfeiture of Appellants' 60,000 shares and a gross inequity. "A court of equity abhors forfeitures, and will not lend its aid to enforce them." Regions Bank v. Wingard Prop., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). For these reasons, the lower court's order should be reversed.

ii. The lower court's valuation of Plaintiff's 20,000 shares as 50% of the company is improper punishment and penalty.

Because the court's forfeiture of Appellants' 60,000 shares has no factual basis, defies logic and is inconsistent with the lower court's assumptions in reaching the overall company value, assigning a 50% value to Plaintiff's 20,000 shares is no more than punishment and penalty. "Equity does not favor ... penalties and will relieve against them when practicable in the interest of justice." Id.

In assessing value, the lower court was tasked with assessing "fair value". In reaching

⁴ The argument would certainly be different if Warpath was valued by the court in its present state, unfunded and not constructed. However, as it is valued as a fully funded, constructed and operational marina, there is no viable

value, "the ultimate issue is what is fair between the parties in each case." Hendley v. Lee, 676 F.Supp. 1317, 1327 (D.S.C. 1987). Fairness and equity is afforded to all parties, not just one. In this case, reality is that the project today sits with no funding and no ability to move forward. In reaching value and extracting his investment before all others, the value of Plaintiff's 20,000 shares receives the benefit of funding and construction in a time of tight credit markets, 8 years of successful operation and a generous sale of the business after a significant reduction in the business debt. These benefits come without having to encounter any of the risk or stress of successfully operating the venture. Penalizing the Appellants by *de facto* forfeiting the very interests they would earn by funding and building the project is not "fair value." It is a punishment and court imposed penalty without any legal or equitable justification. There is no place in this matter for penalty and punishment. The ramifications of such a policy run far beyond this contours of this case. For these reasons, the lower court's order should be reversed.

B. The lower court erred and caused a gross inequity in reaching its value by creating a fictional past event in order to arbitrarily increase the present value of Plaintiff's shares.

In order to further manipulate the value of Warpath to artificially inflate the value of Plaintiff's 20,000 shares, the court created a fictional past event to cause a 2.5 year shift back in Dr. Woodside's calculation. The particular fictional event was the invented start of construction on the Warpath marina in June 2010, as opposed to starting before the end of 2013 as assumed in Dr. Woodside's model. (R. pp. 15-22) Dr. Woodside's model accepted by the court sets the valuation of the financial condition of Warpath as of December 31, 2012. (R. pp. 601-722) On December 31, 2012, it was true then as it is today that Warpath was not funded and construction had not begun. As set forth above, in testimony and within the report of Dr. Woodside, in order

arguments to ignore and *de facto* forfeit 60,000 shares to arbitrarily and inequitable increase the value of Plaintiff's holding.

to build a model to value Warpath through a discounted cash flow model, Dr. Woodside had to make a number of assumptions about the future of Warpath. [Id.] These included that Warpath would be funded and construction would begin before the end of calendar year 2013, that Warpath would be constructed at a given cost and on schedule, that Warpath would begin commercial operations within a given time period, that Warpath would perform in accordance with its *pro formas*, that Warpath would obtain favorable long-term financing, that Warpath would significantly pay down its debts over an 8 year time period, that Warpath would become profitable at a given time period, that Warpath would begin to make shareholder distributions at a given time period and that Warpath would be sold a generous amount at the end of 8 years. (R. p. 237, line 2-p. 242, line 15) [Id.] In generating the model, Dr. Woodside accepts the current condition of Warpath. Each of the assumptions made is as to the happening of a future event.

Plaintiff, on the other hand, sought to manipulate the timing of Dr. Woodside's December 31 valuation by creating a fictional construction beginning in June 2010 and a fictional 2.5 years of operation up to December 31, 2012. (R. p. 254, line 18-p. 255, line 5; p. 256, line 1-p. 257, line 22.) This is pure fiction that the court inexplicably, improperly and inequitably accepted. First, this is not a valuation of Warpath as of June 2010. The testimony of Dr. Woodside is that there was no valuation of Warpath done in consideration of the financial condition of Warpath as of 2010, as well as there was no consideration of the general economic conditions overall of the United States' economy or of the marina market specifically done as of 2010. Factually, there was no valuation of Warpath in 2010 done at all by anyone. Second, this is far beyond a rational or reasonable assumption. This is an absolute fiction. Warpath did not start construction in 2010 and there was factually no obligation for management to begin construction in 2010. Further, by accepting the fiction the court is imposing an obligation on management to begin construction in

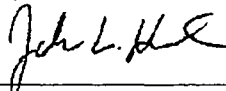
2010, which by implication means that they were improper in failing to do so. "The business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct." Dockside Assoc. Inc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). To claim management impropriety is a separate claim, involving evidence outside of the confines of this proceeding, potentially involves a right to a jury and most certainly implicates management's business judgment into this valuation hearing which is beyond the scope of the hearing and the evidence before the lower court. There has been no challenge to the decision to not build in June 2010, no inquiry into why construction did not begin in June 2010 and no such evidence exists that the decision was in any way improper such that the court can intervene. Last, while a court may choose when to value a business at a moment in time, the law provides that the financial condition is considered as is, where is at that fixed moment in time. The courts order assuming a fictional past event in order to manipulate the valuation violates all such notions of law and equity.

In summary, the only time period properly evaluated and evidenced before this court is the financial condition Warpath as is, where is and fixed as of the moment of December 31, 2012. The lower court's imposition of a fictional start of construction in June 2010 cannot be legally or factually supported, is an improper exercise of judicial authority and is inequitable. As such, for these reasons, the lower court should be reversed, its October 2, 2010 Order vacated, and this matter remanded for further consideration.

CONCLUSION

For the reasons set forth herein, the lower court's October 2, 2013 Order is unlawful and inequitable, therefore should be vacated and the matter reversed and remanded for further consideration.

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In the Court of Appeals

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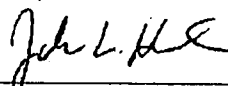
v.

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and Warpath Development, Inc. Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellants' Final Brief complies with Rule 211(b),
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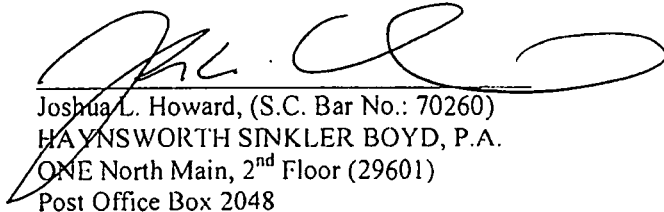
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APPELLANTS' FINAL REPLY BRIEF

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This matter comes before the court on Appellants Tim Roberson, Rick Thoennes, Sr. and Rick Thoennes III's appeal of the lower court's order arising out of its August 6, 2013 hearing. Respondent submitted its Initial Brief of Respondent on June 19, 2014. Appellant's hereby reply as follows:

1. The Court must undertake a *de novo* standard of review.

For the reasons cited by Appellants in this appeal, the standard of review in South Carolina on appeal from a matter decided in equity is *de novo*. This is the long-standing law of South Carolina. Respondent asserts an abuse of discretion standard should be largely applied in this appeal. Respondent goes so far to suggest that an abuse of discretion standard should be accorded to matters of statutory interpretation and the application of law. Respondent cites no authority for this proposition and presents no case where such standard has ever been applied in the appeal of matter decided in equity. For this reason, Respondent's assertion that an abuse of discretion standard should be applied lacks merit and should be discarded.

2. Appellants' issues on appeal are all properly before court.

Respondent's assertion that Appellant's challenge to the court's imposition of a personal judgment is precluded by the prior appeal is without merit. Respondent twists and contorts Appellants' arguments on appeal in a concerted effort to squeeze Appellants' arguments into one they purport is precluded. The court should not entertain such efforts to avoid the issues properly raised in this appeal.

The court's May 3, 2010 order sets forth 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)". (May 3, 2010

Order; R. pp. 1-14) The remedy of "buy-out" is one enumerated by statute. Appellants do not challenge the ability of the court to order a buy-out as it did in 2010. In fact, in Appellant's opinion, an appropriately considered and well-reasoned buy-out could have been fashioned in this matter as suggested by Appellant's Initial Brief. Appellants do not challenge that the court had the authority to order that one or more shareholders and the corporation participate in the buy-out, as it did. Appellants challenge the ability of the court to order a buyout that is (a) secured by a personal money judgment of the company and its shareholders, (b) order a buyout with no regard to whether it can be funded, (c) and order a buyout that leaves the corporation in perpetual limbo with no consideration of its future ability to survive. Not one of these issues presented itself within the 2010 order such that they are the law of the case. As these matters are only now before the court as they arose from the trial court's October 2, 2013 Order (R. pp. 15-22), they are properly raised herein. Respondent's assertion that they are precluded is therefore without merit and should be disregarded.

3. Respondent's suggested interpretation of S.C. Code Ann. §33-14-310(d) renders an absurd result.

With regard to the court's ability to impose a personal money judgment in this matter, Respondent's interpretation in section II of his Initial Brief lacks merit for the reasons expressed in Appellants' Initial Brief. Further, the court need not stretch so far to graft such authority as suggested by the Respondent. If S.C. Code Ann. § 33-14-310(d) can be so broadly interpreted as suggested by the Respondent then most certainly the court may, by analogy, consider how the legislature attended to the same issue in S.C. Code Ann. § 33-18-420 section of the Statutory Close Corporation Supplement, which specifically provides that "if the purchase is not complete

in accordance with the specified terms, the corporation is to be dissolved...". §33-18-420(b)(5). "[T]he goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." Davis v. Sch. Dist. of Greenville Cnty, 375 S.C. 39, 45, 647 S.E.2d 219, 222 (2007). With regard to the issue of judicial dissolution, the Statutory Close Corporation Supplement mirrors the Business Corporation Act in nearly all respects. However, as set forth above, the Statutory Close Corporation Supplement goes one step further and fills in the gaps and ambiguities left within §33-14-310(d) of the Business Corporation Act. A finding of oppression is the same under the Statutory Close Corporation Supplement and the Business Corporation Act. In this case, it would render an absurd result for one to permit a personal money judgment to secure a buy-out and the other not.

4. Respondent is not entitled to a money judgment against either the individual shareholders or the corporation to secure the buy-out.

Respondent suggests in Section II of his Initial Brief that Appellants argue that the judgment should be only against the corporation and not the individual shareholders. Respondent misinterprets Appellants' assertion. Personal judgment includes the corporation also. Appellants assert that ordering a judgment, whether against the individual shareholders and/or the corporation, to secure a buy-out is an improperly applied, inappropriate, inequitable and does not harmonize with analogous law or the aims of the judicial dissolution provisions of the Business Corporation Act.

5. The court may enforce the buy-out by use of its power to dissolve

Respondent suggests in Section II of his Initial Brief that Appellants' opposition to the imposition of a judgment to secure the buy-out leaves the court with no means of enforcement. That is not true. The statute upon which Respondent seeks a remedy is within the broader section entitled "Judicial Dissolution". Section 33-14-310 is entitled "Procedure for judicial dissolution". The court's power to dissolve is the means by which the court may enforce the buy-out. By analogy, dissolution is expressly provided as the means of enforcement in the Close Corporation Supplement as quoted *supra* in S.C. Code §33-18-420(b)(5).

6. The court's order and respondent fail to give any consideration to the equities due the corporation.

In raising the question of by what means the court may enforce the buy-out, Respondent seeks to answer the wrong question. The 90 days expressed in the trial court's October 2, 2013 Order passed and the court's buy-out remedy has failed. The real question is: How should the court address the state of limbo that the corporation and shareholders now find themselves? At present, the shareholders are together, but not entirely. Respondent has one foot in and one out. He has a buy-out ordered secured by money judgment that cannot be fulfilled yet retains his shares. The corporation and the shareholders that remain cannot function under the court's order. There is no future and no means to move forward. The court's order gave no due consideration to the ability of the corporation to thrive and survive.

In the second to the last paragraph of Respondent's section IV, the respondent sums up the difficulty created by the court's October 2, 2013 Order (R. pp. 15-22). The corporation's time is running short. Even excluding the individual appellants, it was incumbent upon the court

to consider not only the singular desires of the respondent, but the interests of the corporation. It is the corporation's interests that have never been considered by the court. The respondent focuses entirely upon the inequity dealt him and on the inequitable conduct of the individual shareholders. By ordering the buy-out, the court was presumably choosing to permit the corporation to survive. In making that decision and ultimately fashioning a remedy, the corporation's status had to be considered. It was not. An orderly buy-out based on the reality of the circumstances of the corporation and its shareholders in August 2013 was required. The court did not consider the interests of the corporation or undertake a reasoned approach as requested by Appellants. As such, the arbitrary October 2, 2013 decision with no due consideration of its consequences now leaves the corporation in a limbo that cannot be resolved.

7. This court is entitled to a *de novo* review the appropriateness and reasonableness of the terms of the trial court's ordered buy-out.

In section IV, Respondent asserts that it was the court's discretion to set the time frame for the buy-out and the court is not obligated to a time frame as suggested in the matter of Kaplan v. First Hartford Corp., 671 F.Supp.2d 187 (D. Me. 2009), cited by Appellants. First, it is the trial courts duty in equity to set reasonable terms for an ordered buy-out. It is the appellate court's right to undertake a *de novo* review of the terms of the court's order for appropriateness and reasonableness. Second, appellants do not cite Kaplan as controlling authority. Kaplan presents a reasoned alternative for this court to consider in its *de novo* review of the matter before it. Second, it is not up for debate whether the 90 days ordered was reasonable or not. The 90 days has passed. The buy-out has failed. This was the result suggested by Appellants to Judge Miller at the hearing in August 2013 and in subsequent filings. The court gave no due consideration to the actual facts before it in fashioning the buy-out. The court gave no due

consideration to the Appellants request to be financially examined as was performed by the court in Kaplan.

8. The trial court clearly adopted Dr. Woodside's opinion of value in finding a total company value of \$7,178,594.

In support of section V of Respondent's Initial Brief, Respondent premises its entire response in opposition on the claim that Judge Miller did not adopt the \$7,178,594 July 2010 valuation set forth by Dr. Woodside. This assertion is misleading and is patently false. On September 25, 2013, the parties received an email from Judge Miller's law clerk stating

Judge Miller would appreciate it if Mr. Lightsey would prepare an order in the above referenced case regarding the valuation. Judge Miller would request in the order that Dr. Woodside's valuation of July, 2010 stating a Total Firm Value as \$7,178,594 be used. He would like to set a valuation of plaintiff's shares as 50% of that value. Therefore, \$3,589,297 if my calculation is correct (please check).

(September 25, 2013 Email; R. p. 734). Given the court's email, the order drafted by Respondent's counsel was required to adopt Dr. Woodside's July 2010 valuation. The Respondent cannot now assert that the order his counsel drafted does not meet the court's requirements they were bound to meet. The issues presented by the adoption of the Dr. Woodsides' July 2010 valuation were placed before the court on Appellants' motion for reconsideration. (Motion for Reconsideration, October 11, 2013; R. pp. 139-142) The court denied Appellants' motion thereby declining to alter or amend its order. (R. p. 23) Respondent cannot now in good faith deny that the court required its counsel to draft an order adopting Dr. Woodsides' July 2010 valuation.

9. Appellants accepted, but never agreed with Dr. Woodside's \$873,000 valuation of Respondent's 20,000 shares.

In support of Section V, Respondent asserts that Appellant Roberson agreed with a valuation greater than that of Dr. Woodside's valuation of \$873,000 for Respondent's shares. This is without merit. Roberson testified as follows:

Q. Do you recall what the amount was that Woodside put on Mr. Ballard's shares?

A. Yes, I believe it was \$873,000.

Q. Do you think that from your prospective that was hire(sp.) or lower number than you expected?

THE WITNESS: You're asking me what's in my head okay and I thought it was high and I just paid him a million dollars. If you do the math, it was twice as high, however, I want this behind me and I'm thinking we agreed to have the appraiser appraise it and I accepted it.

(R. pp. 221-222)

Mr. Roberson believed Dr. Woodside's evaluation of \$873,000 to be twice as high as he expected based on the \$1,000,000 he believed he had paid for 80% of the company in 2007.

10. The July 2010 valuation relied upon by the trial court in reaching the valuation in its October 2, 2013 order is based solely on *ex parte* derived information and is not the independent assumption of Dr. Woodside in reaching his independent evaluation.

In support of Section V, Respondent improperly cites to Dr. Woodside's May 9, 2013 letter setting out the July 2010 valuation as if the assumption of a July 2010 start date was Dr. Woodside's. This was not Dr. Woodside's assumption. Dr. Woodside's May 9 letter specifically provides "Based on our analysis, described in the Summary Report dated April 29, 2013 ..., we have concluded that a reasonable estimate of the fair market value of 20,000 shares or a 20% in Warpath Development, Inc. as of December 31, 2012 is \$873,000." (Woodside's May 9, 2013 Letter; R. pp. 723-725). In truth, Dr. Woodside's May 9 letter¹ and July 2010 evaluation was an *ex parte*² procured number premised on a gross falsity that was designed by Respondent to do no more than artificially inflate the stock value beyond the bounds of reasonableness.

11. The assumption of a false historical start date of July 2010 to artificially inflate value is grossly inequitable and an improper infiltration of business judgment.

In support of Section V, Respondent asserts that while Dr. Woodside's May 9, 2013 letter may be supported on a false premise, Dr. Woodside's \$4.4 million calculation was also based on

¹ Dr. Woodside's specifically provides that the May 9 letter "should not be referenced or used in any manner without the Valuation Report dated April 29, 2013." (Woodside's May 9, 2013 Letter; R. pp. 723-725)

² Q. Let's go back to the May 9th supplement and Mr. Lightsey indicated he made that request of you. Do you recall that?

A. Yes.

Q. How was it made? Was that made by phone, email?

A. I think both if I recall. I don't know initially, but I know we talked about it on the telephone just so I understood and got some clarification of just what he was asking for.

Q. Was [Appellants' counsel] on that phone call or those emails, do you recall?

A. No.

(R. pp. 254-255)

a hypothetical event – the securing of financing and start of construction in 2013. Respondent's assertion merely proves Appellants' point. Dr. Woodside's assumption of future events, provided they are reasonable, in rendering value are accepted means of valuation. A distinction is drawn between a reasonable assumption of future events and the invention of a past that is false and fantasy. The assumption of a false history renders a gross inequity and is taken in violation of the law of business judgment that the Respondent made no effort to counter.

12. The court cannot equitably ignore the shares in escrow in concluding value.

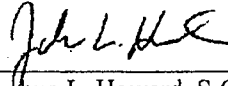
For the reasons set forth in Appellants' Initial Brief, Appellants assign error to the trial court's willful forfeiture of Appellants' escrowed 60,000 shares in computing its valuation. It is entirely inequitable for the court to assume events in reaching the overall value that would cause the shares to be released from escrow, but then ignore those very shares in otherwise reaching the proportionate value of Respondent's shares.

13. Any assertion of Respondent not specifically addressed within this reply is nevertheless deemed opposed and should in no way be deemed accepted or admitted by the Appellants.

CONCLUSION

For the reasons set forth herein and in Appellants Initial Brief, the trial court's October 2, 2013 order should be reversed and the matter remanded for further consideration.

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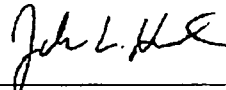
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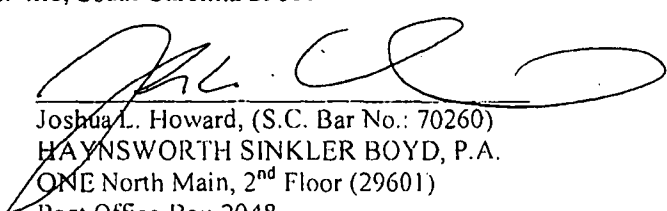
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Appellate Case No. 2013-002790

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STATEMENT OF ISSUES ON APPEAL

1. Does law of the case preclude appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, because of appellants' failure to raise this issue in their previous appeal from the Circuit Court's 2010 Order and the Supreme Court's affirmance of this remedy in the previous appeal?

2. Does S.C. Code section 33-14-310 allow individual liability of majority shareholders for the buyout of a minority shareholder by explicitly giving the trial court the discretion to require the purchase of an oppressed minority shareholder's stock "by other shareholders"?

3. Did Judge Miller abuse his discretion in refusing to order dissolution and liquidation of the company in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits, which are the company's only significant assets?

4. Did Judge Miller abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and protracted the proceedings on remand by representing that they had the financial means to carry out the buyout?

5. Is Judge Miller's valuation of the company at \$7.2 million supported by the evidence, which included appraisals ranging from \$4.4 million to \$20 million as well as representations by appellants to third parties that the company was worth from \$6 million to \$37 million?

6. Did Judge Miller err as a matter of law by refusing to give value to shares of stock issued to appellants by the company for which appellants have never paid?

STATEMENT OF THE CASE

This suit was filed in 2008 by a minority shareholder against the majority shareholders and the corporation. It has been pending for over six years and has already been through one appeal to the South Carolina Supreme Court from an interlocutory, though appealable, order. It is now on appeal from the Circuit Court's final judgment.

Through this action, the respondent has sought relief for oppression by the appellants and to require the escrow of shares issued by the company to the appellants for future services to the company that the appellants never provided. The present appeal challenges the valuation of the company and of respondent's ownership interest by the Circuit Court for purposes of a judicially ordered buyout of the respondent's shares by the appellants, a remedy that was decided upon in 2010 by the Circuit Court and affirmed in the 2012 decision of the Supreme Court.

The respondent, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc. ("Warpath"), 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, restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through years of work by Mr. Ballard the company obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina. (R. p. 389, ¶ 1) Warpath obtained all necessary permits to construct and develop the marina and related properties by the summer of 2010. (R. p. 188, lines 1-10)

Under a Stock Purchase Agreement dated May 29, 2007 (the "Agreement"), appellant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard

for \$1,000,000, and he and the other two individual appellants 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. (R. pp. 369-70) 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, merely five months after signing the Agreement with Mr. Ballard, the appellants began discussions among themselves of how to force Ballard out of the company, and then proceeded to try to do so.¹

Ballard filed suit on July 30, 2008. Following 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). (R. pp. 1-14) 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 the value at a subsequent hearing. The 2010 Order specifically provides that the appellants' liability for buying out Mr. Ballard's shares is "joint and several" and states that "[t]his remedy is the appropriate one given the conduct of the defendants as found above." (R. p. 13, ¶ 15) Judge Miller also found that appellants had not provided the agreed upon consideration to pay for the 60,000 shares issued to them by the company, and ordered under S.C. Code § 33-6-210 that those shares be held in escrow. (R. pp. 8-9, ¶¶ 3-7)

¹ See, e.g., R. pp. 541-42. This fact was the subject of extensive evidence in the 2010 trial, the record of which was incorporated by reference into the record of the valuation proceedings. Judge Miller's findings to this effect in his 2010 Order were affirmed by the Supreme Court in its 2012 decision. *Ballard v. Roberson*, 399 S.C. 588, 595-97, 733 S.E.2d 107, 110-12 (2012).

Before the valuation hearing could be held, the appellants took an immediate appeal of the 2010 Order. In the appeal, the appellants contested the finding of oppression and the escrow of shares, but they did not assert any error in the buyout remedy, did not take issue with Judge Miller's requirement that they be jointly and severally liable for the buyout, and did not contend that Judge Miller should have ordered dissolution of the company in lieu of the buyout. (See R. pp. 599-600) In August of 2012, the South Carolina Supreme Court affirmed the 2010 Order. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The Supreme Court specifically affirmed the Circuit Court's remedy that all of the appellants, not just the company, be required to purchase Ballard's stock at fair value, and that appellants' 60,000 shares of Warpath stock be held in escrow. *Id.* at 598-99, 733 S.E.2d at 112-13.

Nearly a year later, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. Mr. Ballard testified that in his opinion the company was worth approximately \$20 million. (R. p. 193, lines 2-8) Respondent's appraisal expert, Furman University economist Dr. Charles Alford, appraised the total company value between \$9.3 million and \$12 million. (R. p. 293, line 20, to p. 294, line 15;² R. pp. 586-87 ("Indicated value of equity \$9,268,126 [discounted 8 years, or] \$12,034,969 [discounted 6 years]")) The court-appointed appraiser, Dr. Perry Woodside, set the value at either \$4.4 million or \$7.2 million depending on the time period over which the present value was calculated. (R. p. 242, line 13; R. p. 243, lines 10-21; *see also* R. pp. 723-24)

² Page 125 of the hearing transcript (R. p. 294) has the wrong numbers for the higher valuation calculated by Dr. Alford. As his written report shows, the higher valuation he determined was slightly over \$12 million. (See R. p. 587 ("Indicated value of equity \$12,034,969"))

Notably, one of the individual appellants, Tim Roberson, testified that the \$1,000,000 he paid for Ballard's 20,000 shares in 2007 was a fair value and that he accepted Dr. Woodside's appraisal. (R. p. 214, lines 14-19; R. p. 215, lines 2-4; R. p. 222, lines 10-11) Appellants' counsel also formally stipulated to Dr. Woodside's appraisal figures. (R. p. 156, lines 19-21; R. p. 157, lines 16-20; R. p. 163, lines 1-14) Another individual appellant who testified at the hearing, Rick Thoennes Sr., admitted that he had represented to one third party that Warpath was worth \$6,000,000 "in its present condition" and that it had an appraised value of \$36.7 million. (R. p. 233, lines 5-13, 23-25; *see also* R. pp. 476-77) Respondent also presented evidence that appellants had told other third parties that the company was worth \$28 million to \$36 million. (R. pp. 194-95, 462-502)

Finally, the appellants "threw themselves on the mercy of the court" and claimed that they were impoverished would be unable to pay any amount of money to Ballard, not even the \$1,000,000 that appellant Roberson had testified was a fair price. (R. p. 176, lines 16-18) They asked Judge Miller to give them "several years" to buy out Mr. Ballard's interest. (R. p. 176, lines 19-21) This position was in direct contradiction of the position they had taken months earlier, while the parties were attempting to schedule the valuation hearing, when appellants' counsel represented to Judge Miller and to Ballard's counsel that the appellants had the financial means to go through with the buyout of Mr. Ballard's shares. (R. p. 177, lines 5-12; R. p. 309, lines 5-25)

On October 3, 2013, Judge Miller issued an Order finding that a fair value of the company was \$7,178,594. This finding was not based on any particular testimony, methodology, or expert analysis, but instead was derived from weighing all of the

evidence and the parties' pre-hearing and post-hearing submissions. (R. p. 15) Judge Miller went on to hold that, because the appellants still had not provided the contractually agreed upon consideration for which they received the shares of stock held in escrow, those shares should not be counted in the valuation process. Not counting those shares, Ballard retained 20,000 of his original shares, and Roberson owned 20,000 purchased directly from Ballard in 2007. Accordingly, Judge Miller concluded that Ballard's ownership interest should be treated as 50% of the whole and ordered the appellants to purchase Ballard's shares at \$3,589,297 (i.e., 50% of \$7,178,594). He rejected appellants' request for a multi-year payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and the practical consideration that an extended period of structured payments would likely result in further litigation, and gave appellants 90 days to tender payment for Ballard's shares. (R. pp. 21-22)

Appellants moved for reconsideration. On November 8, 2013, the Circuit Court issued a Form 4 Order denying the motion for reconsideration. (R. p. 23) Appellants' Notice of Appeal was served on December 20. In January of 2014, after the 90 days for appellants to buy out Ballard's shares had passed with no attempt by appellants to satisfy the Order, respondent's counsel began efforts to execute on the judgment. Appellants moved for a stay of execution without bond, which Judge Miller denied on March 27, 2014. (R. pp. 25-28) On April 23, 2014, after hearing evidence suggesting that appellants were transferring large amounts of money and other assets in fraud of creditors, Judge Miller appointed a receiver to ascertain and secure the appellants' assets pending the appeal. (R. pp. 29-39, 298-364) In this Order and another entered the same day, Judge Miller specifically found that the appellants owned or controlled assets "at

risk of being wasted, secreted, or diverted while the defendants' appeal is pending." (R. p. 31, ¶ 9; *accord* R. p. 42) Appellants did not appeal those orders or that finding, although the orders were immediately appealable. S.C. Code § 14-3-330(4).

STANDARD OF REVIEW

In an action in equity, the appellant has the "burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 388, 544 S.E.2d 620, 623 (2001); *accord Ballard, supra*, 399 S.C. at 593, 733 S.E.2d at 109. Further, the appellate court does not "disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." *Pinckney, supra*, 344 S.C. at 387, 544 S.E.2d at 623; *accord Ballard, supra*, 399 S.C. at 593, 733 S.E.2d at 109; *Brenco v. South Carolina Department of Transportation*, 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved." *Department of Social Services v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). Appellant's burden is particularly heavy here, because Judge Miller has special expertise in corporate matters like this case from serving as one of three Business Court Judges in South Carolina. *Ballard, supra*, 399 S.C. at 592 n.3, 733 S.E.2d at 109 n.3.

Further, while this Court may find facts in accordance with its own view of the evidence, the corporate dissolution statute that is the basis for the remedy ordered by the Circuit Court grants the trial judge broad discretion in fashioning equitable relief to fit the unique circumstances of the corporation and facts of the case. S.C. Code § 33-14-310(d); *see* 2 F. O'NEAL & R. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 7.20, at 7-132 & n.1 (rev. 2d ed. 2005)

(recognizing S.C. statute as one that gives extraordinary discretion to the trial judge in fashioning a remedy for oppression). Thus, the appellants have the burden of convincing this Court that Judge Miller – who observed all the witnesses and saw all the evidence firsthand – abused his discretion or committed error of law in his weighing of the evidence to determine the fair value of the company.

The percentage of the total company value to be allocated to Mr. Ballard's shares of stock under the facts of this case (i.e., whether 20% or 50%) is purely a legal issue and thus is open to this Court's *de novo* review.

ARGUMENT

I. The law of the case doctrine bars appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, as this issue was decided in the Circuit Court's 2010 Order; it was not raised by appellants in their previous appeal from that Order; and the remedy was affirmed by the Supreme Court in the previous appeal.

Appellants' primary argument is that Judge Miller erred in entering a "personal judgment" against them for the buyout of Mr. Ballard's shares, and that the Judge should have dissolved the company instead. Because appellants did not raise this issue in their appeal from the Circuit Court's 2010 Order, when they could have done so, and the buyout remedy was affirmed by the Supreme Court in its 2012 decision, appellants are precluded from raising the issue now.

In his 2010 Order, Judge Miller expressly held 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" (R. p. 13, ¶ 15 (emphasis added)) Joint and several liability, of course, means that each party is personally responsible for payment of the total amount

due. “Thus, each liable party is individually responsible for the entire obligation.”

BLACK’S LAW DICTIONARY, *joint and several liability*, at 997 (9th ed. 2009).

Appellants took an immediate appeal from the 2010 Order, but at no time in that appeal did they raise any issue concerning the buyout remedy, Judge Miller’s direction of appellants’ joint and several liability for the buyout, or the decision to require a buyout of Ballard’s shares in lieu of dissolution of the company. (*See R.* pp. 599-600)

Consequently, the Supreme Court did not address those matters as contested issues in its 2012 opinion, and upon concluding that the evidence supported the Circuit Court’s finding of oppression, the Supreme Court stated: “Based on the foregoing, we affirm the circuit court’s order directing Appellants to purchase Ballard’s stock for fair market value” *Ballard, supra*, 399 S.C. at 599, 733 S.E.2d at 112. The only issue left for remand was the determination of the amount constituting fair value.

Having failed to appeal the Circuit Court’s buyout remedy in their previous appeal, appellants may not do so now. As the Supreme Court recently explained:

“Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order. [A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal.”

Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 119-20, 754 S.E.2d 486, 490 (2014) (emphasis added; citations omitted) (summarizing *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). This rule applies in the specific procedural context presented here, where one party failed to raise an issue decided by the lower court in a previous appeal but then attempts to raise the issue in a second appeal from a later order of the lower court.

“[T]he law-of-the-case doctrine encompasses not only those issues decided on the first appeal, but also those issues decided by the trial court

prior to the first appeal which were not presented for review at the first appeal. Thus, whether the prior appeal was decided correctly or not, under the law-of-the-case doctrine, the questions that were raised or could have been raised in that case ordinarily will not be reexamined on a subsequent appeal."

5 C.J.S. *Appeal and Error* § 991 (footnotes omitted); *see also Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."); *Worth v. Norton*, 56 S.C. 479, 35 S.E. 135 (1900) (question that could have been raised on a first appeal to the Supreme Court could not be raised on a second); *Ellis v. Sanders*, 34 S.C. 236, 13 S.E. 417 (1891) (exception to report of referee on a foreclosure of a mortgage that was not raised on the first appeal could not be raised on the second appeal); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 319-20, 594 S.E.2d 867, 878 (Ct. App. 2004) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.") (citing *Greenville Cty. v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003)).

Because the buyout remedy and appellants' joint and several liability for it are law of the case, appellants cannot challenge this aspect of the 2013 Order in the present appeal.

II. Appellants' individual liability for the buyout is clearly authorized by S.C. Code section 33-14-310, which expressly allows the court "in its discretion" to grant relief, "including, without limitation," the purchase of an oppressed minority shareholder's stock "by other shareholders."

In addition to being precluded by law of the case, appellants' contention that individual liability for the buyout of Mr. Ballard's shares is not authorized by the

corporate dissolution statute, S.C. Code § 33-14-310, is flatly contradicted by the clear language and intent of the statute.

First, the statute gives the court broad discretion to “make such order or grant such relief, other than dissolution, as in its discretion, is appropriate, including, without limitation, an order [providing for certain types of relief set forth in the statute].” *Id.* § 33-14-310(d) (emphasis added). Thus, by its express terms, the statute’s enumeration of certain potential forms of relief is “without limitation” to what the court may do in its discretion. In addition, the statute provides that a remedy for oppression may include “directing or prohibiting any act of the corporation or of shareholders.” *Id.* § 33-14-310(d)(3) (emphasis added). The question, therefore, is not whether the statute specifically includes “entry of personal judgment” in its list of potential remedies, but whether it specifically precludes such a remedy. Because the statutory remedies include entry of an order “directing ... any act ... of shareholders,” because the list is explicitly “without limitation,” and because the statute does not prohibit entry of judgment for which a defendant shareholder is personally liable, it must be construed to authorize such relief as against other shareholders. *See also* F. O’NEAL & R. THOMPSON, *supra*, at 7-134 (courts have “inherent equity power [to] grant[] alternative remedies not mentioned in the [dissolution] statute”).

Further, in its description of potential remedies, the statute specifically includes “providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.” *Id.* § 33-14-310(d)(4) (emphasis added). Appellants’ argument that a buyout cannot be ordered or enforced against other shareholders personally, but only against the assets of the company, flies in the face of

this clear statutory language. If an order directing a buyout of a minority shareholder's stock by other shareholders could be satisfied only against the company or its assets, as appellants contend, then the statutory inclusion of the phrase "or by other shareholders" would be rendered meaningless. Under appellants' position, a court could order other shareholders to buy out a minority owner, but then the minority owner would be powerless to enforce it. The court itself, appellants contend, may only "provide" for a buyout against other shareholders but cannot make its remedy effective against them. To state the argument is to refute it. It makes no sense to think that the General Assembly would specifically set forth a remedy in the statute but not intend for the courts to be able to enforce it.

Finally, Judge Miller did not commit error by directing that the buyout remedy be entered as a judgment against the appellants. The Order clearly provides that Ballard must relinquish his shares of stock when he has received payment of the buyout price, and that this is part of the Court's judgment: "The Court orders defendants, jointly and severally, to pay plaintiff this amount [\$3,589,297.00] 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." (R. p. 15 (emphasis added)) In effect, therefore, the Order is the entry of an equitable decree requiring the appellants to pay a certain amount of money and requiring Ballard to give back his stock upon receipt of payment, similar to specific performance of a contract in which one party's contractual obligation is to make a payment. Judge Miller's use of the term "judgment" is perfectly correct, as this term merely signifies that an order finally determines the rights of a party, and the term specifically includes

equitable decrees. Rule 54(a), SCRPC; *see* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 2651, at 7-8 (1998) (discussing Rule 54(a), Fed. R. Civ. P.). Because the 2013 Order made such a final determination, it was appropriately characterized as an entry of judgment.

Labels aside, it is well established that an equitable decree requiring the payment of money may be enforced by execution, just like a money judgment for damages.

“Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.”

S.C. Code § 15-39-30 (emphasis added). Similarly, judgment liens on real estate may be entered on the basis of “final judgments and decrees,” *id.* § 15-35-810 (emphasis added), and the Uniform Enforcement of Foreign Judgments Act defines a “foreign judgment” for purposes of the act as “a judgment, decree or order of a court of the United States,” *id.* § 15-35-910(1) (emphasis added). Likewise, the rate of interest that accumulates on both “money decrees” and judgments is set by statute. *Id.* § 34-31-20. In addition to this specific statutory authority, numerous cases from the South Carolina Supreme Court and Court of Appeals (and from other states) recognize the authority of the courts to enforce equitable decrees requiring the payment of money. *See, e.g., Finley v. Finley*, 299 S.C. 99, 100, 382 S.E.2d 890, 890 (1989); *Collins Music Co. v. IGT*, 365 S.C. 544, 550-51, 619 S.E.2d 1, 4 (Ct. App. 2005).

Whether the 2013 Order is called a “judgment” or something else, therefore, Code section 33-14-310 authorizes the courts to require other shareholders to buy out an oppressed minority shareholder, and under Code section 15-39-30, as well as the well

established statutory and case law discussed above, the remedy is enforceable by execution against their assets. There was no error in Judge Miller's entry of judgment.

III. Judge Miller did not abuse his discretion in refusing to order dissolution in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits (which are the only significant assets of the company), since dissolution without such agreement would wipe out the entire value of the company.

At the August 2013 valuation hearing, appellants asked the Court, for the first time, to dissolve Warpath and order a liquidation sale of its assets. Appellants now argue that dissolution would have been "less drastic" than the buyout remedy, and that Judge Miller committed reversible error by failing to order dissolution and liquidation.

As discussed above, this argument is barred by the law of the case and appellants' failure to challenge Judge Miller's decision to order a buyout in lieu of dissolution in their appeal from the 2010 Order. In addition, on the merits, their argument ignores the fact that dissolution would completely eviscerate the economic worth of the company's assets. Those assets consist entirely of the Duke Power lease and the Pickens County permits to construct the project. These assets cannot be auctioned off to the highest bidder in a liquidation sale; they are not freely assignable. Indeed, a dissolution sale without Duke Power's consent would cause the company to default under its lease (*see* (R. pp. 395-96, sec. 29), and as a result the company's assets would become worthless. This is not equity that appellants seek, but mutual self-destruction.

Clearly, it was well within Judge Miller's discretion not to enter an order that would have wiped out the entire value of Warpath's assets. At the very least, it was incumbent on appellants to present evidence that Duke Power and Pickens County would have consented to the assignment of the lease and permits pursuant to a liquidation sale

and judicial auction. Having failed to present a shred of evidence to this effect, appellants cannot now maintain that Judge Miller erred by not choosing this remedy.

Moreover, appellants' argument that dissolution would have been "less drastic" than the buyout is predicated upon fallacious logic, for it completely ignores the value of the company. If this Court upholds Judge Miller's determination of fair value, then the buyout affords appellants the opportunity to acquire 100% ownership of a business worth \$7.2 million in exchange for payment to Ballard of \$4.6 million (the initial \$1 million paid in 2007 plus \$3.6 million under the Circuit Court's Order) – a gain of \$2.6 million. Even under the lowest valuation of the company – Dr. Woodside's \$4.4 million figure, a number that appellants stipulated was fair – appellants would have the ability to acquire total ownership of a \$4.4 million business for \$3.2 million – a gain of \$1.2 million. Thus, it is simply untrue that the buyout remedy is more drastic than dissolution, which would have destroyed all value of the company to all of the parties. Judge Miller was well within his discretion to reject this request.

IV. Judge Miller did not abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and protracted the proceedings on remand by representing that they had the financial means to go through with the buyout.

How much time the court should allow for a buyout in a shareholder oppression case is exactly the kind of detail that should be left to the discretion of the trial judge. Certainly, it would have been within Judge Miller's discretion to give more than 90 days to appellants had he deemed that appropriate, as the district court did in the case touted by appellants, *Kaplan v. First Hartford Corp.*, 671 F. Supp. 2d 187 (D. Me. 2009), but there is no support in that case or any other authority for the proposition that he was obligated to do so as a matter of law. Given the particular facts and history of the case at

bar, it was well within Judge Miller's discretion to allow appellants 90 days for compliance with his Order (substantially more time than respondent suggested), rather than allowing them the additional "several years" that they requested. *See In re Petralia*, 267 A.D.2d 1013, 701 N.Y.S.2d 193 (N.Y. App. Div. 1999) (no abuse of discretion in trial court refusing to allow three years to complete purchase of petitioner's shares).

As Judge Miller noted in his Order, appellants had already had over six years to satisfy their contractual and fiduciary obligations to Ballard, and they had known since entry of the 2010 Order that they were facing the possibility of having to buy Ballard's remaining shares. Moreover, in the valuation hearing, appellant Roberson testified that the \$1,000,000 price he paid for Ballard's 20,000 shares in 2007 was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the appellants had to have known that the buy-out price for Ballard's remaining 20,000 shares would be at least something higher than \$1,000,000 (since the company now has the permits it did not have in 2007). In short, the appellants had more than enough time to prepare for the buyout. Instead of scheming 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.

Indeed, after the Circuit Court issued its 2010 Order, 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. (R. p. 21)

Having done so and lost, they should not be heard to complain about not being allowed to further delay compliance with the Court's judgment.

Furthermore, Ballard presented undisputed evidence at the August 2013 valuation hearing that the oppressive conduct of the appellants had continued since the 2010 trial through the present. (R. pp. 188-93) Judge Miller later made specific findings to this effect: "[T]he conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the [valuation] hearing." (R. p. 31, ¶ 4; *accord* R. p. 41) In these circumstances, it would have been a miscarriage of justice to allow appellants to continue to string out this six-year-old dispute for the "several years" more they wanted.

Their plea of poverty should be ignored because of their failure to raise this issue in a timely fashion. Not only did the appellants fail to apprise respondent or the Circuit Court that they would be unable to pay even what they agree is a fair price for Ballard's shares, but during the nine months from remand to the valuation hearing they repeatedly assured counsel and the Court that they would be able to pay Mr. Ballard when the time came. (See R. p. 177, lines 5-12; R. p. 309, lines 5-25) As a result of these assurances, both the respondent and the Court wasted months of time and numerous hours of preparation and court time pursuing the determination of a valuation number that – appellants now tell us – is meaningless.

Appellants' position is particularly untenable since they presented no evidence to the Circuit Court that if they had more time they would be better able to comply with the Court's judgment. Indeed, given the nature and history of appellants' conduct toward Mr. Ballard and the complete breakdown of the parties' relations, as noted in the 2010

Order and the Supreme Court's opinion, Judge Miller correctly concluded that allowing additional time to buy out Mr. Ballard under a structured payout would likely end up in further litigation. In this regard, it is telling that, in addition to the instant action, the appellants have been sued over the past several years by numerous business partners and clients for fraud, breach of contract, and breach of fiduciary duty. *See, e.g., Odom et al. v. Thoennes et al.*, 2009-CP-23-9828 (S.C. Cir. Ct. Greenville Cty.); *Stoneledge at Lake Keowee Owners Association, Inc., et al. v. IMK Development Co., LLC, et al.*, 2009-CP-37-0652 (S.C. Cir. Ct. Oconee Cty.). Indeed, one of them has been convicted of federal felony conspiracy to commit bank fraud. *United States v. Thoennes*, No. 6:11-cr-02053-HFF-1 (D.S.C. Sept. 1, 2011). These facts, all of which are matters of public record, strongly suggest that appellants' primary objective is merely to drag out this litigation as long as possible in the hope that Mr. Ballard will be worn down and give up. The appellants did not present to Judge Miller, and have not presented to this Court, any reason to believe that they deserve more time or that giving them more time would enable them to satisfy the buyout.

On the other hand, continued protraction of this litigation could have a devastating effect on the value and prospects of Warpath. Under the Lease Agreement with Duke Power, Warpath has a certain amount of time in which to commence and complete construction (R. p. 396, sec. 29(d)), and construction has not yet started even though more than seven years have now elapsed since the lease was signed. (R. p. 188, lines 11-15) The more time that passes without construction commencing, the more likely it is that Duke will terminate the lease. If this should occur, Warpath will become worthless.

This litigation has been ongoing for over six years and it is time for it to come to an end. In these circumstances, Judge Miller acted well within his discretion in allowing the appellants 90 days to carry out the buyout.

V. Judge Miller's valuation of the company at \$7.2 million was not based upon a fictional past event, but rather was decided by weighing all of the evidence, including appraisals ranging from \$4.4 million to \$20 million as well as representations by appellants to third parties that the company was worth from \$6 million to \$37 million.

Appellants construct a straw man by asserting that Judge Miller adopted the theory and analysis presented by Dr. Woodside with his \$7.2 million valuation of Warpath's total worth. In fact, Judge Miller did not do so, but instead reached his finding of the company's value by weighing all of the evidence and testimony. The Order specifically states:

"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. ... '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.' 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."

(R. p 19 (emphasis added; citations omitted) (quoting *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 124, 522 S.E.2d 357, 365 (Ct. App. 1999)))

The inherent imprecision of appraising the value of a company is particularly acute when, as here, the company is closely held, with no public market for its assets or stock, and is still in a start-up phase with no history of earnings and profits. Given this context, Judge Miller's determination was fair and reasonable in light of all of the evidence, summarized as follows.

In 2007, per the parties' Stock Purchase Agreement, appellant Roberson purchased 20,000 shares representing 20% of the company's ownership directly from Ballard for \$1,000,000 cash. In the valuation hearing, appellant Roberson agreed that this was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the overall value placed upon the company by all of the parties in 2007 was at least \$5,000,000. (R. p. 186, line 9, to p. 187, line 25) Notably, at that time not all permits necessary for the venture to proceed had been obtained. At the time of the valuation hearing, all necessary permits were in hand, the final needed permit having been obtained in June of 2010. (R. p. 188, lines 1-10) Thus, the value of the company at the time of the 2013 hearing was clearly in excess of \$5,000,000.

The Lease Agreement with Duke Power has substantial value in and of itself. The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease. (See R. p. 389, sec. 1) In effect, therefore, it is a perpetual lease. (R. p. 16 n.2) All necessary permitting and governmental approvals have now been secured. In light of the unique nature of the property, the fact that there is only one other marina and no hotel on Lake Keowee, and the potentially perpetual lease term, Mr. Ballard opined that a conservative value of the lease interest in the acreage itself is approximately \$20 million.³ (R. p. 184, lines 19-22; R. p. 193, lines 2-8)

³ South Carolina courts have consistently held that property owners are qualified to give opinion testimony about the value of their property when such value is at issue in a trial. See *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert") (internal citations omitted); see also *Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 149-50, 735 S.E.2d 659, 662 (Ct. App. 2012) ("property owners can generally testify as to the value of and damage to their own property"); *Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007)

Indeed, in attempting to obtain financing for the project, the appellants themselves represented to third parties that the “appraised value” of the company’s property was \$36,669,050 (R. p. 476), and that the value of the company upon completion of construction would be in the range of \$28 million to \$37 million. (R. pp. 462-502; R. pp. 194-95, 233) Appellants also represented to a third party in 2011 that the “current value” of the company’s property “in its present condition” was \$6 million. (R. p. 477; R. p. 233, lines 23-25) Similarly, a third-party marina developer made an offer of \$4.5 million for 70% of the company’s equity in the company’s current condition in 2012. (R. pp. 504, 510) This price for 70% ownership is equivalent to \$6.4 million for 100%. (R. 207, lines 5-28)

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 § 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*, 265 S.C. 270, 217 S.E.2d 789 (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.* at 273, 217 S.E.2d at 791 (emphasis added).

(“in South Carolina, a property owner is competent to offer testimony as to the value of his property”). This doctrine has been applied in other jurisdictions in the specific context of the valuation of a business in shareholder oppression suits. *Shane v. Shane*, 891 F. 2d 976 (1st Cir. 1989).

The above is the approach that Dr. Woodside utilized in making his calculations. Dr. Woodside determined that after eight years for construction and “ramp up,” the company’s net value as a whole would be \$20,384,428. (R. pp. 638-39) Using a discount rate of 22.0%, Dr. Woodside’s initial report discounted this figure to a present value of approximately \$4.4 million, based on the assumption that financing was in hand and construction would begin sometime in 2013. (R. p. 639) In a subsequent analysis, however, Dr. Woodside opined that the present value of the company would be \$7,178,594 if construction had begun in July of 2010, when the final needed permits had been obtained. (R. p. 724)

While it is true, as appellants assert, that Dr. Woodside based his \$7.2 million calculation upon a hypothetical assumed start of construction in July 2010, two points are worth noting here. First, Judge Miller did not adopt Dr. Woodside’s approach or rationale – he simply concluded that the \$7.2 million figure was a fair and reasonable one after weighing all of the evidence and the equities of the case. Second, the \$4.4 million valuation that Dr. Woodside derived in his initial report, a calculation that the appellants embrace, was also based upon the assumption of a hypothetical event – the securing of financing and start of construction in 2013. Appellants like that assumption because it gives them the benefit of their own failure to begin construction for years after obtaining all needed permits and approvals, but both calculations are predicated on hypothetical events that did not actually occur, and it was abundantly clear from appellants’ own testimony and representations to the Court that there was no way construction would begin in 2013 (and in fact it still has not). Consequently, if Dr. Woodside’s methodology is flawed because of its reliance on hypothetical assumptions that are counter to fact, then

both of his valuations – including the \$4.4 million valuation that the appellants accept – should be thrown out,⁴ leaving the other evidence (summarized above) valuing the company at a minimum of \$5 million and a maximum of \$20 million.

Dr. Alford did not criticize Dr. Woodside's overall approach, but opined that the discount rate used by Dr. Woodside to compute present value was too large in light of an actual offer that had been made for the company in late 2012 by a third-party private venture capital firm called Dakota Holdings. (*See* R. pp. 273-85, 729-32) Using the lower discount rate derived from the Dakota Holdings offer, Dr. Alford computed a present value of the company of \$9.3 million to \$12 million. (R. pp. 586-87 (“Indicated value of equity \$9,268,126 [discounted 8 years, or] \$12,034,969 [discounted 6 years]”))

Thus, Judge Miller was presented evidence supporting the following present values of the company as a whole:

- \$4.4 million (Dr. Woodside's lowest figure),
- \$5 million (the least value placed on the company by the parties' 2007 contract),
- \$6 million (appellants' representation to a third party of the “current” value of the company “in its present condition” in 2011),
- \$6.4 million (calculated from the Vinings 2012 offer for 70% equity),
- \$7.2 million (Dr. Woodside's higher valuation),
- \$9.3 million (Dr. Alford's lower valuation),
- \$12 million (Dr. Alford's higher valuation), and
- \$20 million (Andy Ballard's valuation).

Judge Miller weighed all of the evidence and came to a valuation that he decided was reasonable in light of the record and the inherent imprecision of valuing a closely held start-up company of the nature of Warpath. Appellants have not sustained their

⁴ Before, during, and after the valuation hearing, respondent argued that Dr. Woodside's valuation should not be admitted in evidence because it failed to meet the evidentiary standard for the admission of expert opinion. (*See* R. pp. 97, 100-01, 105-06; R. p. 150, lines 11-14; R. p. 152, line 10, to p. 154, line 21; R. p. 270, lines 10-21; R. pp. 133-34))

burden to show that Judge Miller committed error in making this determination. The Court should sustain his decision.⁵

VI. The Circuit Court did not err by refusing to give value to shares of stock owned by the appellants for which they have never paid.

The appellants acquired their ownership interests in Warpath under the 2007 Stock Purchase Agreement. Per the Agreement, defendant Roberson purchased 20,000 shares constituting 20% of the company's stock directly from Mr. Ballard for \$1 million, and he and the other two individual defendants (Thoennes and Thoennes III) 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. (R. pp. 369-70)

In its 2010 Order, the Court concluded that the appellants 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 and remedy were affirmed by the Supreme Court. *Ballard v. Roberson*, 399 S.C. at 598-99, 733 S.E.2d at 112-13. Those shares remain in escrow, and it was undisputed at the 2013 valuation hearing that the appellants have still not performed the services for which they received 60,000 shares of stock from the company. Judge Miller found specifically to this effect (R. p. 17), and appellants cannot point to any evidence contradicting that finding of fact.

Based on that finding, Judge Miller allocated 50% of the company value to Ballard's shares, since Ballard owned 20,000 of the 40,000 shares that were not in

⁵ If, notwithstanding the above, this Court should view the weight of the evidence differently than Judge Miller did, respondent urges the Court to set its own valuation number rather than remand for a redetermination of the value. Another valuation hearing, regardless of the outcome, is virtually certain to result in yet another appeal by appellants.

escrow. This was not only legally correct, but was mandated by section 33-6-210(e) of the South Carolina Code. That statute dictates that “the corporation must place in escrow shares issued for a contract for future services.” S.C. Code § 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).

South Carolina’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. As the official comment 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,” S.C. Code § 33-6-210 official comment, which is exactly the case here. Furthermore, the statute 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.” S.C. Code § 33-6-210(e).

In light of these provisions of the South Carolina Code, the value of Ballard’s stock ownership should not be diluted by giving the appellants the benefit of counting the escrowed shares in determining Ballard’s ownership percentage of the total value of the company, as this would reward the defendants for their failure to deliver the consideration they agreed to provide for those shares. *See Kreischer v. Kerrison Dry Goods Co.*, 172 F.3d 863, at *12 (4th Cir. 1999) (upholding the district court’s refusal to apply a minority discount “because such an award would reward the majority stockholders for their wrongful conduct”). This is not a “forfeiture” or “penalty” as the appellants assert, but a fair and equitable conclusion that appellants should not benefit in the valuation process by counting escrowed shares for which they have never paid.

Nor is this conclusion inconsistent with respondent’s argument in the Circuit Court that the company should be valued as if fully funded and already developed if Ballard is allocated only 20% ownership, as appellants contend on appeal. *See* Brief of Appellants at 15. In making this argument, appellants quote one sentence from respondent’s pretrial memorandum but fail to give this Court the full substance of respondent’s position. A more complete statement is the following passage from respondent’s pretrial memorandum:

“Obviously, if the defendants had done what they contracted to do in 2007, the project would have already been completed and would currently be near the end of Dr. Woodside’s projected ‘ramp up’ period. Thus, if Andy’s ownership percentage is to be set at 20% (rather than 50% as we assert), then the value of the company should be undiscounted from the \$20 million figure determined by Dr. Woodside, and Andy’s 20% share should be valued at \$4,076,886 (20% of \$20,384,428). Conversely, if the Court is going to use the current (discounted) value determined by

Dr. Woodside, Andy should be treated as a 50% owner since none of the defendants has provided the consideration for which 60,000 shares of stock were issued to them by the company. Accepting Dr. Woodside's current value calculation of \$7,178,594 million [*sic*], Andy's stock should be valued at half that amount, or \$3,589,297."

(R. p. 97)

Indeed, Judge Miller's decision not to give value to the shares held in escrow is in keeping with what one of the appellants has represented to another court. In 2011, one of the appellants stated in a filing with the United States Bankruptcy Court that his 20,000 shares of Warpath stock held in escrow did not have any economic value. *In re Thoennes*, No. 11-07438-hb, Schedule B (Personal Property), docket entry #1, p.10 (Bankr. D.S.C. Dec. 2, 2011). Judge Miller's refusal to give value to appellants' escrowed stock in the valuation is thus entirely consistent with what this appellant has represented in court on the public record.

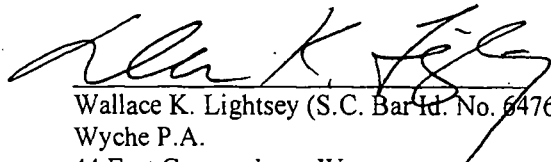
In short, South Carolina Code section 33-6-210 clearly contemplates that a shareholder whose shares were issued for future consideration should not receive any economic benefit from those shares until the consideration has been provided. As it is undisputed that the appellants have not performed the services in exchange for which their stock was issued, the 60,000 shares in escrow should not have been considered in the allocation of an ownership percentage to Ballard. It was entirely correct, therefore, for Judge Miller to allocate 50% of the total company value to Ballard's shares. To do otherwise would be to allow appellants to benefit from stock for which they have not paid, in violation of S.C. Code section 33-6-210.

CONCLUSION

It is time to bring this long-drawn-out case to an end. The relief ordered by Judge Miller was well within his discretion under the statute, is supported by substantial evidence in the record, and is correct in its legal underpinnings.

This Court should affirm.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-002790

RECEIVED
DEC 08 2014
SC Court of Appeals

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

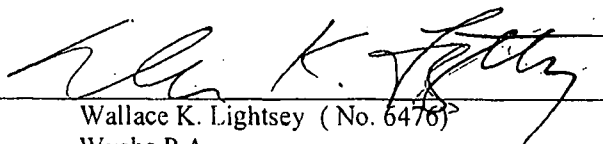
v.

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

Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing final BRIEF OF RESPONDENT and CERTIFICATE OF COUNSEL 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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Date: December 4, 2014

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
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Edward W. Miller, Circuit Court Judge

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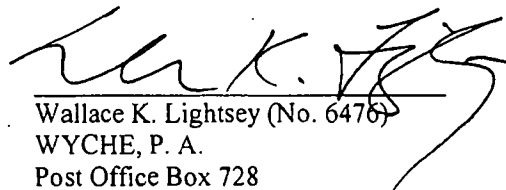
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And Warpath Development, Inc.....Appellants.

Certificate of Counsel

The undersigned certifies that the foregoing final Brief of Respondent complies
with Rule 211 (b), SCACR.

December 4, 2014



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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-23-05739

RECEIVED

NOV 14 2014

SC Court of Appeals

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

v.

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

**RECORD ON APPEAL
VOLUME I OF II**

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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,

Plaintiff,

vs.

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

Defendants.

Case Number: 2008-CP-23-5739

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 IM 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 SCRCF 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.

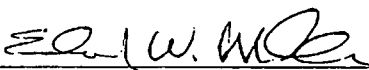
16. In order to provide for the purchase of Ballard's shares, the Court must determine the fair value. The Court directs the parties to communicate and attempt to agree on an appraiser or valuation expert for the valuation of Ballard's shares, taking into account the Agreement. If the parties are unable 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.


The Hon. Edward W. Miller
Circuit Judge

Greenville, South Carolina

5-3, 2010

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT

Andrew P. (Andy) Ballard,

Plaintiff,

vs.

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

Defendants.

Case Number: 2008-CP-23-5739

ORDER OF JUDGMENT

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, 2013,¹ 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

¹ 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.² 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

² 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 value³ 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

³ 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 Thoenneses, 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

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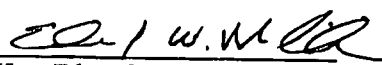
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them additional time to buy out Mr. Ballard under a structured payment arrangement, including provisions for interest, security, and remedies on default, will simply end up in further litigation.

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

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

FORM 4

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.
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☒ Defendant ☐ Self-Represented Litigant

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICK
CLERK
2013 NOV 8 PM 2:38

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.

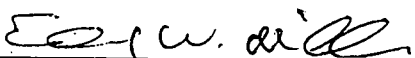
Additional Information for the Clerk:

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INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


 Circuit Court Judge

2130
 Judge Code

11/8/13
 Date

For Clerk of Court Office Use Only

This judgment was entered on _____, and a copy mailed first class or placed in the appropriate attorney's box on _____, to attorneys of record or to parties (when appearing pro se) as follows:

Wallace K. Lightsey
 Wyche, Burgess, Freeman & Parham, P.A.
 P.O. Box 728
 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua L. Howard
 Haynsworth, Sinkler, Boyd
 P.O. Box 2048
 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer
 Greenville County Clerk Of
 Court - Clerk of Court

Court Reporter

FILED - CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT

2014 MAR 27 PM 4 45

Andrew P. (Andy) Ballard,
Plaintiff,

vs.

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

Defendants.

Case Number: 2008-CP-23-5739

**ORDER DENYING DEFENDANTS'
MOTION TO STAY EXECUTION**

This matter is before the Court on Defendants' Motion to Stay Execution. For the reasons stated herein, the Court denies the motion.

This is a shareholder oppression case, filed by the plaintiff in July 2008. On May 4, 2010, following a trial, this Court entered an Order finding that the defendants had committed oppression of the plaintiff and ordering defendants to buy out the plaintiff's shares at fair value. The defendants appealed, and the Supreme Court affirmed. On remand, this Court held an evidentiary hearing to determine the fair value of the plaintiff's shares. On October 3, 2013, the Court issued an order (i) valuing Warpath at \$7,178,594, and (ii) directing Defendants to pay 50% of that value (\$3,589,297) to Plaintiff to buy out his ownership. The Court gave the defendants a 90-day grace period to arrange for payment of the judgment.

Defendants filed a notice of appeal from that judgment on December 20, 2013. On January 7, 2014, defendants filed the motion to stay. In it, defendants ask the Court to stay execution of the judgment for the duration of defendants' second appeal, and submit that the Court should not require a bond as a condition of staying execution.

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Under Rule 62(d), SCRPC, and Rule 241, SCACR, the Court has the discretion to grant or deny the motion to stay. See *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007) ("Whether to grant such a stay rests in the court's discretion 'on such conditions for the security of the [creditor] as are proper'"). No South Carolina state court has provided assistance on exercising this discretion. Accordingly, the Court may look to federal cases interpreting similar federal rules for guidance. See *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); see also Comments to Rule 62, SCACR (noting that "rule 62 is drawn from the Federal Rule").¹

In interpreting Rule 62(d), FRCP, the United States Supreme Court has laid out four factors that courts should examine when determining whether or not to grant a motion to stay execution. Under this framework courts should examine the following:

- (i) movant's likelihood of success on the merits,
- (ii) the extent of movant's injury absent a stay,
- (iii) the extent of injury to non-movants if a stay is granted, and
- (iv) the public interest.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987).

Applying the *Hilton* standard, the Court finds that defendants have failed to carry their burden that the balance of the four factors supports a stay of execution. In particular, defendants have not made a showing of likelihood of success on the merits, injury to them if a stay is denied that outweighs plaintiff's injury if a stay is granted, or that the public interest is better served if

¹ Rule 62(d), SCRPC, states that "when an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay." Rule 62(d), FRCP, states that "if an appeal is taken, the appellant may obtain a stay by supersedeas bond."

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execution is stayed. The plaintiff, on the other hand, makes a persuasive showing that all of these factors favor the denial of a stay.

Furthermore, the defendants have not presented any evidence or argument as to why a bond should not be required as security for plaintiff's judgment should it be affirmed on appeal. At oral argument, defendants' counsel offered to put up defendants' shares in Warpath as security for the judgment, but defendants' continued majority ownership and control of Warpath gives them the ability to render its shares worthless while the appeal takes its course, and therefore this proffer of security is inadequate if not illusory. In light of (a) the fact that the defendants' liability has already been determined and affirmed by the Supreme Court on appeal, (b) defendants' concession at the valuation hearing that a fair price for plaintiff's is at least \$873,000 to \$1,000,000, and (c) defendants' failure to demonstrate likelihood of reversal of the judgment on appeal, there is no reason that a bond to secure the full amount of the judgment should not be required.

At the conclusion of argument on defendants' motion, the Court indicated that it would deny the stay unless the defendants posted a bond for 125% of the amount of the judgment, which is the minimum amount set forth in the local rules of the U.S. District Court for the District of South Carolina, and gave the defendants a week to obtain and post such a bond. See Rule 62.01(A), DSC Local Civil Rules. Defense counsel contended at the motion hearing that South Carolina Code section 18-9-130 caps the amount of any bond this Court may require at \$1,000,000. Plaintiff's counsel contends that this statutory ceiling is not applicable here, given the particular facts and procedural history of this case, the fact that defendants have already appealed liability and lost, and the fact that the judgment also requires the delivery of personal property and thus implicates South Carolina Code section 18-9-150, which does not contain any

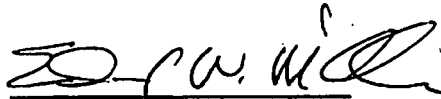
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cap on the amount of a supersedeas bond. While the Court finds plaintiff's argument persuasive, it is not necessary to reach this issue, as the defendants have not offered to post a bond for the \$1,000,000 amount set forth in section 18-9-130.

Accordingly, defendants' motion for a stay of execution is denied.

It is so ordered.

Dated: 3/27, 2014
Greenville, SC


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

A. Certified Copy
Paul B. Wicks
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 3/27/14

STATE OF SOUTH CAROLINA
CLERK OF COURT
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE
FILE B. WICKENS
IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

2014 APR 23 PM 12 01
Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

ORDER APPOINTING RECEIVER

vs.

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

Defendants.

This matter came before the Court for a hearing upon the Rule To Show Cause issued to the defendants and their attorney, Joshua Howard. The Rule was heard by the Court on April 23, 2014. Part of the Rule directed the defendants to show cause why a receiver should not be appointed to ascertain by investigation, marshal and protect assets and income of the defendants.

Upon reviewing the record, the evidence, and the applicable law and hearing statements and representations of counsel, I find that a receiver should be appointed with authority to pursue discovery from the defendants and third parties, require the production of documents and other evidence, and take possession of defendants' assets and secure them while defendants' appeal is pending, upon threat of contempt and sanctions by this Court for willful failure to cooperate with the receiver.¹

¹ While the findings of fact contained in this Order apply to all defendants, the relief granted herein is not entered against defendant Rick Thoennes III. At the hearing, plaintiff's counsel advised the Court that on December 2, 2011, while the first appeal was pending, defendant Thoennes III filed a petition for bankruptcy with the United States Bankruptcy Court. An order of discharge was entered by that Court on March 26, 2012. Plaintiff disputes that the discharge applies to or affects the judgment, but has agreed with counsel for Thoennes III to hold further collection efforts against Thoennes III in abeyance until that issue has been resolved by agreement or court order.

FINDINGS OF FACT

1. This is a shareholder oppression case, filed by the plaintiff in July 2008. 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 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. All necessary permits to construct and develop the marina and related properties were obtained by the summer of 2010.

2. 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, 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 breached their fiduciary duty to the plaintiff by engaging in majority shareholder oppression, 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.

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3. On May 4, 2010, following a bench trial, this Court entered an Order finding that the defendants had breached their fiduciary duty and committed oppression of the plaintiff. The Court ordered defendants to buy out the plaintiff's shares at fair value. The defendants appealed.

4. The Supreme Court affirmed this Court's 2010 Order in August of 2012. On remand, this Court held an evidentiary hearing in August of 2013 to determine the fair value of the plaintiff's shares. At the valuation hearing, plaintiff presented undisputed evidence that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the hearing.

5. On October 3, 2013, the Court issued an order of judgment (the "Judgment") valuing Warpath at \$7,178,594 and directing defendants jointly and severally to pay 50% of that value (\$3,589,297) to plaintiff to buy out his ownership. The Court gave the defendants a 90-day grace period to arrange for payment of the Judgment. Defendants filed a notice of appeal from the Judgment on December 20, 2013.

6. Defendants have not paid any portion of the Judgment.

7. Plaintiff attempted to execute the Judgment against defendants' assets in Greenville County and Oconee County. The writs of execution in both counties were returned *nulla bona*.

8. On January 7, 2014, defendants filed a motion to stay execution pending appeal. This Court denied that motion by Order dated March 27, 2014. On the same date, the Court issued its Rule To Show Cause.

9. The defendants directly or indirectly own or control assets that are at risk of being wasted, secreted, or diverted while the defendants' appeal is pending.

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10. No other supplementary proceedings are pending against the defendants, and no other receiver of the defendants' property has been appointed.

11. Forensics Research Group, Inc. ("FRG"), and its principal Michael F. O'Shea, are experienced in handling receiverships and financial matters in fiduciary capacities, and FRG is a fit and proper company to act as receiver herein. FRG holds no interest which would interfere with the proper performance of its fiduciary duties as a receiver in this case and is willing to so serve.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are denominated Conclusions of Law to the extent that they constitute the same.

2. The Judgment was granted in favor of Ballard and has not been satisfied.

3. A receiver may be appointed after judgment to carry the judgment into effect. *See* S.C. Code Ann. § 15-65-10(2).

4. A receiver may be appointed after judgment to dispose of the property according to the judgment. *See* S.C. Code Ann. § 15-65-10(3).

5. A receiver may be appointed after judgment to preserve the judgment debtor's property during the pendency of an appeal. *See* S.C. Code Ann. § 15-65-10(3).

6. A receiver may be appointed after judgment when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment. *See* S.C. Code Ann. § 15-65-10(3).

7. A receiver may be appointed to receive any distributions due to or to become due to the judgment debtor from a limited liability company in which the judgment debtor has a membership interest. *See* S.C. Code Ann. § 33-44-504(a).

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8. South Carolina law otherwise allows for the appointment of a Receiver under the facts of this case.

9. The Court concludes that the plaintiff is entitled to the appointment of a receiver in order to ascertain by investigation and to take possession of and secure assets and income of the defendants until the appeal is resolved.

NOW, THEREFORE, based upon the foregoing findings of fact and the conclusions of law, IT IS THEREFORE ORDERED that:

1. FRG is hereby appointed as Receiver to ascertain by investigation and to take possession of and secure assets and income of the defendants until their appeal of the Judgment is resolved.

2. Immediately following the entry of this Order, and on an ongoing basis as long as this Order remains in effect, defendants shall surrender and deliver possession to FRG of all of the assets and property that they possess, own or control, directly or indirectly, legally or equitably, including all shares of stock of Warpath Development, Inc., and all assets and records of Warpath Development, Inc., and all assets and property that defendants hereafter receive or acquire, directly or indirectly, legally or equitably, while the Order is in effect (all of the foregoing herein referred to as the "Property"), with the exception of property that is exempt from execution or levy (for example, the homestead exemption). As to such exempt property, defendants shall not dispose of or encumber such property beyond the statutory amount of the exemption. If such property is already encumbered such that the owner's equity in the property is less than the amount of the exemption, the owner shall not further encumber or dispose of the property.

3. Effective as of and from the date of the entry of this Order, all funds or other property that are received by defendants shall be delivered to the Receiver and deposited with a bank of Receiver's choice or otherwise secured by Receiver pending resolution of defendants' appeal.

4. Defendants may request from the Receiver the release of such funds as are required for ordinary living expenses, and the Receiver shall comply with reasonable such requests. Any dispute over such requests shall be brought promptly to the Court.

5. The Receiver will be and hereby is authorized and directed to take immediate possession of defendants' assets and to exercise full control over defendants' assets, provided that Receiver shall not sell or dispose of such assets until further order of this Court, and the Receiver in so doing will have all powers generally available to Receivers under the laws of the State of South Carolina, and will have, among others, the following specific powers:

(a) The power and authority to take possession of property owned or leased by defendants. All parties in possession of any such property are to surrender it to the Receiver upon demand. This property shall include, but not be limited to the following;

- i Real Property
- ii Goods
- iii Inventory
- iv Equipment
- v Chattel Paper and Accounts
- vi Securities and Instruments, including but not limited to Stocks, Bonds, and Promissory Notes
- vii Investment Property
- viii Documents

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ix Deposit Accounts

x Commercial Tort Claims

xi Money

xii Letter of Credit Rights

xiii General Intangibles

xiv Supporting Obligations

xv All Cash or Equivalents, Savings Accounts, Brokerage Accounts,
any other bank accounts of defendants;

xvi All proceeds and products of above

(b) Gather all books and records of defendants, and subpoena or otherwise require production of books and records of third parties, to determine the existence and amount of all defendants' debts and obligations together with all their assets;

(c) To control all bank accounts owned by or for the benefit of defendants. No other person shall have any authority or control over any funds in the accounts, including but not limited to authority or control otherwise disburse funds;

(d) Insurance: With respect to any insurance coverage in existence or obtained, the Receiver shall be named as an additional insured on the policies for the period that the Receiver shall be in possession of the property insured;

(e) Distributions from limited liability companies. The Receiver is hereby authorized to demand and receive any distributions due to or to become due to a defendant from any limited liability company in which the defendant has a direct or indirect membership interest; and any such limited liability company is hereby directed and enjoined, upon receipt of this Order, to make such distribution(s) only to the Receiver while this Order is in effect.

6. Plaintiff and Receiver shall have no obligation to pay for accrued wages, benefit, and taxes, payroll or other, accrued in advance of the date of this Order, whether currently due or owing.

7. The Receiver will furnish to the Court and to the parties monthly statements itemizing property that has been secured by Receiver pursuant to this Order. Such report will be filed within thirty (30) days after the end of each calendar month, the first such report to be due thirty days after the end of the first month this order is entered and monthly thereafter. The parties to this litigation will be entitled to inspect the books and records of the Receiver concerning assets held by it pursuant to this Order at reasonable times and with reasonable notice.

8. Without further Order of the Court, the Receiver shall be entitled to payment of professional fees and expenses incurred by the Receiver. While the defendants' appeal remains pending, Receiver's fees and expenses shall be paid by plaintiff's counsel. If the Judgment is affirmed in whole or in part, plaintiff's counsel shall be entitled to reimbursement of such payments from the defendants' assets. Receiver's professional fees shall be charged at \$200 per hour for Michael O'Shea's time. All photocopies and facsimile charges along with necessary out-of-pocket expenses (including travel and lodging) will be billed at cost. All fees and expenses of the Receiver shall be accounted for in the Monthly Statement of Operations.

9. The Receiver will have such additional powers as are provided by law and as this Court may from time to time direct.

10. No person or entity shall file suit against the Receiver, plaintiff, or plaintiff's counsel or take any legal action for actions taken in compliance with this Order. All other proceedings by defendants or any creditor of defendants relating to the Judgment or the Property are enjoined.

11. The Receiver shall have no personal liability in connection with any liabilities, obligations, liens or amounts owed to any creditors or claimants of defendants.

12. The Receiver and its employees, agents, and attorneys shall have no personal liability or obligation and shall have no claim asserted against them in connection with the Receiver's actions under this Order.

13. The Receiver may, in its discretion, notify this Court and the parties to this action that the Receivership is not practical, and upon such notice all duties of the Receiver shall terminate except with regard to liabilities which arise prior to the date of the notice. The Court may then appoint a new Receiver to take any and all such other action as it deems appropriate. Receiver shall turn over all of the assets and records secured pursuant hereto to any successor receiver appointed by the Court and shall file a final accounting with the Court.

14. In the event that the defendants fail to immediately turn over their property and other items required by this Order, the appropriate County Sheriff is hereby ordered to take all necessary actions and appropriate force to give full effect to the terms of this Order.

15. All persons who receive notice of this Order are enjoined from interfering with the powers and duties of the Receiver.

16. All providers of insurance with respect to the Property are prohibited and enjoined from cancelling such insurance policies provided that the Receiver pay the applicable premiums for any prospective exposure going forward under the receivership, and such premiums may be paid from assets secured by the Receiver pursuant to this Order.

17. The receiver is not responsible for filing any federal, state, or local tax returns including those relating to any activities during the receivership.

18. The Receiver and the parties to this case may at any time apply to this Court for instructions or orders and for further powers necessary to enable the Receiver to perform the Receiver's duties properly.

19. IT IS FURTHER ORDERED that pending further Order of this Court, the defendants and their respective agents, partners, managers, employees, assignees, successors, representatives, officers, directors, affiliates or related entities and all other persons acting in concert with them who have actual or constructive knowledge of this Order, and their agents and employees, shall not:

A. Commit Waste:

Defendants shall not commit or permit any waste of the Property or any part thereof, or suffer or commit or permit any act on the Property or any part thereof in violation of law, or remove, transfer, encumber or otherwise dispose of any of the Property or the fixtures presently on the Property or any part thereof.

B. Cash or Credit Card Receipts:

Defendants shall not discount or in any other way divert or use any of the monies from the property, including, but not limited to, rents, cash from sales, or credit card receipts.

C. Interfere with Receiver:

Defendants shall not directly or indirectly interfere in any manner with the discharge of the Receiver's duties under this Order or the Receiver's possession of the Property;

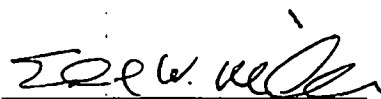
D. Transfer or Encumber the Property:

Defendants shall not expend, disburse, transfer, assign, sell, convey, devise, pledge, mortgage, create a security interest in, encumber, conceal or in any manner whatsoever deal in or dispose of the whole or any part of the Property, including, but not limited to, the cash, rents inventory, and fixtures without prior Court Order; and

E. Impair Preservation of Property or Plaintiff's Interest:

Defendants shall not do any act which will, or which will tend to impair, defeat, divert, prevent or prejudice the preservation of the Property, or the preservation of plaintiff's interest in the Property. Defendants are further enjoined from making any payments or transfers of funds or property to or from any affiliates, insiders, directors, officers, family members, or any other person or entity controlled by or otherwise related to any affiliates, insiders, directors, and/or officers.

IT IS SO ORDERED.



Edward W. Miller
Judge, South Carolina Circuit Court

4/23, 2014
Greenville, South Carolina

FILED-CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT

2014 APR 23 PM 12 01

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

CHARGING ORDER

vs.

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

Defendants.

This matter came before the Court for a hearing upon the Rule To Show Cause issued to the defendants and their attorney, Joshua Howard. The Rule was heard by the Court on April 23, 2014. The Rule directed the defendants to show cause why their assets should not be applied toward the satisfaction of the plaintiff's Judgment against them entered in October 2013. Pursuant to the evidence and arguments of counsel at the hearing, and the record evidence in this case, the Court hereby enters this Charging Order with respect to the distributional interests of defendants in any limited liability companies in which they have a direct or indirect membership interest.¹

The background of this case has been presented in other orders of this Court. In brief, this is a minority shareholder oppression case. The plaintiff, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc., and was its sole owner, officer, and director

¹The relief granted herein is not entered against defendant Rick Thoennes III. At the hearing, plaintiff's counsel advised the Court that on December 2, 2011, while the first appeal was pending, defendant Thoennes III filed a petition for bankruptcy with the United States Bankruptcy Court. An order of discharge was entered by that Court on March 26, 2012. Plaintiff disputes that the discharge applies to or affects the Judgment, but has agreed with counsel for Thoennes III to hold further collection efforts against Thoennes III in abeyance until that issue has been resolved by agreement or court order.

for a number of years. 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, 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 breached their fiduciary duty to the plaintiff by engaging in majority shareholder oppression, 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.

On May 4, 2010, following a bench trial, this Court entered an Order finding that the defendants had breached their fiduciary duty and committed oppression of the plaintiff. The Court ordered defendants to buy out the plaintiff's shares at fair value. The defendants appealed. The Supreme Court affirmed this Court's 2010 Order in August of 2012. On remand, this Court held an evidentiary hearing in August of 2013 to determine the fair value of the plaintiff's shares. At the valuation hearing, plaintiff presented undisputed evidence that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the hearing.

On October 3, 2013, the Court issued an order of judgment (the "Judgment") valuing Warpath at \$7,178,594 and directing defendants jointly and severally to pay 50% of that value (\$3,589,297) to plaintiff to buy out his ownership. The Court gave the defendants a 90-day grace period to arrange for payment of the Judgment. Defendants filed a notice of appeal from the Judgment on December 20, 2013. Defendants have not paid any portion of the Judgment.

Plaintiff attempted to execute the Judgment against defendants' assets in Greenville County and Oconee County. The writs of execution in both counties were returned *nulla bona*. On January 7, 2014, defendants filed a motion to stay execution pending appeal. This Court denied that motion by Order dated March 27, 2014. On the same date, the Court issued its Rule To Show Cause.

Based on the evidence presented at the show cause hearing, the Court finds that the defendants directly or indirectly own or control assets that are at risk of being wasted, secreted, or diverted while the defendants' appeal is pending. Some of these assets are owned or controlled through membership in limited liability companies. Under the South Carolina Uniform Limited Liability Company Act, the Court may charge the distributional interest of a judgment debtor to satisfy the judgment, upon application by a judgment creditor of a member of the limited liability company. In addition, a receiver may be appointed to receive any distributions due to or to become due to the judgment debtor from a limited liability company in which the judgment debtor has a membership interest, and the Court may "make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order." S.C. Code Ann. § 33-44-504(a).

ACCORDINGLY, the Court hereby enters this Charging Order upon any and all distributional interests of the defendants in all limited liability companies in which any of them

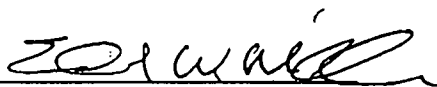
or any entity owned or controlled by any of them is a member. This Charging Order is directed to the defendants, to entities owned or controlled by any defendant, and to the following limited liability companies, as well as any other limited liability companies that are identified as entities in which a defendant or an entity owned or controlled by a defendant has a membership interest:

1. Greenville Gateway Developers, LLC
2. Sozo, LLC
3. Sozo7, LLC
4. IMK Development Co., LLC
5. TRG, LLC
6. Dayspring of South Carolina, LLC
7. Kings Witness, LLC
8. Primus Source, LLC

Upon receipt of this Charging Order, no such limited liability company shall make a distribution directly or indirectly to any defendant, but instead shall transfer all distributions due to or that become due to any defendant to Forensics Research Group, Inc. ("FRG"), in care of its principal Michael F. O'Shea, which is hereby appointed receiver of the defendants' share of any and all such distribution(s). Any distributions received by FRG pursuant to this Order shall be held by FRG pending resolution of the defendants' appeal or further Order of this Court.

Defendants may redeem their distributional interests charged by this Order at any time prior to foreclosure upon the same, pursuant to the methods set forth in South Carolina Code § 33-44-504(c).

IT IS SO ORDERED.


Edward W. Miller
Judge, South Carolina Circuit Court

4/23, 2014
Greenville, South Carolina

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739

Andrew P Andy Ballard

Warpath Development, LLC

Tim Roberson
Rick Thoennes III

Rick Thoennes
Warpath Development
Inc

2014 APR 23 PM 12 01

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. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(c), SCRPC; ☐ 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. (If not, order to follow.) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed, such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Date

4-23-2014
Date

CP FORM 400
SC & SCRPC Form 400 (Revised 1/1/13)



For Clerk of Court Office Use Only

This judgment was entered on 23th day of April, 2014, and a copy mailed first class or placed in the appropriate attorney's box on 23th day of April, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Wallace K. Lightsey Wyche P.A. 44 East Camperdown Way
Greenville, SC 29601
William Marvin Wilson III Wyche, P.A. P.O. Box 728
Greenville, SC 29602-0728
Amos A. Workman Wyche, P.A. P.O. Box 728 Greenville,
SC 29602-0728

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua L. Howard Haynsworth Sinkler Boyd, P.A. P.O. Box
2048 Greenville, SC 29602
James W. Fayssoux Sr. Fayssoux Law Firm, PA P.O. Box
10207 Greenville, SC 29603

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer - Greenville County Clerk Of
Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
2008 JUL 30 P 4:23

2008-CP-23-5139

Andrew P. (Andy) Ballard,
Plaintiff,

CASE NO.:
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL J. WICKENSIMER

vs.

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

COMPLAINT
(JURY TRIAL)

The plaintiff, Andrew P. (Andy) Ballard ("Ballard"), complaining of the defendants, alleges as follows:

1. Ballard is a citizen and resident of Greenville County, South Carolina.
2. The defendants Tim Roberson, Rick Thoennes, and Rick Thoennes III are citizens and residents of Greenville County, South Carolina.
3. The defendant Warpath Development, Inc. ("Warpath") is a South Carolina corporation with its records located in Greenville County, South Carolina. The principal asset of Warpath is a lease on property located at Lake Keowee in Oconee County, South Carolina, and associated assets.
4. Warpath has been working toward developing a marina on the property located on Lake Keowee.
5. Ballard and the defendants are parties to a Stock Purchase Agreement, dated May 29, 2007, attached hereto and incorporated herein (the "Agreement").
6. Prior to the Agreement, Ballard was the sole shareholder of Warpath.
7. Under the Agreement, the individual defendants became shareholders of Warpath.

8. In the Agreement, the defendants expressly agreed that "the final holdings" of stock in Warpath consist of Ballard owning 20,000 of the outstanding 100,000 shares of Warpath, or 20% of Warpath.

9. Further, in the Agreement, the defendants agreed that the defendant Tim Roberson would "provide the necessary capital to obtain long term financing on the project" and that Ballard would not be required to sign any personal guarantees to obtain financing by the corporation.

10. After entering into the Agreement, the individual defendants elected themselves the directors of Warpath.

11. At a directors meeting on May 1, 2008, the individual defendants passed a motion purportedly to authorize the issuance of 900,000 additional shares of Warpath Treasury Stock in order to raise capital, pay expenses, and offer employee incentives, and purportedly authorized Warpath to file the necessary paper work purportedly to authorize the issuance of an additional 900,000 shares. At a shareholders meeting on the same day, the individual defendants purportedly approved the issuance of the additional 900,000 shares. This action is in breach of the Agreement.

12. Further, if these shares are issued and sold or otherwise transferred to shareowners, Ballard's percentage ownership in Warpath would be reduced to 2%, thus breaching the Agreement.

13. Further, the defendants have breached the Agreement in that the defendant Tim Roberson has not provided the necessary capital to obtain long term financing and instead the defendants have begun the process to sell Warpath stock, contrary to the express terms of the Agreement.

14. The actions of the individual defendants and the action of the defendant Warpath, purportedly authorized individually and collectively, are in direct violation of the Agreement.

FOR A CAUSE OF ACTION

15. The defendants have breached the Agreement.

16. The proposed issuance of stock by the defendant Warpath will cause Ballard irreparable harm and Ballard has no adequate remedy at law.

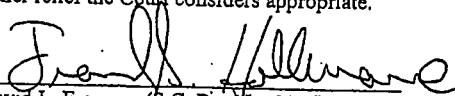
17. A temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants are in the public interest and would not result in an undue burden on the defendants.

18. Ballard is entitled to a temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants that would reduce Ballard's final holdings in Warpath to less than 20% of the stock of Warpath.

19. Ballard is entitled to the costs of this Action.

WHEREFORE, Ballard asks that the Court:

1. Issue a temporary and a permanent injunction barring the issuance of stock in the defendant Warpath by the defendants that would reduce Ballard's final holdings in Warpath to less than 20% of the stock of the defendant Warpath;
2. Award him costs;
3. Award him whatever further relief the Court considers appropriate.



David L. Freeman (S.C. Bar No. 2126)
Frank S. Holleman (S.C. Bar No. 2564)
Hannah R. Metcalfe (S.C. Bar No. 73046)
Wyche, Burgess, Freeman & Parham, PA
44 E. Camperdown Way
P.O. Box 728 (29602-0728)
Greenville, SC 29601
Phone: 864-242-8200
Facsimile: 864-235-8900
Email: dfreeman@wyche.com;
fholleman@wyche.com; hmetcalfe@wyche.com

Dated: 7/30/08
Greenville, South Carolina

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY.

STOCK PURCHASE AGREEMENT

WITNESSETH

Roberson	40,000 shares
Thoennes	20,000 shares
Thoennes III	20,000 shares
Ballard	20,000 shares

W.F.B.
K. B.

2. In addition to the above the corporation will pay Ballard \$100,000.00 upon the grand opening of the Marina. An additional \$50,000.00 will be paid one year after said grand opening. Grand Opening being defined as "when the Marina opens for business."
3. Ballard warrants and represents that he holds a lease with Duke Power and the necessary approvals from Duke Power and Pickens County in order to build the development per conceptual plans for Warpath Landing. Final permits must be obtained to move forward.
4. Ballard agrees to execute a separate agreement with Warpath defining his duties in the project development which shall include but not be limited to securing dock permits, building permits, hotel leases, restaurant leases, engineering services, architectural services and any other service deemed necessary and appropriate to complete the conceptual plan for Warpath Landing. If Ballard is unable to obtain the Marina and Dock permits per the conceptual plan the \$1,000,000.00 payment will be refunded, \$250,000.00 will be refunded within 90 days and the balance within 6 months after it is determined the permits cannot be obtained.
5. Thoennes and Thoennes III will execute an agreement with Warpath defining their respective duties, including but not limited to development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate.
6. Roberson agrees to provide the necessary capital to obtain long term financing on the project. Ballard, Thoennes and Thoennes III will not receive any dividend or distribution of profit until all capital contributions of Roberson have been repaid.
7. Ballard will not be required to sign any personal guarantees to obtain financing by the corporation.
8. The parties agree that it will be necessary at a subsequent date to execute additional documents to give full validity to this Agreement and that they will mutually cooperate with each other in that regard.
9. Ballard further represents and warrants that Warpath is in good standing and that he has authority to enter into this Agreement and that Warpath has no liabilities outstanding.

WJR
D.P.B.
B.B.
A.D.

10. This Agreement shall be binding on the parties hereto, their heirs, successors and assigns.

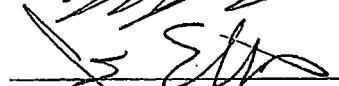
11. No part of this Agreement may be assigned without written consent of all parties.

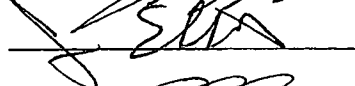
In witness whereof the parties have set their had and seal the day first above written.

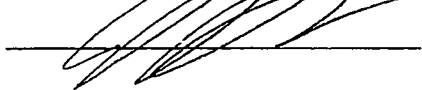
WITNESSES:



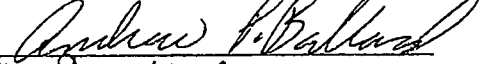


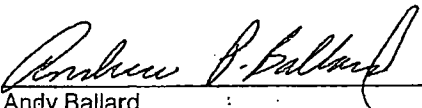




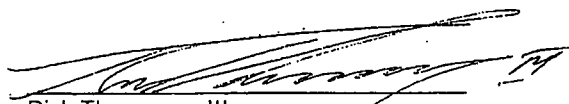



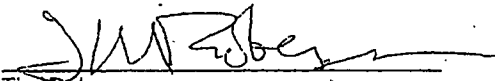
Warpath Development, Inc.


Its: President


Andy Ballard


Rick Thoennes


Rick Thoennes, III


Tim Roberson

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

FILED 25 P 12:00

Andrew P. (Andy) Ballard, individually, and
derivatively on behalf of Warpath
Development, Inc.,

Plaintiff,

vs.

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

Defendants.

CASE NO.: 2008-CP-23-5739

**FIRST AMENDED COMPLAINT
(JURY TRIAL)**

The plaintiff, Andrew P. (Andy) Ballard ("Ballard"), complaining of the defendants,
alleges as follows:

1. Ballard is a citizen and resident of Greenville County, South Carolina.
2. The defendants Tim Roberson, Rick Thoennes, and Rick Thoennes III are citizens and residents of Greenville County, South Carolina.
3. The defendant Warpath Development, Inc. ("Warpath"), is a South Carolina corporation with its records located in Greenville County, South Carolina. The principal asset of Warpath is a lease on property located at Lake Keowee in Pickens County, South Carolina, and associated assets. Warpath is made a defendant herein solely for the purpose of ensuring the effectiveness of the injunctive relief sought in the first and tenth causes of action set out below.
4. Warpath has been working toward developing a marina on the property located on Lake Keowee.
5. Ballard and the defendants are parties to a Stock Purchase Agreement, dated May 29, 2007, attached hereto and incorporated herein (the "Agreement").

6. Prior to the Agreement, Ballard was the sole shareholder of Warpath. Ballard created Warpath and obtained the lease for Warpath for the property on Lake Keowee where the marina is to be located.

7. Under the Agreement, the individual defendants became shareholders of Warpath.

8. Under the Agreement, the individual defendants purchased 20,000 shares of Warpath owned by Ballard for One Million Dollars (\$1,000,000) that was paid to Ballard. The defendants received an additional 60,000 shares of Warpath issued to them in exchange for the other and additional promises and commitments made by them to take certain actions to further the business, financing, development, and operations of Warpath.

9. In the Agreement, the defendants expressly agreed that "the final holdings" of stock in Warpath consist of Ballard owning 20,000 of the outstanding 100,000 shares of Warpath, or 20% of Warpath.

10. Further, in the Agreement, the defendants agreed that the defendant Tim Roberson would "provide the necessary capital to obtain long term financing on the project" and that Ballard would not be required to sign any personal guarantees to obtain financing by the corporation.

11. Further, in the Agreement, the defendants agreed that the defendants Rick Thoennes and Rick Thoennes III "will execute an agreement with Warpath defining their respective duties, including, but not limited to development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate."

12. After entering into the Agreement, the individual defendants became owners of 80% of the stock of Warpath. Further, the individual defendants decided to have Warpath issue additional stock to benefit them and improve their return on investment. They also conspired together and put together and executed a plan to force Ballard out of Warpath.

13. At a stockholders meeting on May 1, 2008, the individual defendants elected themselves as the three directors of Warpath and did not re elect Ballard as a director. They then held a meeting of the Board of directors and passed a motion purportedly to authorize the issuance of 900,000 additional shares of Warpath Treasury Stock in order to raise capital, pay expenses, and offer employee incentives, and purportedly authorized Warpath to file the necessary paper work purportedly to authorize the issuance of an additional 900,000 shares. This motion was then presented to the shareholders, and in the shareholders meeting the individual defendants purportedly approved the issuance of the additional 900,000 shares. This action is in breach of the Agreement.

14. Further, if these shares are issued and sold or otherwise transferred to shareowners, Ballard's percentage ownership in Warpath would be reduced to 2%, thus breaching the Agreement.

15. Further, these actions are in violation of Warpath's Articles of Incorporation. Warpath's Articles of Incorporation authorize the issuance of 100,000 shares.

16. Further, these actions were designed to harm Ballard, to force him out of Warpath, and to benefit the individual defendants.

17. Further, the individual defendants have breached the Agreement in that the defendant Tim Roberson has not provided the necessary capital to obtain long term financing

and instead the defendants have begun the process to sell additional Warpath stock, contrary to the express terms of the Agreement.

18. Further, the individual defendants have made clear that they have not fulfilled their promises and commitments under the Agreement, have made clear that they will not do so, and/or, upon information and belief, are not able to do so.

19. The actions and inactions of the individual defendants, including their planned action of the defendant Warpath with respect to the issuance of the stock, purportedly authorized individually and collectively, are in direct violation of the Agreement.

20. The individual defendants have also acted in bad faith.

FOR A FIRST CAUSE OF ACTION

21. The individual defendants have breached the Agreement.

22. The proposed issuance of stock by the defendant Warpath will cause Ballard irreparable harm and Ballard has no adequate remedy at law.

23. A temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants are in the public interest and would not result in an undue burden on the defendants.

24. Ballard is entitled to a temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants that would reduce Ballard's final holdings in Warpath to less than 20% of the stock of Warpath.

25. Ballard is entitled to the costs of this Action.

FOR A SECOND CAUSE OF ACTION

26. The actions taken by the individual defendants are in violation of Warpath's Articles of Incorporation.

27. Ballard is entitled to a temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants beyond the 100,000 shares already authorized and issued, in violation of Warpath's Articles of Incorporation.

28. Ballard is entitled to the costs of this Action.

FOR A THIRD CAUSE OF ACTION

29. The individual defendants have breached the Agreement.

30. The individual defendants have not fulfilled and have breached their promises and commitments that they made in the Agreement, they have made clear that they do not intend to fulfill them, and/or, upon information and belief, they are not capable of fulfilling them.

31. The breaches by the individual defendants have reduced and will reduce the value of Ballard's stock and have resulted and will result in delays in Ballard receiving economic benefit from his interest in Warpath.

32. The individual defendants must return the 60,000 shares of Warpath that they received under the Agreement, as restitution for their breaches of the Agreement.

FOR A FOURTH CAUSE OF ACTION

33. The individual defendants have committed anticipatory breaches of the Agreement.

34. The individual defendants have not fulfilled and have breached their promises and commitments that they made in the Agreement, they have made clear that they do not intend to fulfill them, and/or, upon information and belief, they are not capable of fulfilling them.

35. The breaches by the individual defendants have reduced and will reduce the value of Ballard's stock and have resulted and will result in delays in Ballard receiving economic benefit from his interest in Warpath.

36. The individual defendants must return the 60,000 shares of Warpath that they received under the Agreement, as restitution for their anticipatory breaches of the Agreement.

FOR A FIFTH CAUSE OF ACTION

37. The individual defendants have breached the covenant of good faith and fair dealing.

38. The breaches by the individual defendants have reduced and will reduce the value of Ballard's stock and have resulted and will result in delays in Ballard receiving economic benefit from his interest in Warpath.

39. The individual defendants must return the 60,000 shares of Warpath that they received under the Agreement, as restitution for their breach of the covenant.

FOR A SIXTH CAUSE OF ACTION

40. The individual defendants have breached the covenant of good faith and fair dealing.

41. Ballard is entitled to recover his damages, plus costs.

FOR A SEVENTH CAUSE OF ACTION

42. The individual defendants have breached the Agreement.

43. The individual defendants have not fulfilled and have breached their promises and commitments that they made in the Agreement, they have made clear that they do not intend to fulfill them, and/or, upon information and belief, they are not capable of fulfilling them.

44. Ballard is entitled to recover his damages for these breaches, plus interest and costs.

FOR AN EIGHTH CAUSE OF ACTION

45. The individual defendants have committed anticipatory breaches of the Agreement.

46. The individual defendants have not fulfilled and have breached their promises and commitments that they made in the Agreement, they have made clear that they do not intend to fulfill them, and/or, upon information and belief, they are not capable of fulfilling them.

47. Ballard is entitled to recover his damages for these anticipatory breaches, plus interest and costs.

FOR A NINTH CAUSE OF ACTION

48. In taking action to force Ballard out of the company and in taking action to authorize the issuance of additional shares of Warpath, as part of that effort, to dilute Ballard's ownership in Warpath, and to benefit themselves, and by breaching the Agreement and its covenant of good faith and fair dealing, the individual defendants breached their fiduciary duties owed by them as directors of Warpath to Ballard, a Warpath shareholder, in violation of S.C. Code Ann. § 33-8-300.

49. The individual defendants acted intentionally, willfully, wantonly, and grossly negligently in breaching their fiduciary duties owed to Ballard.

50. Ballard is entitled to recover actual and punitive damages from the individual defendants, interest, and costs.

FOR A TENTH CAUSE OF ACTION

51. Tim Roberson has been and is the President-CEO of Warpath, Rick Thoennes, III, is the Vice President, and Rick Thoennes is the Secretary-Treasurer. The individual defendants are all the officers of Warpath.

52. In taking action to force Ballard out of the company and in taking action to authorize the issuance of additional shares of Warpath, as part of that effort, to dilute Ballard's ownership in Warpath, and to benefit themselves, and by breaching the Agreement and its covenant of good faith and fair dealing, the individual defendants breached their fiduciary duties owed by them as officers of Warpath to Ballard, a Warpath shareholder, in violation of S.C. Code Ann. § 33-8-420.

53. The individual defendants acted intentionally, willfully, wantonly, and grossly negligently in breaching their fiduciary duties owed to Ballard.

54. Ballard is entitled to recover actual and punitive damages from the individual defendants, interest, and costs.

FOR AN ELEVENTH CAUSE OF ACTION

55. Tim Roberson, Rick Thoennes, and Rick Thoennes, III, own are majority shareholders of Warpath and own 80% of its stock.

56. In taking action to force Ballard out of the company and in taking action to authorize the issuance of additional shares of Warpath, as part of that effort, to dilute Ballard's ownership in Warpath, and to benefit themselves, and by breaching the Agreement and its covenant of good faith and fair dealing, the individual defendants breached their fiduciary duties owed by them as majority shareholders of Warpath to Ballard, a minority Warpath shareholder.

57. The individual defendants acted intentionally, willfully, wantonly, and grossly negligently in breaching their fiduciary duties owed to Ballard.

58. Ballard is entitled to recover actual and punitive damages from the individual defendants, interest, and costs.

FOR A TWELFTH CAUSE OF ACTION

59. Under S.C. Code Ann. §§ 33-14-300 and 310, the individual defendants have acted and are acting in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial to Ballard.

60. Ballard asks that the Court direct the individual defendants, jointly and severally, to purchase his stock at fair value, pursuant to S.C. Code Ann. §§ 33-14-310 (d) (4), and that the defendants not issue any additional Warpath stock pending that purchase, pursuant to S.C. Code Ann. §§ 33-14-310 (d) (3).

61. Alternatively, Ballard asks that the Court direct the defendants, jointly and severally, not to issue any additional Warpath stock, pursuant to S.C. Code Ann. §§ 33-14-310 (d) (3).

FOR A THIRTEENTH CAUSE OF ACTION

62. This is a derivative claim, brought pursuant to Rule 23 (b) (1) of the South Carolina Rules of Civil Procedure, to enforce a right of Warpath.

63. Ballard is and has been a shareholder of Warpath since Warpath came into existence. Ballard was a shareholder at the time of the transactions of which he complains.

64. A pre-filing demand upon the Warpath directors or shareholders is futile and useless because:

(a) The individual defendants constitute all of the directors of Warpath;

(b) The individual defendants constitute all of the shareholders of Warpath other than Ballard and currently own 80% of the outstanding shares;

(c) The claims asserted herein are claims brought against the individual defendants, and the individual defendants have asserted in this litigation that they are not in violation of the Agreement, as alleged herein;

(d) The breaches of the Agreement alleged herein are breaches alleged against the individual defendants;

(e) In order to pursue this claim, the individual defendants would have to sue themselves;

(f) There is no reason to think that the individual defendants would bring this claim against themselves, and in fact the individual defendants have asserted that they have no liability under the Agreement, as set out in their Answer and Counterclaim and the deposition of Tim Roberson.

65. The defendants are parties to a Stock Purchase Agreement, dated May 29, 2007, attached hereto and incorporated herein (the "Agreement").

66. Under the Agreement, the individual defendants purchased 20,000 shares of Warpath owned by Ballard for One Million Dollars (\$1,000,000) that was paid to Ballard. The defendants received an additional 60,000 shares of Warpath issued to them in exchange for the other and additional promises and commitments made by them to take certain actions to further the business, financing, development, and operations of Warpath.

67. In the Agreement, the individual defendants agreed that the defendant Tim Roberson would "provide the necessary capital to obtain long term financing on the project"

and that Ballard would not be required to sign any personal guarantees to obtain financing by the corporation.

68. Further, in the Agreement, the defendants agreed that the defendants Rick Thoennes and Rick Thoennes III "will execute an agreement with Warpath defining their respective duties, including, but not limited to development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate."

69. Further, the individual defendants have breached the Agreement in that the defendant Tim Roberson has not provided the necessary capital to obtain long term financing and instead the defendants have begun the process to sell additional Warpath stock, contrary to the express terms of the Agreement.

70. Further, the individual defendants have not fulfilled their promises and commitments under the Agreement, have made clear that they will not do so, and/or, upon information and belief, are not able to do so.

71. The actions and inactions of the individual defendants, purportedly authorized individually and collectively, violate the Agreement.

72. The individual defendants have also acted in bad faith.

73. The individual defendants have breached the Agreement and have committed anticipatory breaches of the Agreement.

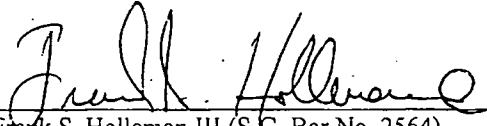
74. Ballard is a party to the Agreement and alleges that he has a right to bring these claims individually as set out in the Second, Third, and Fourth Causes of Action, set out above.

75. Alternatively, Ballard brings these claims derivatively to enforce Warpath's rights under the Agreement.

76. The individual defendants must return the 60,000 shares of Warpath that they received under the Agreement, as restitution for their breaches and anticipatory breaches of the Agreement.

WHEREFORE, Ballard asks that the Court:

1. Issue a temporary and a permanent injunction barring the issuance of stock in the defendant Warpath by the defendants that would reduce Ballard's final holdings in Warpath to less than 20% of the stock of the defendant Warpath;
2. Issue a temporary and a permanent injunction barring the issuance of stock in the defendant Warpath by the defendants that would increase the number of shares beyond the 100,000 authorized by Warpath's Articles of Incorporation;
3. Order that the individual defendants return their 60,000 shares in Warpath, as restitution;
4. Award Ballard actual and punitive damages;
5. Order that the individual defendants, jointly and severally, purchase his shares for fair value and order that the defendants, pending such purchase, not issue additional shares of Warpath or, alternatively, order that the defendants not issue additional shares of Warpath;
6. Alternatively, as a remedy for the derivative claim, order that the individual defendants return their 60,000 shares in Warpath, as restitution;
7. Award him interest and costs;
8. Award him whatever further relief the Court considers appropriate.



Frank S. Holleman III (S.C. Bar No. 2564)
Hannah R. Metcalfe (S.C. Bar No. 73046)
Wyche, Burgess, Freeman & Parham, PA
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P.O. Box 728 (29602-0728)
Greenville, SC 29601
Phone: 864-242-8200
Facsimile: 864-235-8900
Email: fholleman@wyche.com;
hmetcalfe@wyche.com

Dated: 8/25/2009
Greenville, South Carolina

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

STOCK PURCHASE
AGREEMENT

This Agreement made and entered into this 29th day of May, 2007 by and between Andy Ballard, hereinafter referred to as *Ballard*, Tim Roberson, hereinafter referred to as *Roberson*, Rick Thoennes, hereinafter referred to as *Thoennes*, Rick Thoennes III, hereinafter referred to as *Thoennes III* and Warpath Development, Inc, hereinafter referred to as *Warpath*.

WITNESSETH

Whereas, Warpath is a South Carolina corporation presently solely owned by Ballard;
and

Whereas, Warpath is the holder of a lease on property located at Lake Keowee and is desirous of developing the property; and

Whereas, Roberson, Thoennes and Thoennes III are in the business of property development and are desirous of being involved in the development of the project with Ballard and Warpath; and

Whereas, Ballard wishes to convey to the other parties 80% of the corporation in exchange for the purchase of one half of his stock plus an additional 60,000 shares; and

Now Therefore for and in consideration of the monetary sum stated herein and other valuable consideration the parties hereto agree as follows:

1. The group of Roberson, Thoennes and Thoennes III will pay to Ballard upon closing the sum of \$1,000,000.00 in exchange for 20,000 shares of Ballard's 40,000 shares and will receive from the corporation additional shares so that Ballard will hold 20% of the stock and the other 80% will be held by Roberson, Thoennes and Thoennes III when all shares are finally issued. When the new stock is issued the final holdings will be as follows:

Roberson	40,000 shares
Thoennes	20,000 shares
Thoennes III	20,000 shares
Ballard	20,000 shares

Handwritten signatures and initials:
M.A.
A.B.
R.A.
E.

2. In addition to the above the corporation will pay Ballard \$100,000.00 upon the grand opening of the Marina. An additional \$50,000.00 will be paid one year after said grand opening. Grand Opening being defined as "when the Marina opens for business."
3. Ballard warrants and represents that he holds a lease with Duke Power and the necessary approvals from Duke Power and Pickens County in order to build the development per conceptual plans for Warpath Landing. Final permits must be obtained to move forward.
4. Ballard agrees to execute a separate agreement with Warpath defining his duties in the project development which shall include but not be limited to securing dock permits, building permits, hotel leases, restaurant leases, engineering services, architectural services and any other service deemed necessary and appropriate to complete the conceptual plan for Warpath Landing. If Ballard is unable to obtain the Marina and Dock permits per the conceptual plan the \$1,000,000.00 payment will be refunded, \$250,000.00 will be refunded within 90 days and the balance within 6 months after it is determined the permits cannot be obtained.
5. Thoennes and Thoennes III will execute an agreement with Warpath defining their respective duties, including but not limited to development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate.
6. Roberson agrees to provide the necessary capital to obtain long term financing on the project. Ballard, Thoennes and Thoennes III will not receive any dividend or distribution of profit until all capital contributions of Roberson have been repaid.
7. Ballard will not be required to sign any personal guarantees to obtain financing by the corporation.
8. The parties agree that it will be necessary at a subsequent date to execute additional documents to give full validity to this Agreement and that they will mutually cooperate with each other in that regard.
9. Ballard further represents and warrants that Warpath is in good standing and that he has authority to enter into this Agreement and that Warpath has no liabilities outstanding.

WMP
A.P.B.
B.E.
A.D.

10. This Agreement shall be binding on the parties hereto, their heirs, successors and assigns.

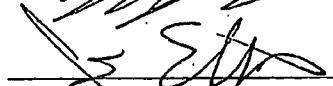
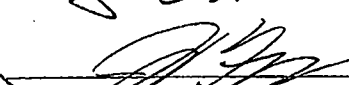
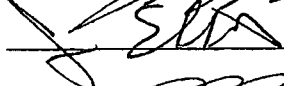
11. No part of this Agreement may be assigned without written consent of all parties.

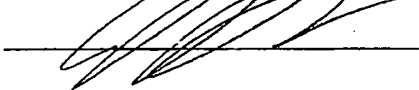
In witness whereof the parties have set their had and seal the day first above written.

WITNESSES:

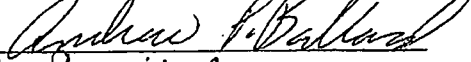


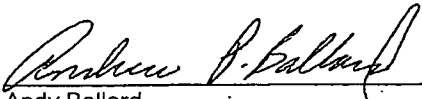


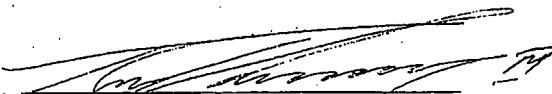



Warpath Development, Inc.


Its: President


Andy Ballard


Rick Thoennes


Rick Thoennes, III


Tim Roberson

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

SEP 15 2009 P 12:00

Andrew P. (Andy) Ballard, individually, and
derivatively on behalf of Warpath
Development, Inc.,

Plaintiff,

vs.

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

Defendants.

CASE NO.: 2008-CP-23-5739

VERIFICATION

Personally appeared before me, Andrew P. Ballard, who, first being duly sworn
states that he is the Plaintiff in this action, that he has read the First Amended Complaint
and states that the allegations of the Thirteenth Cause of Action are true, except for any
matters which are alleged on information and belief, and he believes them to be true to
the best of his knowledge.

Andrew P. Ballard
Andrew P. Ballard

Sworn to this 24th day of
August 2009

Susan B. Hahn
Notary Public for South Carolina
My Commission expires: 2/21/2012

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
SEP 17 PM 4:39
IN THE COURT OF COMMON PLEAS

Andrew P. (Andy) Ballard,

Plaintiff,

v.

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

Defendants.

C.A. No. 2008-CP-23-5739

AMENDED ANSWER AND
COUNTERCLAIMS OF
DEFENDANTS TIM ROBERSON, RICK
THOENNES, RICK THOENNES III, AND
WARPATH DEVELOPMENT, INC.,
TO PLAINTIFF'S FIRST
AMENDED COMPLAINT
(Jury Trial Demanded)

The Defendants, Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development, Inc. (collectively "Defendants"), answering the First Amended Complaint of the Plaintiff, would respectfully show to the Court:

FOR A FIRST DEFENSE
TO PLAINTIFF'S GENERAL ALLEGATIONS

1. Defendants admit the allegations of Paragraph 1 of the First Amended Complaint.

2. Defendants admit so much of the allegations of Paragraph 2 of the First Amended Complaint as allege that Defendants Rick Thoennes and Rick Thoennes III are citizens and residents of Greenville County, South Carolina. Defendant Tim Roberson is a citizen and resident of Pickens County, South Carolina.

3. Defendants admit so much of the allegations of Paragraph 3 of the First Amended Complaint as allege that Defendant Warpath Development, Inc., is a South Carolina Corporation with its records located in Greenville County, South Carolina. Defendants further admit that the principal asset of Warpath is a lease on property located at Lake Keowee in Pickens County, South Carolina, and associated assets. Defendants do not take a position on

Plaintiff's purpose for joining Defendant Warpath in this matter, therefore, neither admits or denies the last sentence of paragraph 3 of the First Amended Complaint.

4. Defendants admit the allegations of paragraph 4 of the First Amended Complaint.

5. Defendants admit the allegations of Paragraph 5 of the First Amended Complaint.

6. Defendants admit the allegations of paragraph 6 of the First Amended Complaint.

7. Defendants admit the allegations of paragraph 7 of the First Amended Complaint.

8. In response to Paragraph 8 of the First Amended Complaint, Defendants would assert that the Stock Purchase Agreement speaks for itself. To the extent a response is needed, Defendants deny the allegations of paragraph 8 of the First Amended Complaint. Defendants paid One Million Dollars (\$1,000,000) to Ballard in exchange for 80,000 of a total of 100,000 shares of Warpath stock.

9. In response to Paragraph 9 of the First Amended Complaint, Defendants assert that the Stock Purchase Agreement speaks for itself. Defendants would admit so much of the allegations of paragraph 9 as allege that at the close of the stock purchase transaction, the Stock Purchase Agreement contemplated that Ballard would own 20,000 of the outstanding 100,000 shares of Warpath and the Defendants would collectively own 80,000 of the 100,000 shares of Warpath.

10. In response to paragraph 10 of the First Amended Complaint, Defendants assert that the Stock Purchase Agreement speaks for itself and no response is necessary.

11. In response to paragraph 11 of the First Amended Complaint, Defendants assert that the Stock Purchase Agreement speaks for itself and no response is necessary.

12. Defendants admit so much of the allegations of paragraph 12 of the First Amended Complaint as allege that at the close of the stock purchase transaction, the Defendants owned 80,000 of the total 100,000 shares or 80% of the stock of Warpath. Defendants deny the remaining allegations of paragraph 12. Specifically, there have been no actions to issue or any issuance of any additional stock by Warpath.

13. Defendants admit so much of the allegations of paragraph 13 of the First Amended Complaint that at a stockholders meeting on May 1, 2008, with the prior blessing and consent of Ballard, the individual Defendants elected themselves as the three directors of Warpath. It is further admitted that Ballard was not reelected as a director, however, there is no evidence that Ballard sought any further director position. It is further admitted that at a meeting of the Board of Directors, 900,000 additional shares of Warpath treasury stock were authorized and Warpath was authorized to file the necessary purported paperwork with the South Carolina Secretary of State. It is further admitted that the motion was presented at a shareholders' meeting and the authorization for the additional 900,000 shares was approved. The remaining allegations of paragraph 13 are denied.

14. Defendants admit so much of the allegations of Paragraph 14 of the First Amended Complaint as allege that if additional shares are issued and sold or otherwise transferred, then all shareholders of Warpath will be diluted unless one or more elect to assert their preemptive rights. The remaining allegations of paragraph 14 are denied.

15. Defendants deny the allegations of paragraph 15 of the First Amended Complaint.

16. Defendants deny the allegations of paragraph 16 of the First Amended Complaint.

17. Defendants deny the allegations of paragraph 17 of the First Amended Complaint.

18. Defendants deny the allegations of Paragraph 18 of the First Amended Complaint.

19. Defendants deny the allegations of paragraph 19 of the First Amended Complaint.

20. Defendants deny the allegations of paragraph 20 of the First Amended Complaint.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

21. Defendants deny the allegations of paragraph 21 of the First Amended Complaint.

22. Defendants deny the allegations of paragraph 22 of the First Amended Complaint.

23. Defendants deny the allegations of paragraph 23 of the First Amended Complaint.

24. Defendants deny the allegations of paragraph 24 of the First Amended Complaint.

25. Defendants deny the allegations of paragraph 25 of the First Amended Complaint.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

26. Defendants deny the allegations of paragraph 26 of the First Amended Complaint.

27. Defendants deny the allegations of paragraph 27 of the First Amended Complaint.

28. Defendants deny the allegations of paragraph 28 of the First Amended Complaint.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

29. Defendants deny the allegations of paragraph 29 of the First Amended Complaint.

30. Defendants deny the allegations of paragraph 30 of the First Amended Complaint.

31. Defendants deny the allegations of paragraph 31 of the First Amended Complaint.

32. Defendants deny the allegations of paragraph 32 of the First Amended Complaint.

**FOR A FIRST DEFENSE
TO THE FOURTH CAUSE OF ACTION**

33. Defendants deny the allegations of paragraph 33 of the First Amended Complaint.

34. Defendants deny the allegations of paragraph 34 of the First Amended Complaint.

35. Defendants deny the allegations of paragraph 35 of the First Amended Complaint.

36. Defendants deny the allegations of paragraph 36 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE FIFTH CAUSE OF ACTION

37. Defendants deny the allegations of paragraph 37 of the First Amended Complaint.

38. Defendants deny the allegations of paragraph 38 of the First Amended Complaint.

39. Defendants deny the allegations of paragraph 39 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE SIXTH CAUSE OF ACTION

40. Defendants deny the allegations of paragraph 40 of the First Amended Complaint.

41. Defendants deny the allegations of paragraph 41 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE SEVENTH CAUSE OF ACTION

42. Defendants deny the allegations of paragraph 42 of the First Amended Complaint.

43. Defendants deny the allegations of paragraph 43 of the First Amended Complaint.

44. Defendants deny the allegations of paragraph 44 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE EIGHTH CAUSE OF ACTION

45. Defendants deny the allegations of paragraph 45 of the First Amended Complaint.

46. Defendants deny the allegations of paragraph 46 of the First Amended Complaint.

47. Defendants deny the allegations of paragraph 47 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE NINTH CAUSE OF ACTION

48. Defendants deny the allegations of paragraph 48 of the First Amended Complaint.

49. Defendants deny the allegations of paragraph 49 of the First Amended Complaint.

50. Defendants deny the allegations of paragraph 50 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE TENTH CAUSE OF ACTION

51. Defendants deny the allegations of paragraph 51 of the First Amended Complaint.

52. Defendants deny the allegations of paragraph 52 of the First Amended Complaint.

53. Defendants deny the allegations of paragraph 53 of the First Amended Complaint.

54. Defendants deny the allegations of paragraph 54 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE ELEVENTH CAUSE OF ACTION

55. Defendants admit so much of the allegations of paragraph 55 as allege that Tim Roberson owns 40,000 of the 100,000 shares of Warpath, Rick Thoennes owns 20,000 of the 100,000 shares of Warpath and Rick Thoennes III owns 20,000 of the 100,000 shares of Warpath. Defendants would admit that collectively the combination of Tim Roberson, Rick Thoennes, and Rick Thoennes III's shares constitute 80% of the outstanding stock of Warpath. Defendants deny the remaining allegations of paragraph 55 of the First Amended Complaint.

56. Defendants deny the allegations of paragraph 56 of the First Amended Complaint.

57. Defendants deny the allegations of paragraph 57 of the First Amended Complaint.

58. Defendants deny the allegations of paragraph 58 of the First Amended Complaint.

FOR A FIRST DEFENSE
TO THE TWELFTH CAUSE OF ACTION

59. Defendants deny the allegations of paragraph 59 of the First Amended Complaint.

60. In response to paragraph 60 of Plaintiff's First Amended Complaint, Defendants assert that such allegations are a legal conclusion and requests for legal relief for which no response is necessary. To the extent a response is necessary, the allegations of paragraph 60 are hereby denied.

61. In response to paragraph 61 of Plaintiff's First Amended Complaint, Defendants assert that such allegations are a legal conclusion and requests for legal relief for which no response is necessary. To the extent a response is necessary, the allegations of paragraph 61 are hereby denied.

**FOR A FIRST DEFENSE
TO THE THIRTEENTH CAUSE OF ACTION**

62. Defendants deny the allegations of paragraph 62 of the First Amended Complaint.

63. Defendants admit the allegations of paragraph 63 of the First Amended Complaint.

64. In response to paragraph 64 of the First Amended Complaint, Defendants would assert that it sets forth a legal conclusion for which no response is necessary. To the extent a response is necessary, Defendants deny paragraph 64 including subparts a through f.

65. Defendants admit the allegations of paragraph 65 of the First Amended Complaint.

66. Defendants deny the allegations of paragraph 66 of the First Amended Complaint. Defendants would admit that in exchange for One Million Dollars (\$1,000,000), the Defendants collectively purchased 80,000 shares of Warpath.

67. In response to paragraph 67 of the First Amended Complaint, Defendants would assert that the Stock Purchase Agreement speaks for itself.

68. In response to paragraph 68 of the First Amended Complaint, Defendants would assert that the Stock Purchase Agreement speaks for itself.

69. Defendants deny the allegations of paragraph 69 of the First Amended Complaint.

70. Defendants deny the allegations of paragraph 70 of the First Amended Complaint.

71. Defendants deny the allegations of paragraph 71 of the First Amended Complaint.

72. Defendants deny the allegations of paragraph 72 of the First Amended Complaint.

73. Defendants deny the allegations of paragraph 73 of the First Amended Complaint.

74. Defendants deny the allegations of paragraph 74 of the First Amended Complaint.

75. Defendants deny the allegations of paragraph 75 of the First Amended Complaint.

76. Defendants deny the allegations of paragraph 76 of the First Amended Complaint.

FOR A SECOND DEFENSE

77. The Defendants re-allege Paragraphs 1 through 76 of this Answer as specifically set forth herein.

78. The Defendants assert that the Plaintiff has failed to state a claim for which relief can be granted.

FOR A THIRD DEFENSE

79. The Defendants re-allege Paragraphs 1 through 78 of this Answer as specifically set forth herein.

80. The Defendants assert that the Plaintiff's claims are barred by the doctrines of estoppel and unclean hands as well any other and further equitable defenses that may be available.

FOR A FOURTH DEFENSE

81. The Defendants re-allege Paragraphs 1 through 80 of this Answer as specifically set forth herein.

82. The Defendants assert that the Plaintiff's claims are not ripe for adjudication.

FOR A FIFTH DEFENSE

83. The Defendants re-allege Paragraphs 1 through 80 of this Answer as specifically set forth herein.

84. The Defendants plead the Business Judgment Rule in opposition to Plaintiff's claims.

COUNTERCLAIMS

GENERAL ALLEGATIONS

85. In or around late 2006/early 2007, Ballard began searching for investors to pick up and finally develop the Warpath Landing project. The Defendants were eventually informed of the project and potential investment by an intermediary.

86. Sometime thereafter, the parties met with one another at the intermediary's office wherein Ballard briefly explained the deal, provided the Defendants with a conceptual plan, and disclosed the financial arrangements of his proposal. Ballard gave the impression that the development was "shovel ready."

87. After reviewing the proposal, the Defendants determined at the time that Ballard's proposed deal did not make sense financially and walked away.

88. Lines of communication were eventually reopened and Ballard and the Defendants began to seriously discuss the investment. After several meetings in which *pro formas* developed in part based upon the representations of Ballard, as well as those contained in the conceptual plan, were presented to and discussed by Ballard and the group as a whole, a counterproposal was eventually made by the Defendants.

89. After consideration, Ballard accepted the counterproposal.

90. The parties then moved forward and entered into the Stock Purchase Agreement on May 29, 2007.

91. Following the close of the stock purchase transaction, the Defendants set to work immediately on what was believed to be the final touches of the development.

92. Over the next several weeks, it became clear to the Defendants that the state of the development, as well as the profitability of the investment, was not as represented.

93. In particular, the development was not "shovel ready" as represented by Ballard. In fact, over two and one-half years later, Warpath is still awaiting final permits.

94. Additionally, a primary profit center for the development are the wet boat slips. During the course of selling the Defendants on the investment, Ballard provided the Defendants a conceptual plan which indicated that Warpath Landing could support anywhere between 100 to 200 boat slips. Seeing that the wet boat slips provided the greatest profit potential, the Defendants opted to install 200 wet boat slips, the maximum number Ballard represented were possible, in their *pro formas*. In the summer of 2007, it was, unfortunately, determined that only approximately 100 wet boat slips were possible.

95. Given Ballard's presence at the meetings regarding the *pro formas*, Ballard was aware that the Defendants were evaluating the investment based upon 200 boat slips. In fact,

however, based upon later representations by Ballard, as well as the existence of a prior, undisclosed conceptual plan which only indicated that 100 wet boat slips were possible, Defendants believe that Ballard was well aware that it was not possible to get any more than approximately 100 boat slips in place at the Warpath Landing development. Ballard, however, chose not to divulge this information prior to Defendants investing with him.

96. As a result of these misrepresentations, Defendants have lost monies, experienced mounting delays and now have a significantly devalued investment.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

97. The Defendants reallege and incorporate herein all prior paragraphs as specifically set forth herein.

98. The Plaintiffs and Defendants entered into the Stock Purchase Agreement on May 29, 2007.

99. Implied in every agreement is a covenant of good faith and fair dealing.

100. Upon information and belief, Plaintiff has breached the Stock Purchase Agreement.

101. As a result of Plaintiff's breach, Defendants have suffered actual and consequential damages that include, but are not limited to, lost time, lost expenses, mounting delays, and a significantly devalued investment.

FOR A SECOND COUNTERCLAIM
(Breach of Contract Accompanied By a Fraudulent Act)

102. Defendants reallege and incorporate herein all prior paragraphs as specifically set forth herein.

103. For the reasons set forth in Defendants' First Counterclaim, Plaintiff breached the Stock Purchase Agreement with Defendants.

104. Upon information and belief, Defendants actions in breach of the Stock Purchase Agreement are made with fraudulent intent and accompanied by a fraudulent act.

105. As a result of Plaintiff's actions, Defendants are entitled to actual, consequential and punitive damages.

FOR A THIRD COUNTERCLAIM
(Fraud)

106. The Defendants reallege and incorporate herein all prior paragraphs as specifically set forth herein.

107. In soliciting Defendants' investment in Warpath Development, Plaintiff incorrectly represented and/or improperly allowed the Defendants to believe that the project was "shovel ready" and that it was possible to have 200 wet boat slips at the development.

108. Plaintiff was aware of the falsity of these representations.

109. Based upon his meetings with the Defendants, Plaintiff was aware of the materiality of these representations to the Defendants' decision regarding the investment.

110. Plaintiff either knew of the falsity of these representations or recklessly disregarded the truth or falsity of these representations.

111. Plaintiff intended and knew that these representations would be acted upon.

112. The Defendants were ignorant as to the falsity of the representations.

113. The Defendants relied on the truth of the representations.

114. The Defendants had a right to rely therein.

115. Defendants were damaged as a result of these fraudulent representations and Plaintiff's actions. Defendants were injured.

116. As a result of Plaintiff's actions, Defendants are entitled to actual, consequential and punitive damages.

FOR A FOURTH COUNTERCLAIM
(Negligent Misrepresentation)

117. The Defendants reallege and incorporate herein all prior paragraphs as specifically set forth herein.

118. As set forth above, in soliciting Defendants' investment in Warpath Development, Plaintiff incorrectly represented and/or improperly allowed the Defendants to believe that the project was "shovel ready" and that it was possible to have 200 wet boat slips at the development.

119. Plaintiff had a monetary interest in making the representation. Plaintiff was eventually paid \$1,000,000 and promised \$150,000 more for the investment.

120. Plaintiff was obligated and duty bound to provide truthful information and dispel misunderstandings.

121. Plaintiff breached this obligation by failing to exercise due care.

122. The Defendants justifiably relied on Plaintiff's representations, actions and inactions and have suffered losses as a result.

123. As a result of Plaintiff's actions, Defendants are entitled to actual, consequential and punitive damages.

FOR A FIFTH COUNTERCLAIM
(Violation of S.C. Code Ann. 35-1-501)

124. The Defendants reallege and incorporate herein all prior paragraphs as specifically set forth herein.

125. As set forth above, in soliciting Defendants' investment in Warpath Development, Plaintiff incorrectly represented and/or improperly allowed the Defendants to believe that the project was "shovel ready" and that it was possible to have 200 wet boat slips at the development.

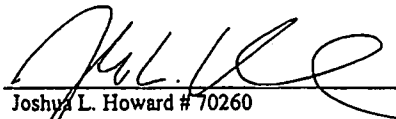
126. The belief the project was "shovel ready" and that it was possible to have 200 wet boat slips at the development was material to the Defendants decision to move forward with the investment.

127. Plaintiff's misrepresentations and/or improper silence were actions or inactions in violation of the S.C. Code Ann § 35-1-501.

128. As a result, Defendants are entitled to any and all damages afforded by S.C. Code Ann. § 35-1-509 or otherwise.

WHEREFORE, having answered and fully counter-claimed of the Plaintiff, Defendants seek a full dismissal of Plaintiff's claims and demand judgment against the Plaintiff for actual, consequential and punitive damages, the costs of suit, including reasonable attorneys' fees and interest and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,



Joshua L. Howard # 70260
Haysworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602
Telephone: 864-240-3202
Facsimile: 864-240-3300
jhoward@hsblawfirm.com

Attorneys for the Defendants

Greenville, South Carolina
September 17, 2009

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
2009 SEP 18 P 3:16

Andrew P. (Andy) Ballard, individually, and
derivatively on behalf of Warpath
Development, Inc.,

Plaintiff,

vs.

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

Defendants.

CASE NO.: 2008-CP-23-5739

**PLAINTIFF'S REPLY TO DEFENDANTS'
COUNTERCLAIMS
(JURY TRIAL DEMANDED)**

The plaintiff submits this reply to the defendants' counterclaims. All allegations not specifically admitted are hereby denied. The plaintiff shows the Court as follows:

FOR A FIRST DEFENSE

1. In response to paragraph 85, the plaintiff alleges that in late 2006 and/or early 2007, he was considering investors in Warpath Development, Inc. ("Warpath"), and that the defendants learned of Warpath and the potential investment. Otherwise, the plaintiff denies paragraph 83.
2. In response to paragraph 86, the plaintiff alleges that he met with the individual defendants and discussed Warpath with them. Otherwise, the plaintiff denies paragraph 84.
3. In response to paragraph 87, the plaintiff alleges that the individual defendants initially decided not to invest in Warpath. Otherwise, the plaintiff denies paragraph 87.
4. In response to paragraphs 88, 89, and 90, the plaintiff alleges that the individual defendants expressed interest again in investing in Warpath, that the individual defendants had access to the relevant information including the lease from Duke Power, and that the individual defendants had every opportunity to investigate and examine Warpath. The plaintiff further

alleges that the individual defendants, who are sophisticated investors, after reviewing the materials and information and making whatever inquiries and investigations they chose to make, decided to become shareholders in Warpath, as set out in the Stock Purchase Agreement dated May 29, 2007. Except as alleged herein, the plaintiff denies paragraphs 88-90.

5. The plaintiff denies paragraphs 91, 92, 93, 94, 95, and 96.

6. In response to paragraph 97, the plaintiff realleges the prior paragraphs of this Reply and the allegations of his First Amended Complaint.

7. The plaintiff admits paragraphs 98 and 99.

8. The plaintiff denies paragraphs 100 and 101.

9. In response to paragraph 102, the plaintiff realleges the prior paragraphs of this Reply and the allegations of his First Amended Complaint.

10. The plaintiff denies paragraphs 103, 104, and 105.

11. In response to paragraph 106, the plaintiff realleges the prior paragraphs of this Reply and the allegations of his First Amended Complaint.

12. The plaintiff denies paragraphs 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116.

13. In response to paragraph 117, the plaintiff realleges the prior paragraphs of this Reply and the allegations of his First Amended Complaint.

14. The plaintiff denies paragraphs 118, 119, 120, 121, 122, and 123.

15. In response to paragraph 124, the plaintiff realleges the prior paragraphs of this Reply and the allegations of his First Amended Complaint.

16. The plaintiff denies paragraphs 125, 126, 127, and 128.

17. The plaintiff denies that the defendants are entitled to the relief they seek in their prayer.

FOR A SECOND DEFENSE

18. The plaintiff reiterates and realleges the above allegations.

19. Defendants' counterclaims fail to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE

20. The plaintiff reiterates and realleges the above allegations.

21. Defendants' counterclaims are barred in whole or in part by their failure to mitigate damages.

FOR A FOURTH DEFENSE

22. The plaintiff reiterates and realleges the above allegations.

23. Defendants' counterclaims are barred in whole or in part by their own breaches of the contract.

FOR A FIFTH DEFENSE

24. The plaintiff reiterates and realleges the above allegations.

25. Defendants' counterclaims are barred in whole or in part by of the doctrine of unclean hands.

FOR A SIXTH DEFENSE

26. The plaintiff reiterates and realleges the above allegations.

27. Defendants' counterclaims are barred in whole or in part by of the doctrine of waiver.

FOR A SEVENTH DEFENSE

28. The plaintiff reiterates and realleges the above allegations:

29. Defendants' counterclaims are barred in whole or in part by of the doctrine of estoppel.

FOR AN EIGHTH DEFENSE

30. The plaintiff reiterates and realleges the above allegations.

31. The punitive damages sought by Plaintiffs are unconstitutional under the excessive fines clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and in violation of the South Carolina Constitution.

FOR A NINTH DEFENSE

32. The plaintiff reiterates and realleges the above allegations.

33. Defendants' claims are barred, in whole or in part under the doctrine of comparative negligence, on the grounds that alleged negligence or other breach of legal obligations on the part of defendants or others was the intervening or superseding cause of the alleged damages at issue and to the extent the plaintiff was negligent, which is denied and stated solely for purpose of this defense, any such negligence was outweighed or should otherwise be off-set by defendants' negligence; so that the plaintiff should not be held liable to defendants and/or any damages incurred by defendants should be reduced by their comparative negligence.

FOR A TENTH DEFENSE

34. The plaintiff reiterates and realleges the above allegations.

35. Defendants' counterclaims are barred in whole or in part by their contributory negligence.

FOR AN ELEVENTH DEFENSE

36. The plaintiff reiterates and realleges the above allegations.

37. Defendants' counterclaims are barred in whole or in part by their assumption of the risk.

FOR A TWELFTH DEFENSE

38. The plaintiff reiterates and realleges the above allegations.

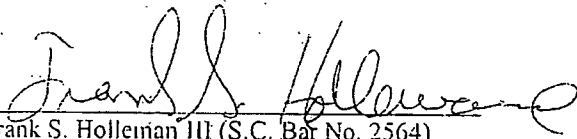
39. In response to the Fifth Counterclaim, the plaintiff specifically denies that he made any untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading.

40. Further, the plaintiff alleges that the defendants knew the alleged untruth or omission alleged in their counterclaims.

41. Further, the plaintiff alleges that he did not know and, in the exercise of reasonable care, could not have known of the alleged untruth or omission alleged in the defendants' counterclaims.

WHEREFORE, the plaintiff asks that the Court dismiss the defendants' counterclaims with prejudice, award the plaintiff costs, and grant the plaintiff whatever other relief the Court considers just and appropriate.

THE PLAINTIFF HEREBY DEMANDS A JURY TRIAL



Frank S. Hollenian III (S.C. Bar No. 2564)

Hannah R. Metcalfe (S.C. Bar No. 73046)

Wyche, Burgess, Freeman & Parham, PA

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Greenville, SC 29601

Phone: 864-242-8200

Facsimile: 864-235-8900

Email: fhollenian@wyche.com;

hmetcalfe@wyche.com

Dated: 9/18/09
Greenville, South Carolina

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

vs.

**PLAINTIFF'S MEMORANDUM
FOR VALUATION (DAMAGES) HEARING**

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

Defendants.

The plaintiff submits this memorandum in regard to the hearing scheduled for June 4, 2013, to determine the value of the plaintiff's shares in defendant Warpath Development, Inc., for purposes of the forced buyout ordered by the Court in its Order of May 4, 2010.

Background

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 until the defendants acquired ownership interests in the company under a Stock Purchase Agreement dated May 29, 2007 (the "Agreement") (Plaintiff's Exhibit 1).

Andy is currently a 20% shareholder of the company. The individual defendants are the other shareholders. In 2007, per the parties' Agreement, defendant Roberson purchased 20,000 shares constituting 20% of the company's stock directly from Mr. Ballard for \$1 million, and he and the other two individual defendants (Thoennes and Thoennes III) 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. Thus, per that transaction, the overall value placed upon the

company by the parties at that time was at least \$5,000,000. Notably, at that time not all permits necessary for the venture to proceed had been obtained. At the present time, all necessary permits are in hand, the final needed permit having been obtained in June of 2010. Thus, the current value of the company is clearly well in excess of \$5,000,000.

During the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, merely five months after signing their agreement with Mr. Ballard, the defendants began discussions among themselves of how to force him out of the company.¹ 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 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 (Plaintiff's Exhibit 2). The defendants appealed, and this Court's Order was affirmed by the Supreme Court last year. Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012).

In its 2010 Order, the Court also concluded that the 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 it is undisputable that the

¹ Extensive evidence concerning the defendants' scheme and efforts to force Mr. Ballard out were presented at the trial of this matter in 2010. Plaintiff incorporates the entire trial record by reference in the instant proceeding.

defendants have still not performed the services for which they received 60,000 shares of stock from the company.² Thus, the current ownership structure of the company is as follows:

Andy Ballard: 20%;

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

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

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

If, however, the escrowed shares are not counted for purposes of determining the value of Andy's shares, as the plaintiff submits is the equitable approach given the facts of this case, then Andy and defendant Roberson should each be treated as 50% owners.

Questions Before the Court

The issue now to be decided is: what is the fair value of Andy Ballard's ownership interest in Warpath Development? That question, in turn, presents the following legal issues that will be up to the Court to decide as a matter of law:

(a) What time should be used for determining the value of the company – when the suit was filed; when the trial took place; or at the present time?

(b) Should the defendants' shares that are being held in escrow be counted for purposes of assessing the proportion of ownership of the company that is represented by Andy's shares, when the defendants have not provided the services that they contractually agreed to provide in exchange for those shares? In other words, should the defendants receive economic benefit from shares of stock for which they have not paid what they contracted to pay?

² In fact, plaintiff sought discovery from defendants concerning any efforts by them since 2010 to comply with those provisions of the Stock Purchase Agreement, and defendants refused to provide such discovery, asserting that it was not relevant to the value of the stock.

(c) If the defendants' shares in escrow are to be counted in determining Andy's proportion of ownership, should the value of the company be determined as if the defendants had fully performed the services they agreed to provide in exchange for those shares? In other words, if the defendants are to receive the economic benefit of their escrowed shares for purposes of determining ownership percentages, in fairness should the company be valued under the hypothetical assumption that they had already done what they agreed to do in order to receive those shares?

We respectfully submit that Andy should receive either of two alternatives, whichever produces the higher value: (a) 50% of the company's current value (i.e., not counting the defendants' shares held in escrow and therefore treating Andy as a 50% owner), or (b) 20% of what the company would be worth if the defendants had fully performed their obligations under the shareholder agreement (in other words, giving them credit for the stock in escrow but valuing the company as if they had fully performed what they contracted to do in return for those shares).

Summary of Plaintiff's Position

As to the current value, we believe that the Lease Agreement with Duke Power (Plaintiff's Exhibit 3) has substantial value in and of itself. The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease agreement. *See* Lease Agreement, ¶ 1. In effect, therefore, it is a perpetual lease. All necessary permitting and governmental approvals have now been secured. Given the unique nature of the property, the fact that there is only one other marina and no hotel on Lake Keowee, and the potentially perpetual lease term, a conservative value of the lease interest in the acreage itself is approximately \$10 million. Indeed, in attempting to obtain financing for the project, the

defendants have represented to third parties that the company's property is worth over \$36 million. *See* Plaintiff's Exhibit 4(b).

As to the alternative valuation of the company, if the defendants had simply done what they had agreed to do in the 2007 Stock Purchase Agreement, the marina, restaurant and hotel envisioned for the project would have been built and operational by now. The Agreement states: "Roberson agrees to provide the necessary capital to obtain long term financing on the project." Agreement ¶ 6. Thoennes and Thoennes III agreed to assist with the "development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate." Agreement ¶ 5. This Court determined in 2010 that the defendants had not carried out their contractual obligations, and that decision was affirmed by the Supreme Court on appeal. Defendants cannot now contend otherwise, and indeed have refused to provide discovery on this issue on the ground that it is not relevant to the valuation proceeding.

Thus, under the "alternative hypothetical scenario" of what would the company be worth if the defendants had fully and timely performed their contractual duties, it will be necessary to assess what the value of the company would be if it was now fully financed, developed, and operational. The Court's appointed valuation expert, Perry Woodside, has determined that after eight years for construction and "ramp up," the company's net value as a whole is \$20,384,428. Summary Report (April 29, 2013).³ Using a discount rate of 22.0%, Dr. Woodside's initial report discounts this figure to a present value of approximately \$4.4 million. In a subsequent letter dated May 9, 2013, however, Dr. Woodside opined that the present value of the company would be \$7,178,594 if construction had begun in June 2010, when the final needed permit was

³ Plaintiff reserves all objections to Dr. Woodside's report.

obtained. Clearly the latter approach is the correct one; otherwise defendants would be rewarded for their delay.

Obviously, if the defendants had done what they contracted to do in 2007, the project would have already been completed and would currently be near the end of Dr. Woodside's projected "ramp up" period. Thus if Andy's ownership percentage is to be set at 20% (rather than 50% as we assert), then the value of the company should be undiscounted from the \$20 million figure determined by Dr. Woodside, and Andy's 20% share should be valued at \$4,076,886 (20% of \$20,384,428). Conversely, if the Court is going to use the current (discounted) value determined by Dr. Woodside, Andy should be treated as a 50% owner since none of the defendants has provided the consideration for which 60,000 shares of stock were issued to them by the company. Accepting Dr. Woodside's current value calculation of \$7,178,594 million, Andy's stock should be valued at half that amount, or \$3,589,297. Because Andy is the party who has been wronged, the Court should give him the benefit of the higher calculation - \$4,076,886.

The above figures are based upon Dr. Woodside's calculations. We believe that there are a number of fundamental flaws in Dr. Woodside's analysis, and will present an alternative valuation of \$5 million to \$7 million for Andy's ownership interest. The flaws in Dr. Woodside's report are, in sum: (a) he relies upon speculative and suspect revenue and expense projections provided to him by the defendants, who have already demonstrated that they cannot be trusted and who have every reason to undervalue the company in this proceeding; and (b) the discount rate used by him to calculate present value is too large - indeed, it is more than double the return on investment incorporated in a third-party offer to fund the company made in December 2012. Thus, the true, intrinsic value of the company, and of Andy's ownership, is at

least twice that determined by Dr. Woodside, and there is substantial evidence supporting a valuation of \$5 million to \$7 million for Andy's ownership interest.

Indeed, the defendants' own representations to third parties made as part of their efforts to obtain financing show very clearly what they believe the company is worth if it receives long-term financing and the development moves forward. In multiple applications for funding from 2009 through 2012, defendants have sought to obtain between \$27 million and \$30 million in loans. See Plaintiff's Exhibit 4. Clearly, defendants would not have done so had they not believed that the project would generate at least sufficient revenues to carry the debt service and ultimately pay off the loan, cover all other ongoing expenses, and provide some reasonable profit margin to themselves – they expressly stated this to the third parties that they were asking to finance the project. Thus, based upon defendants' own calculations and representations made to third parties for the purpose of inducing the third parties to provide financing, the company if fully funded and developed is worth in excess of \$27 million to \$30 million. In fact, defendants represented to one third-party lender that the "appraised value" of the property was \$36,669,050. See Plaintiff's Exhibit 4(b). Under defendants' own representations, therefore, Andy's 20% share should be valued at \$5.4 million to \$7.2 million (20% of \$27 million to \$36 million).

Argument

Time of Valuation

Section 33-14-310 of the South Carolina Code states that "[i]n any action filed by a shareholder to dissolve the corporation ... the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including ... providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders." S.C. Code Ann. § 33-14-310(d)(iv). "Fair value" is defined as "the value of the

shares immediately before the effectuation of the corporate action to which the dissenter objects.” § 33-13-101. Because cases of shareholder oppression deal with patterns of behavior rather than isolated occurrences, it is often difficult to identify a single corporate action to which the dissenter objects. There is very little case law defining the proper valuation date in cases of minority shareholder oppression, but South Carolina courts have concluded that the most important issue is finding a solution that is equitable. See Kreischer v. The Kerrison Dry Goods Co., Nos. 97-1230, 97-1800, 199 WL 30836, at *10 (4th Cir. Jan. 26, 1999) (applying South Carolina law).

In the instant matter, defendants’ oppression of Andy Ballard has continued to the present time. He has not been provided any information concerning the company’s affairs or activities (other than what counsel demanded in formal discovery); nor has he been included in any directors’ meetings or discussions or decisions made by the board of directors (to which he was elected in 2009). Accordingly, the timing of his stock value should be the present. See Hendley v. Lee, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (finding the “most equitable valuation date” for purposes of a buyout was the time of the trial, when “evidence was received as to the worth of the company”).

“Fair Value”

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.* (emphasis added). In fact, this is the remedy that has been granted in every published decision 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 Dr. Woodside purported to utilize in making his calculations, but then he made no effort at all to determine the value of the company’s assets and instead based his analysis entirely on projected revenues and expenses for a business that has never even broken ground or had the first dollar of operating revenue or expense. In this context, it is utter speculation to project revenues and expenses eight years out, as Dr. Woodside does in order to determine a present value. To make matters worse, Dr. Woodside’s numbers came from the “fox in the henhouse” – the defendants themselves, who obviously have an incentive to undervalue the company, and who have already shown themselves to be untrustworthy. Indeed,

the pro forma projections upon which Dr. Woodside has based his calculations were given to him *ex parte* by defendants and were not even disclosed to the plaintiff until after plaintiff's counsel received a draft report from Dr. Woodside noting that he had relied upon these pro formas. The undersigned then requested and received the pro formas from defense counsel on April 24, 2013, months after plaintiff sought discovery of (among other things) all pro formas, and after defense counsel represented to plaintiff's counsel that all pro formas had been produced.

The potential for inaccuracy, bias, or outright fabrication in the pro formas is obvious, and the defendants' failure to make a timely production of this material has made it impossible for the plaintiff to seek evidence to rebut the figures contained in the pro formas. By way of example, the projected expense figures may embody excessive fees or salaries for the defendants' themselves, thus increasing the effective return to themselves while decreasing the projected cash flow for the company on which Dr. Woodside based his valuation. As explained in *O'Neill's Oppression of Minority Shareholders*:

[A]n enterprise's earning power is reflected in the values attributed to the enterprise's intangible assets such as goodwill and "going concern" value. Thus, the payment of excessive compensation over a period of time may redound to a minority shareholder's detriment when the corporation sells its business and assets ..., because its apparent earning power, that is, its earning power as indicated by a statement of earnings as reduced by the excessive compensation, may be reflected in the price the corporation receives for its assets

Id., § 3:07, at 68 (2d ed. 2001).

For the above reasons, Dr. Woodside's calculation of projected cash flow and his present value determination from that cash flow grossly understate the total value of the company. For the reasons stated above and in the last section of this memorandum, an accurate valuation of Andy's ownership interest should fall in the \$5 million to \$7 million range.

Defendants' Shares Held in Escrow Should Not Be Counted

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).

South Carolina'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. 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 value of Andy's stock ownership should not be diluted by giving the defendants the benefit of counting the escrowed shares in determining Andy's ownership percentage of the total value of the company, as this would reward the defendants for their wrongful conduct. See Kreischer v. Kerrison Dry Goods Co., 172 F.3d 863 (4th Cir. 1999) (noting that the district court declined to apply a minority discount "because such an award would reward the majority stockholders for their wrongful conduct"). Accordingly, for purposes of assessing the value of Andy's stock ownership, the escrowed shares should not be counted, and Andy's ownership percentage should be treated as 50% of the value of the company as a whole.

This conclusion is entirely consistent with the legal authorities. Although we have not found any caselaw addressing the specific situation presented here, the courts uniformly hold 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.").

In this case, the Court held that the defendants have not earned the 60,000 shares they were issued by the company, which are currently held in escrow, and that holding was affirmed on appeal. See Ballard v. Roberson, 399 S.C. 588, 599, 733 S.E.2d 107, 113 (2012), ("[T]he corporation had not otherwise been compensated for its issuance of the remaining 60,000

shares.”). Consequently, it would be inequitable for the defendants to derive economic benefit from the escrowed shares in the valuation by treating Andy’s ownership as 20%.

In short, the South Carolina Code section clearly contemplates that a shareholder whose shares were issued for future consideration should not receive any economic value for those shares until the consideration has been provided. As it is undisputable that the defendants in this case have not performed the services for which their company stock was issued, the 60,000 shares in escrow should not be counted in the allocation of an ownership percentage to Andy. He should therefore be counted as a 50% owner – he has 20,000 shares, and defendant Roberson has 20,000 shares that he purchased directly from Andy. The escrowed stock should not be counted in this valuation proceeding.

No Minority or Marketability Discount Should Be Applied

Dr. Woodside’s report correctly assumes that Andy’s stock value should not be discounted because it is a minority interest. Every South Carolina judge and commentator who has considered this issue has concluded that such discounts are improper. *See, e.g., Morrow v. Martschink*, 922 F. Supp. 1093, 1105 (D.S.C. 1995) (“These discounts have not been recognized in South Carolina in the context of corporate dissolution actions and have been rejected by many courts.”); *Hendley v. Lee*, 676 F. Supp. 1317, 1330 (“discounts should not be imposed in a forced sale situation”); H. Haynsworth, *Valuation of Business Interests*, 33 Mercer L. Rev. 457 (1982) (“[I]t would be inappropriate to impose a discount ... in a case where a minority interest has been improperly squeezed out of the business. Allowing discounts in these situations would undercut the purpose of dissenters’ rights statutes to give minority shareholders the fair value of their shares, and it could also encourage squeeze outs.”); *Belk of Spartanburg, S.C. v. Thompson: An Overview and Analysis of the Techniques Employed to Value Minority Interests in Closely*

Held Corporations in Dissenters' Rights Cases, 52 S.C.L. Rev. 391, 407 (2001) (“[T]he majority of courts are correct in rejecting ‘minority and liquidity discounts that can have a dramatic and devastating impact on the value of minority interests.’”).

For the same reasons, a marketability discount should not be applied to reduce the value of Andy’s shares. As the court explained in Chiles v. Robertson,

“This is not a sale by a willing seller to a willing buyer, and defendants should not benefit from reductions in value that are based on such a sale. We require defendants to purchase plaintiffs’ interests because of their breach of fiduciary duty to plaintiffs. The purchase is a judicial remedy to compensate plaintiffs for the damage resulting from defendants’ wrongs, not a market transaction.”

767 P.2d 903, 926 (Ore. App. 1989); accord Charland v. Country View Golf Club, Inc., 588 A.2d 609, 613 (R.I. 1991) (concluding that it would be unfair for a shareholder who has proven a case of minority oppression to have the value of his shares discounted based on marketability considerations).

While correctly rejecting application of any minority discount, Dr. Woodside’s calculation inconsistently and incorrectly includes a substantial discount for the fact that Warpath Development is a small, closely held business. As a result, Dr. Woodside commits an error of law by over-discounting his estimated value of the company in reducing it to a present value of \$7.2 million. Dr. Woodside concludes that the net sales value of the company after the construction and ramp-up of the development is \$20,384,564. He then computes the present value of that figure by discounting it at a whopping discount rate of 22%. This discount rate is determined by Dr. Woodside by assessing what a willing buyer would seek as a return on investment (ROI) with a closely held start up business seeking to develop a marina and related facilities. However, as noted above, the “willing seller / willing buyer” approach is legally improper in cases of a forced sale via minority shareholder oppression. South Carolina courts have held that this “willing buyer/willing seller” analysis is not applicable in forced buy-out

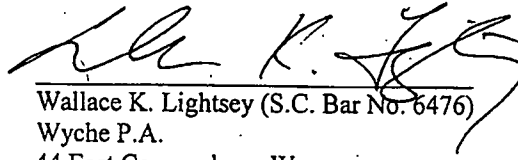
situations, Hendley, supra, 676 F. Supp. at 1330, and courts of other states have likewise rejected the application of a marketability discount. See Chiles, supra; Charland, supra.

Accordingly, the common stock equity rate should be applied. Dr. Woodside has determined this to be 9.2% (a risk-free rate of 2.5% plus an equity premium of 6.7%). At most, the discount rate should be the 11% equity return figure incorporated in the conditional loan commitment offer made by Dakota Holdings, LLC, see Plaintiff's Exhibit 4(d). Using these numbers for the discount rate generates a present value of \$12 million (at the 11% discount rate) to \$13 million (at the 9.2% discount rate).⁴ Under Dr. Woodside's approach of projecting revenues and expenses and discounting the future value to present value, Andy's 20,000 shares should be valued at 50% of this range – i.e., \$6 million to \$6.5 million.

The evidence, including defendants' own representations to third parties, plaintiff's valuation of his shares, and a proper construction of Dr. Woodside's analysis, consistently shows that the value of Andy's ownership interest lies in the \$5 million to \$7 million range. Plaintiff asks the Court to order the defendants to buy him out at a price in this range that the Court determines to be fair and equitable. Furthermore, because this case has been dragging on for five years, we respectfully request that the Court impose a firm and prompt deadline for the defendants to do so, such as 10 days or at most 30 days, and that the Court order the defendants to surrender their shares of stock for cancellation by the company if they fail to buy Andy out at the price set by the Court within the time set by the Court.

⁴ Calculating the present value of Dr. Woodside's estimated future value of \$20,384,564, at various discount rates over various time periods, is a straightforward mathematical calculation and does not require expert analysis. It can be performed on an Excel spreadsheet or on an Internet calculator. See, e.g., <http://www.calculatorsoup.com/calculators/financial/present-value-investment-calculator.php>. The figures stated in the text were calculated at discount rates of 9.2% and 11% over a five-year period.

Respectfully submitted,



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May 31, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Andrew P. (Andy) Ballard,

Plaintiff,

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS

C.A. No. 2008-CP-23-5739

DEFENDANT'S POST-HEARING
MEMORANDUM

A hearing was had before the Court on August 6, 2013 to hear evidence in support of the valuation of Warpath Development, Inc. ("Warpath") and the 20,000 shares held by Plaintiff, Andrew Ballard ("Ballard"). Taking this matter under advisement, the Court requested briefing in follow-up. Defendants present the following post-hearing memorandum in support of their position:

INTRODUCTION

The Defendants are appealing to this Court to be the fair and reasonable arbiter of these issues. Despite ongoing efforts, the divide between these parties is something we have never been able to bridge. While Plaintiff has prevailed on the issue of oppression, the time to try that case is beyond us. As the party prevailing on this issue of oppression, Plaintiff is entitled to a remedy to rectify the oppression, which may be one that permits him to remove his investment either through dissolution or buyout, or another statutorily enumerated remedy short of money exchanging hands. Plaintiff has not been harmed as an injured party is harmed in tort or contract and is not entitled to damages in this matter.

The court is tasked to now objectively sever a business relationship. Equity in this

determination is due to everyone involved, including the corporation itself. The determination of value is a determination of the value of all parties' interests. It is the court's task to weigh all interests, including the survival of Warpath, the preservation of the Defendant's interest and the Plaintiff's interest in receiving fair value for his shares. The Plaintiff has requested and the court in its consideration of equity has ordered a buyout. However, equity does not demand that the buyout be immediate. Equity demands that the value and the terms be fair and reasonable.

ISSUES FOR THE COURT

1. What is the value of Warpath and the Plaintiff's 20,000 shares?
 - A. Timing of Valuation
 - B. Amount of Valuation
 - C. 20% or 50%
2. Absent a reasoned structured payoff, the buyout remedy is inequitable and fails of its purpose.
3. Assuming the buyout remedy fails, what remedies are available?

ANALYSIS

1. Valuation of Warpath and the Plaintiff's 20,000 shares.

The valuation of Warpath and Plaintiff's shares is premised around the legal concept of "fair value". In South Carolina, "fair value" means "intrinsic value," which is computed by establishing the fair market value at a fixed moment in time as an established and going business. See Metromont Materials Corp. v. Pennell, 270 S.C. 9, 19, 239 S.E.2d 753, 758 (1977). Historically, South Carolina has focused on three factors to consider in establishing "fair value": (1) net asset value, (2) market value, and (3) the earnings or investment value of the stock. See

Santee Oil Co. v. Cox, 265 S.C. 270, 272-73, 217 S.E.2d 789, 791 (1975). The Santee method is substantially similar to the well-known "Delaware Block Method".

A. Timing of Valuation

The court is charged with determining the timing of valuation. However, once the time is fixed, as stated above, the valuation is calculated as is, where is at a fixed moment in time. In this matter, the timing is a simple issue to resolve given that there is no consideration of the financial condition of Warpath other than its condition as of December 31, 2012. While the Plaintiff has sought to manipulate the December 31 valuation of Dr. Woodside to cause it to shift back 2.5 years to July 2010, the testimony of Dr. Woodside is that there was no valuation of Warpath done in consideration of the financial condition of Warpath as of 2010, as well as there was no consideration of the general economic conditions overall of the United States' economy or of the marina market specifically done as of 2010. Factually, there was no valuation of Warpath in 2010 done at all by anyone.

At the request of the Plaintiff, Dr. Woodside shifted the 8-year model back 2.5 years and calculated the value today as if Warpath was built and operational for 2.5 years. This is improper for several reasons. First, as stated, there has been no calculation performed as of 2010. Second, this is far beyond a rational or reasonable assumption. This is an absolute fiction. Warpath did not start construction in 2010 and there was factually no obligation for management to begin construction in 2010. Further, to suggest that management was in some way obligated or should have begun construction in 2010 implicates management's business judgment into this valuation hearing which is beyond the scope of this hearing and the evidence before this court. Third, this violates South Carolina law in that this suggests that the court should not consider the value of Warpath as is, where is at a fixed moment in time.

In summary, the only time period properly evaluated and evidenced before this court is the actual financial condition and state of the development as is, where is and fixed as of the moment of December 31, 2012.

B. Amount of Valuation

While Defendants believe the value of Warpath is less, having no alternative evidence, Defendants are willing to accept Dr. Perry Woodside's opinion as fair and do stipulate to the value of \$873,000 accorded to Plaintiff's 20,000 shares. Plaintiff's objections to Dr. Woodside's report are unfounded. Plaintiff's own expert, Dr. Charles Alford, takes no exception to Dr. Woodside's report or methodology and actually adopts all of Dr. Woodside's report but for the discount rate in his own calculation.

As for Plaintiff's alternative calculations, the first presented is the Plaintiff's. Despite the obvious substantial bias, the Plaintiff's own evaluation should be excluded for these reasons: 1) It is an improper lay opinion; 2) Plaintiff is not qualified to give an expert opinion; and 3) the opinion is not factually supported or calculated in accordance with the methods required by South Carolina law. The second opinion given is that of Dr. Alford, the Plaintiff's hired expert. While Defendant takes no issue with Dr. Alford's qualifications, Defendant does maintain that Dr. Alford's testimony be excluded on the following grounds: 1) Dr. Alford's identification is egregiously late and unfairly prejudicial to the Defendants. Dr. Alford was hired by the Plaintiff in April 2013. This matter was first set for hearing on June 4, 2013. At that time, Dr. Alford was not identified as a witness. The matter was then rescheduled for June 27, 2013. Again, Dr. Alford was not identified. The matter was then rescheduled for August 6, 2013. It was not until July 18, 2013, that Dr. Alford was named and documents provided. However, the nature of his opinion was not identified until the hearing. Further, no notice was ever given to Dr. Woodside

that Dr. Alford would be testifying with alternative opinions. 2) Dr. Alford's opinion is not factually based on an independent evaluation of Warpath's financial condition or in line with the methods prescribed by South Carolina law. 3) Given that Dr. Alford's opinion is premised upon Dr. Woodside's model, if Dr. Woodside's opinion is excluded and fails so must Dr. Alford's leaving the court with no expert opinion. 4) Dr. Alford's opinion as to the discount rate is premised upon a woefully deficient factual basis and not calculated in accordance with a recognized methodology.

Factually, if both Dr. Woodside's and Dr. Alford's opinions are considered, given that Dr. Alford uses Dr. Woodside's model, the only difference is as to the discount rate. Dr. Woodside, the court's neutral appraiser, employs a 22% 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, Pl's Ex. 4D, in December 2012 that has 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 around. Further, Dr. Alford does not in any way consider any of the other offers in evidence, such as the \$4.5 million offer of Vinings Marine Group, LLC, Pl's Ex. 5, submitted a mere few months prior to the Dakota Holding's Conditional Loan Commitment. The \$4.5 million offer being substantially similar to the overall calculation of the value of Warpath computed by Dr. Woodside.

This evaluation is of 20,000 shares 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, 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, 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 is not investing in Warpath. They have 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 is not simply risking their capital in an investment. Dakota Holdings is lending the money, and through the control accorded by the collateralized stock will

control how the money is appropriated, the build out, the management of Warpath, and will 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 simple equity investment being evaluated by this hearing.

For these reasons, Dr. Woodside's, fair, equitable and unbiased opinion should take precedence over all others. The court should therefore enter an order setting the value of Plaintiff's 20,000 shares at \$873,000.

C. 20% or 50%

Plaintiff has interjected the issue of whether his 20,000 shares represent 20% or 50% of the company. Plaintiffs own Memorandum submitted prior to this hearing provides that "if the defendants are to receive the economic benefit of their escrowed shares for purposes of determining ownership percentages, in fairness [the company should] be valued under the hypothetical assumption that they had already done what they agreed to do in order to receive those shares." Given that Defendants stipulate to Dr. Woodsides' appraisal and his appraisal does assume that the development is funded, constructed and operational for 8 years, the issue is moot. Plaintiff's 20,000 shares should be valued as representing 20% of the value of Warpath.

2. Absent a reasoned structured payoff, the buyout remedy is inequitable and fails of its purpose.

While the Defendants have and do desire to continue to pursue the development of Warpath as they have for the past 6 years, the evidence before the court is that the defendants,

Warpath included, are not in a financial position to buyout the 20,000 shares of the Plaintiff absent reasonable buyout terms. Defendants have stated that they are willing to have their financial conditions examined by the court or someone appointed by the court to determine a reasonable structure for the buyout. Defendants have and renew their request that the court do so prior to entering its final order. For reference, Defendants attach a copy of and submit the matter of Kaplan v. First Hartford Corporation, 671 F.Supp.2d 187 (D. Maine 2009) for consideration by the court. Kaplan represents as a well-considered and well-reasoned example of a court reasonably and orderly evaluating the feasibility of a majority buyout and putting a structured plan into place.

Based on the authority granted by S.C. Code Ann. § 33-14-200(2)(ii), the judicial dissolution provision of the South Carolina Business Corporation Act, this court determined that the Plaintiff had been oppressed by the Defendants. By statutory definition, oppression can come in the form of “illegal, fraudulent, oppressive, or unfairly prejudicial” conduct to the corporation or to any shareholder. Id. Even statutorily permitted conduct can be considered oppressive if employed under improper motivations. As the opinion of the Supreme Court of South Carolina in this matter illustrates, actual pecuniary harm is not necessary to a finding of oppression. See Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012). The hallmark of oppression “is that the minority faces a trapped investment and an indefinite exclusion [from] participation in business returns.” Id. at 110. There is no need to show a loss, legal damages or any harm at all. In this case, the record is devoid of any evidence demonstrating that Plaintiff has suffered any losses as a result of any of the conduct complained of here. Moreover, coming into the 2010 trial, in various forms, Plaintiff had plead legal causes of action for breach of contract and breach of fiduciary duty that, if proven, could have resulted in a legal judgment for damages. Plaintiff

dismissed those causes of action in 2010 thereby foregoing any and all claims that may result in the award of legal damages to the Plaintiff.

The Plaintiff chose to proceed on the equitable claim of oppression. The default remedy for oppression is dissolution, which would accomplish the Court's stated goal of separating the shareholders of Warpath and the general goal of releasing Plaintiff's "trapped investment". In fact, when the value is significantly disputed, there can be no more fair method of division than to liquidate the assets and divide the proceeds *pro rata*.

However, equity is owed to the corporation also and its continued existence should be considered. Therefore, short of dissolution, S.C. Code Ann. § 33-14-310(d) enumerates four remedies that may be considered if the equities permit. One of those enumerated remedies is a company or shareholder buyout. In this matter, the court chose that remedy presumably based on Plaintiff's request, but also upon further consideration of the desire to maintain the Warpath corporate form and the court's stated desire to separate the shareholders of Warpath.

As stated above, the Defendants have expressed a continued desire to see the development of Warpath to conclusion. Defendants have further expressed a continued commitment to buying out the shares of Mr. Ballard. Reasonable time is, however, required.

Plaintiff, however, demands an order of immediate payment of the buyout within 10 or 30 days. Based on the evidence of Defendants' inability to fund a buyout in that short a time period, such an order calls into question the equity of the court's desired remedy of buyout and its ability to achieve the court's stated purpose of causing Plaintiff to separate from the remaining shareholders of Warpath. First, there is a distinction between a court ordered buyout of the shares and a personal judgment for damages. Based on the evidence before the court, a buyout ordered within 10 to 30 days will inevitably result in Defendant's default, and, according to

Plaintiff's stated desire and objective, a personal judgment against the defendants. Plaintiff has further openly expressed an inequitable motivation of obtaining a personal judgment for non-payment of the buyout and seeking satisfaction of that judgment through acquisition of Defendant's shares. Plaintiff has no pending cause of action entitling him to damages and no right to obtain a judgment. Plaintiff is not entitled to receive damages or a personal judgment from the Defendants under South Carolina's judicial dissolution statute, S.C. Code Ann. § 33-14-300, upon which he plead his claim of oppression. He is entitled to dissolution. If there is no basis to continue the existence of Warpath and/or the buyout cannot be reasonable achieved, equity demands that the court find an alternative remedy to buyout, which, given the court's expressed aims to separate the parties, is statutorily restricted to dissolution.

Second, even absent considerations of equity, to order a buyout to occur in so short a time that default is inevitable without any consideration of the ability to fund the buyout presents an entirely illogical result. In this case, the Plaintiff would receive an order entitling him to payment of the 20,000 shares at a given price thereby setting the floor price for the shares. In Plaintiff's theory, the judgment could be satisfied by tendering 20,000 shares to the Plaintiff since they are of equal value as set by the court to the 20,000 shares held by the Plaintiff. However, having received satisfaction, by order, the Plaintiff would have to simultaneously exchange his 20,000 shares in return. The Plaintiff cannot argue that the shares be fixed with a lesser value having already requested that the court set the price as requested by the Plaintiff. Any other result is inequitable. This exchange of shares does not in any way accomplish the court's stated objective to separate the parties as shareholders of Warpath.

Finally, the real motivation behind the Plaintiff's demands is to keep the \$1,000,000 received in the stock purchase transaction and secure the return of all of the shares of Warpath

without paying any value for them. Such is a wholly inequitable result. Oppression is not punitive. A finding of oppression serves to restore the balance among the shareholders and set a level playing field for all shareholders. Oppression is not a means to judicially carve out a better position than originally negotiated. Without even addressing the due process problem, Plaintiff can present no legal support and is aware that there is no equitable or legal basis for the court to order that the Defendants must sign over their shares of Warpath to the Plaintiff for no value. However, if the court accedes to Plaintiff's unreasonable request for a buyout in 10 or 30 days, Plaintiff nevertheless seeks to achieve that result indirectly through an inevitable default of the court ordered buyout. Plaintiff's counsel has stated as much on the record. This "backdoor" tactic is likewise inequitable.

The only way the buyout makes sense as a feasible remedy is for it to be structured in a manner that is reasonably achievable. Defendant's interest in completing the buyout can be achieved by the structure and Plaintiff's interest in security and the timely receipt of funds can respectively be met by adequate security, which has been offered and can be put up, as well as a fair rate of interest on the unpaid balance. The shares of Warpath cannot be offered as collateral as they will necessarily be needed to obtain funding for the development. If the experts' projections prove true, an operational Warpath will most certainly increase the speed at which Plaintiff's buyout may be funded. For these reasons, the court must set a reasonable schedule for the buyout of Plaintiff's shares or consider an alternative remedy.

3. Assuming the buyout remedy fails, what remedies are available?

A. As stated above, dissolution is the default remedy for oppression. Dissolution would permit the assets of Warpath to be put up for judicial sale in a manner that may be structured by the court. An open market for the assets could be established and parties, including

the Plaintiff and Defendants, would be available to bid on the assets. The assets of Warpath being the lease, permits, architecture, engineering, acquired land, goodwill, etc. Plaintiff claims these assets have significant value that far exceeds the value paid for them in 2007. All other valuations are hypothetical and in the abstract. Dissolution allows the market to speak to value. The amount received would then be used to satisfy creditors with the result distributed *pro rata* to the shareholders.¹

B. As an alternative, while not statutorily enumerated, if Plaintiff is unwilling to accept payment for his share over time, Defendants have signaled Plaintiff that they are willing to engage in a minority buyout of their shares at an amount reciprocal to the value assigned to Plaintiff's 20,000 shares. Assuming Dr. Woodside's value of \$873,000 for Plaintiff's 20,000 shares, the value of Defendants 80,000 shares would be \$3,492,000. Plaintiff has stated on the record that Warpath is a fantastic project with great potential and has a significant value. While Defendants remain committed to Warpath, if the Plaintiff will not accept and the court does not set a reasonable buyout schedule, Plaintiff is welcome to acquire Defendant's shares and move forward with the development of Warpath. Defendants are willing to accept payment for the shares on the same terms they have requested for the buyout of Plaintiff's shares. Those terms being a reasonable time to complete the purchase, adequate security and interest.

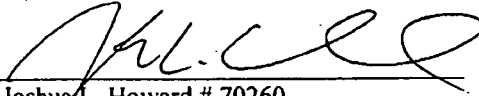
CONCLUSION

For these reasons, Defendants request that the court enter an order of \$873,000 as the value of Plaintiff's 20,000 shares. Additionally, Defendants request that either the court or someone appointed by the court examine Defendants financial condition and set a commercially

¹ In anticipation of the Plaintiff claiming dissolution to be inequitable, dissolution is far from beneficial to the Defendants. In addition to countless hours, Roberson has invested upwards of \$1,500,000 that would unlikely be recovered in liquidation. The Thoennes' have as well invested countless hours of time in pursuit of the development that would never be compensated.

reasonable buyout structure that includes terms, security and interest. If the court does not wish to set commercially reasonable terms for the buyout, Defendants assert that the court must forego the buyout and enter the alternative remedy of dissolution or minority buyout at Plaintiff's election.

Respectfully Submitted,



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Attorneys for the Defendants

Greenville, South Carolina
August 16, 2013



Analysis
As of: Aug 05, 2013

RICHARD E. KAPLAN, PLAINTIFF v. FIRST HARTFORD CORPORATION
AND NEIL ELLIS, DEFENDANTS

CIVIL NO. 05-144-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

671 F. Supp. 2d 187; 2009 U.S. Dist. LEXIS 110640

November 23, 2009, Decided
November 23, 2009, Filed

PRIOR HISTORY: *Kaplan v. First Hartford Corp.*,
603 F. Supp. 2d 195, 2009 U.S. Dist. LEXIS 24792 (D.
Me., 2009)

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JUDGES: D. BROCK HORNBY, UNITED STATES
DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION

[*189] DECISION AND ORDER ON THE RE- PORT OF THE SPECIAL MASTER

In this corporate oppression case, I appointed Attor-
ney George J. Marcus as Special Master to determine
whether the corporation is financially able [**2] to
purchase the oppressed shareholder's shares and under
what circumstances; and, if the corporation cannot do so,
whether the controlling shareholder can. The Special
Master filed his Report on September 14, 2009. The pri-
mary issues now are whether the Special Master fol-
lowed my Order in what he did and did not address in his
Report; whether the buyout schedule he devised is ap-
propriate; and the nature and computation of pre- and
postjudgment interest. The plaintiff filed objections to

the Special Master's Report; the defendants filed a motion to modify it; other shareholders as amici curiae filed a legal memorandum in support of the defendants' position.

After notice and a hearing on November 16, 2009, and upon de novo review of the issues that the parties raise, ¹ I ADOPT the Report of the Special Master with one exception noted below. The plaintiff's Objections are SUSTAINED IN PART as to postjudgment interest but otherwise OVERRULED. I DENY the defendants' Motion to Modify the Report of the Special Master to strike references to prejudgment interest and GRANT the plaintiff's request for prejudgment interest on the terms described below.

1 See *Fed. R. Civ. P. 53(f)(3-4)*. The defendant ² Ellis's lawyer argued at the hearing on November 16, 2009 that the Master's interpretation of my Order concerning what he should consider was a procedural decision subject to review for abuse of discretion under *Rule 53(f)(5)*, but I conclude that it is substantive and subject to de novo review.

BACKGROUND

This case began in March 2005. Richard Kaplan, a nineteen-percent (19%) shareholder of First Hartford Corporation ("First Hartford"), sued the company and its controlling shareholder, Neil Ellis, alleging, among other things, shareholder ³ [190] oppression. ⁴ The litigation proceeded in three stages. First, after a bench trial in November 2006, I ruled that First Hartford and Ellis had treated minority shareholders oppressively. ⁵ Second, in November 2007, after the parties extensively briefed the remedy issue, I determined that First Hartford should buy Kaplan's shares. ⁶ Third, after further briefing and a bench trial at which the parties presented opinion evidence on First Hartford's fair value from three experts, I found that First Hartford was worth \$ 15 million (or \$ 4.87 per share) as of September 15, 2005, the date Kaplan filed his complaint. ⁷

2 The details of the case are contained ⁸ [14] in my Findings of Fact and Conclusions of Law ("Liability Decision") (Docket Item 81) and in the Report of the Special Master (Docket Item 213). I will not repeat them here.

3 Liability Decision at 44.

4 Findings of Fact and Conclusions of Law Part 2: Remedy at 4 ("Remedy Decision") (Docket Item 116).

5 Findings of Fact and Conclusions of Law Part 2: Valuation at 25 and n.43 ("Value Decision") (Docket Item 192). Given this valuation

and under the assumption that Kaplan owns 591,254 shares of First Hartford stock, Kaplan is entitled to \$ 2,879,406.98. Report at 3.

With liability, remedy, and valuation decided, the parties tried to reach an agreement on the mechanics of the buyout, but could not settle on a solution. After consulting with the parties and other shareholders, whom I had allowed to intervene as amici curiae, I appointed Attorney Marcus as Special Master and ordered him to determine:

1. Whether First Hartford Corporation has the capacity to buy outright and promptly the Richard Kaplan shares as I have defined them at the value I have assigned, without adversely impacting the corporation's ability to do business and to continue as a viable company in its business pursuits for the ⁹ [15] benefit of other shareholders.

2. If outright and prompt purchase is not possible, the most reasonably speedy schedule for doing so and commercially reasonable terms providing fair protection for Richard Kaplan to secure any delayed or extended payment.

3. If First Hartford Corporation cannot purchase the shares, whether Neil Ellis can purchase the shares and under what circumstances, with commercially reasonable assurance of payment to Richard Kaplan.

4. [T]he impact of the assessment of prejudgment interest on the answer to question # 1 and, if relevant, # 2, and if relevant, # 3. ¹⁰

As detailed in the Special Master's Report, he met with the parties on several occasions in July, August, and September 2009. ¹¹ Both parties submitted documents and information to the Special Master, responded to questions posed by him, and submitted comments and objections to the Special Master's draft report. ¹² The Special Master issued his final report on September 14, 2009.

6 Order Appointing Special Master at 1-2 (Docket Item 209).

7 Report at 4-9.

8 Id.

The Special Master found that while First Hartford could not buy Kaplan's shares outright and promptly (Question # 1), it could pay \$ 500,000 immediately;

[**6] execute a note for and pay the remainder of the purchase price of Kaplan's shares at \$ 4.87/share over five years, which the Special [*191] Master determined was a reasonably speedy schedule (Question # 2); offer Kaplan commercially reasonable security (Question # 2); and pay prejudgment interest without affecting First Hartford's ability to perform the buyout and continue in business (Question # 4). * Since the Special Master found that First Hartford could buy Kaplan's shares on a reasonably speedy schedule with commercially reasonable security, he did not evaluate Ellis's ability to purchase the shares (Question # 3). "

9 Id. at 18-21.

10 Id. at 20.

DISCUSSION

(A) The Special Master's Decision Not to Assess Ellis's Finances

Kaplan contends that after finding that First Hartford could not buy his shares outright and promptly, the Special Master should have determined not only the most reasonably speedy schedule on which First Hartford could perform with commercially reasonable security to Kaplan, but also how Ellis's ability to purchase the shares could assist First Hartford in performing the buyout. " Kaplan's objection poses two questions: whether the Special Master properly understood my [**7] Order; and, if he did, whether his conclusion that First Hartford could perform satisfies the standards that I established in my Order. I review such mixed questions of fact and law de novo.

11 Pl. Richard E. Kaplan's Objections to the Report of the Special Master at 2 (Docket Item 216).

The Special Master properly understood his duties. Once the Special Master found that First Hartford could purchase the Kaplan shares under the terms described in question two of my Order, he did not need to answer question three. That would have been necessary only if First Hartford could not purchase the shares on a commercially reasonable basis. " The plaintiff's objection regarding the scope of the Special Master's duties is **OVERRULED**.

12 Question # 4 of my Order states that the Special Master should determine how a prejudgment interest award would affect the answer to "question # 1 and, if relevant, # 2, and if relevant, # 3." Order at 2. Question # 4 therefore clearly contemplates that the Master could stop his inquiry at Question # 2, without proceeding to Question # 3.

(B) The Special Master's Finding of a Reasonably Speedy Buyout

Kaplan objects that the Special Master's proposed five-year buyout [**8] schedule is not "reasonably speedy" given the circumstances of this case. Specifically, he contends that the Special Master settled for the "best FHC can do" rather than focus on my requirement that a buyout be accomplished with reasonable speed. " Kaplan notes that there is no generally accepted definition of "reasonably speedy" in connection with applying the Maine Business Corporation Act " and argues that the Special Master was wrong to take guidance from standards established by Chapter 11 of the Bankruptcy Code and voluntary private-company buyouts. " Kaplan maintains that the Special Master should have determined what is reasonably speedy from Kaplan's point of view: "an oppressed shareholder who has had to resort to extraordinarily costly litigation over a period of [four] years." " Kaplan submits that from this point of view, the five-year buyout is unreasonably long because [*192] it is longer in duration than the underlying litigation and threatens to "leave Kaplan's interests subjugated to FHC and Ellis." "

13 Pl.'s Objections at 3-4.

14 Oral Argument Tr., Nov. 16, 2009.

15 Pl.'s Objections at 5-6.

16 Id. at 7.

17 Id. at 2.

While recognizing that Kaplan had prevailed at trial and was [**9] entitled to a remedy, I charged the Special Master with creating a remedy that recognized other interests as well. Specifically, my Order precluded any schedule so speedy as to affect adversely "the corporation's ability to . . . continue as a viable company in its business pursuits for the benefit of other shareholders." " It was therefore wholly appropriate for the Special Master to consult both the Bankruptcy Code and commercial practice for guidance on standards of commercial reasonableness. He noted, for example, that it is customary for shareholders in close corporations to be bought out over time " and that it is a reasonable commercial expectation that a shareholder buyout will typically be funded over "five to ten years with no security or junior security and with modest interest if any." " He also considered how current economic conditions affect First Hartford's core business and First Hartford's financial condition as he assessed the schedule by which First Hartford could buy Kaplan's shares at the 2005 price, a price far above that supported by today's market. The Special Master noted that First Hartford's "operating performance . . . has been marginal and unsteady," [**10] " that it has a "very thin margin of available working capital" " and that it must rely on "opportunistic

tic" liquidations and refinancings to meet its "existing obligations." " I agree with his conclusion that, given its business model, First Hartford needs flexibility in meeting its existing business obligations and its obligations to Kaplan. Given current economic conditions, the Special Master found that five years would provide reasonable confidence in First Hartford's ability to perform. "4 He quite reasonably did not speed up the buyout by assigning net sales proceeds to Kaplan because of the consequences for First Hartford's operations and because the five-year schedule is already on the speedier end of the spectrum of shareholder buyouts. I agree with the Special Master that the five-year buyout is reasonably speedy for a shareholder buyout, and I conclude that the Special Master has crafted a reasonably speedy, commercially reasonable buyout schedule. The plaintiff's objection to the five-year term is **OVERRULED**.

18 Order at 1.

19 Report at 43 n.20.

20 Id. at 23.

21 Id. at 15.

22 Id. at 17.

23 Id. at 18.

24 Id. at 43 n.20. Kaplan has argued that the Special Master has failed to consider [**11] how the proceeds from a recent sale of property in Bangor could speed up the buyout. Pl.'s Mem. in Opp'n to Defs.' Mot. to Modify Report of the Special Master at 3-5 (Docket Item 222). Kaplan no longer contends that First Hartford failed to disclose the sale. Oral Argument Tr., Nov. 16, 2009. But he suggests that First Hartford's initial payment of \$ 500,000 could be increased with the \$ 900,000 net on the Bangor sale. Pl.'s Mem. in Opp'n at 5. The Special Master not only had access to First Hartford's disclosure of the sale but also assumed that the company was already using the proceeds of the sale to fund the initial payment. See Report at 36 n.10. There is thus no need to ask the Special Master to consider how the Bangor sale could affect the speed of the buyout.

(C) The Special Master's Finding of Commercially Reasonable Security

Kaplan contends that he is entitled to "the kind of protections that any lender [*193] would reasonably require" " and that the Special Master has failed to provide them. " Specifically, since First Hartford cannot provide security liens in the equity of its operating properties because of restrictions on its mortgages, Kaplan wants Ellis to pledge his shares [**12] as security for the promissory note to Kaplan. " First Hartford and Ellis counter that a pledge of the Ellis shares would hamstring

First Hartford's ability to get necessary operating loans from other lenders, " because other lenders are likely to require the Ellis shares as security for loans during the buyout term. I agree with the Special Master's determination that First Hartford's business model requires flexibility and that it can perform the buyout only if it has the latitude it needs to continue its operations. Thus, it is commercially reasonable not to require Ellis to pledge his shares as security for Kaplan's note. It is also reasonable to require Kaplan to release his security interest in any asset upon tender of the fair market value of that asset by First Hartford, so that the company can continue with its business of disposing of its real estate from time to time. "

25 Pl.'s Objections at 6.

26 Id. at 10.

27 Oral Argument Tr., Nov. 16, 2009.

28 Id.

29 Report at 42.

I also find that the Special Master has provided Kaplan with commercially reasonable security. Kaplan will receive first priority interests in: (a) First Hartford's 50% interest in CP Associates, which is worth more [**13] than \$ 3.2 million; (b) First Hartford's 50% interest in Trolley Barn Associates, which is worth at least \$ 225,000 just in the value of unencumbered land; (c) First Hartford's rights to service and fee income from its agreements with CVS, which was \$ 1.47 million in 2008 and \$ 3.02 million in 2009, yielding a net income of \$ 407,000 and \$ 964,000 respectively; (d) an estimated \$ 600,000 per year from three cash-generating properties; and (e) Kaplan's own beneficially owned stock. " Kaplan therefore receives security in assets far exceeding the value of his promissory note, sufficient to give him reasonable confidence that First Hartford will be able to pay the estimated \$ 470,000 annual payments on his note. I note that in addition Ellis has personally guaranteed the payments on the note. Without disclosure of the Ellis financial statements, I cannot place a value on the guarantee, " but it does create some incentive to paying the note. Second, the proposed escrow account provides confidence-building transparency. Kaplan will be able to see that First Hartford has made contributions to the account to service his note, and First Hartford cannot withdraw money from the account once [**14] it is deposited.

30 Defs.' Resp. to Pl.'s Objection to the Report of the Special Master at 8 (Docket Item 221); see also Report at 38-43.

31 The Special Master did not consider Ellis's guarantee to be part of the commercially reasonable security. Report at 35. The plaintiff's objection to the guarantee is therefore inapposite.

I conclude that Kaplan will receive commercially reasonable security, and his objections on this issue are **OVERRULED.**"

32 This includes Kaplan's request to be able to participate in the sale or merger of First Hartford on equal terms with other shareholders. Pl.'s Objections at 11-12. Whatever happens to the value of First Hartford's stock, Kaplan is guaranteed a value of \$ 4.87 per share.

(D) Prejudgment Interest

Prejudgment interest is controlled [*194] by Maine law. "The parties agree that, under Maine law, I have discretion to award prejudgment interest" and that Maine law has a presumption in favor of such awards. "The defendants do not challenge the Special Master's finding that First Hartford can pay prejudgment interest, * but they do contend that an award of prejudgment interest would be inequitable in this case and that to the extent that there is a presumption [*15] in favor of the award, either Kaplan has lost the benefit of the presumption by virtue of his conduct during litigation or the circumstances of the case provide good cause for waiving it."

33 14 M.R.S.A. § 1602-B; see also *Crowe v. Bolduc*, 365 F.3d 86, 91 (1st Cir. 2004) (noting that in a diversity action, "[state] law governs the plaintiff's entitlement to prejudgment interest"). The Maine statute allows prejudgment interest at 3% above the one-year Treasury bill rate from the last full week of the calendar year immediately prior to the year in which a notice of claim is served. 14 M.R.S.A. § 1602-B(3). On petition of a non-prevailing party and a showing of good cause, I may fully or partially waive an award of prejudgment interest. 14 M.R.S.A. § 1602-B(5).

34 Defs.' Mot. to Modify the Report of the Special Master Pursuant to *Fed. R. Civ. P. 53(j)(2)* at 2 (Docket Item 214); Pl.'s Mem. in Opp'n at 2.

35 Defs.' Reply to Pl.'s Opp'n to Mot. to Modify Report of the Special Master at 2 (Docket Item 226); Pl.'s Mem. in Opp'n at 2; see also *Pierce v. Central Maine Power Co.*, 622 A.2d 80, 85 (Me. 1993) (interpreting 14 M.R.S.A. § 1602 "as presuming that the prevailing party is entitled to prejudgment [*16] interest on the rationale that the presumption encourages the defendant to conclude a pretrial settlement of clearly meritorious suits" (quoting *Simpson v. Hanover Ins. Co.*, 588 A.2d 1183, 1185 (Me. 1991)); *Crowe*, 365 F.3d at 91 ("Maine law broadly entitles prevailing civil plaintiffs to prejudgment interest as a matter of right." (citing 14 M.R.S.A. § 1602-B and

Sawyer v. Walker, 572 A.2d 498, 499 (Me. 1990)). Under Maine law, an award of prejudgment interest serves two purposes. First, it "compensates an injured party for the inability to use money rightfully belonging to that party between the date suit is filed and the date judgment is entered." *Jasch v. Anchorage Inn*, 2002 ME 106, 799 A.2d 1216, 1219 (Me. 2002) (quoting *Guiggey v. Great N. Paper, Inc.*, 1997 ME 232, 704 A.2d 375, 377 (Me. 1997)). Second, the possibility of a prejudgment award "encourages the defendant to conclude a pretrial settlement of clearly meritorious suits." *Id.* A plaintiff's right to prejudgment interest "is not absolute" and may be lost if, for example, a plaintiff "causes delay" or otherwise acts unreasonably. *Pierce*, 622 A.2d at 85 (quoting *Simpson v. Hanover Ins. Co.*, 588 A.2d 1183, 1185 n.3 (Me. 1991)).

36 The defendants do [*17] argue that the prejudgment interest award would deprive First Hartford of "badly needed cash, which could be used to run and grow the business for the benefit of all." Defs.' Resp. at 14.

37 The amici curiae argue that an award of prejudgment interest would "amount to an extraordinary, unfair windfall to one minority stockholder" that would be inequitable given the plaintiff's recovery and inappropriate since "none of the policy interests under lying prejudgment interest" are implicated here. Reply Mem. of Amici Curiae in Support of Report of the Special Master at 2 (Docket Item 225).

The defendants say that Kaplan should not receive prejudgment interest because his unreasonable valuation of the company "made settlement impossible." * Thus, they say, an award of prejudgment interest does not serve the purpose of encouraging early settlement of meritorious cases. Kaplan asserts that First Hartford never made a settlement offer, "a contention that the company has not disputed, and points to my earlier observation that prejudgment interest is a crude measure [*195] of the "investment value of his shares" during the lawsuit. "Having observed the conduct of the parties in this case for more [*18] than four years, I cannot conclude that Kaplan is primarily responsible for the length of this highly contentious litigation."

38 Defs.' Resp. at 12.

39 Pl.'s Reply Mem. in Support of Objections to the Report of the Special Master at 3 (Docket Item 229). *Morales v. Rosenberg*, 919 So. 2d 476 (Fla. Dist. Ct. App. 3d Dist. 2005), is therefore inapposite.

40 Remedy Decision at 8.

41 As the Law Court has explained, the Maine legislature did not intend prejudgment interest to be a measure of damages in a particular case but rather "a procedural device to control the parties' conduct of the trial." *Ginn v. Penobscot Co.*, 342 A.2d 270, 281 (Me. 1975).

The defendants also argue that it would be inequitable to award Kaplan prejudgment interest because he enjoyed his full rights as a shareholder throughout the litigation, could have sold his shares at any time, received a dividend of ten cents per share in 2006, and obtained the time value of his money by not sharing in the losses suffered by other shareholders.⁴³ The first two arguments are unconvincing. Kaplan was a minority shareholder who suffered oppression and who was actively suing First Hartford for relief as a result. The defendants' argument [**19] that Kaplan could simply have sold his shares amounts to saying that Kaplan could have abandoned his pursuit of the actual value of his investment. The fourth argument is also unpersuasive. Kaplan filed his Complaint in 2005, but was unable to withdraw his investment in the company and place it at work elsewhere as I have ruled he was entitled to do. Running prejudgment interest from the Complaint's filing is a crude measure of what Kaplan could have done if he had obtained immediate relief. I do agree, however, that the award of prejudgment interest should be reduced by the amount of the dividend Kaplan received in 2006; the dividend flows from ownership of the stock; the interest flows from what hypothetically would have happened if he had been able to rid himself of his stock. He cannot have it both ways.

42 Defs.' Resp. at 11, 13, 14.

The parties agree that any prejudgment interest should accrue at the fixed statutory rate,⁴⁴ but differ as to whether the interest should be compound. The prejudgment interest statute "does not address compounding but Kaplan argues that Maine case law and one of my previous cases show that prejudgment interest should be compound." *McLoon*, the Maine [**20] case, dealt with prejudgment interest pursuant to a previous statute governing shareholder's appraisal rights that the Supreme Judicial Court explicitly distinguished from the kind of prejudgment interest at stake here.⁴⁵ *McLoon* held that prejudgment interest under the appraisal rights statute was a substantive right rather than a "procedural device to encourage expeditious litigation."⁴⁶ *McLoon's* logic therefore has no application here. It is true that in *Warren v. United Parcel Service, Inc.*,⁴⁷ I awarded compounding under the circumstances, but I made no ruling that the statute required compounding, and I had already partially waived interest to avoid giving the plaintiff interest on backpay during the periods when he had [**196] not

yet earned it.⁴⁸ Here, I find that compounding is not appropriate. The Special Master determined that First Hartford could afford prejudgment interest on the assumption that it would be simple.⁴⁹ An award of compound interest could upset the balance the Special Master has worked so hard to achieve,⁵⁰ and fairness to the other minority shareholders requires that Kaplan receive no more than equity requires.

43 See Defs.' Resp. 15. The plaintiff initially argued [**21] that the interest rate should be floating. Pl.'s Objections at 13, but abandoned this argument at oral argument on November 16, 2009.

44 14 M.R.S.A. § 1602-B.

45 Pl.'s Objections at 12-13.

46 *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989).

47 *Id.*

48 495 F. Supp. 2d 86 (D. Me. 2007).

49 *Id.* at 90.

50 Report at 20 n.8.

51 The Special Master could "not articulate a precise pathway for FHC to raise [the] funds" to pay prejudgment interest, but he concluded that since the "the obligation is deferred for a significant period of time and . . . is not terribly large in context of all of [FHC's] assets," it could likely pay a balloon payment of prejudgment interest at the end of five years. Report at 38 n.15. I am unwilling to impose an additional burden that may limit the company's ability to meet its obligations.

The plaintiff's request for prejudgment interest, but without compounding, is GRANTED.

(E) Postjudgment Interest

Postjudgment interest is controlled by federal statute.⁵² The Special Master has proposed that First Hartford pay postjudgment interest at the legal postjudgment rate for twelve (12) months as an incentive for First Hartford to pay as much of the note as [**22] much as possible in the first year.⁵³ He has proposed that thereafter First Hartford pay interest based on the average rate then payable to its first mortgage creditors.⁵⁴ The Special Master has also proposed that the company pay no interest on the award of prejudgment interest.⁵⁵ Kaplan objects that the interest rates are not commercially reasonable and that First Hartford should pay interest on the full amount of its obligations, including prejudgment interest.

52 See 28 U.S.C. § 1961; see also *Fratus v. Republic Western Ins. Co.*, 147 F.3d 25, 30 n.5 (1st Cir. 1998) (applying Section 1961 in a diversity case).

53 Report at 36. It is an "incentive" because the current rates for Treasuries make postjudgment interest so low, given the statutory formula--"[Postjudgment] interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a).

54 Report at 37. The defendants have not objected to the use of an interest rate higher than that provided for by the federal ["23] postjudgment interest statute, 28 U.S.C. § 1961. See Def.'s Mot. to Modify at 1-2; Def.'s Resp. at 10 (referring to the mortgage-based rate as "entirely reasonable").

55 Report at 36.

First, I find that the Special Master's proposal for postjudgment interest is reasonable. The first year is the statutory rate and given its low level, First Hartford has a strong incentive to pay as much of the note as possible during the first year to avoid paying the higher mortgage-based rate thereafter. Second, it is hard to imagine a rate more commercially reasonable than the one the Special Master has devised for interest after the initial year. Kaplan will receive an interest rate based on what is commercially available to First Hartford.

But Kaplan is correct that First Hartford should pay interest on the full amount of its debt including prejudgment interest. Although Maine does not allow for postjudgment interest on prejudgment interest, "federal law does." ["197] Accordingly, the plaintiff's objections to the interest rates are **OVERRULED**, but his objection to the non-payment of postjudgment interest on prejudgment interest is **SUSTAINED**.

56 14 M.R.S. § 1602-B(6).

57 See, e.g., *Buckley v. Brown Plastics Mach., LLC*, 368 F. Supp. 2d 167, 174 (D.R.I. 2005).

As ["24] a practical matter, it is necessary to set a date on which prejudgment interest stops accruing and postjudgment interest starts. Under *Kaiser Aluminum*, post-judgment interest runs from a "date certain" on the entry of judgment. "[A] finding of liability alone without a corresponding determination on damages does not suffice to start the clock on postjudgment interest." "Rather, postjudgment interest begins to accrue when it becomes possible to ascertain money damages in a 'meaningful way.'" ["26] "[D]amages are considered to have been ascertained when all that remains is a 'mechanical task of computing' the exact sum based on the court's orders." "Here, although it is clear that Kaplan is entitled to a money judgment, it will not be possible to spec-

ify the fixed amount of his award until the parties determine the number of shares that Kaplan owns. Once the parties know how many shares Kaplan owns, the amount of his money judgment can be calculated using the \$ 4.87/share valuation, and judgment can be entered. Until such time as Kaplan's award can be calculated, therefore, prejudgment interest will continue to accrue.

58 *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990).

59 *Radford Trust v. First Unum Life Ins. Co. of Am.*, 491 F.3d 21, 24 (1st Cir. 2007) ["25] (citing *Happy Chef Sys., Inc. v. John Hancock Mut. Life Ins. Co.*, 933 F.2d 1433, 1435, 1437 (8th Cir. 1991)).

60 *Id.* (quoting *Kaiser Aluminum*, 494 U.S. at 836).

61 *Id.* at 25 (quoting *EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 149 (7th Cir. 1992)). In *Gurnee Inns*, the defendant argued that a judgment entered by a magistrate judge "was not a money judgment but an injunctive judgment for specific performance (the delivery to certain individuals of certified checks in specified amounts), which when modified to allow [the defendant] to compute the applicable payroll deductions, did not set forth specific amounts for the checks." 956 F.2d at 149. The defendant contended that postjudgment interest was improper "because 28 U.S.C. § 1961 allows interest only on 'money judgments' in a sum certain, and the checks it was ordered to deliver were not for a specific amount." *Id.* The Seventh Circuit found that "[n]either argument survived even minimal scrutiny" because an order for back pay was a money judgment, even though "equitable in nature," and because "the ["26] award[] did not lose [its] character as [a] sum[] certain simply because [it was] subject to the mechanical task of computing the payroll deductions." *Id.*

For the reasons stated above, I hereby **ORDER** as follows:

1. The plaintiff's Objections to the Report of the Special Master are **OVERRULED IN PART** and **SUSTAINED IN PART**.

2. The defendants' Motion to Modify the Report of the Special Master is **DENIED**.

3. A standing special master shall be appointed with the powers and duties described in the Report of the Special Master. I will appoint Attorney George J. Marcus unless, within ten (10) days of this Order, the parties show good cause why he should not be appointed.

4. The plaintiff's request for prejudgment interest from September 15, 2005, until the entry of final judgment is **GRANTED**, subject to an offset for the 2006 dividend he received. Such interest shall be simple.

5. The clerk shall determine the fixed rate for prejudgment interest pursuant to *14 M.R.S.A. § 1602-B(3)*.

[*198] 6. Postjudgment interest shall be calculated at the rates specified by the Report of the Special Master on the entire money judgment, including prejudgment interest.

7. For the purposes of calculating prejudgment and postjudgment [**27] interest, final judgment shall enter when the parties have determined the precise number of shares owned by Kaplan. If, within three weeks of this

Order, the parties cannot agree upon a procedure for making this determination, the standing special master shall resolve it.

8. First Hartford shall begin performing the buyout on the terms laid out in the Report of the Special Master upon entry of final judgment.

SO ORDERED.

DATED THIS 23RD DAY OF NOVEMBER, 2009

/s/ D. BROCK HORNBY

D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Andrew P. (Andy) Ballard,
Plaintiff,

Case Number: 2008-CP-23-5739

vs.

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

Defendants.

**PLAINTIFF'S POST-HEARING
MEMORANDUM
FOR VALUATION (DAMAGES) HEARING**

The plaintiff submits this memorandum in response to the Post-Hearing Memorandum of the defendants. As discussed below, the defendants' memorandum is fundamentally flawed with numerous misrepresentations of both fact and law, a continuation of the pattern of deceit and dishonesty that has characterized the defendants' conduct throughout this dispute. We respectfully submit that the Court is bound as a matter of law to reject their legal position and bound as a matter of equity to reject their hypocritical plea for mercy, that the Court should set a true fair value for the plaintiff's ownership in Warpath Development, and order the defendants to pay this amount forthwith or surrender their ownership in the company.

INJURY AND EQUITY. Perhaps the most misleading statement by the defendants is their repeated assertion that the plaintiff has not been injured, and that he abandoned his claim for breach of contract. Nothing could be further from the truth. The plaintiff has been denied the benefit of his bargain. The parties' Stock Purchase Agreement was a binding contract in which the 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 the defendants have failed to meet these contractual commitments. They have failed to bring the value to the company that they agreed to provide in exchange for their shares. Likewise, it is undisputed that the overall value of the company, and hence of Mr. Ballard's ownership interest, would have increased dramatically if the defendants had simply done what they promised to do. Given the years of his life and hard work that Mr. Ballard has put into the project, and the substantial value that his stock would have now if defendants had carried out their contractual obligations, there can be no question that he has been harmed significantly by the defendants' wrongdoing.

Defendants' assertion that the plaintiff "dismissed" his cause of action for breach of contract, Def. Mem. at 9, is a flagrant misrepresentation of fact to the Court. While Mr. Ballard elected at the 2010 trial not to pursue a jury verdict for damages, he has steadfastly maintained his claim for breach of contract and continued, both at the 2010 trial and since then, to seek the equitable remedy of restitution for the defendants' breach of contract. The following is a verbatim excerpt from the plaintiff's 2010 *post-trial* memorandum:

Breach. As to anticipatory breach, we believe our jury charges set out the governing standards. By taking action both as directors and as majority shareholders, the defendants made clear that they rejected their obligation to provide the necessary capital to obtain long term financing, and the Thoennesses' many problems make them, in addition, unable to perform their obligations to help with the financing and to develop the marina property.

Restitution. Restitution is an appropriate and recognized remedy for breach of contract and for breaches of fiduciary duties. The defendants have wrongfully retained their shares when they have repudiated and anticipatorily breached the contract by which they received the 60,000 shares.

Plaintiff's Post Trial Memorandum, at 4 (April 6, 2010). Plaintiff explicitly asked the Court not only to order the escrow of the defendants' shares, but also to order that the defendants be

required to surrender their stock to the company. In its 2010 Order, the Court agreed that the shares should be placed in escrow, but decided that it need not address the request for cancellation of the defendants' stock because of its decision to order the buy-out of the plaintiff. Order at 14. If, however, the defendants are unable to pay fair value for the plaintiff's shares – as they now claim – then the time is ripe for the Court to order defendants to surrender their shares of stock and let Mr. Ballard reassume ownership and control of Warpath. This is the only equitable and practical way to bring closure to this long-running dispute.¹

FURTHER DELAY. Defendants' plea for more time under a structured payoff should fall on deaf ears. He who seeks equity must do equity. The defendants have had over six years now to satisfy their contractual obligations, and have known for at least three years that they were facing the possibility of having to buy out the plaintiff. Moreover, in the recent hearing, Mr. Roberson testified that the \$1,000,000 price he paid for Mr. Ballard's 20,000 shares in 2007 was a fair price. Thus, the defendants had to have known that the likely buy-out price for Andy's remaining 20,000 shares would be at least something higher than \$1,000,000 (since the company now has the permits it did not have in 2007, and thus has increased significantly in value since 2007). In short, the defendants have had more than enough time already to prepare for this moment. Instead of scheming 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. They have not done equity and are not entitled to receive equity. It would be a miscarriage of justice to allow them to continue to string out this old dispute.

¹ Defendants' suggestion that the Court order the dissolution of the company and a liquidation sale of its assets is completely untenable. As discussed below, dissolution of the company would trigger a default under the lease agreement with Duke Power and render the company's assets completely worthless.

Even worse, over three years ago, after the Court issued its 2010 Order, the plaintiff suggested to defendants then that the parties proceed with the valuation hearing ordered by the Court. Defendants refused, 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 proffered no evidence that having more time will make any difference. Indeed, given the history of defendants' actions and the parties' relations, it is highly likely that allowing them additional time to buy out Mr. Ballard under a structured payout will simply end up in further litigation.²

It is time to bring this matter to an end. Once the Court determines the fair value of Mr. Ballard's stock, it should give the defendants no more than 30 days to come up with the money or else surrender their stock in the company.

FAIR VALUE. The defendants make a number of false statements in arguing that the Court should accept Dr. Woodside's lowball valuation of \$873,000. First, their claim that "fair value" is the same as "fair market value," Def. Mem. at 2, is a complete mis-statement of the law. The cases are clear that fair value is not the same as fair market value. This is the fundamental flaw that led Dr. Woodside to his erroneous 22% discount rate, as that conclusion was based on his determination of what rate of return would be required by a willing buyer from a willing seller in an open market transaction. However, as the court explained in *Chiles v. Robertson*,

"This is not a sale by a willing seller to a willing buyer, and defendants should not benefit from reductions in value that are based on such a sale. We require

² In fact, in addition to the instant action, the defendants have been sued over the past several years by numerous business partners and clients for fraud, breach of contract, and breach of fiduciary duty. See, e.g., *Odom et al. v. Thoennes et al.*, 2009-CP-23-9828 (S.C. Cir. Ct. Greenville Cty.); *Stoneledge at Lake Keowee Owners Association, Inc., et al. v. Thoennes, et al.*, 2009-CP-37-0652 (S.C. Cir. Ct. Oconee Cty.).

defendants to purchase plaintiffs' interests because of their breach of fiduciary duty to plaintiffs. The purchase is a judicial remedy to compensate plaintiffs for the damage resulting from defendants' wrongs, not a market transaction."

767 P.2d 903, 926 (Ore. App. 1989); *accord* *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 613 (R.I. 1991).

Defendants also attempt to mislead the Court in arguing against Dr. Woodside's alternative calculation of what the company would be worth if the defendants had begun construction in 2010, when the last of the necessary permits were obtained. In performing this calculation, Dr. Woodside did *not* value the company *as of 2010*, as defendants assert; he still valued the company as of the end of 2012, but under the alternative assumption that construction had begun in 2010. In other words, he addressed the question of what the company would be worth at the end of 2012 if the defendants had met their contractual obligations and begun construction in 2010 after obtaining all of the permits. Defendants assert that "[t]his is an absolute fiction," Def. Mem. at 3, but so is Dr. Woodside's entire analysis. It is all predicated on the fiction that defendant Roberson would put up \$9,000,000 of his own money as equity in the company in order to obtain the necessary construction loan, when Roberson has made it crystal clear that this is never going to happen. Dr. Woodside's entire calculation is based upon this fiction, as well as future financial projections given to him by the defendants *ex parte*, the accuracy of which Dr. Woodside explicitly stated he could express no opinion upon (and in fact repeatedly disclaimed any opinion of such in his written report). To be admissible under South Carolina law, expert opinion "must be certain to a reasonable degree of probability in the field,"³ and since Dr. Woodside did not and cannot state that his valuation number is accurate "to a

³ South Carolina Evidence sec. 8.7, at 235-236 (citing *Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)); *see also* 32 S.C. Juris. *Witnesses* sec. 79 (the "test for the admissibility of expert testimony ... requires the expert to state that the result most probably came from the cause alleged.").

reasonable degree of certainty” or even “most probably” correct, it does not meet the evidentiary standard for admissibility.⁴

This does not mean, as defendants contend, that there is no other evidence of value. There is evidence in the form of defendants’ own admissions as well as plaintiff’s testimony of his opinion of the value of his shares. As to the former, the 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 (Bates No. 000044). If the company’s value is determined according to its current condition, Mr. Ballard should be entitled to 50% of that number, because defendants are precluded by South Carolina law from receiving any economic benefit from the shares held in escrow.⁵ Therefore, by defendants’ own admission to third parties, plaintiff’s stock is worth at least \$3,000,000.⁶ 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). As Dr. Alford demonstrated, the accurate present value of a future value of this magnitude is in the range of \$9.3 million to \$12 million, equating to a value of \$1.85 million to \$6 million

⁴ Plaintiff agrees that, if Dr. Woodside’s opinion is excluded on grounds of inadmissibility, then it is unnecessary to consider Dr. Alford’s application of a more accurate and equitable discount rate to the future projected value calculated by Dr. Woodside.

⁵ For the same reason, defendants are not entitled to be paid for their shares of stock held in escrow. This point of law is discussed at length in plaintiff’s pre-trial memorandum and will not be rehashed here.

⁶ Similarly, the Vinings Marine offer was \$4.5 million for 70% of the company’s equity in the company’s current condition. Pl. Ex. 5. This price for 70% ownership is equivalent to \$6.4 million for 100%. If plaintiff’s ownership interest is treated as 50%, as it should be under the South Carolina Code, then its value according to the Vinings Marine offer is half of \$6.4 million – i.e., \$3.2 million.

for Mr. Ballard's shares, depending on the period of time over which the future value is discounted and the percentage ownership ascribed to the Ballard shares.⁷

In addition to this proof, the plaintiff testified that in his opinion his shares were worth \$5 to \$7 million. Defendants' argument that this opinion is inadmissible is wrong as a matter of law. South Carolina courts have consistently held that property owners are qualified to give opinion testimony about the value of their property when such value is at issue in a trial. See *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert") (internal citations omitted); see also *Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 149-50, 735 S.E.2d 659, 662 (Ct. App. 2012) ("property owners can generally testify as to the value of and damage to their own property"); *Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007) ("in South Carolina, a property owner is competent to offer testimony as to the value of his property").

In addition to South Carolina's general property owner rule, the current trend among U.S. courts that have applied the rule in a context analogous to the instant action is to hold that

⁷ Dr. Alford also explained that the Dakota Holdings terms could be the result of its valuation of Warpath as being worth approximately twice the amount calculated by Dr. Woodside based on defendants' projections. Either way, the result is the same. As to defendants' substantive attack on Dr. Alford's testimony, plaintiff respectfully submits that Dr. Alford's response to the post-trial letter to the Court from Dr. Woodside adequately explains the fallacies in defendants' argument. As to defendants' contention that Dr. Alford's testimony should be excluded because he was identified too late, plaintiff's counsel and Dr. Alford both explained that he was identified to the defense as soon as it was determined that he had testimony potentially helpful to the Court. That occurred three weeks before the hearing; the defense was notified immediately and given Dr. Alford's spreadsheets; and Dr. Alford could easily have been made available for a deposition prior to the hearing. Moreover, at the hearing, the defense rejected the Court's suggestion of a continuance.

business owners may testify to the value of their business.⁸ One case in particular, *Shane v. Shane*, 891 F. 2d 976 (1st Cir. 1989), is especially instructive to the case at bar. *Shane* involved a plaintiff, Michael, who was frozen out of the management of the company he started and did not know about his company's pending debt restructuring. The debt restructuring led to an increase in the value of the company, but the defendants induced Michael to sell his stock before the debt restructuring took place. Michael successfully brought a shareholder oppression and fraud suit against the defendants, the co-owners of the company, and recovered \$1,259,000 in damages. The damages reflected the shares Michael sold times the difference between the value of the firm before and after restructuring. *Id.* at 978-80.

The defendants challenged, among other things, the district court's decision to allow Michael to give opinion testimony about the value of the company. *Id.* at 980. The Court of Appeals began its analysis of the defendants' challenge by stating two rules. First, "the owner of a company is competent to testify as to its value based on substantial personal familiarity with the property". Second, in testifying "as to the value of his property, an owner is entitled to the privileges of an expert." *Id.* at 981-82.

The Court then used these two rules to hold that Michael, as the owner of a business, was entitled to testify as to his opinion of the value of the business. *Id.* at 981. In doing so the Court noted that the rules were applicable to Michael because he "was the founder, chief manager, a director, and [shareholder]" for six plus years. *Id.* at 982. The Court also found that the

⁸ See, e.g., *Police & Fire Ret. Sys. of City of Detroit v. Watkins*, 08-CV-12582, 2011 WL 5307594 (E.D. Mich. Nov. 3, 2011); *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 853 (Tex. 2011); *Pitzel v. Software Dev. & Inv. of Nevada*, 124 Nev. 1500, 238 P.3d 846 (2008); *S. Cellular Telecom, Inc. v. Banks*, 208 Ga. App. 286, 288, 431 S.E.2d 115, 119 (1993); *In re Marriage of Sumner*, 777 S.W. 2d 767, 274 (Mo. Ct. App. 1989).

defendants' challenge to Michael's valuation "only raise[d] questions concerning the accuracy and credibility of [Michael's] testimony" but did not negate its ultimate admissibility. *Id.*

Thus, both South Carolina doctrine as well as cases from other jurisdictions support the proposition that Andy Ballard may testify to his opinion of the value of the stock shares at issue in this proceeding.⁹ Consequently, if the Court excludes Dr. Woodside's testimony for failure to meet the test for the admissibility of expert opinion, there is substantial evidence in the form of plaintiff's testimony as well as defendants' own admissions to third parties supporting a valuation in the range of \$3 million to \$7 million.

DISSOLUTION AND LIQUIDATION. In a last-ditch effort to accomplish what the Court's intervention prevented the defendants from doing in 2008 – destroying the value of Mr. Ballard's ownership in Warpath – defendants ask the Court to dissolve the company and order a liquidation sale of its assets. The terrible fact that defendants conceal from the Court in making this suggestion, however, is that such a course would completely eviscerate the economic worth of the company's assets. Those assets consist entirely of the Duke Power lease and the permits to construct the project. These assets cannot be sold in a liquidation sale; they are not freely assignable. Indeed, the order of dissolution and sale would cause the company to default under its lease with Duke Power, *see* Pl. Ex. 3 sec. 29,⁹ and as a result the company's assets would become worthless. This is not equity that defendants seek, but mutual self-destruction.

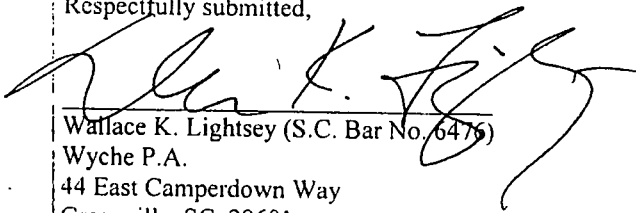
Defendants' plea of poverty should also be rejected because of their failure to raise this issue before the hearing. Not only did the defendants fail to apprise plaintiff or the Court that they would be unable to pay even what they agree is a fair value for the plaintiff's shares, but

⁹ Theoretically, Duke Power could waive the default and consent to an assignment. However, the defendants presented no evidence that Duke Power would do either, and it is highly unlikely that Duke Power would consent to assign the lease to whoever happens to be the highest bidder at a liquidation sale.

over the past 9 months they repeatedly assured plaintiff's counsel that they would be able to pay Mr. Ballard when the time came. As a result of these assurances, both the plaintiff and the Court have wasted months of time and numerous hours of preparation and court time pursuing the determination of a valuation number that – defendants now tell us – is meaningless.

For the reasons stated above, as well as in plaintiff's pre-trial memorandum and in the evidence and arguments presented at the hearing, the Court should set a valuation of plaintiff's shares in the range of \$3 million to \$7 million, give the defendants no more than 30 days to pay the amount ordered, and require defendants to surrender their shares of stock if they are unable or unwilling to comply with the Court's decision.

Respectfully submitted,



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August 23, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Andrew P. (Andy) Ballard,)
Plaintiff,)
v.)
Tim Roberson, Rick Thoennes, Rick)
Thoennes III, and Warpath Development,)
Inc.,)
C.A. No. 2008-CP-23-5739)
DEFENDANTS' MOTION FOR)
RECONSIDERATION, TO ALTER)
OR AMEND, AND/OR)
FOR A NEW TRIAL/HEARING)

Defendants hereby move for reconsideration of the Court's Judgment/Order and/or new trial/hearing of the above captioned matter pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure.

The Court's Judgment/Order was signed by Judge Miller on October 2, 2013 and stamped entered by the clerk's office on October 3, 2013. A copy of the Judgment/Order was subsequently received by counsel for Defendants on October 4, 2013. Defendants hereby formally set forth their objections and concerns to the Court's judgment/order.

Specifically, Defendants move on the following grounds:

1. As a matter of law, the court erred in fixing the overall company value of Warpath Development at \$7,178,594.
2. In the alternative, the court's setting of the overall company value of Warpath Development at \$7,178,594 is inequitable and an abuse of discretion.
3. As a matter of law and equity, the court erred, rendered an inequitable result and abused its discretion by finding an overall company value of \$7,178,594 that is built on a fiction that site development and construction began in 2010. This fiction is not based on any actual contractual promise or requirement, management's business judgment to not begin construction in 2010 or the reasons construction did not begin in 2010 was not properly

before the court, and, assuming the issue was properly before the court, there was no evidence presented to cause the court to properly set aside or look beyond management's business judgment. Including the fiction that construction should have begun in 2010 without any basis in fact, equity or law in order to increase the overall company value in 2012 is error and an arbitrary, inequitable and unjustified finding by the court.

4. As a matter of law, the court erred in fixing the value of Andy Ballard's 20,000 shares in the company at \$3,589,297 or 50% of the company value.
5. In the alternative, the court's fixing of the value of Andy Ballard's shares at \$3,589,297 or 50% of the company value is inequitable and an abuse of discretion.
6. The court erred as a matter of law in forfeiting the 60,000 shares of Roberson, Thoennes and Thoennes III in its finding of value.
7. In the alternative, the court's forfeiture of the 60,000 shares of Roberson, Thoennes and Thoennes, III is inequitable and an abuse of discretion.
8. As a matter of law, the court erred in considering any and all arguments that the 60,000 shares of Roberson, Thoennes and Thoennes, III should be forfeited or not considered in the valuation because, by Plaintiff's own admission in brief, the issue is moot.
9. As a matter of law or equity, the court erred in considering Plaintiff's assertion that the court should not consider or forfeit the 60,000 shares of Roberson, Thoennes and Thoennes, III in reaching the valuation of his 20,000 because by Plaintiff's own arguments and repeated admissions of counsel before this court, Plaintiff is judicially estopped from making such assertions. In considering Plaintiff's assertion, the court has erred as a matter of law, rendered an inequitable result and has abused its discretion.
10. The court's order is inequitable and/or an abuse of discretion in that in fixing the overall value the court assumed that the Defendants had met all conditions precedent to receiving the full value of the escrowed shares, but, in fixing the value of Plaintiff's 20,000 shares the court forfeited the escrowed shares. It is inequitable for the Plaintiff to on one hand receive the value of the services to be rendered in fixing the overall company value, but in the same expression ignore that those values had been received in fixing the value of his individual shares.
11. As a matter of law, the court erred in displacing the business judgment of Warpath's management without proper notice, evidence or sufficient legal basis.
12. As a matter of law, Defendants' due process rights were violated by the court improperly and without sufficient notice displacing the business judgment of Warpath's management.

13. As a matter of law, Defendants' constitutional rights to a jury trial were violated as they are entitled to a jury trial on the issue of whether or not Warpath's management's business judgment is subject to being displaced.
14. In the alternative, as a matter of law, even if Warpath's management's business judgment was properly before the court, the court erred because Plaintiff failed to meet its burden by failing to present any evidence that management's decisions were in violation of any contractual obligation or that management's business judgment accorded under South Carolina law should be set aside or looked beyond in the consideration of value.
15. As a matter of law and equity, South Carolina law provides that the valuation of Plaintiff's shares should be fixed as is, where is. The Court's valuation fails to meet that standard. As such, the court's valuation is in error as a matter of law, inequitable and an abuse of discretion.
16. As a matter of law and equity, the court's order of a buyout within 90 days is an error of law as based on the evidence the remedy fails of its essential purpose and is inequitable and an abuse of discretion.
17. Based on the evidence before the court, the court's order of buyout within 90 days is inequitable and an abuse of discretion.
18. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result, and abused its discretion in arbitrarily fixing the buyout to occur within 90 days of the order.
19. The court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to cause the further examination of Defendants financial ability prior to structuring the arbitrary buyout within 90 days.
20. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in ordering a buyout remedy that the court had full knowledge would fail.
21. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in ordering a buyout remedy that the court had full knowledge would result in a forfeiture.
22. Based on the evidence before the court, the court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to fix a remedy in the alternative to the ordered buyout within in 90 days of the court's order.
23. If as the court's order states, despite all of the evidence before the court indicating that a 90 day buy out cannot be achieved, the court does not wish to order an extended buyout,

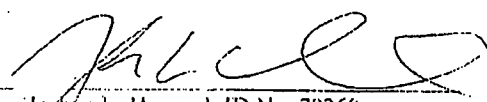
the court erred as a matter of law, rendered an inequitable result and abused its discretion in failing to default to the statutory remedy of dissolution.

24. As a matter of law or equity, the court's order unfairly misrepresents, misstates and/or mischaracterizes the testimony and evidence presented.

In support of this motion, Defendants rely upon the record at trial, a memorandum of law and exhibits to follow, and such oral argument as the Court may permit.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: 
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(864) 240-3200
Attorneys for Defendants

October 11, 2013
Greenville, South Carolina

There were no witnesses.

There were no exhibits.

Certificate of Reporter

1 THE COURT: All right, how y'all doing?

2 MR. LIGHTSEY: Good afternoon, Your Honor. You ready
3 to proceed?

4 THE COURT: Yes, sir, ready to go.

5 MR. LIGHTSEY: May it please the Court, this is the
6 matter of Andy Ballard versus Tim Roberson, et al. Your
7 Honor, I know that the Court is familiar with the
8 background of the case from trying this in 2010 and also
9 with the issues before you. We did submit a pre-hearing
10 memorandum on Friday. I hope you've had a chance to look
11 at that. Because of your familiarity with the case, I
12 will try to cut to the chase. I would like for the record
13 to incorporate the entire 2010 trial record in this
14 proceeding. The testimony and exhibits. And I will try
15 to avoid rehashing all that here...

16 Just by way of brief background, to set the context
17 for the issue today, my client, Andrew Ballard, is the
18 individual who conceived the idea of the venture that's at
19 issue here. The idea of placing a marina and related
20 facilities including a hotel, a restaurant, cabins on Lake
21 Keowee. He spent years of his life getting the pieces of
22 that together so that it could become a reality. He
23 negotiated a -- an agreement with Duke Power which is
24 basically a perpetual lease for this property. As you
25 probably are aware there's only one other marina on Lake

1 Keowee. It's not in very good shape, it's got a long
2 waiting list for slips. So, this is truly a unique
3 property and a unique and very, very valuable opportunity
4 here. After Mr. Ballard got the pieces together he
5 invited other investors to come in and that's how we
6 became involved with the Defendants.

7 They signed a stock purchase agreement in May of
8 2007. And only five months after they became majority
9 owners of the corporation they began plotting to run
10 Mr. Ballard out of the company. The agreement was signed
11 May 29th, 2007. In October 2007 there was an email
12 exchange where the Defendants were talking about running
13 Andy out of the deal. And what they were saying they
14 thought he would quote, Take his money and run after a
15 little threatening, posturing and whining. Those are
16 their words. As you may recall from the 2010 trial, the
17 Defendants tried initially to deny that this was their
18 intent. But on cross-examination everyone of them
19 admitted that they wanted to force Andy out of the deal.
20 And Mr. Thoennes admitted that this was something that
21 they all decided together.

22 I submit that they are still trying to accomplish
23 this, to run him out. They still think that all of this
24 is just threatening, posturing and whining. All that
25 you've done, all that the State Supreme Court has done.

1 And even though you ruled against them on liability, even
2 though your decision was affirmed by the South Carolina
3 Supreme Court, the Defendants are still trying to do in
4 Mr. Ballard. And they're trying to do that now by
5 attempting to persuade you to set the value of his stock
6 at an amount far, far below what it is really worth.

7 The issue in our proceeding today is the value of
8 20,000 shares Mr. Ballard continues to hold in the company
9 Warpath Development. In 2007 when the Defendants first
10 came in Mr. Ballard had 40,000 shares. He sold half of
11 that 20,000 shares to Mr. Roberson directly for
12 one million dollars. But that was part of a package deal.
13 The total consideration for Mr. Ballard was actually far
14 more than the million dollars that he got for those 20,000
15 shares. Because it was all based on the predicate that he
16 would keep 20,000 shares in the company and the value of
17 those shares would increase significantly when the
18 Defendants did what they had agreed to do in their
19 agreement. In essence what the Defendants contractually
20 committed themselves to do was to obtain long term
21 financing. And Mr. Roberson was to put in the funds
22 necessary to obtain long term financing for this project.
23 And the Thoennes, father/son, agreed to essentially
24 develop and market the project.

25 So, I would submit there is no question, no

1 reasonable dispute that the stock that Mr. Ballard
2 retained is worth significantly more than the one million
3 dollars that he got for the 20,000 shares in 2007.
4 Furthermore, importantly in 2007 all of the permits had
5 not been obtained for this project to proceed. In fact,
6 the stock purchase agreement specifically provided that
7 Mr. Ballard would have to refund the money that he had
8 gotten if all the permits did not come in. Well, now the
9 project is fully permitted. The final permit came in June
10 of 2010, just a couple of months after the trial in this
11 case. So, the project is now fully permitted. And that
12 in itself increases the value of Mr. Ballard's ownership
13 and interest in it.

14 So, I would submit, Your Honor, it's in disputable or
15 beyond any reasonable dispute that the 20,000 shares that
16 were issued are worth well more than the one million
17 dollars today. Nonetheless, the pattern of conduct that
18 you held constituted oppression of Mr. Ballard by the
19 majority has continued. There has not been any
20 shareholder meetings in 2011. There has not been any
21 Board of Directors meetings since 2009. As you may
22 recall, just a couple of days after an amended complaint
23 was filed by Mr. Ballard alleging shareholder oppression,
24 the Defendants called a shareholder meeting and reelected
25 him to the Board of Directors. Although they denied it,

1 you specifically found that was simply a litigation ploy.

2 And the facts bear that out.

3 Since then Ballard, you know, by title remains on the
4 Board of Directors and there hasn't been a single meeting.
5 He has not been provided with any information as a
6 director, he has not been asked to participate in any
7 decision making by the Board of Directors. It's just a
8 farce. The whole thing. And the Defendants have not done
9 what they contractually committed to do for the 60,000
10 shares that they got from the company. Which remain held
11 in escrow. Mr. Roberson has not put in the funds
12 necessary to obtain long term financing and the Thoennes'
13 have not provided the development services that they
14 agreed to do in exchange for those shares. The site at
15 Warpath looks the same now as it did in 2007.

16 There's an irony to that because as you may recall,
17 one of the main arguments that the Defendant's made in
18 2010 why they were upset with Mr. Ballard was that it had
19 taken too long to get the permits. It took longer than
20 they thought it was going to be. They started trying to
21 run him out after five months. In their mind, five months
22 was too long to wait. We're now three years later after
23 the trial, three years after this project was fully
24 permitted and they have done nothing to move forward.
25 Have not moved forward.

1 This is important for the evaluation issue.
2 Dr. Woodside had done a report and I believe he mailed it
3 to the Court. His initial report was dated April 30th of
4 this year. And it was supplemented by a letter, which I
5 believe he also sent to the Court, dated May 9th of this
6 year. In his initial report he calculated the present
7 value of the company as being 4.4 million dollars. In his
8 letter of May 9th he revised that and said it would be
9 worth 7.2 million dollars if you assume that the
10 development had begun in 2010 when the final permit was
11 obtained. It's our position, Your Honor, that
12 Dr. Woodside's analysis is fundamentally flawed and
13 inadmissible under South Carolina evidentiary standards
14 for expert opinions. But, even if you use his numbers and
15 his calculations, we submit a minimum ownership percentage
16 for Mr. Ballard should be 50 percent, not 20 percent. And
17 50 percent of 7.2 million is 3.6 million.

18 We submit that Andy is entitled as a matter of law to
19 be treated as a 50 percent owner because the Defendants
20 have not provided in full the consideration they agreed to
21 provide in exchange for the stock that is still in escrow.
22 The whole point of the South Carolina statute on this,
23 which is Section 33-6-210 of the corporate code, the whole
24 point of it is to prevent delusion of a shareholders
25 ownership interest and stock is issued in exchanged for

1 future consideration. And the statute is different from
2 the Model Act and it says, Shares in this situation must
3 be held in escrow. The Model Act said May, South Carolina
4 substituted the word Must. And it also says, Any
5 dividends that are issued among the escrow shares must
6 also be held in escrow. And all that has to be held by
7 the company until the consideration for the stock has been
8 provided in full. That has not been the case here.

9 The statute is clear that the intent is that no
10 economic benefit should accrue, the stock is to be paid
11 for with future consideration until that consideration has
12 been provided. And that has not been the case here. And
13 ownership therefore, should not be diluted by these shares
14 held in escrow and the Defendants should not benefit
15 economically for shares that in essence that they have not
16 paid what they agreed to pay for those shares.

17 So, we believe Andy is entitled to at least 50
18 percent of the value Dr. Woodside calculated the company
19 would have if the development had begun in 2010 when the
20 final necessary permit was obtained. Since he calculates
21 that value is about 7.2 million, Andy's 50 percent would
22 be 3.6 million. That is what we believe should be the
23 minimum amount the Court should consider here.

24 We will submit evidence that a more accurate value is
25 five to seven million dollars. I realize that is a lot of

1 money. We don't downplay that aspect of it. But I would
2 submit the evidence consistently supports a value in this
3 range. We will present testimony from Mr. Ballard as to
4 the value of his shares. Significantly, the Defendants
5 own documents, their own representations that they made to
6 third parties that they have been trying to get funding
7 from support this evaluation. And even Dr. Woodside's
8 numbers, which we submit are fundamentally flawed, when
9 properly analyzed, they produce a number in this range.

10 In summary, Your Honor, there are three fundamental
11 flaws in Dr. Woodside's analysis. One, he relies entirely
12 on projections, future revenues and expenses. These
13 projections are total speculation. They are complete
14 conjecture. He does not include in his report or in his
15 letter any statement. His conclusions are most probably
16 correct to a reasonable degree of certainty. That is the
17 standard for the admissibility of expert opinion. That's
18 not in his report. And therefore, we submit the report is
19 not admissible.

20 The report itself recognizes this flaw and I'll read
21 just briefly from it. At Page 21 of his report, top of
22 the page at the first column he says, The discounted
23 future benefits method, which is the method he used to
24 appraise the company, The discounted future benefits
25 method is appropriate to use when the future operations

1 can be forecasted with some accuracy. And in this case it
2 is simply not the case that the future revenue and
3 expenses can be forecasted with any accuracy.

4 And, in fact, Dr. Woodside in the limitations section
5 of his report, this is reading from Page 37, he says,
6 Information supplied by management, which is the source of
7 his projections and sole source of his projections,
8 Information supplied by management has been accepted as
9 correct without further verification and we express no
10 opinion regarding the accuracy or completeness of such
11 information. He also says, Financial statements and other
12 related information provided by Warpath Development, have
13 been accepted without any verification. Accordingly, we
14 express no form of insurance on this information. So,
15 after saying that the methodology he was using is
16 appropriate only when projections can be considered
17 reliable and reasonably accurate, he goes on to say, We
18 have no opinion on this, we just assume this.

19 The problem with that is where this information came
20 from. All of the data that Dr. Woodside based his
21 projections on was given to him by the Defendants. And it
22 was given to him ex parte. We did not get it at the time
23 it was given to him. These are the same Defendants who
24 have repeatedly denied having done anything wrong in the
25 2000 trial -- 2010 trial. The same Defendants who have

1 repeatedly contradicted on the stand their own deposition
2 testimony as well as statements that they had made in
3 emails and documents. The same Defendants this Court had
4 to have found were not credible witnesses in order to
5 reach the finding of facts that you reached in your 2010
6 Order. These are people who provided the information that
7 Dr. Woodside relied on. And clearly they have every
8 incentive in this evaluation proceeding to lead him to a
9 number as low as possible.

10 In my opinion, Your Honor, this is tantamount to an
11 economist who's been asked to find out how much money an
12 embezzler has taken from a company. And what he does is
13 he just goes to the embezzler and says, How much money did
14 you take? And the guy says, I took x amount of dollars.
15 And he says, Okay, my conclusion is x dollars. It was
16 total reliance on sources that are not credible.
17 Information that is inherently suspect. And should not
18 have formed the basis of any appraisal. We submit it
19 makes no sense at all. And the entire basis of
20 Dr. Woodside's evaluation is flawed, unreliable and
21 inadmissible.

22 And then finally, Your Honor, even accepting his
23 methodology and numbers, we submit he made an error of law
24 in discounting his projected future value with a 22
25 percent discount rate. What that 22 percent discount rate

1 does is he actually computed the value of the company to
2 be 30 million dollars once it had been developed and
3 stabilized. But then he discounted that by 22 percent
4 which is a huge discount rate in today's economy. And
5 that's what brought us back to the 7.2 million dollar
6 figure.

7 I submitted a fairly detailed argument in our
8 memorandums, I won't go over it unless you want me to but
9 we believe the correct discount rate for discounting
10 should have been 11 percent. And it should have only been
11 discounted over a few years. This produces a present
12 value in the range of 12 to 13 million dollars. And the
13 cases recognize that an appraisal of this nature in this
14 kind of proceeding is not an exact science. And the Court
15 has substantial leeway to do what is fair and equitable.
16 But even using Dr. Woodside's unprojected future value,
17 using an appropriate discount rate of 11 percent, you get
18 a total value of 12 to 13 million dollars. Which is
19 completely consistent with Andy's evaluation in the five
20 to 7 million dollar range.

21 That's what we believe the shares are worth. And
22 that's what we ask the Court to order the Defendants to
23 pay for Mr. Ballard's stock. And because this case has
24 been going on so long, it was filed in 2008, we're now
25 five years down the road, three years from the liability

1 trial, we ask the Court to give the Defendants a short
2 deadline to pay whatever price you decide is a fair
3 appraisal. Give them a short deadline to do it. I would
4 suggest ten days, 30 days at the most. And provide in
5 your order that if they do not pay by that time, then --
6 and the -- should be forfeited for calculation by the
7 company. Thank you, Your Honor.

8 THE COURT: All right.

9 MR. HOWARD: Your Honor, I'm sort of at a lost
10 because I thought Mr. Lightsey would have informed you
11 that while they have -- while he's made a lot of
12 allegations against Dr. Woodside, Dr. Woodside apparently
13 was not notified of this hearing even though he's Court
14 appointed expert in this case. He's done a lot of work.
15 We paid for a lot work for him to be here. But apparently
16 he's not.

17 THE COURT: Well, we don't have to be -- we can
18 reconvene. If that...

19 MR. HOWARD: Certainly. And I'm not -- what we were
20 coming here today, Your Honor, to do is accept
21 Dr. Woodside's report. Dr. Woodside's report was
22 admittedly is as much as a surprise to us as it was to
23 them. It was used -- our performing numbers that we put
24 together. Now, you need to understand where those
25 performing numbers come from. They come from Mr. Thoennes

1 and his research. And they've been something that has
2 been up there and continuing throughout as financing as
3 consulted. The numbers that were generated for purposes
4 of this report were generated in December of 2012 for
5 purposes of seeking financing from a company named Dakota
6 Holdings, Inc. Dakota Holdings is still currently in
7 talks to buy out Mr. Ballard, to take a controlling
8 interest in Warpath and supply the funding on loan to the
9 to company to build the development itself.

10 Everything that has held up all the funding, and
11 that's really what's held it up at this point. Is that
12 2007 we were in a very different country at this point.
13 From an economic position. It has been a challenge.
14 Mr. Roberson can talk about the challenge if need be.

15 THE COURT: Well let me ask, where's the
16 disagreement? Where do you place the value on the
17 company?

18 MR. HOWARD: We're willing to accept the 873 that
19 Dr. Woodside has put on this company as of December 31,
20 2012. The problem I have with the July -- and this is
21 where we're not having the benefit of his testimony. The
22 seven million dollars, let me explain where that came
23 from. The seven million dollars is taking the evaluation
24 of December 31, 2012, because what Dr. Woodside did, and
25 let me explain what he did. He assumed, and so this is

1 for -- and let me cover that 50 percent argument, too. He
2 assumed the development had been funded, it was
3 operational and built. And then operated for eight years.
4 And then he went out to eight years, and he can explain
5 why he went out to eight years, that's better left for an
6 expert to explain why he chose that.

7 But he went out eight years and he valued it at that
8 point at nearly 21 million dollars. And I don't have the
9 figure right here in front of me. So, at eight years he
10 says it's worth -- it's going to be worth -- because what
11 he did is he found the total value, he had to backlog what
12 had been owed on the note still. And then -- and that's
13 the one thing that I don't know that they want to accept
14 is that it's going to take financing to build it. And so,
15 whatever it costs to finance it, it has to be backed off
16 the value. So somebody's going to have to pay that. And
17 then he assumed the sell eight years from now. And on
18 that sell obviously you would have gotten a number that he
19 said was a reasonable number. There was about 10 million
20 owed on it. So, that's where he got the nearly
21 21 million.

22 Then, you got to take the 21 million, since it's a
23 eight year future dollar. Now, we all know, we're use to
24 this, but reduce it to present value today. Well, this
25 isn't the same as having a -- as a personal injury case

1 where you're see T-bill used and stuff such as that.
2 Dr. Woodside was able to go in and he said, There's an
3 overall risk to this investment. And the risk is -- he
4 assigned a seven percent number to that. Now, frankly, we
5 would assert that that risk is probably a little higher
6 than that. That's basically assuming, in my view, the way
7 he wrote it out, 93 percent chance that this thing could
8 succeed. Exactly as the performance indicated it would.
9 Which the performance indicated a 3.2, nearly a 3.1 net
10 operating income.

11 So, he went out there and he grabbed that seven
12 percent. Then he went to literature and he came up with a
13 number that I think benefits them. Which is that it's
14 a -- he said in the literature apparently that he used
15 said that the average rate of return that an investor who
16 has bought stock in a small cap public company, would
17 expect is around a 15 percent return. And this is
18 supposedly in his books. And what he did is he took that
19 and he said an investor would normally say I want
20 15 percent plus the risk I assign to it being seven
21 percent. And he combined that together and that's where
22 he got his 22 percent.

23 So, what that theory is is that if you take that 873
24 here and it gets a 22 percent return for the next eight
25 years, as an investor would expect it from an investment

1 like this, that that number would equal the pro rata 20
2 percent ownership share of that of Warpath eight years
3 from now as it sold. And so, that's where he came up with
4 the numbers from. From what I can tell. Now, obviously
5 we don't have the benefit of his testimony here today but
6 that's my reading of it, whatever.

7 A couple of things that we would have said when I say
8 that we agree to it, the purpose of our agreeing to it,
9 Your Honor, is that we came here today ready to ask you to
10 go ahead and enter an Order directing us to pay \$873,000
11 of these shares. Asking you to give us some time because
12 we've never -- we've always labored and we've labored
13 consistently over the last few years with the specter of
14 this litigation pending over this -- over this investment.
15 Now, most of it was carried out in trying to seek the
16 appeal. The appeal came back and unfortunately for us it
17 came back to the negative to us on a three to two decision
18 by the Supreme Court. I assume you've had an opportunity
19 to read that.

20 The three to two decision was about as razor thin as
21 you can get. And it was -- it was a finding, in my
22 estimation and the way I read it, of not an egregious --
23 what they found was that Mr. Ballard was going -- in the
24 future was likely to lose his -- to not gain the
25 investment, I guess, the benefits of his investment,

1 likely not reap those rewards. And so, not currently but
2 sometime in the future they said this would likely happen.
3 And so, it came back down on that. It came back down
4 three/two. And once it went back up it was decided on
5 reconsideration on the same three/two that's come back to
6 you now. So, that time period was built up in the appeal.

7 In that period of time there has been multiple
8 efforts to try to bring Mr. Ballard into conversations.
9 There was, as he alluded to, there was a shareholder
10 meeting in 2011. There was a notice of shareholder
11 meeting that went out and he accepted it on August 16,
12 2012, last year. It had to be canceled as a result of
13 a -- there was a potential offer from a group that they
14 subpoenaed called, Vinings Marine Group. This gentleman
15 named Peter Anzo. Now, there was a gentleman named Pat
16 Setenger [ph] who was trying to bring this deal together.
17 And we know -- and Mr. Roberson had multiple conversations
18 involving both he, Mr. Ballard, and Mr. Setenger about
19 this deal.

20 It ended up for reasons unknown to us that they
21 subpoenaed documents from them. I don't know -- we
22 don't -- I don't know what happened but for whatever
23 reason Mr. Anzo and his group elected not to move forward
24 with the deal. Presumably and some of the biggest
25 problems we've had is with this pending litigation. This

1 pending litigation has been a problem. And that's the
2 current problem for Dakota Holdings who has been -- they
3 submitted documents, Dakota Holdings said, we got a letter
4 of intent from them which required Mr. Roberson to pay
5 \$20,000 as a commitment funds, which he's done. And
6 they're waiting to see what happens here.

7 It's one of those that if it's five to seven million,
8 it's my estimation that they will walk. I can't imagine.
9 Because the reality is that five to seven million might be
10 what it's worth some day down the road when it's not
11 incumbered by debt. If it's a stable asset at that point.
12 But at this point Dr. Woodside applied what, the numbers
13 we used, to actually try to sell the investment deal.
14 Which I would pose it to the Court that the motivation
15 under those circumstances would be to actually increase
16 the value of those numbers, not to decrease the value of
17 those numbers as we're trying to sell it to investors.

18 But what Mr. Thoennes would testify to -- and
19 actually what he testified to back in the other trial when
20 he was talking about his development performance, is that
21 he makes an effort and does study to try to make sure that
22 he lays out as much as possible what they reasonably
23 predict can happen. And that's where those numbers were
24 developed from. And those were requested by Dr. Woodside
25 and supplied to him.

1 THE COURT: Well, let me ask you this, you say that
2 you accept his evaluation of the company, is that right?

3 MR. HOWARD: 873, yes.

4 THE COURT: 873?

5 MR. HOWARD: Yes.

6 THE COURT: Okay.

7 MR. HOWARD: His evaluation of the company -- his
8 evaluation -- if you look at the report dated April 29,
9 his evaluation of Mr. Ballard's 20,000 shares and
10 20 percent ownership is 873. And that assumes -- for
11 purposes of this it needs to be understood that Mr. --

12 THE COURT: That's based on 4.4 million dollars?

13 MR. HOWARD: Four million dollar value -- present
14 value today. Divided into fifths. Which would be Mr. --

15 THE COURT: Okay.

16 MR. HOWARD: This actually meets Mr. Lightsey's
17 brief. Mr. Lightsey said that if you take it at its
18 current value, which means nothing has happened on the
19 property, that is today. And I won't say nothing, but
20 it's not developed, it's not built at this point. Because
21 plenty has happened to get it to permit and plenty has
22 happened to try to get it funded. But if you take it as
23 it is right now he said, and I don't agree with this but
24 he's saying 50 percent. Or 20 percent. This is from
25 their brief, what the company is worth if the Defendants

1 had fully performed their obligations under the
2 shareholder agreement. And those obligations as he
3 described it were to get it funded, to get it built, to
4 get it operational. And that's what Dr. Woodside assumed
5 in his evaluation.

6 Now, let me take you to the seven million. Here's
7 basically the way he calculated the 7.4 million or
8 whatever.

9 THE COURT: 7.2.

10 MR. HOWARD: 7.2 million. He went back to July of
11 2010 and he took the current 2012 numbers, he went back
12 and just basically moved them. The starting point is here
13 on July 2000 -- December 2012, he just shifted back to
14 July 2010. He didn't make a determination of what the
15 value would have been based on the July 2010 outlook.
16 Both in National outlook or based on interest rates as
17 they existed or what the average investor would have
18 expected in 2010. Or what the rate of risk was on this.
19 He didn't make that determination. He just -- he just
20 said, Just move this number back to here and start here
21 and move forward.

22 The problem with that, Your Honor, is that it -- we
23 already assuming the fiction here that thing is built.
24 And I would say that my review of this looks like you can
25 take management's forecast and what management thinks is

1 going to happen. And when we take that sort of sliver in
2 time that he's entitled to for the fair value, the pro
3 rata share, that sliver of time and you set it right
4 there, he's entitled to whatever pro rata share is based
5 upon what the plans are. And in this case the plans are
6 to build.

7 And so, you know, we weren't here to challenge
8 Dr. Woodside's methodology. The problem is that in
9 addition to that fiction that it actually is built and he,
10 by getting paid today, he actually avoids the risk that it
11 never does get built. But that -- he's taking it back
12 here--

13 THE COURT: He also, by getting paid today, loses the
14 potential reward.

15 MR. HOWARD: But that's -- he asked for it, too, Your
16 Honor.

17 THE COURT: Well, I know, I'm just...

18 MR. HOWARD: But then at the same time, Your Honor,
19 I'll say, potentially. But based only Dr. Woodside's
20 assessment, if he took it, reinvested in it into a small
21 cap company that he could get a similar return on or
22 something like that, presumably you would end up with a
23 reward at the end of eight years. Which is where they
24 would all be. Because what we're talking about here is
25 fair value. And fair value, we're here to access the

1 fairness to not only the corporation, Mr. Ballard,
2 Mr. Roberson, Mr. Thoennes, Mr. Thoennes the third.
3 Because -- and that's what we're here to access.

4 THE COURT: Well, what about fair market value?

5 MR. HOWARD: Well, fair market value, now that's what
6 an average investor would come out and pay at this point.
7 I think the fair market value is typically going to lessen
8 what their value would be. Because -- and we can -- I
9 mean, that's where Dr. Woodside would come into play here.
10 But let me get back to the July issue here first. Because
11 I want to -- because they're basing it completely on this.
12 This assumes the first of fiction that we actually started
13 in July 2010, when they have no evidence to suggest,
14 number they'll say --

15 THE COURT: Let me interrupt you. Can I talk to you
16 lawyers up here for a second?

17 (WHEREUPON, an off-the-record bench conference was
18 held.)

19 THE COURT: Okay, we're going to suspend the
20 remainder of this hearing. I have a term of court in
21 Greenville the last week of June. And the reason that I'm
22 doing this is is that I understand there is apparently a
23 legitimate interested party who I am -- would be hopeful
24 would make a legitimate offer which would give us a fair
25 market value on this property and perhaps could resolve

1 this whole issue.

2 But I'm putting a time limit on it, it's to going
3 have to be done quickly. And I know you all need to talk
4 and everybody's talked and the lawyers have spoken with
5 their parties, with their clients, and something's got to
6 be done. And it needs -- as I told the attorneys up here,
7 this is an unfortunate circumstance which is going to have
8 to be resolved by a separation of all the interested
9 parties in the business opportunity, one way or another,
10 however it's resolved. It's coming to a close, it's going
11 to be ended one way or another. And if we can have a sort
12 of a real world, meat and potatoes offer on the table,
13 then that may benefit everybody. But it's just not going
14 to drag on and on. We're going to get it over with and
15 hopefully by the end of the month. Okay.

16 MR. LIGHTSEY: Your Honor, I appreciate what you
17 said. I do want the record to reflect that we are ready
18 to go forward today. We would like to go forward today,
19 we would like to get a ruling from the Court soon. And
20 if -- I respect your ruling. I would urge you to go ahead
21 and make your ruling and reconvene June 24th if nothing
22 has happened outside of the process by then.

23 THE COURT: We will make a decision. I couldn't tell
24 you I decided that today, but it's coming to a close.
25 It's all got to be taken care of and finished. I'm hoping

1 for a real world solution to it rather than a paper
2 solution from the Court. And I know that both sides are
3 ready to get it over with, okay.

4 MR. LIGHTSEY: Most assuredly, Your Honor.

5 THE COURT: Okay. All right. Well, sorry we can't
6 get it done completely today but hopefully everyone will
7 benefit by the short recess, okay. All right. Thank you.

8 MR. LIGHTSEY: Thank you, Your Honor.

9 (WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

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4 STATE OF SOUTH CAROLINA)

)

5 COUNTY OF GREENVILLE)

6

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8 I, APRIL P. HERRON, Official Court Reporter for

9 the Thirteenth Judicial Circuit of the State of

10 South Carolina, do hereby certify that the foregoing

11 is a true, accurate and complete Transcript of

12 Record of the proceedings had and evidence

13 introduced in the trial of the captioned case,

14 relative to appeal, in the Court of Common Pleas for

15 Pickens County, South Carolina, on the Fourth day of

16 June, 2013..

17 I do further certify that I am neither of kin,

18 counsel nor interest to any party hereto.

19

20

February 9, 2014

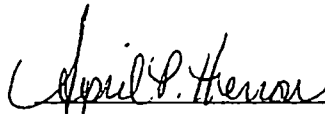
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APRIL P. HERRON, Court Reporter

1 STATE OF SOUTH CAROLINA)
 2) COURT OF COMMON PLEAS
 3 COUNTY OF GREENVILLE) 2008-CP-23-5739
 4)
 5 Andrew Ballard) TRANSCRIPT OF RECORD
 6)
 7 -vs-)
 8 Tim Roberson, Warpath et al)

August 6, 2013
 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE EDWARD W. MILLER, Judge.

12 A P P E A R A N C E S

13 Wallace Lighsey, Esquire
 Attorney for the Plaintiff

14 Joshua L. Howard, Esquire
 Attorney for the Defendant

17 CAROLINE HISKELL
 Thirteenth Circuit Court Reporter

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I N D E X

WITNESSES	DIR	CROSS	REDIR	RECROSS
Andy Ballard	10	29	37	40
Tim Roberson	43	55		
Rick Thoennes	56	62		
Perry Woodside	62			
Charles Alford	102			

E X H I B I T

IDENTIFICATION	ID	IN EVIDENCE
9 Letter	23	23
10 Email	99	99

Ballard vs. Warpath, et al

P R O C E E D I N G S

THE COURT: Andrew Ballard vs. Tim Roberson
and Warpath Development Inc. I'm all ears.

MR. LIGHTSEY: We've got motions.

THE COURT: As Judge Epps used to say,
motions, we don't need any motions. That's just visiting
the past. Okay. Go ahead.

MR. HOWARD: Your Honor, on July 17th we
received a supplemental interrogatory from the plaintiff.
A month and a half after our first hearing name
Dr. Alford as a witness. About a week or so later we got
a few more documents. There's been no report provided.
There's been no indication of what his opinions are going
to be. This was two weeks before this hearing. I would
move at this point to exclude Dr. Alford as he is too late
to the party, too late to the game based on unfair
prejudice, Rule 37 and failure to supply his name in an
adequate enough time to allow us to prepare for this
hearing today.

The second one, Your Honor, the plaintiff
also named witnesses identified as Chad Odom ---

MR. LIGHTSEY: On the second motion, Your
Honor, I decided not to call those witnesses. We
disclosed them in an abundance of caution and we don't
intend to call them.

Ballard vs. Warpath, et al

1 THE COURT: So you just got the one.

2 MR. HOWARD: We need to discuss Dr. Alford's
3 testimony, Your Honor.

4 THE COURT: Okay.

5 MR. LIGHTSEY: We've had a few starts and
6 stops in this case. I engaged Dr. Alford after we got
7 Dr. Woodside's report at the end of April. At that point,
8 we thought we were going to trial on June 4th. I engaged
9 him as a consulting expert and he was not planning on
10 being a testifying expert. I just asked him to help me to
11 understand Dr. Woodside's report after we appeared before
12 you in Pickens on the 4th. The case was continued and we
13 thought we were coming up in two weeks and that didn't
14 happened. That was when today's date was set up.

15 During that time period, I worked with
16 Dr. Alford. He found some things we thought were very
17 interesting that we thought would find very helpful in
18 this case. We did disclose Dr. Alford to the defendants
19 as soon as we decided he would be testifying as an expert.
20 He didn't do a formal report. He did do a number of
21 spread sheets. I did give those immediately to defense
22 counsel.

23 It was about three weeks ago, there would
24 have been time to work in a deposition. We would have had
25 to scurry but we could have accommodated that. More

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1 importantly, Your Honor, if you would allow Dr. Alford to
2 testify and take his testimony subject to the objection
3 what you'll hear is really not opinion testimony. It's
4 more explaining some mathematical computations that he's
5 done that's not. It's not an attack on Dr. Woodside's
6 methodology. He uses the same methodology but puts some
7 inputs into it and found some numbers that I don't think
8 Dr. Woodside would quibble with it. It's just different
9 inputs into the same type of calculation that Dr. Woodside
10 did.

11 I do think it would be helpful to hear this
12 testimony. I don't think it would be unfairly prejudicial
13 to the defendants and we did give notice as soon as we
14 decided that Mr. Alford had to testify about that we felt
15 would be helpful and if you could hear his testimony
16 subject to the objection, I think you'll find it helpful
17 and it is not the type of testimony that would be unfairly
18 prejudicial to the defendants.

19 THE COURT: Okay.

20 MR. HOWARD: Obviously we're not aware of
21 this testimony. This was he basically gave two weeks
22 before this year and my schedule was completely tied up
23 during those two weeks and I do not think it is reasonable
24 to set aside my schedule for a two week period in order to
25 try and accommodate their late notice of an expert. At

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1 this point I will continue to motion that he be excluded.

2 Also, I did inquire of Dr. Woodside if he was
3 aware, and since he was the Court's expert and appraiser
4 in this case, if he was aware of the presence of
5 Dr. Alford and he was not. None of these documents were
6 provided to Dr. Woodside for review prior to today and so
7 under those circumstances I would also seek to exclude his
8 testimony.

9 THE COURT: You want me to continue this?

10 MR. HOWARD: I do not. I want you to exclude
11 his testimony.

12 THE COURT: Y'all are asking me to value a
13 corporation and I think the factfinder ought to be
14 provided with the facts. I don't want to continue it
15 either. I want to get this over with as much as you all
16 do. Is there some way that we can -- even if it's not
17 completed today, if we can get the bulk of it over with
18 and provide you with the opportunity to revisit his
19 testimony and present some kind of rebuttal if that
20 becomes necessary.

21 I don't know what he's going to say. I have
22 no idea.

23 MR. HOWARD: That's part of the problem that
24 I'm faced with. We do have Dr. Woodside here today. From
25 a process standpoint if we're going to forward, I would

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1 think the most appropriate thing would be for the Court to
2 examine Dr. Woodside. He is the Court's appraiser and
3 this is the Court's appraisal.

4 There could be potentially -- we were going
5 to bring up a subject here today that could potentially
6 lead to another hearing being necessary.

7 THE COURT: What is it?

8 MR. HOWARD: From a process standpoint and I
9 don't know exactly how we're going to proceed here but I
10 was going to suggest to the Court that there are several
11 questions that are going to have to be addressed here
12 today.

13 The first one is value, the second one is
14 under the circumstances of the majority buyout achievable,
15 and this is based on my gentlemen here to testify today,
16 if you're going to order it within 10 or 30 days, you
17 might as well just dissolve the corporation because we
18 can't fund that buyout in 10 to 30 days.

19 We made a proposal to Mr. Ballard that would
20 extend it probably over several years, but that's what
21 we're able to do. There's some case law out there that
22 suggests that the appointment of a special master to make
23 a determination as to their ability and what would be an
24 appropriate schedule is an appropriate way for the Court
25 to proceed. If a buy-out is not achievable, I would

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1 suggest that equity would suggest that remedy fails
2 because what we're basically saying today if the buyout is
3 within 10 or 30 days, the default is inevitable and I
4 would suggest it's inequitable if default is inevitable.

5 MR. LIGHTSEY: I really take objection to
6 this. I raised this concern six months ago, seven months
7 ago, because I was worried about exactly this and said if
8 y'all don't have the money to pay it, let's deal with that
9 now and try to work something out. I was assured
10 repeatedly that they had the ability to pay a fair value
11 purchase for Mr. Ballard's stock. So I resent that being
12 brought up now after I raised that months and months ago.

13 I would suggest that once you determine what
14 a fair value is, what that number is, it be entered just
15 like any other judgment and if they don't pay it, we will
16 execute on that judgment like anybody else.

17 One of the first things we will seize to
18 satisfy the judgment is their stock in the company.
19 Mr. Ballard would like to take the company back over. We
20 had suggest that as a way of resolving this and we've
21 rebuffed that, but I don't think that needs to be
22 addressed now. I think we need to go ahead and present
23 the evidence on evaluation and for you to decide what that
24 number is, enter that judgment, and post-judgment
25 proceedings to deal with that.

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1 MR. HOWARD: Your Honor, I do not believe
2 that the statute would provide and it certainly doesn't
3 provide that a personal judgment can be rendered against
4 my clients. The question of buyout is an alternative to
5 the solution. This solution is the statute that they pled
6 and the cause of action if the buyout is not achievable
7 and I would suggest that the statutory remedies and we are
8 in equity here would suggest that this is not a situation
9 where these man have damaged, from a legal standpoint,
10 Mr. Ballard. He had an opportunity to raise those claims
11 and ---

12 THE COURT: I'm not sure if he would agree
13 with that.

14 MR. HOWARD: He had legal claims when we sat
15 in this courtroom three year ago, Your Honor, and he
16 dropped them before we walked in.

17 MR. LIGHTSEY: This is not correct, Your
18 Honor. In fact, we were ordered specifically noted that
19 the claim that we had for division of their shares was
20 muted by your decision to order a buyout. That claim was
21 preserved and it was addressed in our post-trial
22 memorandum and you found that it was muted by the remedy
23 ordered.

24 THE COURT: Let's just go forward with the
25 testimony. Who wants to take a lead on it?

Andy Ballard - Direct Examination by Mr.
Lightsey
Ballard vs. Warpath, et al

1 MR. LIGHTSEY: I'm prepared to, Your Honor.
2 Do you want an opening or just call the witnesses or how
3 do you want to proceed?

4 THE COURT: Let's call the witnesses.

5 MR. LIGHTSEY: We would call Andy Ballard.

6 THE CLERK: Place your left hand on the Bible
7 and raise your right hand.

8 ANDREW BALLARD, having been duly sworn
9 testified as follows:

10 Please state your name for the record.

11 THE WITNESS: Andrew H. Ballard.

12 THE CLERK: Thank you. You may be seated.

(- 13 MR. LIGHTSEY: Your Honor, back in late May I
14 think I sent you a copy of pre-trial memo and I thin I
15 included with that a notebook of potential exhibits. I
16 have provided one to counsel as well and I have one for
17 the court reporter. Since we're having a bench trial, I
18 found it would be easier to follow. It's got the exhibit
19 stickers on it if you want to refer to that.

20 THE COURT: Okay.

21 DIRECT EXAMINATION

22 BY MR. LIGHTSEY:

23 Q. Mr. Ballard, since Judge Miller is familiar with
24 a lot of the facts of this case and tried this case a few
25 years ago, let's skip over a lot of background and let's

Ballard vs. Warpath, et al

1 cut to the chase and try to streamline this. Could you
2 tell Judge Miller a little bit about your background,
3 where you grew up, et cetera.

4 A. I grew up in Greenville. I spent a lot time in
5 the textile industry after I finished school and then I
6 owned two or three companies.

7 Q. What type of company did you work for during your
8 career?

9 A. Textile company?

10 Q. Yes, sir.

11 A. JB Stevens, the Bib Company and VanRiver, and
12 then I also at one time I owned a golf shirt manufacturing
13 company.

14 Q. That's a company that you founded and started and
15 built?

16 A. Yes.

17 Q. Now, how long have you been involved with real
18 estate development?

19 A. About 12 or 13 years.

20 Q. What is your main business and occupation at the
21 present time?

22 A. I still do some development own a restaurant
23 called Mary Beth's.

24 Q. Has that business been successful?

25 A. Very successful.

Ballard vs. Warpath, et al

1 Q. And would it be fair to say that you are a
2 experienced and successful business man?

3 A. I hope so. I made one or two mistakes.

4 Q. With Warpath Development and again I'm going to
5 try to go through this quickly because the Judge knows a
6 lot of this but tell us again where the basically concept
7 for Warpath Development came from.

8 A. I was working with a group of developers in
9 Charleston and we worked on the Retro Light Marina and I
10 came home on the weekend and a friend of mine invited me
11 to Lake Kiwi and when we got there we went to the marina
12 and was a dump and there was nothing there and I kept
13 asking him there's not a decent marina on this lake and he
14 said, no. So from that standpoint I started checking with
15 Pickens County and Duke Power and seeing if I could find
16 land or a way to develop the land on Lake Kiwi.

17 Q. What did you find out?

18 A. I found out in 1965 Duke Power had set aside
19 eight or nine different sites on the Lake to be given to
20 the county so that they could develop recreation areas on
21 the Lake. Two of them were to be commercial sites and I
22 found out that Pickens County had put a number of RFPs on
23 the particular project and nobody had basically responded
24 except a couple of individuals who just wanted it for
25 their own use.

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1 So I convinced Pickens County to put out an
2 RFP so that I could bid a proposal to them and see if I
3 could get the project. The put out an RFP, I presented an
4 conceptional plan to them. They accepted it, their
5 executive committee accepted it and eventually we brought
6 Duke Power in and Duke Power loved the concept. They
7 accepted it. Pickens County full counsel voted to accept
8 it and proceed with the project.

9 Then we started working with the Federal
10 Energy Regulatory Commission and we worked with another 18
11 agencies that we had to go through and we eventually got a
12 lease, once all these agencies agreed to it.

13 Q. How long a time period did this all take?

14 A.. I started in 2003 and we finally got the actual
15 lease on the property in 2007.

16 Q. And were you doing that on your own or were other
17 people assisting you?

18 A. No, I did this on my own. All that was totally
19 on my own.

20 Q. How much time roughly did that involve of your
21 time?

22 A. It took over four years off and on. Dealing with
23 the Federal Energy Commission and Duke Power was quite
24 expensive.

25 MR. LIGHTSEY: Your Honor, to streamline

Ballard vs. Warpath, et al

1 things, I would like to incorporate the prior trial record
2 and the exhibits in this proceeding. For ease of
3 reference, I've marked as Plaintiff's No. 3 a document.

4 BY MR. LIGHTSEY:

5 Q. Would you turn to Tap 3, Mr. Ballard. Do you
6 recognize that document?

7 A. Yes.

8 Q. What is that document?

9 A. It's a copy of the lease from Duke Power.

10 Q. What was the date on it?

11 A. January of 2007.

12 Q. If you look down at the very bottom of Page 1,
13 how many acres does the lease cover?

14 A. Sixty-three acres.

15 Q. If you turn to Page 2, the first paragraph there
16 where it says term, just summarize the terms of this
17 lease?

18 A. The terms of this lease is a continuing lease
19 that every time FERC extends the lease to the nuclear
20 plant, to Duke Power, there's an automatic extension on
21 the lease for the project. It's a perpetual lease.

22 Q. As long as the lessee is in compliance, the lease
23 goes forever; is that correct?

24 A. That's correct.

25 Q. The lease is actually with a company called

Ballard vs. Warpath, et al

1 Warpath Development Company, Inc.

2 A. Yes.

3 Q. Tell us about Warpath, who started that?

4 A. I started Warpath Corporation. The reason I
5 started Warpath instead of having it in my name was I knew
6 I would have to create some kind of entity so that I can
7 raise the money to build the project and produce the
8 marina.

9 Q. Where does that name Warpath come from?

10 A. That's the area of the road there. That road was
11 named Warpath there because supposedly this site was the
12 closest to the most inner fort the British had when they
13 fought the Indians.

14 Q. Given that the lease is in the name of the
15 Warpath, what percentage of the assets of this company is
16 represented by this lease, roughly? How significant is
17 this in terms of the assets of the company?

18 A. I guess a large percentage of the assets of the
19 company. You've got probably somewhere depending on the
20 times or the market at the time you got somewhere between
21 20 and 30 million dollars worth of real estate you got
22 leased for life.

23 Q. And the defendants in this case, did they have
24 anything to do with obtaining of the lease?

25 A. No.

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1 Q. How did the defendants get involved with this
2 project?

3 A. After I obtained the lease and even before the
4 lease, I began talking to different groups, investing
5 groups, about investing in the project and some people
6 that I talked to wanted me to meet these guys and
7 introduced me to them and they said that they might have
8 an interest in doing something. So I met with them and
9 showed them my conceptional plans, told them about the
10 project, told them what I would take and what I would do
11 and they kind of weren't interested. And then a little
12 bit late, somehow we got back together and they were
13 interested but they wanted a bigger part of it, so that's
14 what I agreed to sell them 20,000 shares of my personal
15 stock.

16 Q. There was a lot of testimony in the previous
17 trial about these negotiations and discussions and I don't
18 want to go into that detail, but did you eventually reach
19 an agreement with them on how the stock ownership would be
20 done?

21 A. Yes.

22 Q. If you'll turn to Exhibit No. 1, could you tell
23 us what that exhibit is?

24 A. This is a copy of our stock purchase agreement.

25 Q. Now, under this agreement, and again I'm trying

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1 to hi-speed through this, but pursuant to this agreement,
2 you sold 20,000 of your shares to Roberson directly; is
3 that correct?

4 A. That's correct.

5 Q. And then another 20,000 shares each to a security
6 deposit company, Mr. Roberson, Mr. Thoennes and
7 Mr. Thoennes's son; is that right?

8 A. That's correct.

9 Q. And you got a million dollars for the 20,000
10 shares that you sold directly to Mr. Roberson. The
11 million dollars, in your mind, was that the actual total
12 value of those 20,000 shares?

13 A. No.

14 MR. HOWARD: Objection, Your Honor, he's
15 asking to the total value of those shares.

16 THE COURT: He's just asking what his state
17 of mind was. That's alright.

18 BY MR. HOWARD:

19 Q. Why are you saying that a million dollars was not
20 the total value for those shares?

21 A. Because I felt like the project was a lot more
22 but these guys were willing to come in and put up the
23 money necessary to obtain loans, term financing, and the
24 build the project and get it off the ground, so that's why
25 the corporation issued the 60,000 shares to them so that

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1 we can complete building the project.

2 Q. And you retained 20,000 shares yourself?

3 A. Correct.

4 Q. In your mind what did you feel was going to
5 happen to the value of those shares if the defendants
6 carried out what they agreed to do in this contract?

7 A. Oh, if they had built the project to the
8 conceptional plans and everything that had been agreed
9 upon, the value of my stock would have greatly increased.

10 Q. So why did you take a million for this 20,000
11 shares?

12 A. So that I could have the assess to raise the
13 money to build for the project. They assured me that they
14 had the money and could get the money to build the
15 project. They knew up front going in that it was to cost
16 anywhere from 40 to 50 to 60 percent up front money to
17 build the project, but Mr. Roberson was in the process of
18 selling a commune, but they assured me that they had banks
19 that would loan them the money and they wouldn't even have
20 to have that much money.

21 Q. What were the Thomases supposed to do for their
22 shares?

23 A. The Thomases were supposed to handle the
24 construction, the building and help with the permanent
25 financing.

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1 Q. And at that time, did the project have all of the
2 permits and government approvals they needed to begin
3 construction?

4 A. No, it did not.

5 Q. Under the contract, what would have happened to
6 the money if you didn't get all of the permits necessary?

7 A. I would give them the million dollars back.

8 Q. At this time, have all of the permits been
9 issued?

10 A. All the permits have been issued since 2010.

11 Q. Has the project been built?

12 A. No, it has not.

13 Q. What has been done with the site?

14 A. The only thing I seen is like a little silk
15 screen fence around it. Other than that there's nothing.

16 Q. You're actually a director of the company; is
17 that correct?

18 A. I'm supposed to be a director.

19 Q. Have there been any director's meetings that
20 you've been invited to?

21 A. The last stockholder's meetings that I was
22 invited to was 2011 or 2010, I'm not sure.

23 Q. When was the final permanent plan?

24 A. June of 2010, I believe.

25 Q. If the development had started in 2010, where

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1 would it be today?

2 A. It would be completed.

3 Q. It would be operational?

4 A. It should be.

5 Q. Making money?

6 A. Should have been.

7 Q. Has Mr. Roberson provided the capital necessary
8 to get long term financing for this company?

9 A. Not that I've seen.

10 Q. Other than putting the fence up, have they done
11 any site work?

12 A. Not that I know of.

13 Q. You mentioned there was one shareholder meeting.
14 When was that?

15 A. I believe it was in 2011, somewhere mid-year
16 2011.

17 Q. And have there been any shareholder meetings
18 since 2011?

19 A. A scheduled one in 2012 but then they cancelled
20 it. There has not been a shareholder meeting since that
21 one in 2011.

22 Q. Tell us what happened at that meeting in 2011?

23 A. Not a whole lot. They gave me a list of things
24 they said they had done and were doing and the people they
25 had talked to and had gotten FDA approval for an 80

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1 percent guaranteed loan which was an absolute lie. I
2 called the head of the FDA the next day and he said he had
3 talked to them one or two times ---

4 MR. COUNSEL: Objection, Your Honor, hearsay.

5 THE COURT: Yep. Move on.

6 BY MR. HOWARD:

7 Q. You were elected to the board of directors in
8 September of 2009; is that correct?

9 A. The board?

10 Q. You were on the board originally and you were
11 voted off, correct?

12 A. I guess I was voted off. It was taken off.

13 Q. In September of 2009 after you filed your amended
14 complaint in this case, you were put back on, correct?

15 A. That's correct.

16 Q. Since then have you been notified of any board of
17 directors meetings?

18 A. Absolutely not.

19 Q. Have you been provided financial or other
20 information as director of the company?

21 A. No.

22 Q. Were you asked to participate in any board
23 decisions?

24 A. No.

25 Q. Through your attorney, did you raise any concerns

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1 about this matter?

2 A. Yes.

3 Q. I'm handing you a letter dated March 4, 2011 from
4 Frank Hollaman to Mr. Josh Howard, is this what you were
5 just referring to?

6 A. Yes.

7 Q. And on your behalf did Mr. Hollaman raise
8 concerns about the delays in providing information?

9 A. Yes, he did.

10 Q. As far as you know, was there any response to
11 this letter?

12 A. None that I was ever told about.

13 MR. LIGHTSEY: Your Honor, I move this into
14 evidence as Plaintiff's Exhibit No. 9.

15 MR. HOWARD: I'm not sure what the relevance
16 of this is, Your Honor. It's a letter sent to me and I
17 don't know what the relevance is at this point.

18 MR. LIGHTSEY: Your Honor, I think this goes
19 to the timing of the evaluation under the statute, the
20 evaluation is made as of the time when the wrongful
21 conduct is occurring. It's out position that the wrongful
22 conduct has continued since 2011 through the presence and
23 this is proof of that.

24 THE COURT: Okay. Subject to your objection.

25 (Letter marked as Plaintiff's Exhibit No. 9

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1 for identification and admitted into evidence.)

2 BY MR. LIGHTSEY:

3 Q. Mr. Ballard, as the owner of 20,000 shares in
4 Warpath, what is your opinion on the value of those shares
5 now in comparison to what they worth in 2007?

6 MR. HOWARD: Objection, Your Honor, he
7 doesn't have the basis or ability to issue an opinion.
8 This is not a situation where he's valuing real estate or
9 his own personal -- this is expert testimony that is
10 required by the appraisers.

11 MR. LIGHTSEY: Objection, Your Honor. South
12 Carolina and most states follow the rule that an owner of
13 the property can testify to its value and that has been
14 applied specifically to business interest including cases
15 involving the evaluation of minority shares for buyout.

16 THE COURT: Go ahead, subject to your
17 objection.

18 BY MR. LIGHTSEY:

19 Q. Do you want me to repeat my question?

20 A. Yeah.

21 Q. As the owner of the 20,000 shares that you still
22 hold in Warpath, what is their value now -- what is your
23 opinion of their value now as compared to what they were
24 worth in 2007?

25 A. Well, the way I look at it there are only two

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1 assets to the company, one is the lease and one is the
2 permits, and if you look at the value of the lease and say
3 you just use twenty million dollars of that real estate
4 and you only use half of that value and because it's on a
5 lease that's still ten million dollars. If you got all
6 the permits to build everything, that's got to be worth at
7 least that much or more so I would think the value of the
8 company is worth twenty million dollars and my twenty
9 percent of that is four million dollars.

10 Q. In 2007, you didn't have the permits.

11 A. You didn't have the permits.

12 Q. And at that time Mr. Roberson paid you one
13 million dollars for 20,000 shares.

14 A. That's correct.

15 Q. And you believe now the value is more than what
16 it was then because of the permits?

17 A. Absolutely.

18 Q. Tell us a little bit about what you're basing
19 this opinion on, what experience do you have that enables
20 you to give this testimony?

21 A. Just doing the development work that I've done
22 over the past 13 or 14 years looking at projects and doing
23 prospectus and development of the projects.

24 Q. And Mr. Ballard if you, in the course of this
25 action, have you seen various loan applications or

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1 proposals that the defendants have made for funding for
2 the project?

3 A. Yes, I have.

4 Q. If you would turn to Exhibit 4. This is
5 subdivided into A,B,C & D and I just want to go quickly
6 through these. On Exhibit 4a, is this a document that was
7 provided to us by defendants in discovery?

8 A. Yes, it was.

9 Q. And what's the date on this one?

10 A. March 31, 2009.

11 Q. What is the amount of the loan being requested?

12 A. Twenty-eight million.

13 Q. If you would turn to the second page of that
14 exhibit, whose signature is down at the bottom there?

15 A. Rick Thoennes, Treasurer.

16 Q. And if you'll turn to Exhibit 4b, what is the
17 date on that document?

18 A. 11-15-11.

19 Q. November 15th of 2011?

20 A. Yes.

21 Q. And what is the loan amount being requested
22 there?

23 A. Twenty-seven million.

24 Q. What does this document say appraised value of
25 the property?

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1 A. Thirty-six million, six hundred and sixty-nine
2 thousand, fifty dollars.

3 Q. If you look at the second page of this exhibit
4 just above, halfway down the page, it says in all caps,
5 "Current value of this property in its present condition."
6 What is stated there?

7 A. Six million dollars..

8 Q. If you turn to Page 4 of this exhibit, Paragraph
9 16 where it says, "Special Circumstances," if you would
10 just read what it says about the lease.

11 A. "The lease is held by Warpath Development
12 Corporation and granted by Duke Power and sent to the
13 Federal Regulatory Commission."

14 Q. I'm sorry. The next sentence.

15 A. "For all practical purposes the lease is for
16 perpetual as it is automatically renewed (inaudible) hydro
17 electric licensing which runs in intervals of 30 to 50
18 years."

19 Q. Let's turn to Exhibit 4c, if you look down at the
20 bottom of that first page, what is the amount being
21 requested there?

22 A. A total of twenty-nine million, five hundred and
23 eighty thousand.

24 Q. If you'll go to the third page, whose electronic
25 signature is there?

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1 A. Rick Thoennes, President of Warpath Development.

2 Q. And you mentioned before the prior application
3 said Rick Thoennes, Treasurer and this one says President.
4 Were you at any board meeting where Mr. Thoennes was
5 elected president?

6 A. No.

7 Q. Were you even aware of that?

8 A. No.

9 Q. If you'll turn to the very next page which is a
10 letter dated April 11, 2012 at the bottom of the second
11 paragraph, what does he say as far as how the loan would
12 be repaid?

13 A. I'm not with you.

14 Q. It's the April 11, 2012 letter, the second
15 paragraph, last sentence of that paragraph.

16 A. "I would think the repayment would be from the
17 income produced on my project and paid to you monthly,
18 principal and interest."

19 Q. Now, let's go to Exhibit 4d which is a
20 conditional loan commitment, do you see that? What are
21 they proposing in terms of the amount being invested?

22 A. Twenty-four million, fourteen million debt, 9.6
23 million equity.

24 Q. And if you look down under equity split, it says
25 60/40 and paid back 50/50, do you see that?

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1 A. That's correct.

2 Q. And this was a 9.6 million dollar equity
3 investment for initially 60 percent and then 50/50; is
4 that correct?

5 A. That's correct.

6 MR. LIGHTSEY: Your Honor, I move Exhibits 4a
7 though 4d into evidence.

8 MR. HOWARD: No objection.

9 THE COURT: Okay.

10 (Packet previous marked as Plaintiff's
11 Exhibit Nos 4a through 4d, was admitted into evidence.)

12 BY MR. LIGHTSEY:

13 Q. If you would, let's turn back to 4b, do you see
14 that?

15 A. Yes.

16 Q. In the records here, the appraised value of the
17 project is thirty-six million, six hundred and six-nine
18 thousand, and fifty dollars, and what would your 20
19 percent share of that be?

20 A. That's almost thirty-seven million dollars I
21 would say. Twenty percent of that would 7.2 million
22 dollars.

23 Q. If you look at the second page where it states
24 the current value of the property as it is it says six
25 million dollars. If your ownership interest is 50 percent

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1 of the current value as is without any development or
2 financing for the other defendants, what would 50 percent
3 of that ---

4 A. It would be three million dollars.

5 MR. LIGHTSEY: No further questions, Your
6 Honor.

7 THE COURT: Cross.

8 CROSS-EXAMINATION

9 BY MR. HOWARD:

10 Q. Good morning.

11 A. Good morning.

12 Q. Mr. Ballard, Exhibit 1 is a signed purchase
13 agreement, do you see that?

14 A. Yes.

15 Q. You signed that willingly, correct?

16 A. Absolutely.

17 Q. And when you signed that you understood that you
18 were relinquishing control of your company, correct, at
19 that point? They were taking 80 percent and they were
20 taking 20 percent when you signed that, correct?

21 A. Absolutely, I understood that.

22 Q. And that agreement doesn't provide any promises
23 on return, does it not?

24 A. No, it does not guarantee me any promises.

25 Q. You knew it was a risk when you went into it just

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1 like anytime when you put equity into it there's going to
2 be a risk component to it, correct?

3 A. Yes.

4 Q. There's a risk of whether it was going to get
5 built?

6 A. There was a big risk on my part.

7 Q. But there's a risk. There's always a risk.

8 A. Taking their commitment in them putting up the
9 money and ---

10 Q. There's always a risk, correct?

11 A. Correct.

12 Q. And there was nothing promised, correct?

13 A. There were promises.

14 Q. They didn't promise you a ---

15 THE COURT: Hold it. Let him ask the
16 question.

17 BY MR. HOWARD:

18 Q. They did not promise you a return.

19 A. They did not promise me a return.

20 Q. They promised you another \$150,000.

21 A. That is correct.

22 Q. And that's all that they promised you you would
23 get out of that project, correct, in that agreement?

24 A. That's all they promised me in the agreement.

25 They promised Warpath Development that they would put up

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1 the money and the necessary funds to develop and build the
2 project.

3 Q. To get financing to build the project, correct?

4 A. And to put up the equity needed and that would
5 take anywhere from 30 to 60 percent and they stated that
6 in emails.

7 Q. That's your assessment of that.

8 A. That was a fact.

9 Q. The promises they made were to put up money for
10 financing and to develop the project, correct?

11 A. That's correct.

12 Q. There is no mention in that stock purchase
13 agreement about when the project would be built, is there?

14 A. No, there's not.

15 Q. As far as communication, you've already testified
16 that they held a stock shareholder's meeting in 2011,
17 correct, and you were present?

18 A. I was present.

19 Q. There was one schedule in 2012, correct?

20 A. Yes.

21 Q. And you were made aware of that?

22 A. It was scheduled but never happened.

23 Q. Just never happened, but you were made aware of
24 it?

25 A. They cancelled it.

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1 Q. You received tax returns and copies of the
2 yearly, correct?

3 A. That's, basically, the only communication I
4 received from them.

5 Q. Except for the fact last fall you were intimately
6 involved in one of the attempts to get financing, correct?

7 A. I was in discussion with a party that was trying
8 to get financing and they asked me to go and talk with
9 someone who was interested in building the marina with
10 them. I really didn't have anything to do with the
11 financing of it.

12 Q. The first party that you talked to do you
13 remember a name by the name of Brad Seckinger?

14 A. Absolutely.

15 Q. Do you know Brad Seckinger?

16 A. I know him. He's an acquaintance.

17 Q. Did you know him before he came to speak with
18 you?

19 A. I knew him when he came in the restaurant a few
20 times.

21 Q. And Mr. Seckinger was attempting to put together
22 a deal to finance the project, was he not?

23 A. I don't know exactly how he was working with them
24 or what he was doing but from what I understood they owed
25 him money and he was trying to come up with a way where he

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1 could get his money and put together a bill for them to
2 build the marina.

3 Q. And he came and spoke to you about it and brought
4 you in connection with the people that were attempting to
5 build the marina, correct?

6 A. He introduced me to one party.

7 Q. Peter Anzo?

8 A. Yeah.

9 Q. And he was the principal of the investment group
10 that was looking to build the marina, correct?

11 A. That's correct.

12 Q. And you had a conversation with Mr. Anzo?

13 A. Right.

14 Q. And you were invited to those communications by
15 Mr. Roberson, Mr. Seckinger, correct?

16 A. No.

17 Q. You were not invited to those communications by
18 Mr. Roberson, you weren't welcomed to the table?

19 A. No.

20 Q. You visited the site with Mr. Seckinger, correct?

21 A. I did.

22 Q. They sought your opinion, did they not?

23 A. Peter and Mr. Seckinger?

24 Q. Yes.

25 A. I told them where I stood and the position and

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1 what my position was and I told them about what I had done
2 to get everything ready to do.

3 Q. Were they looking to buyout your interest?

4 A. No.

5 Q. Did you make any offers to them to buyout your
6 interest?

7 A. I never made an offer to them for them to buy out
8 my interest.

9 Q. The lease hold interest, have you ever had it
10 appraised?

11 A. No.

12 Q. So the twenty million is just your opinion?

13 A. Just my opinion, absolutely, it's my personal
14 opinion.

15 Q. And this siting itself it's 63 acres, correct?

16 A. Correct.

17 Q. And the lease on it provides that it can be built
18 for one purpose and one purpose only, correct?

19 A. That's correct.

20 Q. And that purpose is even further specified out in
21 a conceptional plan; is that right?

22 A. That's correct.

23 Q. Would you describe it as a limited development
24 opportunity?

25 A. I think it's a fabulous development opportunity.

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1 Q. I'm not asking you that. You can not break up
2 that property and sell it off into pieces, could you?

3 A. Absolutely not.

4 Q. So you do not have 63 acres of lakefront property
5 that you could break up and sell it a million dollars a
6 piece or something like that?

7 A. You couldn't sell it off, you could sublease if
8 you wanted to and they understood that. So it's not just
9 -- it's a fabulous opportunity.

10 Q. I don't think they disagree with you, it's a
11 great opportunity, but it's for a limited purpose,
12 correct?

13 A. It's for a marina, a hotel, two restaurants, four
14 cabins, camp sites.

15 Q. And that costs a lot to build, right?

16 A. Right.

17 Q. Do you know how much it costs to build?

18 A. Well, when we were first looking at it we were
19 estimating 13 to 14 million and now they've gone to 28 and
20 29. I think it's going to cost somewhere around 20
21 million to build. They've got a lot of pad in there for
22 something.

23 Q. Do you have any estimates?

24 A. No. That was my market tag when we first went
25 into the project when we were first looking at it his

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1 estimates were.

2 Q. If you turn to Exhibit 4b, fifth page, what's the
3 development budget?

4 A. Development budget is twenty-seven million.

5 Q. Do you have a number to say that should be
6 different?

7 A. No.

8 Q. You developed your own numbers in here today,
9 have not?

10 A. Not in the last five or six years.

11 Q. And certainly to get to the value of this
12 development, you're going to have to build it, correct?

13 A. Correct.

14 Q. You got to have the marina. It's going to cost
15 money to build the marina, correct?

16 A. Correct. We understand all that.

17 Q. All of these things are going to have to be built
18 before you get all this income that is projected, correct?

19 A. Correct.

20 Q. And it's going to cost twenty-seven million to
21 build it according to this?

22 A. According to this.

23 Q. And you don't have any other numbers to be
24 otherwise?

25 A. I don't have any reason to believe this is

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1 correct either.

2 Q. But you don't have any basis? You're not coming
3 in here with numbers and you don't have any basis to
4 suggest that it's incorrect?

5 A. You're right.

6 Q. And, of course, on any value that you're going to
7 assess on this, you're going to have to back out what it's
8 going to cost to build it, correct?

9 A. Correct.

10 MR. HOWARD: That's all the questions I have,
11 Your Honor.

12 THE COURT: Any redirect?

13 MR. LIGHTSEY: Just a few, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. LIGHTSEY:

16 Q. Mr. Ballard, you were asked about the stock
17 purchase agreement which is Exhibit 1 if there was any
18 promise of a return to you in that document. Do you
19 remember those questions?

20 A. Yes.

21 Q. Does that document anywhere promise you any
22 guarantee return to the other stockholders?

23 A. No, it does not. They got the stock one they
24 fulfilled their obligation then the stock would become
25 theirs.

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1 Q. Is there anything in that document that says once
2 you invest in this company you're going to get a 22
3 percent return on the investment?

4 A. Absolutely not.

5 Q. Now, you were asked about some discussions with
6 Mr. Brad Seckinger and a man named Peter Anzo. If you
7 would turn to Exhibit No. 5, do you see that?

8 A. Yes, sir.

9 Q. And that's the offer Mr. Anzo made through
10 Mr. Seckinger; is that correct?

11 A. That's correct.

12 Q. What was the dollar amount of his offer?

13 A. Four and a half million dollars to start the
14 development of the plan.

15 Q. Do you recall what the ownership interest was
16 that he was going to get for that four and a half million?

17 A. It seems like it was 70 percent.

18 Q. If you'll turn to the end of the agreement, the
19 bottom of the agreement, the contribution agreement, the
20 second paragraph there. Do you see that?

21 A. Seventy percent.

22 Q. If you take four and a half million dollars and
23 provide it by 70 percent, what number do you get for 100
24 percent?

25 A. Six million, four hundred and twenty-eight

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1 thousand, five hundred (inaudible).

2 Q. And 50 percent of that number would be about
3 what?

4 A. Three million.

5 Q. 3.2 million?

6 A. Yes.

7 Q. You mentioned about the possibility of leasing a
8 hotel. Could you elaborate a little bit about that to
9 Judge Miller what you mean by that.

10 A. Like I said one reason I put it in the
11 corporation's name is because I knew I was going to
12 attempt to sell some stock to raise some money. The other
13 thing was by putting it into a corporation, if we decided
14 to lease property, if we decided to lease the land for a
15 hotel to a flagship chain or something for millions of
16 dollars, then we would have a tendency to do that. There
17 is nothing in that agreement that says you can't sublet
18 part of the property for a hotel. It's got to be in the
19 conceptional plans. It would have to stay within the
20 conceptional concept of the project but the hotel side
21 could be leased to a major chain if you could find one.

22 Q. If you did that within Warpath then you wouldn't
23 incur any expenses in connection with the hotel?

24 A. That's what I don't know what they're planning to
25 do. They can't come up with money. I don't have any idea

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Howard Ballard vs. Warpath, et al

1 of what they're planning to do with the hotel or the
2 marina or anything else. I don't know what they're
3 planning to do.

4 Q. Is that a potential way of realizing value for
5 this property?

6 A. If they leased it for a million or two million or
7 three million dollars a year and they got that coming in
8 and they don't have the expense of building a hotel,
9 that's a pretty significant income.

10 MR. LIGHTSEY: Thank you. That's all I have.

11 RECROSS-EXAMINATION

12 BY MR. HOWARD:

13 Q. Have you sought out a hotel chain and asked them
14 what they would be willing to pay for the ground lease
15 there?

16 A. No.

17 Q. And you have no idea today one million, two,
18 three million you're throwing out there, you have no idea
19 of ---

20 A. I have no idea of what a hotel chain would pay.

21 Q. If there's no marina there, do you know if a
22 hotel is going to put their hotel there without a marina
23 there?

24 A. I don't know. And advisor with the State flew up
25 here looking at how we can increase tourism in the State

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1 of South Carolina. They flew him in a helicopter and they
2 flew him over Lake Kiwi and the first thing he said is you
3 don't have a hotel on that lake. He said that would be
4 one of the key issues in increasing tourism in the
5 Upstate. They know this.

6 Q. You have not sought this out.

7 A. I have done this in the last five years because I
8 didn't have control of the project.

9 Q. But you've had an opportunity to put in input.
10 You could have said ---

11 A. To who?

12 Q. To them.

13 A. They haven't asked me for my input. They haven't
14 kept me informed of anything.

15 Q. Your input was not sought?

16 A. Not by them. It was sought by a person they owed
17 three million dollars to that was trying to figure out a
18 way that he could get his money back.

19 Q. You were invite to the table, Mr. Ballard.

20 A. You are wrong.

21 THE COURT: Alright, you can step down.

22 MR. LIGHTSEY: That's all the evidence at
23 this time, Your Honor. Like I said we do anticipate in
24 calling Dr. Alford but it would be after Dr. Woodside.

25 THE COURT: Anything you want to put up?

Ballard vs. Warpath, et al

1 MR. HOWARD: I'd like a directed verdict.

2 THE COURT: I haven't heard from Dr. Woodside
3 yet.

4 MR. HOWARD: I'm just trying to understand
5 the process here, we have the plaintiff put up their case.
6 They have an expert sitting out there and we have an
7 appraiser sitting out there and is not my witness, it's
8 the Court's appraiser. I'm trying to understand exactly
9 where my case would fit in the due process. I do have
10 some testimony I would like to put up and I'd like to know
11 where we stand in the case in chief in the process.

12 THE COURT: This is a bit of a hybrid
13 hearing. It's an evaluation on a corporation and I am
14 going to hear from Dr. Woodside.

15 MR. HOWARD: I understand and I fully expect
16 you to.

17 THE COURT: You want to take a few minutes
18 and talk to your clients?

19 MR. HOWARD: Yes, Your Honor.

20 MR. LIGHTSEY: Just to be clear, Your Honor,
21 with respect to Dr. Woodside, I do object to his report.
22 I think there are evidentiary objections to it. I don't
23 want to be the sponsor of that report that why I would not
24 call him.

25 THE COURT: I'll be calling him as a Court's

Tim Roberson - Direct Examination by Mr.
Howard Ballard vs. Warpath, et al

1 witness.

2 MR. LIGHTSEY: I think that Dr. Alford's
3 testimony would make more sense after Dr. Woodside's.

4 THE COURT: You can call him as a rebuttal.

5 (Whereupon, there was a brief break.)

6 Ready?

7 MR. HOWARD: I would call Mr. Roberson.

8 THE CLERK: Place your left hand on the Bible
9 and raise your right hand.

10 TIM W. ROBERSON, having been duly sworn,
11 testified as follows:

12 Thank you. You may be seated. State your
13 name for the record.

14 THE WITNESS: Tim w. Roberson.

15 CROSS-EXAMINATION

16 BY MR. HOWARD:

17 Q. Tim, we know the Judge heard several days of
18 testimony back in 2010, but would you reintroduce yourself
19 to Judge Miller, please, and tell us just briefly a little
20 background on yourself.

21 A. I lived in Greenville since 1981. I started out
22 my career in corporate and started a home sale business
23 and did that for a number of years and sold it in 2003 and
24 some other businesses and in development and just
25 different kinds of businesses.

Ballard vs. Warpath, et al

1 Q. Just briefly how did you become in contact with
2 Mr. Ballard back in 2007?

3 A. As I recall I had a phone call that asked if I
4 was interested in a project on the lake in developing some
5 town homes on the lake I was familiar with the lake and
6 with the development on the lake, and so I went to a
7 meeting put together by a third-party and Mr. Ballard
8 showed us his project and we talked about it and at the
9 time he was looking for an investor.

10 Q. As a result of that, to kind of move it alone,
11 y'all ended up signing this stock purchase agreement
12 that's part of the record here today, correct?

13 A. Yes, eventually we did. We declined the first
14 time around but Mr. Ballard called me back six or eight
15 weeks later and said he'd like to talk about it some more.

16 Q. And as part of that stock purchase agreement,
17 what did y'all agree to pay Mr. Ballard?

18 A. One million dollars for 80 percent of the
19 company.

20 MR. LIGHTSEY: Objection, Your Honor, this
21 has been covered in trial. We going to object to that
22 argument that the stock sold for 80 percent. That's the
23 law of the case now.

24 THE COURT: Go ahead.

25 BY MR. HOWARD:

Ballard vs. Warpath, et al

1 Q. When you entered into that stock purchase
2 agreement with Mr. Ballard, tell me what your opinion of
3 the project was at that time? Obviously you liked it.

4 A. We liked it. It was very interesting. I had,
5 like I said, had already done some things on the lake and
6 at the time I was looking for a really kind of a swan song
7 less to do really in my career. It was a presented to us
8 as a project presented to us to build cheap. I decided I
9 wanted to build it quality and keep it and rent it as a
10 lifestyle business. Earlier on there were a few things
11 right off the back that were a kicked in the stomach.

12 Q. Let me back up just a second, my intent here is
13 not to retry the case but I do want to ask you this
14 question, was it your state of mind, impression when you
15 paid the million dollars to Mr. Ballard that you were
16 paying a significant under value of what the value of the
17 company was at the time?

18 A. No, not at all. In fact, I thought it was a fair
19 value that we negotiated. At the time we paid that
20 million dollars, I thought we would be giving more revenue
21 than we thought we would be giving because it turned out
22 the slips wound up being one hundred instead of two
23 hundred that were performed.

24 MR. LIGHTSEY: Your Honor, I'm going to
25 object. This issue ---

Ballard vs. Warpath, et al

1 THE COURT: Just go on to his ---

2 THE WITNESS: I had no reason at the time I
3 wrote that check to think that it was high or low. It was
4 fair and I did it of free will.

5 BY MR. HOWARD:

6 Q. Had you been involved in several deals before
7 where people had bought from you and also you purchased?

8 A. Sure. I bought and sold a few companies, my own
9 company, and as we grew our company we did some merges,
10 acquisitions, some sales.

11 Q. Have you ever been involved in a transaction
12 where either yourself was willing to sell or somebody was
13 willing to buy something for an amount that was
14 significantly below the value of what it was at the time?

15 MR. LIGHTSEY: Objection, Your Honor. I
16 don't see where that's relevant.

17 MR. HOWARD: It's his experience.

18 THE COURT: Go ahead.

19 THE WITNESS: Have I been involved in a
20 transaction ---

21 BY MR. HOWARD:

22 Q. Where somebody was willing to take from you money
23 that was significantly less than what it was actually
24 valued?

25 MR. LIGHTSEY: Same objection.

Ballard vs. Warpath, et al

1 BY MR. HOWARD:

2 Q. Have you ever sold something significantly less
3 than the value was?

4 A. Not intentionally, no.

5 Q. Are you the present of Warpath?

6 A. I am.

7 Q. How long have you been the president of Warpath?

8 A. I'm thinking maybe 2008 or '09. There's only
9 been two presidents, Andy and myself.

10 Q. We heard some testimony about whether
11 Mr. Thoennes was president and representations on that.
12 Has Mr. Thoennes ever been president?

13 A. No.

14 Q. And the representation was, what would you
15 describe that as?

16 A. I didn't see the document but I assume that was
17 something that was typed up by someone and signed it.

18 Q. A mistake?

19 A. I would think so. It would have had to be, yes.

20 Q. Since 2007 and since the end of this matter, at
21 the end of this trial in 2010, tell me about all the
22 efforts that have been made by you in order to drive this
23 development home?

24 A. It really relates back to the kick in the stomach
25 I was referring to.

Ballard vs. Warpath, et al

1 Q. I understand but let's -- what I'd like to do ---

2 A. We'd been through all of the permitting process
3 and met with various home owner associations, some 16
4 regulatory authorities that we had to deal with. We with
5 SGA towards securing back up loans which we got the nod
6 on. We had to bring them back to the table which was the
7 next step. I been through three rounds of bank calls over
8 these years while the economy has been fluttering and been
9 through probably every bank that anybody could name. I
10 can't think of any that we haven't been to.

11 We actually had financing at 20 percent when
12 we brought this property. When we bought Warpath, 20
13 percent was not unusual at all and we had nods of interest
14 from both Palmetto Bank and two banks for funding Phase 1.
15 At the time those were non-issues. All of that changed
16 over the next three-and-a-half years as we continued to
17 seek the necessary permits and we spend another year
18 seeking off-shore funds and that's when Brad was involved
19 in signing some things.

20 And then I went through three different
21 equity parties to secure funding and as I mentioned
22 earlier Brad Seckinger was an intermediary. The Thomases
23 did owe him some money and that's how that came to play.
24 I met with Brad and we talked about a strategy of getting
25 funding. I dispatched Brad to Andy and he set up meetings

Ballard vs. Warpath, et al

1 both with me and with Andy with the funding agent -- he
2 was not an agent, he was a marina owner.

3 Q. Let me stop you there, why did you dispatch Brad
4 to go see Andy?

5 A. Because part of that deal was to buy Andy out and
6 that was just part of the whole package was to get funding
7 for Warpath and to buy Andy out. It was my impression in
8 talking with Brad that it fell apart based on the ---

9 MR. LIGHTSEY: Objection, Your Honor. He's
10 basing that on hearsay.

11 THE WITNESS: I was told and I've got an
12 email that says ---

13 BY MR. HOWARD:

14 Q. It's hearsay, Tim. It's fine.

15 A. And it says ---

16 MR. LIGHTSEY: Objection.

17 BY MR. HOWARD:

18 Q. Stop, stop, Tim, it is hearsay. It's okay. What
19 about Duke Power? What is your involvement with Duke
20 Power. They are the ones that issued the lease, correct?

21 A. I had been working with Duke on two levels. As
22 far as specific, it's been pretty much every sixty days,
23 updates, or meetings or whatever. They are very
24 interested in making sure this project goes forward and so
25 just developing that relationship over this number of

Ballard vs. Warpath, et al

1 years and letting them know pretty much everything and
2 turn of events.

3 On another level, which basically intersects
4 with this, I joined the Duke Energy Kiwi (inaudible) Lake
5 Holders Team and so we've been meeting every month and
6 subcommittees and sometimes twice a month over three years
7 now. All of the issues on the lake that has to do with
8 re-licensing so I'm engaged with all of the folks that I
9 had to originally go through to do permitting with, I am
10 now engaged with them on a month-to-month basis to bring
11 this license to bare for Duke Energy's benefit.

12 So everybody from FERC to DHEC to D&R, the
13 homeowner's associations, really everybody on the list,
14 USDA core of engineers are generally mentioned at almost
15 all of those meetings and I'm there as an executive of
16 Warpath.

17 Q. A couple of bindings have been discussed and can
18 you explain what bindings is, your impression of bindings?

19 A. I first ran across them -- I'm getting muddled
20 here -- but early in this stage when we were seeking,
21 pretty much the banks went out of business. I started
22 looking at equity partners and I talked with Peter Anzo
23 sometime back. Probably a year had passed. There was
24 some interest but not enough at the time because he was
25 having his own issues. He was the president of Mannings

Ballard vs. Warpath, et al

1 which owned several marinas in the eastern United States
2 and it was the worse economic times. It was a good
3 conversation but it was put on hold.

4 About a year or two later is when Brad
5 Seckinger put a deal together and he crossed back over
6 with Peter Anzo and so we reconnected at that time.

7 Q. Is there another group you were working with
8 also?

9 A. Yeah. The guy is in Georgia.

10 Q. Capital City.

11 A. This is an individual who had sold his business
12 in Atlanta and decided he wanted to be in the marina
13 business and they bought three marinas in Georgia and then
14 bought one in Seneca, Lake Harbor in Seneca.

15 Q. When y'all entered into the stock purchase
16 agreement with Mr. Ballard back in 2007 and the million
17 dollar check was paid, who was that check paid to?

18 A. Andy Ballard.

19 Q. That money went directly to Andy Ballard,
20 correct?

21 A. Yes.

22 Q. That money was not contributed to the treasure of
23 Warpath?

24 A. Right.

25 Q. And your efforts to seek financing, has anybody

Ballard vs. Warpath, et al

1 been willing to stroke you a check for you equity
2 interest?

3 A. No.

4 Q. The money you're contributing what is your
5 understanding of what it's being contributed for?

6 A. To build the project.

7 Q. It's not built at this time, correct?

8 A. That's correct.

9 Q. Did you ever make any promises of when you were
10 going to build the project?

11 A. Only to myself which was as soon as possible.

12 Q. And you've made efforts to finance and build the
13 project since it was signed, correct?

14 A. Daily activity of mine.

15 Q. You've seen the appraisal of Dr. Woodside,
16 correct?

17 A. I have.

18 Q. Do you recall what the amount was that
19 Dr. Woodside put on Mr. Ballard's shares?

20 A. Yes, I believe it was \$873,000.

21 Q. Do you think that from your prospective that was
22 a hire or lower number than you expected?

23 MR. LIGHTSEY: Objection.

24 THE COURT: Yeah, I don't think he's
25 qualified to interpret the equity.

Ballard vs. Warpath, et al

1 MR. HOWARD: I'm just basing it on his own
2 personal expectation and opinions as to the value of the
3 company.

4 MR. LIGHTSEY: Irrelevant.

5 THE COURT: Go ahead, over his objection

6 THE WITNESS: You're asking me what's in my
7 head okay and I thought it was high and I just paid him a
8 million dollars. If you do the math, it was about twice
9 as high, however, I want this behind me and I'm thinking
10 we agreed to have an appraiser appraise it and I accepted
11 it.

12 MR. LIGHTSEY: Objection. This is
13 irrelevant.

14 THE COURT: That's alright. He's just
15 talking about his state of mind and that's fine.

16 BY MR. HOWARD:

17 Q. Were you aware that there was an \$873,000
18 appraisal put on this front, the 20,000 shares that Andy
19 Ballard holds?

20 A. Yes.

21 Q. Is it your desire to retain this project?

22 A. I would like to build out the project and retain
23 it, yes.

24 Q. Is it your desire, understanding that to move
25 forward you would have to buyout Mr. Ballard?

Ballard vs. Warpath, et al

1 A. That's correct.

2 Q. That being your understanding for how long?

3 A. Since the judge ordered it.

4 Q. Do you remain today to make every effort to buy
5 Andy out?

6 A. I have. In fact, I've offered ---

7 MR. LIGHTSEY: Objection, Your Honor.

8 THE COURT: Yeah, we're getting into
9 settlement negotiations.

10 BY MR. HOWARD:

11 Q. We don't have to get into that but I can ask you
12 if you're willing to buy out Andy Ballard?

13 A. Yes.

14 Q. Assuming the \$873,000, do you have the present
15 ability to pay him?

16 A. No.

17 MR. LIGHTSEY: Objection, Your Honor.

18 MR. HOWARD: I think he can answer that
19 question, Your Honor.

20 MR. LIGHTSEY: His ability to pay has nothing
21 to do with ---

22 THE COURT: Well, subject to your objection.

23 BY MR. HOWARD:

24 Q. The plaintiff has requested 10 days, could you
25 pay it?

Tim Roberson - Cross Examination by Mr.
Lightsey
Howard vs. Warpath, et al

1 A. No.

2 Q. Thirty days?

3 A. No.

4 Q. If ordered to pay in 10 days or 30 days, would
5 that result in a default?

6 A. Yes.

7 THE COURT: Don't ask him to speculate. He
8 can just say he can't do it.

9 BY MR. HOWARD:

10 Q. What has affected your ability at this point?

11 THE COURT: I don't need to know that.

12 BY MR. HOWARD:

13 Q. Would you be willing, if ordered by the Court, to
14 subject your finances to examination to determine what
15 could be paid by you and how long?

16 A. Yes.

17 MR. HOWARD: That's all the questions I have.

18 THE COURT: Any cross?

19 CROSS-EXAMINATION

20 BY MR. LIGHTSEY:

21 Q. Mr. Roberson, the stock purchase that you admit
22 you signed in 2007 obligated you to put up sufficient
23 capital necessary to get long term financing, didn't it?

24 MR. HOWARD: Objection, Your Honor, that is
25 not a subject for this case at this point.

Rick Thoennes - Direct Examination by Mr.
Howard Ballard vs. Warpath, et al

1 MR. LIGHTSEY: My point is he's made efforts
2 to get financing.

3 BY MR. LIGHTSEY:

4 Q. You've made efforts to get financing. You don't
5 have the financing, do you?

6 A. No, I do not.

7 MR. LIGHTSEY: That's all. Your Honor.

8 THE COURT: Okay. You can step down.

9 MR. HOWARD: We would call Rick Thoennes, Sr.

10 THE CLERK: Please place your left hand on
11 the Bible and raise your right hand..

12 RICK THOENNES, having been duly sworn,
13 testified as followed:

14 Please state your name for the record.

15 THE WITNESS: Rick Thoennes.

16 THE CLERK: Thank you. You may be seated.

17 DIRECT EXAMINATION

18 BY MR. HOWARD:

19 Q. Good morning.

20 A. Good morning.

21 Q. Just briefly just reintroduce yourself to the
22 Judge and tell us a little bit about your background.

23 A. Rick Thoennes, been in Greenville since 1969,
24 been involved mostly in the development and construction
25 business for those years and continued through that today.

Ballard vs. Warpath, et al

1 Q. You've been involved in this project since 2007?

2 A. Right.

3 Q. Been involved with Mr. Roberson, correct?

4 A. Correct.

5 Q. Have you made efforts along with Mr. Roberson to
6 pursue financing and development in this project?

7 A. We did. From the very beginning Tim and I and
8 Rick worked together in securing financing. Initially,
9 our bank was Greenville First and Tim's relationship with
10 Palmetto Bank so those were the two directions we went to
11 in May of 2007 and then from that time on even until today
12 we've been trying to secure financing.

13 Q. What has hampered the efforts?

14 A. Well, 2007 preceded the 2008 bust of real estate
15 so the recession prevented any effort to borrow money for
16 any kind of hospitality development. You couldn't borrow
17 money for houses. You couldn't borrow money for office
18 buildings. Banks had just basically shut down for
19 borrowing money unless you wanted to put up 90 percent of
20 the money, which is impossible. And it's remained that
21 way even until today. Hospitality is a difficult business
22 to secure financing for and that's where the marina falls
23 into because of its food restaurants and lodge and
24 everything that's involved in that particular project.
25 It's a hospitality project.

Ballard vs. Warpath, et al

1 Financing has been very difficult at best
2 ever since the recession took down the financing and it
3 has never returned for that particular segment. It's
4 coming back for housing and developments but very slow.

5 Q. Have your efforts been ongoing?

6 A. Yes.

7 Q. And continued to today?

8 A. Yes, weekly. Some weeks daily, but weekly.

9 Q. In addition to assisting the financing, what
10 other activities have you assisted with on the project?

11 A. I helped secure their permits along with Tim and
12 Rick and secured the engineering necessary to secure those
13 permits. We did the engineering to get a sewer system in
14 the project ever since the sewer system could not be put
15 on the property. We had to find other property so I
16 worked with engineers on what it would take to develop a
17 sewer plant to service that project because there is no
18 sewer out in front of the lake in that particular area.

19 So I worked with the engineers and the
20 architects and conceptional plan and we turned the
21 conceptional plan into actual drawings.

22 Q. Turn to Plaintiff's Exhibit 4a through d. Do you
23 recognize Exhibit 4a through d?

24 A. Yes.

25 Q. Can you explain to us what they are?

Ballard vs. Warpath, et al

1 A. They are basically proposals to different
2 financing entities to finance Warpath.

3 Q. When you speak of financing, explain what you
4 mean by that.

5 A. In a lot of cases it was two pronged. One was a
6 loan to build the project, and second was equity. Dakota
7 was going to invest in both a loan for the project and
8 equity to make up the difference between what would take
9 to build and what would be borrowed.

10 Q. Were any of the funds, as far as your
11 understanding, being contributed to the project by any of
12 these entities or discussed by any of them and did they
13 come back to you personally or Mr. Robertson personally?

14 A. None of it was to go to any of the partner's
15 personally other than in the construction. It wouldn't be
16 personal but it would flow through. We weren't going to
17 build it so we obviously would take draws from the loan to
18 pay the subcontractors in the construction, but there
19 wasn't to be any personal checks written to any of us.

20 Q. The draw schedules, the amount of estimate that
21 Warpath believed it was going to take to build the
22 project, who developed those?

23 A. I did for the most part.

24 Q. And this is something you had experience doing?

25 A. Yes.

Ballard vs. Warpath, et al

1 Q. You've seen Dr. Woodside's report, correct?

2 A. I have.

3 Q. And there are performers and other information
4 that are presented in that report, were you aware of that?

5 A. Yes.

6 Q. Who developed those?

7 A. I think he quoted some of the performers that I
8 had developed over the years. He had his own as well but
9 some of them were -- we gave him performers as well.

10 Q. The performers that you developed, were they
11 developed for this case or for this evaluation?

12 A. No.

13 Q. What were they developed for?

14 A. They were developed for potential investors and
15 for potential loan.

16 Q. The money being lent to Warpath to fund the
17 construction on this, what was the expectation of the
18 lender? Was it expected that you were going to pay that
19 money back?

20 A. Yes, monthly or quarterly payments out of the
21 revenues developed through Warpath.

22 Q. Turn to 4b. The information placed on these
23 diagrams, were they placed by yourself?

24 A. Yes, I think. It's been a long time. This was a
25 while ago.

Ballard vs. Warpath, et al

1 Q. You see in Item 3, we're referring to First
2 Ticonderoga?

3 A. Yes.

4 Q. Who is First Ticonderoga?

5 A. They were just a contact we had about a potential
6 lender.

7 Q. The loan amount is twenty-seven million, correct?

8 A. Correct.

9 Q. And if you turn to Page 5 of this document.

10 A. Okay.

11 Q. What is Page 5?

12 A. That's a development budget.

13 Q. And what is the approximate development budget in
14 this?

15 A. Twenty-seven million.

16 Q. And that's an estimate that you developed?

17 A. It is.

18 Q. And that's upon your experience in developing
19 those estimates?

20 A. Yes. In so far as numbers I got some hard
21 numbers from subcontractors.

22 Q. The rest of the numbers in there, how would you
23 have developed the appraised value that you have there?

24 A. The appraised value would be a simple mathematic
25 equation of -- net operating the income divided by

Rick Thoennes- Cross Examination by Mr.
Lightsey Ballard vs. Warpath, et al

1 whatever the cap rate would have been at the time and I
2 kept breaking anywhere from five percent to fifteen
3 percent depending on what the financial climate is for
4 that particular industry.

5 Q. And that value would certainly include the cost
6 of building it and other expenses?

7 A. That is actually it's about five years out
8 probably when the project is complete had history behind
9 it as far as income and expenses go.

10 Q. If you turn to 4c, third page, it identifies Rick
11 Thoennes as president.

12 A. That is just a typo. Someone else typed it up
13 and just didn't catch it. It was signed electronically so
14 I really -- the reason I didn't catch it.

15 Q. Do you have the present ability to buyout
16 Mr. Ballard?

17 A. No.

18 Q. What about in 10 days?

19 A. No.

20 Q. Thirty days?

21 A. No.

22 MR. HOWARD: That's all I have, Your Honor.

23 THE COURT: Cross.

24 CROSS-EXAMINATION

25 BY MR. LIGHTSEY:

Ballard vs. Warpath, et al

1 Q. Mr. Thoennes, you said you had provided some of
2 the performers that were used by Dr. Woodside in coming up
3 to his evaluation; is that right?

4 A. I provided all of the paperwork that I had.

5 Q. And are you aware that we had requested that all
6 performers be produced to us in discovery?

7 A. Yes.

8 Q. And are you aware that the final set of
9 performers that were used by Dr. Woodside were not
10 produced to us until after we got Mr. Woodside's report?

11 A. I don't know. It wasn't intentional.

12 Q. You told on behalf of the defense that it was
13 represented to Dr. Woodside that these performers had been
14 given to Dakota Holdings; is that correct?

15 A. Yes.

16 Q. Are you aware that I contacted Dakota Holdings to
17 ask for that?

18 A. No.

19 Q. Did you have any conversation Dakota Holdings in
20 connection with that?

21 A. No.

22 Q. Do you know if anybody else did?

23 A. No.

24 Q. When you submitted these applications, you were
25 trying to defraud those investors, were you?

Ballard vs. Warpath, et al

1 A. No.

2 Q. You believed that the project would generate
3 sufficient money to pay those loans off?

4 A. Yes.

5 Q. You testified you also believed, at least the
6 time of the First Ticonderoga application that about five
7 years out the company would have operating income
8 sufficient to generate a sale value of about 36.7 ---

9 A. Where are you getting that?

10 Q. The 36.7 million dollar ---

11 A. Tell me where that is and I'll look ---

12 Q. 4b.

13 A. Yes.

14 Q. You testified that was determined by your
15 calculations of then operating income about five years out
16 over the capitalization rate that you used at that time?

17 A. Yes.

18 Q. You represented this to a third-party ---

19 A. That's right.

20 Q. That's the value of the company would have at
21 that point?

22 A. Right.

23 Q. And you also said that currently as is the
24 property was worth six million dollars; isn't that right?

25 A. Right.

Perry Woodside - Direct Examination by
Court Ballard vs. Warpath, et al

1 MR. LIGHTSEY: That's all my questions, sir.

2 THE COURT: Any redirect?

3 MR. HOWARD: No, sir.

4 THE COURT: Thank you. You can step down.

5 MR. HOWARD: Nothing further at this time,

6 Your Honor.

7 THE COURT: Dr. Woodside, come on up.

8 THE CLERK: Please place your left hand on
9 the Bible and raise your right hand, please.

10 B. PERRY WOODSIDE, having been duly sworn,
11 testified as follows:

12 Thank you. You may be seated. Please state
13 your name for the record.

14 THE WITNESS: B. Perry Woodside.

15 DIRECT EXAMINATION

16 BY THE COURT:

17 Q. I haven't done this is 12 years. Tell us your
18 background, educational and work.

19 A. I have an undergraduate degree from Furman
20 University, Master's and PhD from the university of South
21 Carolina. I pursued an academic career that lasted 30
22 years. During that time I also developed a consulting
23 practice. I retired from teaching about five years ago
24 and joined an accounting firm for accounting services that
25 involved evaluations and businesses and two of our

Ballard vs. Warpath, et al

1 evaluations involved economic damaged and it's a fairly
2 broad spectrum of type of engagements that I've been
3 involved with over the years.

4 THE COURT: Does anyone want to voir dire him
5 or does everyone want to stipulate that he's an expert?

6 MR. HOWARD: No voir dire and I would
7 stipulate he's an expert.

8 MR. LIGHTSEY: I stipulate to the
9 admissibility of his report and have no challenge to his
10 qualifications.

11 BY THE COURT:

12 Q. Dr. Woodside, please, for the record, explain how
13 you got involved in this matter.

14 A. I was contacted by the two attorneys involved
15 here about offering an opinion as to the value of stock of
16 Warpath and my understanding was that I would be
17 presenting my opinion and that both parties would be
18 involved in the appraisal process in terms of its finding
19 information. It was not an adversarial proceeding at all.

20 Q. And did you encounter any problems while
21 performing that engagement with respect to obtaining
22 information?

23 A. No. Like many engagement you probably don't have
24 as much information as you would like, detailed
25 information as you would like, but what was represented to

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1 me was what was available.

2 Q. Did you study this issue and come to a
3 conclusion?

4 A. Yes, sir.

5 Q. What documents and resources did you rely on?

6 A. I had a fairly large volume of documents
7 everything from the conceptional plans for the project.
8 There were two design firms involved, the Ellis Group and
9 then Justice Design. I had renderings of elements of the
10 project. I had developed plans -- a history of
11 development plans that were created over time up until, as
12 a matter of fact, I think the last one 2012.

13 Q. Okay. Do you remember what is the beginning date
14 of the documents you examined?

15 A. Well, I went back to the original agreement among
16 the parties. The lease, I got a copy of that and things
17 dealing with legal issues that I'm not involved in. I got
18 tax returns for Warpath Development Inc. There is
19 documents surrounding applications or communications with
20 potential providers of funding. Some of those have been
21 discussed here this morning. It's my understanding is I
22 have a complete file of those documents.

23 Q. And you're familiar with recent and current
24 economic trends?

25 A. Yes, reasonable so.

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1 Q. And did you rely on your knowledge in those areas
2 as well in coming to your conclusions?

3 A. Yes, sir, very much so. I regularly monitor that
4 kind of activity. I also talk to people in the capital
5 markets when I was doing this appraisal. I talked to
6 developers of marinas, owners of marinas, lenders to
7 marinas about the conditions in the market at that point
8 in time. And the basic assumption I made was I appraised
9 this assuming the development had not taken place but was
10 to be undertaken if that makes sense.

11 Q. Yes.

12 A. So I was looking at conditions in the market at
13 that point in time. I've talked to owners of marinas who
14 have developed them, refinanced them, and tried to make
15 this appraisal relevant to the market as it existed at
16 that point in time as I could. So it's economic
17 conditions, but it's also lending and capital market
18 conditions.

19 Q. Okay. So you got a snapshot and what is the date
20 of that snapshot?

21 A. It's April, 2012.

22 Q. Okay. Tell us what's in the picture.

23 A. Well, what I did and this is where there is some
24 confusion, I value the stock of this company. The company
25 has the lease with Duke and the lease with the permit has

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1 value but the value is determined about what it could be
2 used for. In and of itself does not have any value. It
3 has to have some purpose where it could be put in in order
4 to be create. I developed a discounted cash flow for the
5 primary needs in determining the value of the stock.

6 I looked at what we would call a marketing
7 approach. There's virtually no meaningful data out there
8 for the purchase and sales of marinas that you could use
9 as a guideline. They're infrequent and the data is not
10 complete. It's very difficult.

11 The model that I developed reflects the
12 agreements that was reached among the parties where
13 capital was to be provided by Mr. Roberson sufficient to
14 obtain financing. None of that has happened to this point
15 so what I did was to look at what lending requirements
16 generally were in April of 2012. The equity requirement
17 at that point in time ranged from about 40 percent or 60
18 percent or somewhere in that neighborhood. You'd have to
19 have that much equity going into the deal to obtain normal
20 financing.

21 Now, the construction budget that I assumed
22 here was about twenty-one million dollars, round figure.
23 That means that ten million dollars is coming from the
24 lender and ten million dollars provided by Roberson. I
25 don't know exactly in what form, but he was going to

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1 provide it so it would support that loan. In other words
2 what he put in, that would be subordinated to the lender
3 more than likely, so it's about a 50/50 split basically.

4 The agreement provided that Mr. Roberson
5 would be paid back that support funding before there would
6 be any distributions or dividends back to the partners in
7 general. So we got a situation where the net operating
8 income developed by the project as it comes on line has
9 then got to satisfy the funding put in by Mr. Roberson as
10 well as satisfy the debt service requirements by the
11 lender. So I developed a very detailed schedule that
12 captures the repayment of debt from the lender as well as
13 repayment of Mr. Roberson's contribution.

14 The forecast or projection of net operating
15 income is based upon first of all the construction of the
16 project which was staged over time. In other words, you
17 begin construction, Mr. Roberson has to put in his money
18 first, the draws that was described earlier under the
19 contract that would be taken periodically, but a lender is
20 going to require that the equity portion be put in first
21 before they start lending their money. So Mr. Roberson's
22 money goes in first as this construction continues.

23 Then as Phase 1 is completed it begins and
24 then Phase 2 is under construction and when it begins its
25 operation it's delayed a little bit. So I accounted for

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1 the construction period. I accounted for the funds that
2 Mr. Roberson put in. I accounted for the funds that a
3 lender put in and then accounted for the for it all as the
4 operation begin to generate then operating income.

5 So what I then have is a schedule that
6 ultimately shows a return to the investors and then I make
7 an assumption at the end that the project is sold and I
8 think I did that, I can't remember off the top of my head,
9 but I think it was a year. The projection that I had at
10 the end of that period was thirty million dollars.

11 Some of the debt would be outstanding at that
12 point in time. What happens in a real estate development
13 like this is typically you have a construction term and
14 when that construction is completed, there may be some
15 term after that until the project reaches stabilized NOI
16 and at that point in time you refinance the construction
17 loan. Sometimes you can go into the permanent debt
18 markets to be able to do that, but the point is by the
19 time I made that sales assumption, not much of the debt
20 has been paid down because of the typical terms of the
21 loan. So what has to happen when a sales takes place is
22 any remaining debt has to be repaid and I subtracted that
23 out.

24 A big issue in a discounted cash flow model
25 is the required rate of return which then translates into

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1 a discount rate for discounting those expected returns and
2 I spent a good deal of time and effort trying to
3 accurately determine what a required rate of return should
4 be.

5 Now, when you talk about cap rates
6 determining that value of a property and the cap rate
7 maybe 10 or 11 percent, that is not an investor rate of
8 return because these projects are always leveraged. So
9 when you have that NOI and you divide it by .10, they were
10 talking about an example of .07 on one of these and gave a
11 thirty-six million dollars, that is not an investor return
12 at all. What you've got to do is account for the fact
13 that you're going to earn that NOI but then a good portion
14 of it is going to be financed. You're going to service
15 the debt and pay the debt back and then the residual left
16 over that provides the investor a return and that is a
17 risky residual.

18 I talked to lenders of marinas and similar
19 projects. I talked to developers, owners of projects and
20 look at it from both sides and the required rates of
21 returns that I got were in the neighborhood of -- the
22 lowest I got was 20 percent and I got three or four
23 opinions, observations, that would probably be 24, 25
24 percent. I chose 21 percent as a reasonable required rate
25 of return and it's an equity required rate of return.

Perry Woodside - Cross Examination by Mr.
Lightsey
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1 That what we would be seeking to account for
2 the delay in ever realizing the positive NOI once is ramps
3 up and the risks associated with it. The risk can be from
4 any source.

5 So I discounted all of that complex model
6 back to the spring and I assumed, I know there is maybe
7 some legal issues surrounding the percentage ownership but
8 for the sake of this appraisal, I appraised a 20 percent
9 ownership interest in the property. If it were some other
10 percent, you could certainly work off of that number to
11 determine.

12 The total value, I should have said that, was
13 four million, three hundred and sixty.

14 Q. Total value meaning?

15 A. Stock in the company.

16 THE COURT: Any questions anybody wants to
17 ask?

18 MR. LIGHTSEY: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. LIGHTSEY:

21 Q. Dr. Woodside, at my request you did a supplement
22 to your report, correct?

23 A. Yes, I did.

24 Q. Dated May 9th.

25 A. Yes.

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1 Q. And you provided a copy of that report, did you
2 not?

3 A. Yes, it was provided.

4 THE COURT: I'm not sure I ever got it.

5 MR. LIGHTSEY: I've got extra.

6 THE COURT: Okay.

7 MR. LIGHTSEY: This is a copy of the report
8 and the supplemental is in the pocket.

9 BY MR. LIGHTSEY:

10 Q. And the basis of the supplemental report was to
11 determine if the construction of the project could be done
12 when the final permit was issued in the summer of 2010 and
13 what effect that would have on the evaluation, correct?

14 A. Yes.

15 Q. And you determined based on those assumptions
16 that the total value of the company would be seven
17 million, one hundred and seventy-eight thousand?

18 A. That's correct but that's if the project had
19 begun then and we were looking at the value now which
20 would be the present value of what's expected beyond that
21 point.

22 Q. This may not be important but I think you
23 miss spoke at one point in your testimony. You said your
24 evaluation was done as of April of 2012 but I think it was
25 December of 2012; is that right?

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1 A. That's correct.

2 Q. And based on your supplemental analysis the total
3 value of seven million, hundred and seventy-eight thousand
4 calculated at 20 percent value would be one million, four
5 hundred and thirty-six thousand; is that right?

6 A. Yes, sir, that's exactly right. Now, when you
7 called me to do this rather than go back and redo
8 everything, I assumed the same cap rate when the sale of
9 the property occurs, which is pretty reasonable I think.
10 So I did go back and make adjustments to some of the
11 underlying assumptions but what it does calculate that if
12 it had begun then and go through by schedule on the
13 (inaudible) and to ramp up the revenues, if we were
14 sitting here at this point in time, it would already be
15 operational and it would have greater value.

16 Q. And as a legal matter if Mr. Ballard would be
17 determined to be entitled to 50 percent of the value of
18 the company, that would be approximately two and a half
19 million, is that right?

20 A. Yes, approximately.

21 Q. Now, as you testified you used the discounted
22 future benefits methods for doing this?

23 A. Yes.

24 Q. And the report says that discounted future
25 benefits method is appropriate when the future operations

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1 can be forecasted with some accuracy; is that right?

2 A. That's correct.

3 Q. The forecast that you were using for projected
4 revenues, expenses, profits and that operating income,
5 those were provided to you by the management of the
6 company, correct?

7 A. They were and I had a number of those projections
8 at the time and I used the ones that were developed in
9 late of 2012.

10 Q. And those were represented as being the ones that
11 were given to Dakota Holdings, correct?

12 A. I believe so but they are similar to ones that
13 were submitted earlier.

14 Q. In your report when you saw the information came
15 from management, we're really talking about the defendants
16 in this case, aren't we?

17 A. Yes, because they were the ones involved at that
18 times. I talked to Mr. Ballard and he wasn't privy to a
19 lot of information so I couldn't get it to him directly.
20 I certainly would have.

21 Q. Certainly. You are aware from reading Judge
22 Miller's prior order in this case, the defendants, the
23 management, that they were found to be engaged in
24 shareholder oppression.

25 A. Correct.

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1 Q. And specifically oppression of the founder of
2 this company.

3 A. Correct.

4 Q. And you would agree with me that at least in
5 terms of this evaluation proceeding, the defendants have
6 an incentive to minimize the evaluation, do they not?

7 MR. HOWARD: Objection, Your Honor.

8 THE COURT: Overruled over the objection.

9 THE WITNESS: I can't say whether they have
10 an incentive or not.

11 BY MR. LIGHTSEY:

12 Q. Well, they would obviously prefer an evaluation
13 as long as possible, wouldn't they?

14 A. They would prefer probably lower number than 100.

15 Q. And the performers that you used for your
16 evaluation and calculation has a number of various items
17 to it?

18 A. Sure.

19 Q. And those were provided to you by the defendant?

20 A. Correct.

21 Q. And if those change, it would effect the
22 calculation of the value?

23 A. The one observation if you're talking about
24 incentives if you're looking for financing, you'd rather
25 have a higher number than a lower number. So I sort of

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1 put all of this in context and said this is the best
2 information I've got. I don't have anything other than
3 this and so I ruled out the work based on that. But one
4 point you made, discounted future benefits can make
5 projections that are reasonable. Commercial real estate
6 appraisals do this all the time.

7 They appraise properties on an as built basis
8 when there's nothing but a piece of dirt out there and
9 they go through basically the same process except the
10 appraiser is not going to figure out all the debt service
11 and figure out when he needs to return back to the
12 investors. They sort of stop half way down. The process
13 is the same for the top half of it, the revenue
14 projections, the construction budget and all of that.

15 Q. My question, Dr. Woodside, is not related to the
16 process but the source and the fact that they came from
17 the defendants.

18 A. Sure.

19 Q. You make an interesting point you said these were
20 numbers that were given to potential investors and if
21 anything they might want to inflate the numbers, did you
22 actually contact any of those third-parties to see if what
23 the defendants told you what they gave them?

24 A. No, I did not.

25 Q. You didn't verify their protective numbers, did

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1 you? In other words, you didn't go out and verify those
2 numbers of all of those numbers, did you?

3 A. You mean like contacting subcontractors?

4 Q. Yes.

5 A. No.

6 Q. And you did not purport to opine here as to the
7 reliability of the performers that were provided to you
8 that you used?

9 A. No.

10 Q. In fact, your report makes it very clear that you
11 relied solely on management and the actual numbers could
12 be materially different, correct?

13 A. If it comes to that, it could be different.

14 Q. You became aware after you first circulated your
15 report that we had not been given the performers that were
16 provided to you. You read the email exchange about that?

17 A. I did and I was not called the exchange documents
18 or anything but you did make me aware of that.

19 Q. Does that lead you to question the reliability at
20 all the fact that they were not provided?

21 A. I can't comment on that at all.

22 Q. If it were in fact the case what you were told
23 was given to Dakota Holdings was not given to Dakota
24 Holdings, would that cause you to question the reliability
25 if you were misled about that?

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1 MR. HOWARD: I object to the question here.
2 There is nothing factually in evidence to suggest that
3 these numbers were not provided to Dakota Holdings.

4 THE COURT: I don't know if he's setting the
5 whole thing up for something but all he's doing is ---

6 MR. HOWARD: Assuming facts not in evidence.

7 MR. LIGHTSEY: I'm not trying to set up
8 anybody, Your Honor. I have information to hand up to
9 you, a copy of the email that I have of Clem Anderson who
10 was with Dakota Holdings, their principal, where he was
11 trying to get the performers that they were provided and
12 all he could get was a promotional packet which was years
13 old. Just for the record if we could mark that as Court's
14 Exhibit 1 so we could have that in the record.

15 (Email marked as Court's Exhibit No. 1 for
16 identification.)

17 MR. HOWARD: I would object to that for the
18 record, Your Honor. It's not addressed to me and I can't
19 tell -- there is nothing to actually confirm this email.

20 MR. LIGHTSEY: The reason I brought it up is
21 I was accused of saying something that I had no basis for.

22 THE COURT: Okay. It's entered as a Court's
23 Exhibit.

24 BY MR. LIGHTSEY:

25 Q. The company itself obviously has no operating

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1 history at this time, does it, Dr. Woodside?

2 A. Not really. It's incurred expenses but --

3 Q. But it hasn't broken ground.

4 A. No.

5 Q. Doesn't have any operating revenues, correct?

6 A. Correct.

7 Q. And as you know there's really no way to
8 determine the projections that you were given that you
9 relied on if those will come to pass or not likely that
10 those will come to pass, is there?

11 A. Only if you can divine the future.

12 Q. Could be worse, could be better, could be very
13 different, couldn't it?

14 A. It's possible, yes.

15 Q. Are you opining today that it's likely those
16 numbers will come to pass?

17 A. They are the result of my analysis based on my
18 assumptions.

19 Q. You were given those numbers by the defendants,
20 correct? I'm talking just about the performers.

21 A. Yes, but there are a series of those performers
22 and over the last year or so or a couple of years, I
23 guess, they were fairly consistent.

24 Q. Now, you said that you determined that the equity
25 required to obtain financing would be in the range of 40

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1 to 60 percent of cost of construction or cost of
2 development?

3 A. Yes.

4 Q. And so the twenty-one million dollars estimated
5 construction budget that would require Mr. Roberson under
6 the agreement to put up I think you said nine million --
7 in the range of ten million dollars?

8 A. Yes.

9 Q. And you are aware, of course, that he has not
10 done that.

11 A. That's correct.

12 Q. And based on this morning's testimony, it appears
13 he is unable to do that, would you agree?

14 A. I heard the testimony and I think that's a
15 reasonable statement based on current conditions.

16 Q. Now, you mentioned in terms of the discount rate,
17 22 percent discount rate you used. That was an equity
18 rate of return, correct?

19 A. That's correct.

20 Q. Would you agree that an investor was able to
21 leverage his investment by borrowing money that he was
22 investing from, that that would, under the weighted cost
23 of capital approach, that would cause the required rate of
24 return to be less than the 22 percent equity rate of
25 return?

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1 A. A weighted average cost of capital would clearly
2 be less.

3 Q. And isn't that the approach that is in fact
4 advocated in the draft treatise you cite in your report?

5 A. Well, it depends on the nature of what you're
6 doing. What I was calculating is the cash flow that would
7 go back to the equity holders and in this particular case
8 where you've got to pay down the debt, pay down the
9 whatever you want to call the Roberson contribution -- by
10 the way, that contribution has got to be some form of debt
11 that has to be subordinated debt because of IRS rules.
12 You certainly don't have to use a weighted average cost of
13 capital and use that approach. It makes more sense to do
14 a discounted cash flow to equity because the weight
15 average cost to capital assumes a constant capital
16 structure which means the debt to equity ratio doesn't
17 change. What you got to do here is reflect the fact that
18 Mr. Roberson has got to get paid back before there's any
19 cash flow that will accrue to the owners of Warpath.

20 Q. I don't really understand all that but isn't it
21 true that treatises that you cite advocates weighted
22 average cost of capital approach to determine the discount
23 rate?

24 A. It advocates that but it also recognizes the
25 other. It's not to the exclusion to the other at all.

Perry Woodside - Cross Examination by Mr.
Howard vs. Warpath, et al

1 Q. Isn't it true that you, yourself, have used the
2 weighted average cost of capital approach to evaluating
3 interest in the company?

4 A. If the underlying facts support it, I use it. In
5 this case, I don't think it was appropriate.

6 Q. If it were used here, would you agree that if any
7 investor was able to leverage their investment by
8 borrowing money that that would result in a lower discount
9 rate under the weighted average cost of capital approach?

10 A. The discount rate is a lower number but then you
11 have to subtract all the debt from the conclusion. It's a
12 difference there.

13 MR. LIGHTSEY: Nothing further.

14 BY MR. HOWARD:

15 Q. Dr. Woodside, a couple of questions. Doctor, in
16 the course of receiving documents, you received
17 documentation of efforts made to secure financing,
18 correct?

19 A. Yes.

20 Q. And you would agree with me that Mr. Roberson's
21 obligation could be met by securing capital from other
22 sources, correct?

23 MR. LIGHTSEY: Objection. That's a totally
24 legal question.

25 BY MR. HOWARD:

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1 Q. ~~It could come from another source, though,~~ not
2 just Mr. Roberson, correct, that ---

3 THE COURT: I think Dr. Woodside said that he
4 thought Mr. Roberson's contributions could be leverage.
5 Didn't you say that?

6 THE WITNESS: It could be but that would be a
7 private transaction of him. I read the agreement ---

8 BY MR. HOWARD:

9 Q. I guess my question is you're just assuming money
10 is being put into it. It doesn't necessary matter where
11 it comes from, correct?

12 A. That's correct.

13 Q. From the stand point of having to --

14 A. It's simply provided.

15 Q. And from the documentation you received, there
16 have been efforts to get it provided?

17 A. Yes.

18 Q. Let's go back to the May 9th supplement and
19 Mr. Lightsey indicated he made that request of you. Do
20 you recall that?

21 A. Yes.

22 Q. How was that made? Was that made by phone,
23 email?

24 A. I think both if I recall. I don't know
25 initially, but I know we talked about it on the telephone

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1 just so I understood and got some clarification of just
2 what he was asking for.

3 Q. Was I on that phone call or those emails, do you
4 recall?

5 A. No.

6 Q. The documents that you received -- the performers
7 that you received from my clients, what do you call being
8 explained that those documents were?

9 A. Well, they were actually used for a number of
10 purposes. One was their own internal analysis of what the
11 project was all about. What is the project going to cost,
12 what are the elements of that cost, and what are the
13 drivers of the revenues for the project.

14 Q. The May 9th report that you issued, the
15 supplement, I want to understand that because I followed
16 up with Evans in your office and I think he was the one
17 that sent it to us. This is the way I understand it, you
18 set the value as of December 31, 2012, correct?

19 A. Correct.

20 Q. And you're assuming numbers that were created in
21 that time frame.

22 A. You're talking my model or the information?

23 Q. The model that you developed was assuming numbers
24 as of December 31, 2012, correct?

25 A. Correct.

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1 Q. What Mr. Lightsey to do was go back and assume
2 that this project had been built in 2010, correct?

3 A. Had been started.

4 Q. And by started meaning that the financing had
5 been obtained and the development started; is that right?

6 A. Yes.

7 Q. Because that's what your whole appraisal assumes
8 that all the things that need to be done to build this
9 project, get the money, get the dirt moved around, get is
10 constructed and operational was done.

11 A. Yes.

12 Q. In your May 9th, you don't go back and look at
13 the numbers that are consistent with what was from 2010,
14 correct?

15 A. All this analysis ---

16 Q. You just shifted it.

17 A. That's all I did, yes. Instead of my appraisal
18 because there was nothing out there and I think I talked
19 with both of you about the basic assumption I was making
20 was that what's the value made for the project, what we're
21 doing here, and so my initial report assumes that the
22 funding is obtained and the construction begins and then
23 you have the ramp up and so forth. This revised report
24 assumes that that schedule began back in the summer of
25 2010 so we would be through the schedule a good bit.

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1 Roberson even today would not have been paid
2 back his money but it shifts and that's exactly right.

3 Q. That's what I was getting to. Essentially like
4 the way I read your report is that it assumes that the
5 construction had begun by the end of 2013; is that right?

6 A. Yes.

7 Q. And so what you did is just shifted it back three
8 years and say it's not 2013 but we're going to assume it's
9 begun in 2010.

10 A. Right.

11 Q. And then just project forward in the same
12 numbers, the same everything and just shift it back three
13 years.

14 A. Right.

15 Q. Factual, were you provided anything that
16 construction had begun in 2010?

17 A. No, it was an assumption I made.

18 Q. And factually you had not been provided anything
19 from Mr. Ballard that said Mr. Ballard we promise you that
20 we're going to start this construction in 2010?

21 A. No, I have not seen any documents to that effect,
22 no.

23 Q. As to the numbers you used in development of the
24 model, did you have conversations with Mr. Ballard about
25 numbers on the project?

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1 A. Sure.

2 Q. Did he provide you with any performers or numbers
3 of the project?

4 A. I don't know if he had documents or not, I don't
5 recall. He possibly could have but I actually visited the
6 site with him.

7 Q. It appears that they're arguing that there's
8 something wrong with the numbers that management provided
9 to you and I'm asking did Mr. Ballard have an opportunity
10 to provide his own? Did you give him that chance?

11 A. Perhaps. He didn't have any performers that I
12 know of.

13 Q. And he hasn't submitted anything further to you?

14 A. No.

15 Q. Did he or his lawyer ever question or ask you
16 question about why you use those numbers or question the
17 use of those numbers?

18 A. Nothing other than today.

19 Q. The numbers that you used, those were provided to
20 you by Mr. Thoennes, correct?

21 A. Yes.

22 Q. And did you see the entire email exchange about
23 those numbers after Mr. Lightsey questioned you?

24 A. I don't know.

25 Q. I was just wondering because I was just seeing if

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1 you understood that the reason those numbers didn't get
2 delivered to you was the fault of our office and not
3 Mr. Thoennes, did you know that?

4 A. No, I really didn't.

5 Q. You were saying you weren't aware of that at the
6 time and I just wanted to make sure. From a risk stand
7 point, where did this project hit for investors? Is it a
8 low risk investment or a high risk investment?

9 A. Well, I think the best way of beginning that
10 answer is by saying a real estate investment because
11 that's basically what that is a real estate development.
12 It's got several different components. It's on the higher
13 end of the risk spectrum. If you've got an apartment
14 complex, a 400 unit apartment complex, in a reasonable
15 market, that's a lot different risk profile than a marina
16 on Lake Kiwi. And that's the reason you see different cap
17 rate reflected in the market place. You don't see any
18 marina cap rates much because they're not published but it
19 would be on the higher end of the risk prospective.

20 Q.. Now, the assumption in your model is that in
21 providing this money into it as of the time that you
22 provide it in the financing is not obtained and is not
23 built yet, correct?

24 A. Correct.

25 Q. It is to be built.

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1 A. That's correct.

2 Q. And there's certainly a risk component to
3 obtaining financing; is that correct?

4 A. Yes.

5 Q. There is a risk component as to what it is
6 actually going to cost to build, could be higher or lower?

7 A. Sure.

8 Q. And there's a risk component as to whether or
9 not, in this case while we're hopeful, but whether or not
10 the income and the revenue that is projected to be
11 obtained there's a risk there that there won't be,
12 correct?

13 A. That's correct. And the discount rate that I
14 used considered those risks.

15 Q. How does it consider those risks?

16 A. Well, if it were a treasury security where you'd
17 have very little risk, you'd have a much different
18 required rate of return, maybe three percent. Many
19 closely held businesses required rates of return. They
20 could be north of 25 percent if you were just opening a
21 lot of just risky enterprises, but this a real estate
22 oriented one. And, again, I talked to developers about
23 what their required rate of return would be. And the
24 thing you got to remember is what is the value in the
25 stock of this entity? So if I say it's worth 4.367

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1 million and somebody paid that and bought all the stock,
2 would they then have the lease, the permitting, the
3 drawings that have been done to date, all of that is what
4 you would have and how did you get at that 4.367 million
5 would be I'll have that and can I make it happen and earn
6 a rate of return and you discount all of that can it
7 happen at a rate that reflects that risk.

8 Q. The method you used in generating your discount
9 rate, you ever heard of the build up method?

10 A. Sure.

11 Q. Is that what you used?

12 A. Sure, sure.

13 Q. Why don't you explain the build up method?

14 A. You start off with a risk free rate and then add
15 components of risk to get to what you think is a
16 reasonable required rate of return for the particular
17 entity that you're appraising. The most subjective part
18 of it is what is typically referred to as a company
19 specific risk premium. That gets you away from all these
20 trade market rates of return, start translating it back to
21 Warpath Development Inc on Lake Kiwi, South Carolina.

22 Q. And in this case, you started with the risk free
23 which according to your report was two-and-a-half percent?

24 A. I believe that's correct. Yes.

25 Q. Where did you pull the two-and-a-half percent

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1 from?

2 A. You can get it from any number of resources, but
3 we pull these off of a data service called Bloomberg.

4 Q. The next level of build up that you indicated is
5 a common stock equity premium. Could you explain what
6 that was?

7 A. That's the additional required rate of return
8 that on the average would entice an investor to move out
9 of treasury securities into trade securities in the market
10 place general average. In other words, you've got to have
11 another 6.7 percent return to get you out of treasury into
12 equity.

13 Q. Treasury is going to give you that guarantee
14 two-and-a-half and the way you described it common stock
15 equity premium and that's large capitalized stock; is that
16 correct?

17 A. That's correct.

18 Q. And that's sort of moving into, for lack of a
19 better way of putting it, stocks that maybe trade on the
20 New York Stock Exchange.

21 A. That would be reasonable.

22 Q. And there was a number that you put on that of
23 6.7 percent?

24 A. Correct.

25 Q. And that's developed from where?

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1 A. That comes from the publication there Morning
2 Star. It has an equity premium there. There are other
3 sources that are updated periodically. You can pull this
4 information from several sources. It's a publication.

5 Q. This Morning Star is that one that's commonly
6 used?

7 A. Yes.

8 Q. By one such as you who is looking to create a
9 discount rate on the build up method?

10 A. Yes.

11 Q. The next number that you added -- let me
12 understand on build up is you take the two-and-a-half
13 percent and add a 6.7 to it, correct?

14 A. That's correct.

15 Q. And the next one you add to it was 6 percent
16 which is the risk adjustment for size of company.

17 A. Correct.

18 Q. This is also taken from the Morning Star report,
19 correct?

20 A. Correct.

21 Q. And under that scenario we're still talking about
22 a publicly traded company.

23 A. Correct.

24 Q. We're talking about a smaller capitalization?

25 A. That's correct. We're heading down to smaller

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1 companies but they're still trading.

2 Q. They're still trading, but they're riskier than
3 the larger capitalized companies, correct?

4 A. That's true, yes.

5 Q. And so you start with your two-and-a-half, you
6 add your 6.7 and then 6 which is generated that and then
7 you get to the company's specific risk premium which was
8 seven, correct?

9 A. Correct.

10 Q. And like you said from a build up, that's when
11 you're building up to Warpath, which is a four person
12 entity, correct?

13 A. Correct.

14 Q. And it's not traded.

15 A. Correct.

16 Q. And it has a different level of risk than a small
17 cap stock, right?

18 A. Yes.

19 Q. And how did you come about assigning it seven?

20 A. This was done -- it's really my conclusion as to
21 what a reasonable number would be for that company's
22 specific risk premium but it did involve the discussions
23 with the marina owners and developers what that market at
24 that time what a required rate of return would be so that
25 makes up the difference if you look at it that way.

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1 Q. All total you came up with a rate of 22 percent,
2 right?

3 A. Yes.

4 Q. And that was rounded, right? When it started it
5 would have been 22.3 and you rounded it to 22.

6 A. Correct. I think I misspoke earlier. I think I
7 said 21.

8 Q. I just wanted to correct that. At the end of the
9 day with your determination, your model, you put on his
10 20,000 shares representing 20 percent interest, you placed
11 a value at eight hundred and seventy three thousand,
12 correct?

13 A. Yes.

14 Q. What do you recognize 4b as?

15 A. This is a document entitled a, "Conditional loan
16 commitment."

17 Q. The issuer of this is Dakota Holdings, LLC?

18 A. Yes.

19 Q. Have you looked at documents such as this before?

20 A. Yes.

21 Q. Based on your experience, what does it appear
22 that Dakota Holdings is doing?

23 A. They are advancing twenty-four million dollars
24 that they expect to get repaid and it has got two
25 levels of pricing, eleven percent preferred return and

Ballard vs. Warpath, et al

1 then an eight percent return on straight debt. It's got a
2 five-year term so basically what this is assuming is they
3 advance twenty-four million dollars to get the project
4 built. They will get paid back, it says equity split
5 60/40 total paid back, then 50/50 by seller.

6 What basically is going to happen by the end
7 of five years either one has got to buy the other out or
8 sell it on the open market. It's like a five-year term
9 but it's got two levels is what it amounts to.

10 You could calculate the return to the owners
11 of Warpath Development, Inc., if you went through -- some
12 of this is a little vague -- but if you went through it,
13 if they are advancing twenty-four million dollars, 9.6 at
14 eleven percent -- 9.6 million and 14.4 at 8 percent,
15 that's only two million dollars a year in interest. So my
16 projections of NOI and operating income would have to have
17 a reduction for the interest paid and then the owners of
18 Warpath would get 40 percent of the residual, of what's
19 left over.

20 They say that it would defer the interest on
21 the preferred for one to three years but that doesn't mean
22 it goes away. So they'll have to catch up that interest
23 payment after one, two, or three years. That's unknown.
24 But then when you sell it at the end and if it sells for
25 thirty million or whatever the number is, then that which

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1 has not been paid back would have to be paid back. If
2 it's all been paid back before then -- well, you couldn't
3 pay it back. It wouldn't be enough cash flow to pay it
4 back. You couldn't even begin to pay it back. You'd have
5 to pay whatever is due which would be a large number.

6 I don't think if you work through this with
7 several scenarios, I don't think you'd come up with a
8 number that's as high as my appraised value of the stock
9 the way I read this document. I actually did this a long
10 time ago.

11 Q. As compared to a general equity investor --
12 you're evaluating Mr. Ballard's interest as an equity
13 investment, correct?

14 A. Yes.

15 Q. Not a lender who has got an expected rate of
16 concern? This is somebody who is putting his capital at
17 risk with the desires that it come back to him at some
18 point?

19 A. Yes.

20 Q. Well, it be the sale or through distributions; is
21 that correct?

22 A. Yes.

23 Q. And in this case, you have your physical lender,
24 correct?

25 A. Correct.

Perry Woodside - Recross Examination by Mr.
Lightsey
Howard vs. Warpath, et al

1 Q. And that would certainly account for the lower
2 percentage they are willing to take versus you calculated
3 during the 22 percent?

4 A. Yes, but this is the debt he's going in. The
5 owners of Warpath Development, if they commit to this
6 twenty-four million dollars, they still got to build the
7 project with all the intended risks, they've got to
8 generate revenue with the intended risks, they've got to
9 operate within the economy with the intended risks, so
10 they equity required rate of return is something that's
11 not reflected here.

12 MR. HOWARD: Thank you.

13 MR. LIGHTSEY: I have a few questions, Your
14 Honor.

15 THE COURT: Briefly.

16 MR. LIGHTSEY: I'll be brief.

17 BY MR. LIGHTSEY:

18 Q. You stated, Dr. Woodside, that that had not
19 raised any concerns about the accuracy of the numbers that
20 the defendants were providing to you. I'd like to hand
21 you a email I sent to you and copies Mr. Howard on and
22 have it marked as Plaintiff's Exhibit 10.

23 (Email marked as Plaintiff's Exhibit No. 10
24 for identification and admitted into evidence.)

25 BY MR. LIGHTSEY:

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1 Q. I'd like to hand you what we've marked as
2 Plaintiff's Exhibit 11 and ask you if you remember that
3 email that I sent to you in December of last year or even
4 the beginning of the year -- this is actually to John
5 Evans. John Evans is your associate, correct?

6 A. Correct.

7 Q. My initial question is do you remember getting
8 this email?

9 A. I do. It was back in December.

10 Q. If you go down those two-thirds it says in
11 several places the engagement letter states that, "will
12 rely on the company's management for financial records
13 information," et cetera, and I did raise some concerns
14 there, did I not, Dr. Woodside about the credibility of
15 the defendants?

16 A. Yes.

17 Q. And the reliability of whatever material that
18 they have provided to you.

19 A. Yes, you had issues apparently.

20 Q. And yet still you based your evaluation on
21 financial projections that were given to you by the
22 defendants that you never audited; is that right?

23 A. That's correct, but these financial projections
24 were created at different times and some of them were
25 time-stamped. They appeared to be generated for the

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1 purpose of analyzing the investment and perhaps obtaining
2 funding.

3 Q. After using the defendant's numbers to come up
4 with your projection, you came up with the value for
5 Mr. Ballard's stock that was actually less than what
6 Mr. Roberson paid for the same number of shares in 2007,
7 correct?

8 A. That's correct.

9 MR. LIGHTSEY: No further questions.

10 Your Honor, I don't want to blind side
11 anybody but the nature of my objection to Dr. Woodside's
12 report is that he does not opine that this number is most
13 probably the fair value to a reasonable degree of
14 certainty in the field which I think is the standard of
15 admissibility for expert opinion. I don't see how he can
16 say that given what he's candidly acknowledged and stated
17 in his report to the effect that he's relied on numbers by
18 management and does not know whether they're accurate and
19 gives no opinion as to their accuracy and that is the
20 foundation of his mathematical calculations. That is the
21 nature of my objection.

22 THE COURT: Thank you very much. You can
23 step down, sir.

24 I don't have any more witnesses.

25 MR. LIGHTSEY: I would like to put Dr. Alford

Charles Alford - Direct Examination by Mr.
Lightsey
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1 up.

2 THE COURT: How long do you think it would
3 be? Here's my concern, I have a jury coming at 2:00,
4 court personnel have not had an opportunity to eat lunch,
5 so what do you think ---

6 MR. LIGHTSEY: I think it could be done in 45
7 minutes but you do have a jury coming.

8 THE COURT: I'm less concerned about the jury
9 than court personnel. I can keep them locked away but
10 court personnel I have to deal with.

11 Okay, we'll take about five minutes.

12 (Whereupon, there was a brief break.)

13 MR. LIGHTSEY: We'd like to call Charles
14 Alford to the stand.

15 MR. HOWARD: I renew my objection.

16 THE COURT: Over your objection.

17 THE CLERK: Place your left hand on the Bible
18 and raise your right hand.

19 CHARLES ALFORD, having been duly sworn,
20 testified as follows:

21 Please state your name for the record.

22 THE WITNESS: Charles Alford.

23 THE COURT: Apart from your objection, do you
24 stipulate that he's qualified as an expert.

25 MR. HOWARD: I don't have any problem with

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1 his qualifications.

2 MR. LIGHTSEY: I'll skip over that.

3 DIRECT EXAMINATION

4 BY MR. LIGHTSEY:

5 Q. Dr. Alford, in light of our time emergency and in
6 view of the stipulation, we'll just skip over your
7 background and qualifications. In the notebook I handed
8 to the Court and has been marked as Plaintiff's Exhibit
9 12, there is a copy of your current CV under Tab 7; is
10 that correct?

11 A. It is.

12 Q. Thank you. Just briefly tell the Judge how you
13 initially got involved in this case.

14 A. Mr. Lightsey called me just to consult with him
15 on the case to read Dr. Woodside's report and give him
16 reactions to it. I did and I gave him reactions. I read
17 it, I give the standard check arithmetic and checked the
18 assumptions and I gave you a reaction to it.

19 Q. In general, what is your opinion of Dr. Woodside?

20 A. Well, Dr. Woodside is a friend of mine and we're
21 colleagues and he's the court's expert and I have nothing
22 but good things to say about him. I hold his work in high
23 regard.

24 Q. And you, yourself, served as a court expert in
25 other cases?

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1 A. I have.

2 Q. After your initial review of his report, were you
3 asked to take a look at the report in light of the
4 proposal that had been made by Dakota Holdings?

5 A. You indicated that there was such a document and
6 I looked at that and then expressed a little bit of
7 surprise at their proposal in light of Dr. Woodside's
8 appraisal and began to work some numbers.

9 Q. Why did you initially feel a little bit surprised
10 at their proposal?

11 A. Well, from what I could see just first glance
12 Dakota Holdings wasn't expecting to get the kind of return
13 that Dr. Woodside had opined that you should get as return
14 to capital though you can't look at it -- you have to be
15 very careful with it because part of the money they're
16 putting in was a loan, part of the money they were putting
17 in was preferred stock. They were covering themselves in
18 as many ways as they could. They were planning sixty
19 percent of the equity until it was sold. They were going
20 to get preferred stock dividends. I assume that they were
21 going to cumulative. So even though they were deferred,
22 they were going to get a lot of their money up front.

23 So you couldn't just look at their capital
24 investment and say, well, there the value of a company or
25 the value of half of the company because they were not

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1 going to make all the investment up front. They were
2 going to defer some of it and they were hedging their bets
3 every way they could.

4 Q. We'll run through what you did, but as a general
5 proposition, can an investor get less than 22 percent on
6 an investment but still be given a 22 percent equity rate
7 of return?

8 A. Sure, and Dr. Woodside hit on that and the issue
9 is leverage. It's not a complicated idea. If someone is
10 willing to pay you for your ownership so that the total
11 return on the money you put in is less than, say, 22
12 percent, but if they are leveraging it heavily, they can
13 earn 22 percent on their capital because of the
14 leveraging. That's when you hear about real estate cap
15 rates and 11 percent, 12 percent that's because people who
16 invest in real estate leverage those investments so they
17 get a return on their capital, they expect to at least,
18 risk adjusted, much higher than that so-called cap rate of
19 11 percent because they're leveraging.

20 Q. Let's turn to Tab 1 in your note book and tell
21 the Judge what that is, and what you were doing there?

22 A. Here's what I did, I looked at the Dakota
23 Holdings proposal in light of Dr. Woodside's analysis and
24 his analysis was based on as I read his report information
25 and management given to him, so what I did was to say,

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1 okay, if Dakota Holdings is willing to buy into this
2 company, it's going to have to invest according to this
3 schedule that Dr. Woodside identified and that's what Tab
4 1. There would be draws essentially every other month, an
5 initial draw of 2.6 million dollars and then draws just
6 about every other month for a couple of years. That money
7 would have come from Dakota Holdings.

8 Although Dakota Holdings had indicated that
9 they would chunk in twenty-four million dollars, I would
10 base this on their putting on 21.45 million. That's the
11 amount of total investment that was identified in
12 Dr. Woodside's report and I assume they wouldn't put the
13 money in up front, they would put the money in as it was
14 making.

15 Q. And then what did you do with this information?

16 A. Well, I assume that their investment would be
17 proportionate between preferred stock and loans and they
18 had identified essentially the proportions and in their
19 proposal they had indicated, as you've already heard, 9.6
20 million in equity and 14.4 million in debt. So I took
21 that ratio and I applied to each of these draws. I
22 assumed that initially and then periodically Dakota
23 Holdings would expect to put in either in terms of loaning
24 to the entity or investing in preferred stock. Those
25 amounts were identified by Dr. Woodside and proportionate

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1 to what they had identified as their investment either in
2 terms of the loan or preferred stock.

3 Q. Let's turn now to Tab No. 2 in your notebook and
4 I've got a copy of the first page of that if you want to
5 use that. If you could just using the first page of Tab
6 No. 2, explain to the Judge what you're doing here and
7 what these calculations were intended to do?

8 A. This is a replication of their proposal and there
9 were several elements to it. There were the draws and
10 this is only the first table. There were four or five
11 tables and it identifies the initial draw and then the
12 draws at the beginning of each subsequent month based on
13 what Woodside identified.

14 The net operating income also comes from
15 Dr. Woodside's report so for the first 14 months, they
16 weren't going to make any money and then they were going
17 to make seven thousand dollars on the 15th of the month so
18 they were never making very much money until a couple of
19 years in to the project.

20 Now, how that money would be used? Well,
21 there's a section of this dealing with debt service.
22 There's a section dealing with preferred stock dividends
23 and then there's a section dealing with other cash flow to
24 Dakota Holdings or other owners of the company.

25 The first obligation would be debt service

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1 and with regard to debt service, we can determine what the
2 balance would have been on the debt based on the draws
3 each month. The interest is eight percent -- a twelfth of
4 eight percent since we're dealing with months and you see
5 that points on loan of four hundred and thirty-two
6 thousand dollars? This Dakota Holdings proposal says
7 there would be three points on the loan. I assume three
8 points on the total 9.6 million although they weren't
9 ultimately have to loan that much. So I assumed that the
10 company right off was going to owe Dakota Holdings another
11 four-hundred and thirty-two thousand dollars in loan
12 points.

13 The cash in is interest that Dakota Holdings
14 would actually be paid but they could only be paid out of
15 the profits. So you can see for the first 13 or 14 months
16 that it's just accruing interest and I assume the interest
17 would compound month after month after month and then
18 finally in month 15 they start paying a little bit but the
19 amount they can pay is limited to their operating income.
20 They can't pay anything that they don't have.

21 In this particular model, I assume they would
22 never pay more than interest. They would not pay the debt
23 back until the end. I ran it different ways. I ran it
24 based on -- this is an eight year deal and I also did a
25 five year deal because that's what Dakota Holdings

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1 proposed. I did it based on paying debt back as soon --
2 pay the principal down as soon as they had some extra
3 money to do it and I assume they wouldn't pay the
4 principal down until the end of the deal.

5 The best I could come up with Dakota Holdings
6 is this one. The others run there and you can look at
7 them if you're having a hard time sleeping.

8 Q. When you say the best for Dakota Holdings, you
9 mean the ---

10 A. This generates the highest possible return to
11 Dakota Holdings. That's how I dealt with the debt
12 service. Now, of course, at the end of the eight year
13 period there would have still been debt and that's on the
14 last page 14.35 million dollars and that would have to be
15 paid back to Dakota Holdings whenever the entity was sold
16 after eight years. But then you have to deal with
17 preferred stock because the company -- Dakota Holdings was
18 not going to be just loaning Warpath funds, it was going
19 to be making investments in preferred stock and I assume
20 that immediately preferred stock dividends at 11 percent
21 annually would be due.

22 Their proposal says they're willing to defer
23 it for a couple of years, but like Dr. Woodside said it's
24 not just forgiven, it means it's cumulative and I did
25 that. And, in fact, they would not have been able to make

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1 any preferred stock dividends to Dakota Holdings until the
2 24th months. It almost seems like I made it up, but it
3 didn't, it happens to be two years out and they were
4 willing to defer from one to three years. What I did was
5 to determine the amount of preferred stock dividends they
6 could pay and if you track through the chart, you'll see
7 that the preferred stock dividends after month 24 start
8 increasing significantly until you get up to month 37. At
9 that time they level off because at that time they would
10 have caught up with their obligation with regard to
11 preferred stock.

12 Finally and you'll have to get all the way to
13 month 48 there would be some cash left over after making
14 their debt service obligation at least with the interest
15 payment and the preferred stock dividend obligation there
16 would be some stock leftover and Dakota Holdings get 60
17 percent of that based on their proposal and that's what
18 their third problem is and it starts in month 48.

19 So what I have for 96 months are cash
20 payments by Dakota Holdings and cash receipts back to
21 Dakota Holdings. And then upon the sale of the entity
22 after 96 months or eight years, and I used eight years
23 because that's what Dr. Woodside used in his first
24 evaluation, I replicated totally the selling price which I
25 computing. I looked at trailing 12 months and then I

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1 looked at operating income, used a cap rate of 11 percent,
2 pulled out selling costs, assumed that the loan within the
3 loan balance had to be repaid to Dakota Holdings, then
4 they would split. They'd get 50 percent of the remaining
5 equity.

6 That is a long winded explanation but here's
7 what it amounts to. The discount rate, and although this
8 is at the top of this chart, it really is a computed
9 internal rate of return. Dakota Holdings based on the
10 cash that it was going to be investing and they're in red
11 on this chart, and the cash that it would receive and
12 they're the columns in green in this chart, the net cash
13 is the column over here that shows the net cash either out
14 or in and as you see through about month 15 or 16, they
15 have no money coming in when they finally start getting a
16 little income in near the bottom of that first page
17 including their proceeds from the sale of that company
18 based on the projections that are available based on their
19 proposal, they had an 11.01 percent return on their
20 investment. That is computed by simply -- what it amounts
21 to is the total present values of money out, the total
22 present values of money in at zero, but that is a way of
23 computing internal rate of return.

24 What this says to me is if Dakota Holdings
25 reviewed those projections, it decided it could take an

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1 11.01 percent return on his money at best. Some of these
2 returns are a little bit lower than that, but best case it
3 looks to me like it was going to get 11.01 percent on its
4 money because at that point its cashed out. The project
5 is done, they're in, they're out, and that's what makes me
6 wonder, you know, about the 22 percent discount rate.

7 Really they're three -- I don't know which is
8 the right explanation but I can tell there are three
9 possible reasons for it because its clear that unless
10 Dakota Holdings just drained up this amount of investment,
11 this is about the best return they could expect. Either
12 they expected the project to do a lot better than this and
13 that's one possible explanation and that doesn't really
14 follow through until the end because the interest payment
15 and the preferred stock dividend payments are pretty much
16 defined so it doesn't really follow through until the end.

17 So only if they believe that net operating
18 income after year eight or in a different scenario year
19 five would be much higher than this projected value of 3.3
20 eights of six million dollars, there are stuck with that
21 11 percent. One explanation is they think it would be
22 better than that.

23 Another explanation would be, which I don't
24 think really washes, is they're willing to take an 11
25 percent return on their capital but I don't think they

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1 would. I don't know them but I would be surprised if they
2 would. The third explanation is leverage. That is Dakota
3 Holdings itself as a buyer or investor in this company,
4 Dakota Holdings itself was leveraging its acquisition so
5 that it could get a much higher return on its capital by
6 itself borrowing the money that it reinvested in this
7 company.

8 In fact, if it leveraged 75 percent of it at
9 the mortgage interest rates identified in Dr. Woodside's
10 report, it would get a little bit over 21 percent return
11 on its capital. I can't tell you that's what they did. I
12 know this is on only one prospective buyer but it's the
13 only information I had and it suggested that, to me, a
14 buyer can take nominally a much lower return because they
15 are in fact borrowing the money themselves or a
16 significant portion of the money and that makes it no
17 different than anything else that I sell.

18 If I'm selling real estate today and if
19 somebody is willing to pay me nine or ten times the income
20 that it produces, that's what its value is to me although
21 they are going to leverage it. They are going to borrow
22 the money.

23 Then the last thing I did I took, again, I
24 took Dr. Woodside's and this skips all the way over -- you
25 told me to go fast ---

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1 Q. Yeah, and just for the record we're skipping over
2 Tab 3, 4 and 5. Those are just different scenarios that
3 you ran as to how the money would be paid back and over
4 what period of time; is that right?

5 A. Yes.

6 THE COURT: Less beneficial to Dakota
7 Holdings?

8 THE WITNESS: Yes.

9 BY MR. LIGHTSEY:

10 Q. Let's go to Tab 6.

11 A. Tab 6 is a replication of Dr. Woodside's
12 computation actually. It's not just a PDF. I went
13 through and did the arithmetic and stuff and came up with
14 a dollar or two of his computation. This is based on 22
15 percent return on equity. If, in fact, you assume that
16 the 11.01 percent is the discount rate to be used, if you
17 leave everything else the same, selling at the end of the
18 deal is still based on residual cash flow, still based on
19 trailing 12 months, net operating income, still using a
20 cap of 11 percent that Mr. Woodside used, the only thing
21 that changes and those are the things that are highlighted
22 in sort of the reddish color there, the things that are
23 changed are the present value factors based on a discount
24 rate of 11.01 percent instead of 22 percent. That would
25 change a 50 percent value too.

Ballard vs. Warpath, et al

1 In his first analysis 20 percent value, one
2 million, eight hundred and fifty-four thousand, 50 percent
3 value, four million, six hundred and thirty-four thousand
4 -- most of these are Dr. Woodside's -- I'm sorry these are
5 not Dr. Woodside's. These are my computations using his
6 methodology just with different discount rate.

7 This first computation based on the project
8 is just getting started. This is the second computation
9 based the project having been going for about
10 two-and-a-half years and the differences are in present
11 values that you can see down at the bottom -- middle of
12 the chart. You can compare those to his and I think there
13 is a way of doing it if you put his 22 percent and ---

14 Q. I don't have a blow up.

15 A. Well, it's in your packet.

16 Q. It's the first two pages of Tab 6 and these are
17 the last two pages of Tab 6. These use a discount rate of
18 11.01 percent instead of 22 percent and one discounts it
19 over an eight year period and the other discounts it over
20 the five year period and down at the bottom you've got a
21 value for 20 percent ownership and you've got a value of
22 50 percent ownership. Anything else you want to add?

23 A. I think the question is if the 20 percent owner
24 or 50 percent owner whatever it's determined to be, if an
25 ownership share can be sold to someone who will, in fact,

Charles Alford - Cross Examination by Mr.
Howard vs. Warpath, et al

1 leverage their purchase and it appears to me that's what
2 Dakota Holdings must have been doing, then his shares
3 would be worth more than a 20/10 percent on equity would
4 require. It's still yet a higher return on equity because
5 they're still leveraging. If the proof is that Dakota
6 Holdings and its own deal using its terms, specifically
7 its terms and the best interpretation of its terms, if its
8 willing to purchase for 11.01 percent return, then why
9 would some hypothetical buyer demand 22 percent return.
10 We've got a real buyer here and this is not fair market
11 value here where you're bound by a hypothetical buyer and
12 selling. This is fair value where you can look at real
13 prospective buyers.

14 MR. LIGHTSEY: Thank you, Dr. Alford.

15 CROSS-EXAMINATION

16 BY MR. HOWARD:

17 Q. Good afternoon, Doctor.

18 A. Hi, Mr. Howard.

19 Q. Tell me again when you were hired?

20 A. In 2013. I'm not sure exactly when but it was
21 after Dr. Woodside's initial report.

22 Q. Sometime in April?

23 A. Probably so, yes.

24 Q. I was provided these documents on July 18 of last
25 month. When did you generate these? There's no dates.

Ballard vs. Warpath, et al

1 A. Probably within a few days of you getting them.

2 Q. Do you know when you were disclosed to me?

3 A. No, sir.

4 Q. How much are you getting paid?

5 A. \$320 an hour.

6 Q. And that's only by Mr. Ballard, correct?

7 A. That's what I'm planning on.

8 Q. Have you spoken with Dakota Holdings?

9 A. No. I suggested to Mr. Lightsey that he get
10 whatever information he can get from them.

11 Q. Have they funded this deal? Do you know?

12 A. No. In fact, one of their conditions is that you
13 have to clear up the issue of this 20 percent owner before
14 we're willing to do it so obviously they hadn't yet.

15 Q. Do you have any idea the state of their due
16 diligence at this point?

17 A. No.

18 Q. And so when you're looking at this document and
19 what I mean by that it's marked as 4d in the record, the
20 numbers you're generating, these are your interpretations
21 of their document, correct?

22 A. My interpretation of that document and the
23 projections used by Dr. Woodside.

24 Q. Okay. And when you talk about what Dakota could
25 be expecting or might be doing, those are just assumptions

Ballard vs. Warpath, et al

1 you're making?

2 A. I would say this I would assume that I have
3 interpreted this document reasonable well. I have not
4 made any assumptions about what they are demanding in
5 terms of a return. I've computed what they're return
6 would be based on what I believe they are.

7 Q. This is sort of above my pay grade, if you will,
8 when you put out these numbers and looking through them
9 and flipping through them all and I have not had a chance
10 to talk to you about this, have I, until today?

11 A. I would be happy to talk to you anytime,
12 Mr. Howard, whenever you want to.

13 Q. I understand, Doctor, but two weeks ahead of this
14 hearing is a little tight for me, but the assumption about
15 leverage, that's an assumption?

16 A. No, what I said was there are three explanations.
17 Either Dakota Holdings believes it's going to do better
18 than a residual 12 month cash flow of 3.3 million dollars
19 or they're willing to take an 11.01 percent return on
20 their capital or they're leveraging.

21 Q. Okay. And you indicated before -- what we're
22 here about today is a 20 percent 20,000 shares that
23 Mr. Ballard has, correct?

24 A. I've got no dog in the fight about that whether
25 it's 20 or 50 percent. It's a proportionate ---

Ballard vs. Warpath, et al

1 Q. Assuming Mr. Ballard is putting in money into
2 Warpath and that's what we're doing, right, we're valuing
3 what is his percentage today that if he put it in to
4 Warpath and it goes up eight years, the present value of
5 what that would be eight years from now, if he was to put
6 in 20 percent, 20,000 shares.

7 A. That doesn't matter. If it matters, I'm wrong.
8 It seems to me what we're trying to do is figure out what
9 somebody would pay as a fair value for a 20 percent or a
10 50 percent or some percentage ownership in this entity.
11 That's what you're trying to figure out and we know what
12 kind of return one prospective investor expects based on
13 this. That's all I know.

14 Q. This prospective investor is taking 100 percent
15 of the stock as collateral, correct?

16 A. No, taking 50 percent equity, not 100 percent.
17 Dakota Holdings would not be buying the whole thing.
18 Dakota Holdings would end up with a 50 percent equity
19 interest but because you're dealing fair value and not
20 fair market value, you're still taking about proportionate
21 ownership. You're not talking about any sort of discount
22 because it's a controlling interest or 50 percent or 20
23 percent interest.

24 Q. I understand that but the risk factor you're
25 going to take in putting the money in and certainly your

Ballard vs. Warpath, et al

1 risk is going to be lower when you're taking collateral
2 stock; is that correct?

3 A. Not necessarily. I think your risk is lower if
4 you simply loan them the money. As soon as you start
5 making an equity investment, you start sharing in the
6 risk. Now, their risk, as I said, they were trying to
7 hedge their risk and they did by identifying it as
8 preferred stock and by proposing a 20 percent division --
9 a 60/40 division on equity until it was sold. So you know
10 they're trying to hedge and obviously they were taking a
11 risk. No doubt about that.

12 Q. And this money is coming back to them ahead of
13 everybody else, correct?

14 A. No, the interest comes back to them before
15 anybody else and preferred dividends, then 60 percent of
16 any remaining cash flow, but that's -- it goes without
17 saying that's how they were hedging their risk and it
18 would come back to them.

19 Q. Have you done any independent research on marinas
20 and their expectation of returns on capital?

21 A. Only a little bit of reading and what I've read
22 confirmed what Dr. Woodside said. He and I probably
23 looked at some of the same things. A marina owner wants
24 pretty good return on capital, but an investor would want
25 a good return on capital but that doesn't mean that you

Ballard vs. Warpath, et al

1 can't leverage.

2 Q. But you have no idea what the intentions of
3 Dakota Holdings were in rendering this, do you?

4 A. No intention but I can tell you this either they
5 were leveraging or they were happy with the 11 percent
6 return or they expect the performance of this company
7 would be better than what these projections are. It's got
8 to be one of those three things.

9 Q. When you looked at Dr. Woodside's numbers and you
10 ran your projections according to his numbers, you were
11 using all his numbers for the 11 percent, correct?

12 A. That's what it amounts to because I don't have
13 any other basis for doing projections and computations for
14 present value are mathematical exercises. I check it and
15 they were right and I would be shocked if his computations
16 had not been right. It's coming down to whether 22
17 percent of that first eight years or first six years,
18 whether that's right or not in light of the Dakota
19 Holdings offering. I think that's what it amounts to.

20 Q. Have you made any effort to perform a building
21 method analysis on this, on the rate return?

22 A. No, but if I did that's return equity and I'd do
23 exactly the same thing. I'd use treasuries and what
24 Dr. Woodside used for an equity adjustment and for the
25 small company adjustment and company specific risk

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1 adjustment and 22 percent is fine for returnable equity,
2 but the point is someone can generate a return on equity
3 much higher than the nominal return on the project because
4 they're using some borrowed funds. And the proof of this
5 may be in this. Either than or they're willing to take an
6 11-percent return or they think the project is going to
7 perform better than what management's projection to
8 Dr. Woodside was.

9 Q. Did you do any particular research on the cap
10 rate or did you assume Dr. Woodside's cap rate?

11 A. It doesn't matter. What I did was to determine
12 what -- and the proof in the pudding -- is what Dakota
13 Holdings expected return was and the best case scenario to
14 them is this.

15 Q. You don't know what their expectation is, though.
16 You have no idea what their expectation is.

17 A. That's not a question, though. What I said to
18 you is that's the best case. If Warpath elected with any
19 additional cash flow that it might have after making
20 interest payments and after making preferred dividend
21 payments, if Warpath elected to go ahead and start making
22 the payments down, their return -- Dakota Holdings would
23 be a little bit less. I did it based on five years and on
24 five years which they said the term was. At the end of
25 five years the trailing 12 months and that operating

Ballard vs. Warpath, et al

1 income was much lower so the selling price would be much
2 lower. Like Dr. Woodside said if they had to sell it
3 after five years, the amount at which they could sell it
4 would be even less if it's based on capitalizing 11
5 percent, trailing 12 months and that operating income. So
6 I'm not saying this is what they expected, but as far as I
7 can tell this is the best they could expect.

8 Q. Are you aware if Dakota Holdings is willing to
9 buy this or not?

10 A. No, I don't think they were because they had this
11 reservation about this 20 percent ownership.

12 Q. I understand but were you aware of whether they
13 were willing to buy 100 percent of this investment?

14 A. No, I'm not. The only thing that I'm aware of is
15 what's on this document that you've already identified.

16 Q. Were you aware that they were approached about
17 purchasing this investment?

18 A. Not until this second when you mentioned it.

19 Q. And you're unaware that they were unwilling to
20 buy this investment?

21 A. No.

22 Q. You're not aware they were unwilling to buy
23 Mr. Ballard's 20 percent?

24 A. No.

25 Q. You weren't aware of that?

Ballard vs. Warpath, et al

1 A. I'm presuming that is true because this says you
2 deal with the 20 percent owner then we'll talk about this
3 investment. I think that suggests that. They didn't want
4 his 20 percent, they wanted 50 percent after clearing up
5 this issue that y'all are here arguing about today.

6 Q. But they were unwilling to buy up his 20 percent
7 to clear up this issue, were you aware of that?

8 A. That's what this looks like.

9 Q. They were not willing to buy it, correct?

10 A. That's what this suggest to me, yes.

11 Q. When you used Dr. Woodside's numbers, you were
12 using Rick Thomases numbers, were you not?

13 A. Based on his testimony earlier, yes.

14 Q. The same numbers they are trying to discredit
15 today also?

16 A. I guess. I'm not trying to discredit them. I'm
17 simply saying if that was the projection, here's the
18 result. That's all I'm saying.

19 MR. HOWARD: Thank you, Your Honor.

20 THE COURT: What's the value of the company?

21 THE WITNESS: Based on assuming the eight
22 year, Dr. Woodside's first evaluation, I think the value
23 of the company is paved at nine million, two-hundred and
24 eighty six thousand, one hundred and twenty-six dollars.

25 THE COURT: And that's on eight years.

Charles Alford - Redirect Examination by Mr.
Lightsey Ballard vs. Warpath, et al

1 THE WITNESS: Yes.

2 THE COURT: 11.01 discount.

3 THE WITNESS: Yes.

4 THE COURT: Alright. And that's it.

5 THE WITNESS: That's it. If I had to put a
6 number on it, that would be it.

7 THE COURT: Mr. Lightsey.

8 BY MR. LIGHTSEY:

9 Q. Just to complete that, if you used the five year
10 time period, you would get a company value of five
11 million, thirty-four thousand, nine sixty-nine; is that
12 right?

13 A. Yes, using that six year period, essentially
14 about five-and-a-half years, one million, thirty-four
15 thousand, nine hundred and sixty-nine.

16 MR. LIGHTSEY: Thank you. A couple of quick
17 points. There's been a suggestion that perhaps the terms
18 of Dakota Holdings offers changed, I did recently ask Josh
19 to confirm if there was no further offer from Dakota
20 Holdings and he relayed to me that there was no further
21 offer, that the document we had was the final document or
22 most recent document. And then as far as the due
23 diligence or what we know what Dakota Holdings was really
24 thinking, I didn't ask Dakota Holdings for their
25 documents. We didn't have time to subpoena them, they're

Ballard vs. Warpath, et al

1 out of state and I was told that the defendants said we'll
2 take care of that so we don't need to send them anything.
3 So I was unable to get any documents from Dakota Holdings.

4 And last, Your Honor, as we mentioned in our
5 pretrial memorandum that was submitted back in May in
6 light of the testimony and representations of defense
7 counsel and testimony of the defendants, we do ask for a
8 fairly prompt time period for the defendants to buy out
9 Mr. Ballard for whatever number you determine to be fair
10 value. We would ask in light of the testimony today that
11 the Court include in the order that if the defendants fail
12 to do so that they're remaining shares of stock would be
13 surrendered for cancellation by the company.

14 MR. HOWARD: Do you want me to summarize?

15 THE COURT: Let me do this. I know this will
16 surprise everyone in the courtroom but I'm going to take
17 this under advisement. I need to digest this. Do you all
18 want to submit some post-trial memorandum and I'll be
19 happy to give y'all that opportunity.

20 MR. HOWARD: At this point, if we're not
21 going to summarize, I'll probably need to do that and I
22 think that may be preferable because there are some
23 aspects that I do want Your Honor to consider in light of
24 their issues and in light of the Court's obligations.

25 THE COURT: I'd like to say this, I need to

Ballard vs. Warpath, et al

1 put a limit on it and if Ms. Lightsey if you want to
2 submit one. I've got your pretrial and I don't know what
3 you had with that.

4 MR. LIGHTSEY: If you give me that
5 opportunity, thank you.

6 THE COURT: Thank you very much.

7 ---END OF TRANSCRIPT RECORD---

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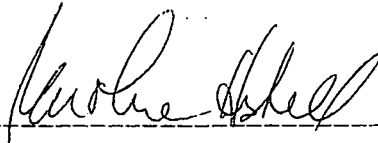
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Ballard vs. Warpath, et al

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I, the undersigned Caroline Hiskell, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Common Pleas Court of Greenville County, South Carolina on the 26th day of August, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Caroline Hiskell, Thirteen Circuit Court Reporter

State of South Carolina.,)

In the Common Pleas
Court of Greenville

County of Greenville.,)

Case No.: 2008-CP-46-05739

Andrew P. Ballard.,)

Plaintiff.,)

-vs-)

Transcript of Record

Tim Roberson, et al.,)

Defendants.)

Greenville, South Carolina
March 13, 2014

B E F O R E:

The Honorable Edward W. Miller, Judge.

A P P E A R A N C E S:

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I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.:

No witnesses were called.

I-N-D-E-X - CON'T

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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1 (COURT IN SESSION IN THE MATTER OF ANDREW P. BALLARD
2 V. TIM ROBINSON, ET AL, THURSDAY, MARCH 13, 2014 AT 02:35
3 P.M..)

4 THE COURT: Okay, what do you all want to tell me?

5 MR. LIGHTSEY: I got a lot, Your Honor, but --

6 THE COURT: Well isn't it Josh's motion?

7 MR. LIGHTSEY: It's his motion yes, Your Honor.

8 THE COURT: All right. Well let me have it.

9 MR. HOWARD: All right, Your Honor.

10 Good to see you by the way. It's been a while.

11 THE COURT: Thank you very much. You're looking very
12 healthy.

13 MR. HOWARD: Trying to - Haven't been to the Y lately
14 but I still been working out.

15 THE COURT: Wallace has been at the Y.

16 MR. HOWARD: I know Wallace has been to the Y.

17 THE COURT: All right.

18 MR. HOWARD: I just didn't make it.

19 But, Your Honor, we're here on Defendant's Motion to
20 Stay Execution pursuant to South Carolina Code annotated
21 18-9-130.

22 Your Honor, this - as you might be aware this matter
23 is under appeal at this point.

24 THE COURT: Uh-huh.

25 MR. HOWARD: As it concerns any considerations that

1 the Court would make obviously being subject to appeal at
2 this point is a consideration. The appeal will ask for the
3 order to be vacated and returned. This is all contained in
4 prior briefing, a Motion for Reconsideration that was made.
5 A lot of it's all contained within there that's gonna be
6 the subject of. I don't think it goes without saying by
7 seeking relief under the involuntary dissolution statutes
8 plaintiff was asking the Court to step in and assume a role
9 in corporate structure and govern it and the Court did
10 that.

11 In that role the Court cannot solely consider the
12 interest of just the plaintiff. This is not a case of
13 damages. Plaintiff voluntarily dismissed those legal
14 claims with prejudice and elected equitable relief.

15 As it stands right now the Court has ordered - issued
16 an order that was essentially doomed to fail from the
17 beginning and for all practical purposes from there aspects

18 --

19 THE COURT: What, Josh?

20 MR. HOWARD: This is what was argued at the trial,
21 Your Honor. I ask for installments. I ask for
22 installments.

23 THE COURT: Okay. All right.

24 MR. HOWARD: And that's what I mean.

25 THE COURT: Okay.

1 MR. HOWARD: And that's - Let me get to it.

2 THE COURT: All right. Go ahead.

3 MR. HOWARD: In as much as this is a consideration of
4 the Plaintiff in issuing it's order the Court should
5 structure it also in consideration of the corporation
6 itself. You got to keep in mind the corporation, it's
7 community, it's creditors, it's - the government financial
8 partners, Duke Energy, all those that play into this
9 corporation and are sitting on the side lines while nothing
10 can happen at this point.

11 This corporation as it sits right now couldn't be
12 sold, it can't be financed, there's basically - when the
13 court considered it, the entire value the court imposed
14 assumed a fully developed and operating Warpath. Yet in
15 its current state it can't reach that as it stands right
16 now.

17 THE COURT: Because - because it's on appeal?

18 MR. HOWARD: No. Because - No not because of an
19 appeal.

20 THE COURT: All right.

21 MR. HOWARD: Because the - Basically at this point
22 because the shares are in limbo. That's where we stand.

23 THE COURT: Okay.

24 MR. HOWARD: All this is in limbo. Like I said, it
25 can't be funded, it can't be sold, over all most of the

1 appeal is as a deficient structure to the order. The order
2 never had a chance to succeed and now Warpath, Community
3 Duke, local government all in limbo.

4 One of the issues, lack of installment purchase on
5 this. We ask for it, it was majority favored, we got -
6 there are other statutes in this state, it's very
7 specifically outlined in the - If you look at just from a
8 persuasive standpoint if you look at this closed
9 corporation statute it specifically states in the close
10 corporation statute that installments should be considered.
11 The majority - And the majority of the Courts out there
12 that consider this imposing installment. You're looking at
13 imposition of hardship and balancing of approach. And in
14 this case you have a non operational entity where you don't
15 have any chance of the corporation itself assisting at this
16 point and getting Mr. Ballard paid off.

17 The - Like I said lack of consideration the interest
18 of Warpath is the going concern. These are all things that
19 are gonna be presented. It's all the issues that are going
20 up on appeal.

21 As I - From a present standpoint Mr. Ballard still
22 retains his shares. No present harm to Mr. Ballard at this
23 point. He has them, he still retains them and possesses
24 them. From a surety standpoint to the extent the Court
25 seeks to grant a stay of execution and seeks surety for

1 that the defendant's have pled - have stated in their
2 motion that we don't think its necessary. The reason is is
3 because Mr. Ballard retains his shares but to the extent
4 surety is needed the defendants will put up their shares as
5 surety to Mr. Ballard. And that's all I have, Your Honor.

6 THE COURT: Okay.

7 MR. LIGHTSEY: Your Honor, I have a bit more but I
8 will try not to go on too long. I sat here listening to
9 Mr. Howard and wondering what does this have to do with a
10 motion for a stay. These are arguments that might be made
11 against the remedy order that's already filed that is on
12 appeal. We had a money judgment and we're entitled to
13 execute on that judgment. Unless the stay is granted the
14 appeal itself does not stay execution.

15 As I prepared for this motion I thought about where
16 we've been just over the last year or so. I kept wondering
17 why are we here? Why are they asking for a stay? Why
18 would they care whether or not execution is stayed? Last
19 August you recall they came into court and said we concede
20 that a million dollars is fair price, we can't pay that.
21 They claim that they were impoverished and couldn't pay
22 even what they conceded was a fair price.

23 What we've learned since then is that in addition to
24 our judgment for about three and a half million dollars,
25 all the defendants including Warpath - this is something we

1 did not know about last August - had a judgment entered
2 against them in 2012 by Palmetto Bank which foreclosed on
3 forty acres of real estate owned by Warpath and now has a
4 deficiency judgment against all the defendants including
5 Warpath for a Hundred and Fifty Thousand Dollars.

6 The Defendant Tim Roberson has a judgment against him
7 in Charleston County of 1.3 Million Dollars by Wells Fargo.
8 Mr. Thoennes, Senior, had a judgment entered against him
9 just this fall in Oconee County for 2.9 million dollars by
10 Kieowee Property Owner's Association with another phase of
11 that trial yet to come and possible equal amount of
12 damages.

13 Mr. Thoennes, Senior, also had a judgment entered
14 against him in January of 2012 by Grand South Bank for Two
15 Hundred and Twenty-six Thousand Dollars. Mr. Thoennes, III
16 has been through bankruptcy because of all the claims
17 against him. And yet they're asking the Court - and I read
18 from their motion - they ask the court to stay and they say
19 no bond is necessary to secure the payment of this judgment
20 should this matter be affirmed on appeal.

21 I cannot understand how a bond could not be necessary.
22 Where are the assets to secure this judgment? They say
23 that they will place the shares of the stock. This is a
24 company that now has a Hundred and Fifty Thousand Dollar
25 deficiency judgment against it; it has been put on notice

1 by Duke Power that if they don't begin construction that
2 Duke is gonna revoke the lease so any security that might
3 come from these shares is illusory at best at this time.

4 If they have assets to secure this judgment let's see
5 it. If they don't have the assets there is no reason that
6 the execution should be stayed at least without a bond.
7 There is a reason the defendant's don't want us to proceed
8 with execution even though they say they don't have
9 anything to pay us. What we have found we have issued the
10 third party subpoena's we are starting to get those
11 documents back and we're really just at the tip of the
12 iceberg now but we have gotten documents back from a couple
13 of banks.

14 What we have found is that the defendants have an
15 extensive network of companies, LLC's and partnerships,
16 over thirty that we have found at this time. They are
17 moving hundreds of thousand's of dollars around among these
18 companies with frequent checks being paid out to
19 themselves, or payable to cash in amounts of five thousand,
20 eight thousand, ten thousand dollars.

21 And most tellingly, Your Honor, just in January of
22 this year six or seven weeks ago the defendant's
23 construction company paid out twenty - excuse me - twenty
24 thousand dollars to the wife of Mr. Thoennes all on one day
25 in three different checks but consecutive numbers. Twenty

1 Thousand Dollars payable after our judgment became final,
2 after they moved for stay of execution, after we moved for
3 supplemental proceedings, twenty thousand Dollars goes out
4 to the wife of one of the defendants from their company.

5 And this speaks volumes Your Honor. If this is not a
6 transfer to defraud creditors I will surrender my law
7 license. They have been paying themselves handsome, they
8 own valuable real estate that is secreted under layers and
9 layers of companies. They are driving around in BMW's and
10 Cadillacs and living in nice expensive homes. They have
11 multiple pleasure boats and all the while they are cheating
12 their creditors and tax collectors. And from what we can
13 see they have been doing this for years.

14 Their mind set is as long as we can keep dragging this
15 out and make collection as protracted and expensive and as
16 difficult as possible the other side will eventually give
17 up and we will get away with it and that is what this is
18 all about here today.

19 This is a mockery of our civil system, it is a waste
20 of the court's resources, these are the same people you
21 will recall alleged counter claims against Mr. Ballard;
22 accused him of fraud demanded a trial by jury and then got
23 into the trial and after being examined - cross examined by
24 my former partner Frank Hallman drive those claims and
25 dismissed the jury. These are the same people who said

1 after they took their initial appeal we said let's go ahead
2 with the evaluation hearing so we can take it all up at
3 once and they said no not gonna do the evaluation hearing
4 until we have this appeal.

5 So they appealed it once, they lost, they came back we
6 spent a year last year getting ready for and doing an
7 evaluation hearing and then after all that they come into
8 court and say well we can't pay anyway.

9 It's a mockery, Your Honor. I brought up a year ago
10 the idea of a bond. I brought it up with Mr. Howard
11 initially. We had an in chambers status conference with
12 you in which you were kind enough to grant us in February
13 of last year. At that time I said the defendant's ought to
14 post a bond so we don't go through all this. We had to
15 spend a lot of money to Barry Woodside. Let's don't go
16 through all this if it's gonna turn out that they can't pay
17 it anyway. So let them you know put up a bond.

18 I was reassured repeatedly by Mr. Howard in the
19 chambers and the multiple emails that I still have that no
20 bond is necessary because the Defendant's had the resources
21 to pay whatever this court determined to be a fair price
22 for that stock. So after going through that and as late as
23 May of last year saying no bond is necessary they intend to
24 buy them out at a fair price whatever the Court finds.
25 Then they come in in August and say we don't have any money

1 we can't pay this off unless you give us installment
2 payments. And then now they come in and say no bond is
3 necessary for a stay of execution. I submit there is no
4 way we can give that any credence.

5 In these circumstances, Your Honor, the Court should
6 deny a stay altogether or at the very least condition it on
7 posting a supercedes bond. And we submit it should be in
8 the full amount of the judgment. Under Rule 26(d) of the
9 Rules of Civil Procedure as well as 241 of the Appellate
10 Court rules this court has the discretion to grant or deny
11 the stay and if it grants it it can condition it on
12 whatever terms it sees fit including the posting of a bond.

13 We submit that they pay the full amount of the
14 judgment that is the norm in Federal Court, in South
15 Carolina, and in most other states. And in fact in Federal
16 Court here there is a little rule that requires a bond to
17 stay execution on appeal of a Hundred and Twenty-five
18 percent to One Hundred and Fifty percent of the amount of
19 the judgment whatever the court decides in its discretion.

20 As our district court said in the Southeast Book
21 Seller's case that we cited in our brief, a plaintiff who
22 has won in the trial court should not be put to the
23 expenses of defending in judgment on appeal unless the
24 defendant takes reasonable steps to assure that the
25 judgement will be paid if affirmed. And here the

1 defendants have not provided any such assurance. To the
2 contrary they have said they can't pay. They do have
3 substantial other judgments against them, a total
4 collectively of over Eight Million Dollars now.

5 So I would submit there is no reason in the world to
6 give them a free ride here. If they want a stay they
7 should put up a bond and it should be for the full amount
8 of the judgment. And if they don't want me, and my
9 partners here, if they don't want us poking around in their
10 various financial dealings then they can put up the bond in
11 the full amount and we would be happy with the stay of
12 execution with the full bond there to satisfy our judgment
13 when we come back from the appeal.

14 Your Honor, you know me, you know it's not my style to
15 hurdle accusations at people or waive arms around and bluff
16 and bluster but we have a very clear picture that we're
17 seeing in these defendants and they have been doing this
18 for years. Not just with Mr. Ballard but against other
19 people as well including the tax collectors. They fight
20 collection tooth and nail. They claim they don't have any
21 assets while they live in expensive homes and enjoy boats
22 and expensive cars and pay themselves handsomely out of
23 cash being generated from the various businesses.

24 That's why they want the stay of execution. That's
25 why they don't want us looking into that and that's exactly

1 why the Court should deny this motion and either let us
2 proceed. And we do urge the Court regardless of your
3 ruling to issue the Rule to Show Cause today so we could at
4 least we could freeze the assets that we know of. We've
5 got I think clear proof of a Twenty Thousand transfer to
6 defraud creditors that happened just six weeks ago so we
7 urge you to go ahead and issue the Rule to Show Cause.
8 I've got - I previously submitted a copy but I have one
9 here for your consideration.

10 And again I would just stress that these are - what
11 we're seeing here are really the first fruits of our
12 investigation. We've just gotten records back from a
13 couple of banks; there are a number of others we're still
14 waiting on that we're trying to work with in getting their
15 documents. The defendants obviously are resisting
16 discovery themselves. We've gotten some stuff from them
17 but mostly a lot of obfuscation so we think we're just at
18 the tip of the iceberg and we certainly think at a minimum
19 their assets should be frozen I think except for we concede
20 that cash to be ordinary living expenses is appropriate.

21 But otherwise the Court should freeze their assets
22 except for in time for them to appear in court and be
23 required to answer questions about some of these things.
24 And that if any stay is gonna be issued that they be
25 required to post a bond for the full amount of the

1 judgment.. Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. HOWARD: There are a lot of facts there that were
4 stated that I have not had a chance to investigate and we
5 were aware of until I walked in here today.

6 The - I have not had a chance to ask my clients about
7 any of this so I don't know how I can respond factually to
8 any of that. I don't have anything to respond at this
9 point. As far as legally --

10 THE COURT: Well which - I mean there were a lot of
11 facts. Which ones do you don't know about?

12 MR. HOWARD: A lot of the information that is being
13 provided here about - I don't know. I don't know what
14 these checks were for. I have no idea. As I understand
15 and I'm not even sure who is full - I'm not even sure what
16 the ownership structure or member construction development
17 is. I know it's associated with I think Rick the III who
18 is the - who is discharged from bankruptcy at this point.

19 THE COURT: Well I think - You mean - What now?

20 This corporation is in bankruptcy?

21 MR. HOWARD: No, no, no. Rick the III personally. I
22 don't think the corporation ---

23 THE COURT: Oh.

24 MR. HOWARD: --- itself is cause I don't know the
25 status of this. They just ask for documents related to

1 Rembery and I don't know what the status of that is at this
2 point.

3 THE COURT: Well I suspect they had some idea about
4 the connection or they wouldn't have subpoenaed the
5 records.

6 MR. LIGHTSEY: I don't know about the ownership, Your
7 Honor. I know that both Thoennes' are directors and
8 managers of the company cause that's on their web site.
9 We've subpoenaed their records they have not responded to
10 our subpoena and we had - we're preparing to move for
11 contempt. I realize it was a defect in the date of
12 production required in the subpoena so we just reserved it
13 again last week and they have another week or so to respond
14 to that so we have requested that.

15 I know it's associated with the Thoennes'. I know
16 from the bank records of Rembery that we have there are
17 multiple checks going frequently like every couple of weeks
18 of Five, Eight, Ten Thousand Dollars to Mr. Thoennes,
19 Senior, as well as Ricky Thoennes the III, for cash. And
20 then we also found that these checks of Twenty Thousand
21 Dollars total going to Mr. Thoennes' wife just in January
22 after we filed out motion for supplemental.

23 THE COURT: Okay.

24 MR. HOWARD: As to a willingness to buy Mr. Ballard
25 out, I don't think that's ever changed. That's why I made

1 a statement about installment payments. That's what
2 they've been looking --

3 THE COURT: I'm sure he'd sell right now for the
4 judgment amount plus the interest that's accrued.

5 MR. HOWARD: I'm certain he would. I'm certain he
6 would. And we didn't give up the interest, Your Honor.

7 THE COURT: Okay.

8 MR. HOWARD: The - As far as - The stay of execution
9 is governed by 18-9-130. He mentioned Federal statute 18-
10 9-130 as a cap of a Million Dollars on it and from the way
11 I read it the amount of bond owned surety may not exceed
12 the amount of the judgment or One Million Dollars which
13 ever is less for all these other individuals.

14 THE COURT: Yeah. Which is sort of works against you
15 in this case.

16 MR. HOWARD: How so?

17 THE COURT: Well I would not be inclined to stop - I
18 mean, Josh, I'm not gonna grant the stay of execution. I
19 mean when did we first start trying this case? When was
20 that with Frank?

21 MR. LIGHTSEY: The trial was in 2010. The case was
22 filed in 2008.

23 THE COURT: I mean I really tried to the best of my
24 ability to encourage everybody to try and resolve it cause
25 I thought it was - I mean everybody knew it was hard times

1 but the upside potential in the project was enormous and I
2 thought well I'd try to encourage everybody to get together
3 and resolve it and that just apparently hasn't happened.

4 So I'm gonna deny your motion to stay execution. Have
5 you reviewed the Rule to Show Cause?

6 MR. HOWARD: Let me see another copy of it, Your
7 Honor, if you've got one.

8 THE COURT: Here.

9 MR. HOWARD: Thank you.

10 MR. LIGHTSEY: Your Honor, one thing I would like to
11 point out. We have in this - The rule - The point though,
12 the rule does include to show cause why receiver and aide
13 of execution should not be appointed and we do think that
14 would be a very good thing here because there is a lot to
15 take in, a lot of records and a lot of money being moved
16 around.

17 THE COURT: Uh-huh.

18 MR. LIGHTSEY: A receiver and aide of execution would
19 be a good thing.

20 THE COURT: Have you had contact with anybody who you
21 think might be willing to take something like this on?

22 MR. LIGHTSEY: Yes, Your Honor. Mike O'Shea who was
23 with Dixon Hughes he's got his own firm now. He's a
24 forensic accountant. He did the - He was the court
25 appointed examiner for the On Gold matter - of Dixon and

1 has good experience with this kind of thing.

2 THE COURT: Yeah.

3 MR. LIGHTSEY: We can submit all of that to the Court
4 if you're inclined to consider it.

5 THE COURT: Okay.

6 You can keep that, Josh, I got about four copies.

7 MR. HOWARD: Okay. Thank you, Your Honor.

8 THE COURT: But that was not signed yet.

9 I'll tell you what.

10 MR. HOWARD: Your Honor, other than a general
11 disagreement we're proceeding forward.

12 THE COURT: Let me just say this. I would be inclined
13 not to sign this and not to put all your client's through
14 the intrusion that is gonna occur and I will stay execution
15 if they will post a bond in a Hundred and Twenty-five
16 percent of the judgment amount.

17 MR. HOWARD: I'm writing that down, Your Honor.

18 THE COURT: I mean that would get them out of this.

19 Otherwise I don't see any reason not to go forward.

20 And if they're - You know if they're Twenty - Twenty
21 Thousand Dollars in a single day to - I mean you know that
22 can turn out to be nothing but it sure looks a little
23 suspicious.

24 MR. HOWARD: I can't say one way or another at this
25 point, Your Honor.

1 THE COURT: That's quite a shopping spree.

2 MR. HOWARD: In isolation I understand.

3 THE COURT: Right. Right.

4 MR. HOWARD: The only thing I can say to this offer,
5 Your Honor, is I'd have to confer with them.

6 THE COURT: Yeah I'm well aware of that. And here's
7 what - I probably much to their chagrin I'm gonna - I'll
8 give you a few days to talk to them but other wise - I'll
9 tell you, if they're not gonna do it, if the bond is not -
10 it's not a promise to post the bond. They're gonna have to
11 get the bond.

12 MR. HOWARD: I understand.

13 THE COURT: Then I don't sign anything. But if
14 they're not gonna do it, they don't have it done, a week
15 from tomorrow the bond is not posted I'm gonna sign the
16 Rule to Show Cause and I guess right now I'm sort of taking
17 your motion under advisement.

18 MR. HOWARD: Understood, Your Honor.

19 THE COURT: Okay.

20 MR. HOWARD: And just so it's aware that for all
21 similar reasons and to the general disagreement and general
22 opposition to the Rule to Show Cause - I'm just putting
23 that on the record.

24 THE COURT: I know. I know you're right. Josh, you -
25 Nobody - it's nothing personal.

1 MR. HOWARD: I understand.

2 THE COURT: Okay. Well then so this --

3 MR. HOWARD: Next Friday should be fine, Your Honor.

4 THE COURT: Okay.

5 MR. HOWARD: I will inform them this afternoon.

6 THE COURT: And if they - I mean its coming to the -
7 you know they're coming right to the both toes on both feet
8 are hanging over the cliff's edge.

9 MR. HOWARD: Certainly.

10 THE COURT: You know maybe between now and then you
11 all can resolve the whole thing. But then again maybe not.

12 MR. HOWARD: That will be the desire, Your Honor.

13 THE COURT: That would be - yeah, desirable for
14 everybody.

15 MR. HOWARD: Certainly desirable and it would be nice
16 to move on.

17 THE COURT: All right. And I put the burden on Mr.
18 Lightsey to get - to tickle me so that I follow through
19 with my Friday week.

20 MR. HOWARD: If they are unable to do that I will let
21 you know even before, Your Honor.

22 THE COURT: Okay. All right.

23 MR. LIGHTSEY: Thank you, Your Honor.

24 MR. HOWARD: Outside of traveling early next week.
25 I'll be back on Wednesday.

1 THE COURT: Okay. Where are you off to?
2 MR. HOWARD: Beautiful Indiana. . .
3 THE COURT: All right.
4 MR. HOWARD: Thank you, Judge.
5 THE COURT: All right. Good to see you guys.
6 - END OF TRANSCRIPT OF RECORD.-
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CERTIFICATE OF REPORTER

State of South Carolina)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 11th and 12th days of August, 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson

Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE:

June 16, 2014

STATE OF SOUTH CAROLINA,

COUNTY OF GREENVILLE

ANDREW BALLARD

PLAINTIFF)

vs.

TIM ROBERSON, ET AL

DEFENDANTS)

COURT OF COMMON PLEAS

2008-CP-23-5739

ORIGINAL

TRANSCRIPT OF RECORD

April 23, 2014

Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, Judge.

A P P E A R A N C E S:

WALLACE LIGHTSEY, ESQ.

AMOS A. WORKMAN, ESQ.

BILL WILSON, ESQ.

Attorneys for the Plaintiff

JOSHUA L. HOWARD, ESQ.

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APRIL HERRON

Official Court Reporter

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PLAINTIFF EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Documents	25	25
2	Photographs	44	44

1 THE COURT: Okay, we're here on a rule.
2 Mr. Lightsey.
3 MR. LIGHTSEY: Thank you, Your Honor. This is a rule
4 to show cause in connection with supplementary
5 proceedings. If I can approach the podium because I have
6 a few things to hand up.
7 THE COURT: Okay.
8 MR. LIGHTSEY: I'm here today with Amos Workman and
9 Bill Wilson who are my law partners and they will be doing
10 most of the heavy lifting with examinations and
11 everything. But I wanted to mention a few preliminary
12 things and submit a few things for your consideration.
13 One is I do want to know that one of the Defendant's,
14 Ricky Thoennes the third, I mentioned this at our last
15 hearing on the motion to stay execution, Mr. Thoennes the
16 third has been through a bankruptcy proceeding. I was
17 contacted late last week and had some discussions early
18 this week with his bankruptcy counsel.
19 THE COURT: Okay.
20 MR. LIGHTSEY: And also Wally Fayssoux and Mr. Jim
21 Fayssoux who is here with us today.
22 THE COURT: Okay.
23 MR. LIGHTSEY: We have a dispute as to whether the
24 bankruptcy effects our ability to collect this judgment
25 against Mr. Thoennes the third but we have agreed, at

1 least, for the time being to hold in abeyance any further
2 attempts to execute against him until we resolve that
3 either by agreement or by a Court order. So, we want to
4 to proceed with the examination today of Mr. Roberson and
5 Mr. Thoennes Senior and possible Mr. Thoennes the third if
6 there's time for that. But as to Mr. Thoennes the third
7 it would only be to seek information concerning the other
8 two defendants. So, I just want to make clear right now
9 we're holding in abeyance any further attempts to execute
10 the judgment against Mr. Thoennes the third.

11 THE COURT: Okay.

12 MR. LIGHTSEY: Until we resolve that issue. This is
13 a minor matter but in connection with some subpoenas to
14 several entities that Mr. Roberson has an interest in.
15 Their attorney who is Berry Preston from Nelson Mullins,
16 has asked that we have a confidentiality order to provide
17 the production of financial records. Several of those
18 entities. I've given a copy of that to Mr. Howard. I
19 don't think there should be any issue concerning that.
20 That's just to allow us to go ahead and get the financial
21 records from those entities.

22 THE COURT: Okay.

23 MR. LIGHTSEY: So, we appreciate your considering
24 that. Part of the rule to show cause as the Defendant to
25 show cause why a receiver should not be appointed. We do

1 think that that is good idea and would save us from
2 continually having to come back to the court and bring
3 issues back up with the court. So, I have an order
4 appointing receiver for your consideration.

5 THE COURT: All right.

6 MR. LIGHTSEY: And the receiver that -- the person
7 that we're suggesting as one of the receivers is Mr. Mike
8 O'Shea who's with us in court today. And he's available
9 to answer questions on his qualifications. But I had him
10 do an affidavit.

11 THE COURT: All right.

12 MR. LIGHTSEY: And attach a copy of his CV for the
13 Court's consideration.

14 THE COURT: Okay.

15 MR. LIGHTSEY: And then finally, Your Honor,
16 Mr. Roberson has interest in a number of LLC's and under
17 the liability company hat the only way you can execute
18 against a membership in a LLC is to enter a Charging Order
19 against distributions from the LLC. You can't actually
20 take the ownership interest like you would with stock in a
21 regular corporation. So, we prepared a draft Charging
22 Order for your consideration as well.

23 THE COURT: All right.

24 MR. LIGHTSEY: It would be just for the LLC interest.

25 THE COURT: Okay.

6

1 MR. LIGHTSEY: I previously provided copies of these
2 materials to Mr. Howard but I'll give him paper copies
3 again today. I wanted to let you know we have been
4 working hard since we saw you last. Issued a lot of
5 subpoenas. We have gotten a good many records from third
6 parties. There is a lot of complexity to the financial
7 picture here. A lot of different entities, LLC's
8 partnerships and corporations. We do believe there are
9 assets available to satisfy the Court's judgment. And
10 since there's an appeal going on, what we want to do at
11 this point is to simply identify the assets, take
12 possession of them or have the receiver take possession of
13 them if you agree to appoint the receiver. Just so those
14 assets can be held while this is pending. Because we are
15 confident that otherwise these entities we found that do
16 have assets will be stripped.

17 We have also had problems getting information from
18 the Defendants. There is presently pending two motions to
19 compel. There are several motions for contempt relating
20 to the entities that the Defendants control and simply
21 don't respond to the subpoenas. So why we have a lot of
22 information it is incomplete. And at that the end of the
23 proceeding today we would like to hold the record open
24 because we do anticipate getting more information. We
25 still would like to begin today. I think that the

1 examination of the Defendants will give you a good sense
2 of the fact that there are some assets, that is a lot of
3 them complexity. There's a honeycomb of companies, LLC's.
4 But in them there's a lot of stuff is moving around. A
5 lot of cash, lots of real estate and other assets.

6 And for all of these reasons it's why we urge you
7 considering appointing a receiver. We think it would be a
8 wise use of the Court's time and resources so that we're
9 continually coming back and saying, we found this, can we
10 go get this. As you know you do have a lot of discretion
11 in appointment of a receiver and the powers that you
12 invest in the receiver. South Carolina Code and we've
13 cited in the draft of Proposed Order, the South Carolina
14 Code specifically provides for the appointment of a
15 receiver to protect assets while an appeal is pending.
16 So, there's clear statutory authority for it.

17 In the Proposed Order I tried to deal with exemptions
18 from execution like homestead exemption or provision for
19 them to have funds for living expenses. But we do think
20 it would be economically from a judicial point of view to
21 have a receiver to continue the investigation and to take
22 possession of the assets that we can identify and hold
23 them while the appeal is pending. Not dispose of
24 anything, not sell anything but just simply hold them.
25 So, we would appreciate Your consideration of that and

1 from hearing from us today.

2 THE COURT: Okay. All right.

3 MR. LIGHTSEY: Thank you, Your Honor.

4 THE COURT: Mr. Howard.

5 MR. HOWARD: I just received these Orders last night.

6 I have not had a chance to fully go through them.

7 THE COURT: Okay.

8 MR. HOWARD: I would ask an opportunity to comment

9 and to respond by maybe next Friday to these issues,

10 written response. I do think.

11 THE COURT: Why so long? I mean, they're Proposed

12 Orders. What about the Confidentiality Order?

13 MR. HOWARD: Confidentiality Order, I don't have a

14 problem with the Confidentiality Order.

15 THE COURT: Okay.

16 MR. HOWARD: It's the -- we'll talk about -- with

17 regard to the receiver, appointing a receiver, I don't

18 want to just say -- I think there are specifics if the

19 Court's inclined to appoint a receiver, I think there are

20 specifics in this Order that need to be addressed. There

21 are certain things that I thought were lacking in this

22 Order in particular. In particular protection for my

23 clients in the event of any damage to them. Which the

24 other side of it is, I know they're taking great pains

25 trying to avoid the statute requiring a double bond. But

1 that statute requires a double bond in an effort to
2 protect my clients from any losses or damage they suffer
3 as a result of the execution efforts being made.

4 And under these circumstances, this Order is not
5 protected them from any damage or losses they may suffer
6 as a result of these assets being put in the hands of a
7 receiver. I'm not saying Mr. O'Shea would do any harm to
8 them but if it excludes him from being harmed -- from him
9 being liable to them at all, it doesn't address whether
10 Mr. Ballard's would hold any liability to them as a result
11 of the execution efforts and taking possession of any
12 property of theirs. Personal or real. And so those are
13 source--

14 THE COURT: Well, I don't anticipate that Mr. Ballard
15 would have control over any of the assets, it would be the
16 receiver.

17 MR. HOWARD: I understand. But the statute addresses
18 the fact that -- what they're addressing in the statute by
19 requiring Mr. Ballard to post a double bond is the fact
20 that that's there to make sure that anything that happens
21 as a result -- it's his personal liability if something
22 happens while this appeal is pending. That's the point of
23 the statute. And so, yes--

24 THE COURT: So, what's --

25 MR. HOWARD: -- next Friday if you want me to give--

1 THE COURT: -- what's the code section you're
2 referring to?

3 MR. HOWARD: It's. . .

4 THE COURT: I tell you, just get that to me.

5 MR. HOWARD: It doesn't have to be next Friday. If
6 you want it earlier I could maybe get it--

7 THE COURT: Yeah, you know, this thing has been
8 dragging on for a long time.

9 MR. HOWARD: I'm not trying to drag it on. It's just
10 that I got to go to Columbia tomorrow, I'm tied up this
11 coming Friday, I have mediation on Monday. So, it's
12 just -- if you need it by maybe next Wednesday, I could
13 probably do it by next Wednesday.

14 THE COURT: I mean, if you've got specific -- we
15 don't need to get into a paper war.

16 MR. HOWARD: I'm not trying to. It's just that I
17 just got these orders last night and haven't had a chance
18 to address them. A legal issue, I do think it's
19 overreaching and that's the issue that I run into. If the
20 Court chooses to sign it, I mean, that's the Court's
21 discretion, obviously, to do it. But my opportunity to
22 appeal it.

23 THE COURT: Okay.

24 MR. HOWARD: But the statute actually is 18 -- I'll
25 find it.

Timothy Roberson - Direct Examination by Mr.
Workman

11

1 THE COURT: Okay.

2 MR. LIGHTSEY: If I could respond briefly on that,
3 the issue about the bond. That applies only if property
4 is sold. If property is sold and a good faith purchase or
5 value is taken, then that property is gone. So, I don't
6 think it would apply at all to property simply being held
7 in a bank account or warehouse or wherever while the
8 appeal is pending.

9 THE COURT: Okay. All right. Okay. All right. You
10 want to call witnesses?

11 MR. WORKMAN: Yes, we'd like to call Timothy Roberson
12 to the stand, please.

13 TIMOTHY ROBERSON, after being duly sworn,
14 testified as follows:

15 THE CLERK: Please state your name for the record.

16 THE WITNESS: Tim Roberson. Timothy W. Roberson.

17 THE CLERK: Thank you. You may be seated.

18 THE COURT: Okay.

19 MR. WORKMAN: Is it all right if I stand here, Your
20 Honor?

21 THE COURT: Yeah, that's okay.

22 MR. WORKMAN: Thank you.

23 DIRECT EXAMINATION

24 BY MR. WORKMAN:

25 Q Yes, state your date of birth, please.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

- 1 A 12/16/44.
- 2 Q A where were you born?
- 3 A Newport News, Virginia.
- 4 Q And your social security number?
- 5 A 226-58-2097.
- 6 Q All right. And you have a South Carolina Driver's
- 7 License?
- 8 A I do.
- 9 Q And do you happen to know the number of that, sir?
- 10 A I can reach in my pocket and get it, though.
- 11 Q Do you have a driving record for any arrest or
- 12 convictions for speeding, drunk driving, suspended
- 13 license, any traffic offenses?
- 14 A No speeding, no drunk driving. No record other than
- 15 ticket. A couple years ago a speeding ticket.
- 16 Q All right. Have you offered testimony in court
- 17 before?
- 18 A I have.
- 19 Q All right, tell us about that, sir.
- 20 A Well, it was right here, this case.
- 21 Q Uh-huh. Are there any other cases in which you've
- 22 been involved where you had to testify?
- 23 A Several years ago with -- I was called as a -- I
- 24 think I was actually called as an expert witness in Baby
- 25 Super Stores owner, Zack Tabor, who was suing somebody. I

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 can't remember but I was called as an expert witness
2 there.

3 Q You actually testified in that proceeding?

4 A Yes.

5 Q Any other cases in which you have been involved in
6 were you offered testimony?

7 A Probably but nothing's coming to mind. Seventy years
8 been in courtroom a few times but I just -- I can't
9 remember anything that's been so large.

10 Q Have you ever given a deposition in any cases other
11 than this case?

12 A I gave depositions in that case I just referred to.

13 Q Okay. The baby store case?

14 A Yeah.

15 Q What's your education, sir?

16 A I have a Bachelor's of Science Degree in Business
17 Administration.

18 Q From what school?

19 A At the time it was called Atlantic Christian College
20 in Wilson, North Carolina. The name's been changed to
21 Barton College.

22 Q When did you graduate?

23 A 1968.

24 Q Have you attended any post-graduate schools?

25 A Executive business classes and courses, yes.

1 Q Whereabouts?

2 A One at Oregon, one at Harvard.

3 Q Have you served in the military?

4 A No, I have not.

5 Q Tell us briefly a little bit about your work history.

6 Where you worked say after you graduated from Barton all

7 the way up to the time perhaps you retired.

8 A I started with NCR Corporation shortly after college.

9 And seven years later I, started -- or worked with a couple

10 other guys and we started our own business. Retail system

11 sales. And that was that my career job and career company

12 up through 2002.

13 Q What was the name of the company?

14 A Well, it morphed. We started out as Mid-South Cash
15 Register Sales. Moved -- when I came to Greenville it was
16 called Checkout Systems. Later Mid-South Data Systems and
17 finally Kyrus, K-Y-R-U-S.

18 Q All right. What did you do for those companies?

19 A Initially was the salesman and I was the sales
20 manager and vice president of sales. Eventually president
21 and CEO. And chairman.

22 Q You said that the ultimate name for the company was
23 Kyrus?

24 A Yes.

25 Q What is the status of Kyrus now?

15

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A Kyrus was sold in 2002 to a company called Agilysys.
2 They have recently actually this year sold it again. It
3 goes by the name of Total Systems. It's in pretty much
4 the same business.

5 Q So, do you have any interest in those companies?

6 A No.

7 Q Are you still receiving any funds from the buyout of
8 Kyrus back in 2002?

9 A No.

10 Q How much did you receive when you sold the company?

11 A About three million dollars.

12 Q And this was in 2002?

13 A Yeah. Some of that got stretched out because it was
14 in escrow until some matters got cleared up. But 2002
15 through 2004, probably.

16 Q All right. What did you do with those funds?

17 A Invested, spent.

18 Q Do you still have any of those funds in retirement or
19 in escrow or in savings?

20 A No, I don't.

21 Q Where do you live now, sir?

22 A 335 Blue Water Way, West Union.

23 Q Do you have any other residence other than that?

24 A No.

25 Q Where did you live prior to Blue Water Way? When did

1 you move there?

2 A I lived at 100 Bogey Court in Greenville. Actually
3 it was in Taylors for 30 years, 39 years. And we moved to
4 Blue Water Way, I think, probably 2007, maybe, right in
5 that timeframe. Let's see, no, no. We've only lived
6 there for about four years, permanently. We had a -- I
7 owned it before then but we moved there permanently three
8 to four years ago.

9 Q And what happened to your Taylors property?

10 A Sold it.

11 Q And did you receive all the money at the time of the
12 sale?

13 A I sure did.

14 Q Where did you live prior to living in Taylors?

15 A Tennessee.

16 Q Tennessee. Where in Tennessee?

17 A Johnson City.

18 Q Did you work up there? Were you working in
19 Tennessee?

20 A Yes.

21 Q Tell me a little bit about your family. What your
22 wife's name is, do you have any brothers or sisters and
23 children if you had any.

24 A My wife's name is Beverly. I have two grown
25 daughters. Three grandchildren, two sisters.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 Q And I believe you said, I'm sorry, you had some
2 siblings, can you tell us who that is and their names,
3 please?

4 A Judy Roberson -- scratch that, Judy Roberson Dickers.
5 She's widowed and Natalie Roberson Smith.

6 Q And do they live in South Carolina?

7 A They live in Six Mile.

8 Q Tell me a little bit about your relationship
9 currently and in the past -- first we'll deal with
10 currently. Your current relationship with Rick Thoennes
11 and Rick Thoennes the Third.

12 A First met Rick Senior in church here in Greenville
13 probably in the early 80's. And just, you know, an
14 acquaintance. After I sold my company I was looking to
15 invest in different business opportunities. And he's been
16 a builder. So, we partnered on a couple of deals. We
17 built a clubhouse in Cliffs Keowee Vineyards. And we
18 built -- I say we built, I financed, he built, some
19 townhomes in Oconee County. And we initially had a
20 relationship on a piece of property downtown that he's not
21 any longer involved in that property. That's pretty much
22 it.

23 Q Now, you say, We. Are you talking about Mr. Thoennes
24 Senior or Mr. Thoennes the third?

25 A Mr. Thoennes Senior. Now, Mr. Thoennes Senior and

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

- 1 Q What are your daughters names?
- 2 A Kelly and Ashley.
- 3 Q What do they do?
- 4 A Kelly is a -- spends her time doing graphic design
- 5 and life coaching, primarily.. And Ashley is a Pastor's
- 6 wife.
- 7 Q And what is her husband's name?
- 8 A His name is Naeem Fazal.
- 9 Q Where is he a Pastor?
- 10 A He pastors a Mosaic Church in Charlotte, North
- 11 Carolina.
- 12 Q All right. Did his previously pastor here in South
- 13 Carolina?
- 14 A He was on staff at Seacoast in Mount Pleasant, South
- 15 Carolina as a associate pastor. But he launched his first
- 16 church in Charlotte.
- 17 Q And has he ever had any connection with the Foothills
- 18 Community Church?.
- 19 A No.
- 20 Q Okay. What are the full names of your daughters
- 21 again?
- 22 A Kelly Renee Roberson.
- 23 Q Uh-huh.
- 24 A Ashley -- Ashley Fazal Roberson -- no, Ashley
- 25 Roberson Fazal.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 the third were partners in some of these arrangements, so.
2 Mr. Thoennes the Third, Ricky to me, because he was that
3 big when I first met him. Was a partner in his dad's
4 business. So, he has been involved as well.

5 Q What was the name of that business?

6 A Marek Construction.

7 Q All right. Were you connected with either Ricky or
8 Mr. Thoennes Senior in any other business other than
9 Marek?

10 A No.

11 Q You did mention a property here in Greenville that
12 you had some connection with, tell us about that.

13 A Well, I think they were in as America[verbatim],
14 though. I'm not sure if they were in personally or as
15 America.

16 Q Spell that last name the again, please.

17 A I believe that was a combination of Mark and Rick,
18 M-A-R-I-C OR M-A-R-I-C-K.

19 Q And you've had no other involvement with him in the
20 business way other than the ventures that is you just
21 talked about?

22 A To the best of my knowledge. That's true.

23 Q Over the past two years have you taken any trips
24 other than trips to the beach for a week or something like
25 that? Take any travels?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A Not even to the beach for a week. No significant
2 trips other than to Charlotte to see grandchildren. I
3 don't think so.

4 Q Been on any cruises?

5 A No.

6 Q Okay. I want to turn now to your income. What is
7 your income now? What income you have, you and your wife,
8 family and how do you live?

9 A Well, my accessible income is social security \$2,500
10 a month. There is -- and again, the terminology might be
11 right or wrong but passive income, because I've had to pay
12 taxes every year -- or excuse me, I've owed taxes every
13 year, not paid. But the accessible income that we're
14 living on is \$2,500 a month. And the rest is borrowed.

15 Q You say -- is that \$2,500 for you and your wife
16 combined?

17 A Combined.

18 Q And you have no other sources of accessible income at
19 this time?

20 A None.

21 Q Do you--

22 A That unless I borrow it. Any income I've had I
23 borrowed it. If you're calling that income. Cash I've
24 had to borrow.

25 Q Do you have any retirement accounts?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A Wiped them all out, gone.
2 Q Do you have any IRA accounts at all?
3 A Spent it.
4 Q Now, how about any Roth accounts?
5 A Nothing.
6 Q There's no retirement accounts?
7 A None.
8 Q All right. Do you have any funds left over, I think
9 I asked you this, left from the sale of your business,
10 Kyrus?
11 A Zero.
12 Q Now, after Kyrus was the another business that you
13 formed?
14 A I joined a company called Integris that was just a
15 two person company to do some development. And buy and
16 sell some companies, just trying to invest money wisely.
17 Q And I believe you testified with Kyrus you received a
18 pay out on that and you used those funds completely?
19 A That's correct.
20 Q All right.
21 MR. WORKMAN: May I approach the witness, Your Honor?
22 THE COURT: Yes, sir.
23 BY MR. WORKMAN:
24 Q I'm going to show you some documents and ask if you
25 can identify them?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A This is -- these are statements from Palmetto Bank
2 and, I guess, all three of them would be. Here's some
3 checks and here's a balance sheet from TRG, LLC. That's
4 the Form 1040 which I assume is part of my taxes, passive
5 income, yeah.

6 Q What year is the tax return, does it say?

7 A 2012.

8 Q All right. What entity is listed on that particular
9 page?

10 A TRG, LLC.

11 Q All right. Would you tell us about TRG, please?

12 A TRG, LLC that holds a building on Wade Hampton
13 Boulevard that houses the company that I sold.

14 Q I see. Do you have an interest in TRG?

15 A I do.

16 Q All right. It is a corporation or a limited
17 liability company?

18 A It's an LLC.

19 Q And who else has an interest in that, if anyone,
20 other than you?

21 A Seven or eight of us.

22 Q All right. But according to this 2012 Form 1040, you
23 receive income of \$207,700. from this LLC, is that
24 correct?

25 A If you'll read that it says passive income, doesn't

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 it?
2 Q No, sir, I don't think so.
3 A Under passive.
4 Q Look at the column here.
5 A No, I didn't. I mean, I might need to get a tax
6 accountant to explain this to us. But we get a tax
7 dividend once a year in 60 to \$70,000 range. And that
8 goes straight to Palmetto Bank to pay something else.
9 It's not accessible by me. Two hundred seven would have
10 been passive. This means I'm paying taxes on it but I
11 don't get it.
12 Q Are you familiar with that balance sheet?
13 A It's got TRG at the top.
14 Q Okay. What does it show on page two as to the value
15 of that? The equity in that business or that LLC?
16 A For December 31st, '13 it shoes 3,118,974 total
17 equity.
18 Q All right. And identify this as a bank statement
19 from TRG?
20 A Uh-huh.
21 Q What is the balance shown on that bank statement and
22 the date please of that statement?
23 A March 31st of that -- that's very recent. And the
24 ending balance, I suppose, is \$59,426.
25 Q Okay.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 MR. WORKMAN: We would like to offer these as
2 Plaintiff's No. 1 collectively.

3 THE COURT: No objection.

4 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked for
5 identification and received into evidence.)

6 MR. HOWARD: The only thing I'd say, that looks like
7 it's last year of April. I just want to make sure that's
8 clear.

9 MR. LIGHTSEY: It does say April 2013, thank you.

10 BY MR. LIGHTSEY:

11 Q All right. So, I think why mentioned some other
12 individuals also had an interest in this TRG. Who are
13 they and do you know the various percentages of ownership?

14 A Not of the top of my head but I can start naming some
15 names. Randy Killen, Paul Civils, Jeff Yelfman, Mike
16 Todd, I'd have to look in the file. These were
17 shareholders in the company. And the company sold ten
18 years ago, so.

19 Q The Kyrus Company?

20 A Yeah, 11 years ago.

21 Q Well, who, this may not be the right term, but
22 manages the business, handles the finances and takes care
23 of the operations of TRG?

24 A Dave Martindale.

25 Q Dave Martin?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A Martindale.

2 Q Dave Martindale?

3 A Yeah, I'm missing his name. He's a CPA and was an
4 officer in our company.

5 Q And where is he located?

6 A Wilmington, North Carolina.

7 Q All right. Do you receive any income from any other
8 LLC or entities?

9 A All that information is in my tax records but no.
10 I'd say something like, made two or \$3,000, I'm not even
11 sure which one. Most of them are showing losses. There's
12 one that we've, in five years, we've taken out about
13 \$10,000, maybe 12 or \$14,000. Nothing this year. Not
14 even sure about last year. No. I mean, there's no
15 regularly expected checks that I get from anybody.

16 Q All right. I do want to ask you about your home or
17 condominium in Anguilla in British Colony, Anguilla.

18 A Several years ago we had the opportunity to invest
19 with a couple of other fellows in a property that IMI was
20 marketing. We actually invested in several of them. One
21 in Philadelphia and one somewhere else. And one wound up
22 being in Anguilla.

23 Q All right. Other fellows, who else was involved with
24 you in the Anguilla property?

25 A Darryl Wicker and Larry Lollis.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

- 1 Q Do you each have a one-third interest?
- 2 A Yes.
- 3 Q All right. And describe the property, if you will.
- 4 A It's a beachfront condo.
- 5 Q Uh-huh. And when were you last there to visit the
- 6 property?
- 7 A I'm guessing four or five years ago.
- 8 Q All right. Do your other principles use the
- 9 property?
- 10 A I don't think we've ever used it.
- 11 Q Does it generate income?
- 12 A It's paying its dues and I've know gotten a check
- 13 from it. So, it's generating income but it goes back into
- 14 the fees and to any income that would be generated would
- 15 still go to first Larry Lollis because there's some debt
- 16 on it to him.
- 17 Q Is there a mortgage on the property?
- 18 A I don't know if Larry has a mortgage on it or not.
- 19 When we closed we had to come up with extra money and he
- 20 put it in. So, how he handled that I don't know. There's
- 21 not a typical bank mortgage that I'm aware of.
- 22 Q Do you own your -- do you have a one-third interest
- 23 or in the -- or in connection with the LLC? In this
- 24 property in the West End?
- 25 A You know, I don't -- I think it's through a run

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 [verbatim] company. I think -- I think it is, I'm not
2 positive. I think we've got one called Sozo Anguilla.

3 Q You have two companies, Sozo and Sozo Seven, don't
4 you?

5 A I've got Sozo, I've got Sozo Seven, Sozo Anguilla.
6 Sozo Anguilla was specifically this project property
7 you're talking about.

8 Q All right. Do you remember what that purchase price
9 was for the condo in Anguilla?

10 A It was about two and a half million dollars.

11 Q And you paid another \$250,000 for furnishings, didn't
12 you?

13 A It was already furnished.

14 Q Okay. So you don't remember the additional \$250,000
15 for furnishings?

16 A It was already furnished from the day I saw it. That
17 was part of the package. We didn't pick out furniture, we
18 didn't go anywhere and buy it.

19 Q I think you said you hadn't been over there in
20 several years, is that correct?

21 A Actually since it's been built and completed, I've
22 never been there. I went to the property to see the site
23 twice before it was built and I saw it. First I saw it
24 just the site and it was nothing. Then I saw it when it
25 got a roof but it was still concrete. And that's the last

1 I've been there.

2 Q What's your intention with regard to that property?

3 A It's for sale.

4 Q For sale. And basically the property is rented out
5 from time to time if you can find vacationers?

6 A We don't find that. We turn it back over to -- it's
7 in the resort community. They have a program you just
8 turn it back over to them. They handle all of that. This
9 was an investment.

10 Q Do you have any paper work on this company, monthly
11 statement, annual statement?

12 A I'm sure I get an email once a year saying something
13 but I don't keep a file on it.

14 Q All right.

15 A But they're available because you subpoenaed my
16 partner that does keep all of that.

17 Q I believe at one time you also owned some property in
18 Philadelphia?

19 A I did.

20 Q Tell us about that.

21 A It was the same thing. It was with money that I had
22 invested after selling my company. I bought that.
23 Similar to the time that we bought the Anguilla property.
24 And I had a opportunity to buy a condo, new property that
25 a high rise. I bought it. They finished it out. I

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 visited it once while it was under construction. Never
2 been back. The market fell out and I lost it.

3 Q You lost it. Was it through a foreclosure?

4 A Yes.

5 Q Okay. And was there a court proceeding in
6 Philadelphia involving it? That forecloser.

7 A I can't tell you. I mean, I didn't go to
8 Philadelphia. If there was one it didn't require my
9 presence.

10 Q Who lived in the condo if you know?

11 A I don't think anybody ever lived in it. We had -- we
12 had two. I had one and Dale Whitaker had one. He
13 managed -- we have made had some -- yeah, I may have had
14 some renters for a while. I think I did actually, yeah.

15 Q Okay. And you say you lost it, what year was that?

16 A That was that year I ran out of money. Because I
17 kept paying on it until the cash went away. That might
18 have been 2008 or 9, possibly. I can't really say.

19 Q Did you no longer have any interest in this Metro
20 Club Property in Philadelphia?

21 A No, I think I've got a judgment, that's my only
22 interest in it. I'm not even sure about that but yeah,
23 it's gone.

24 Q You also owned some property in Asheville as recently
25 as 2009, 2010. Do you still own that property?

1 A Lost it to the bank.

2 Q All right. How did you lose that?

3 A That's what happens when you don't pay them.

4 Q You went through a forecloser on that, too?

5 A I guess, yeah. Because it -- I didn't pay them, it's

6 over, yeah.

7 Q All right. Where was this property located?

8 A It was in the Cliff's Walnut Cove in Asheville.

9 Q Did you ever use that property?

10 A It was just dirt.

11 Q And when do you think you lost that property?

12 A Probably in that same time. I didn't -- I lost the

13 property when I ran out of cash. Because I kept paying up

14 to the last. That's how I got through all my IRA's all my

15 available cash funds. I paid out everything until I could

16 no longer pay. And that was probably in that, I'm

17 thinking, I can go back and see the record but, you know,

18 2008 to 2009 timeframe. And when I quit paying on that or

19 any of these other properties, it was when it was all

20 gone. I didn't squirrel anything away or try to do any

21 strategic foreclosures or anything. I actually paid

22 \$30,000 a month in interest payments until it was gone.

23 Q You're testifying, you're saying that you ran out of

24 money in sometime in 2008-2009? You quit making any

25 payments on it.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A If I'm a year off. Yeah, I just have to go back and
2 look at the letters I wrote, the notes I made. With
3 family and friends stuff to know when that was. But maybe
4 it could have been '10. You know, this is '14 now, so I
5 don't know.

6 Q Did you at any time have any property in Charleston,
7 South Carolina?

8 A I did.

9 Q All right. And what's the status of that?

10 A It's gone.

11 Q Same story?

12 A Similar, different twist. I had it in a -- it was in
13 this Integris company that I had told you about earlier.

14 And when we settled up with -- with that company just
15 divided up whatever assets were there, there was two of
16 us. He took something, I took something and I gave him --
17 I gave him the condo. I couldn't afford to make payments
18 on it.

19 Q Who was that other person?

20 A Bill Cox.

21 Q Bill Cox. Okay. But you're saying you don't have
22 the Charleston property anymore?

23 A I haven't had it for seven years, I don't understand.
24 Six or seven years.

25 Q Where was it located?

1 A Sir?

2 Q Where was it located, I'm sorry?

3 A In Wild Dunes, Isle of Palms.

4 Q All right. In the last ten years did you have any

5 other investment properties that you've lost?

6 A Yeah. Well, investment property and business. You

7 know, I just try to diversify. But you're looking for

8 property.

9 Q Yeah, I appreciate that but right now we're just

10 looking just at properties.

11 A Property. One, two, three, four lots on Lake Keowee.

12 Q Uh-huh.

13 A I can't think of anything else but it's possible.

14 Q All right. Let's turn to this property--

15 A Well --

16 Q I'm sorry?

17 A You're familiar with Gateway down here. That's a

18 entity--

19 Q Yes, I'm going to talk to you about that in a few

20 minutes.

21 A Across the street. Back there somewhere.

22 MR. WORKMAN: If I may approach, Your Honor.

23 THE COURT: Uh-huh.

24 BY MR. WORKMAN:

25 Q I'm going to show you some aerial recon photos and

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 ask if you can identify them?

2 A Yeah, Dayspring, that's one I left off. There it is
3 right here, I think.

4 Q All right. What do those photographs show?

5 A Appear to show the property on Wade Hampton
6 Boulevard. That's in the Dayspring, LLC.

7 Q Tell us about Dayspring, LLC?

8 A Dayspring, LLC was formed in 1997, maybe sometime in
9 there. No,, maybe 1994. Sometime. But anyway, it was
10 formed to hold the building that my company worked in.

11 Q And your company was the Kyrus?

12 A Kyrus.

13 Q Kyrus, excuse me.

14 A Yeah.

15 Q Is this the old Kyrus Plant shown on one of these
16 recon photos? Aerial photos?

17 A Yes. Yes.

18 Q And on the other photo, what does that show?

19 A That shows the property adjacent to it that's got a
20 house on it.

21 Q I see.

22 A Both of those were held by Dayspring.

23 Q Were held or are they still held by Dayspring?

24 A Well, that's a good question. I'll try to answer it
25 but it's probably to -- a banker needs to tell me exactly.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 It's been sold with a title in lieu, I believe is the
2 term, to a church. And the church's pastor. The house to
3 pastor to building to the church. It's -- we're still on
4 the hook basically because they leveraged our loan so
5 we're responsible by default. I'm not sure legally how
6 you would -- if that's considered -- it's a title in lieu
7 is what I was told. We're not to allow -- they didn't
8 have the funds to buy it so we financed it for them. So,
9 the title is somehow, from the bank's point of view,
10 they're responsible for the payments. But if it all falls
11 away we've got it back and we're responsible for the
12 payments.

13 Q You say, We. Who else is involved in Dayspring other
14 than yourself?

15 A There was three of us.

16 Q Who are they?

17 A Dave Martindale, I mentioned earlier. Steve Nesbitt.

18 Q Uh-huh. And Dayspring is still in existence?

19 A Yes.

20 Q But your testimony is that this property's been sold
21 to a church?

22 A Correct.

23 Q And what was the purchase price?

24 A The contract price is million and a half dollars.

25 Q Uh-huh.

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 A The house was sold, I think, for like \$90,000.
2 Q So, you'll stand to get a portion of this money the
3 church complies with the contract?
4 A I get zero.
5 Q Why is that, sir?
6 A Well, the -- had a pretty heavy leverage with
7 Palmetto Bank. My partner in Asheville who use to be my
8 partner in our business before he retired.
9 Q Who is that?
10 A Steve Nesbitt.
11 Q Okay.
12 A Decided two years ago that he could get money cheaper
13 than Palmetto through his IRA or investment accounts
14 somehow. So, he paid off -- and he owned half, he owned
15 51 percent, I think, of the property. So he paid his half
16 off.
17 Q Uh-huh.
18 A So, the bank balance doesn't represent the balance
19 owed on the building because we still owe him 51 percent
20 of whatever. So, if the church winds up paying a million
21 and a half dollars tomorrow, the bank would get their's,
22 Steve would get his, I get nothing. And neither does my
23 other partner because we were basically just trying to get
24 out of it and sell it for cost?
25 THE COURT: Is all that in writing?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

1 THE WITNESS: Sure.

2 THE COURT: Is there a written document somewhere?

3 THE WITNESS: I mean -- you mean one to write up to
4 describe it or can you piece all that together through
5 documents? Sure, yes. Everything is, I mean, contracts,
6 emails.

7 THE COURT: No, I'm talking about a executed
8 document. Is a personal guarantee issued by you and the
9 other gentleman? What is the.

10 THE WITNESS: We're -- we're personally guaranteed to
11 the bank. He's -- when he paid his off -- I'm trying to
12 remember did he get released from the personal guarantee
13 or not, I'm not sure.

14 THE COURT: Are there documents between you and
15 Mr. Nesbitt?

16 THE WITNESS: Yes.

17 THE COURT: Where are they? Do you have those?

18 MR. WORKMAN: No, Your Honor, we made a subpoena to
19 Dayspring, there's been no response to this point. That
20 is part of the motion. And I don't believe we have any
21 information that's been responsive to our subpoena. Let
22 me double check on that but.

23 THE COURT: Well, let me ask you this--

24 MR. WORKMAN: That's within one of the various
25 companies that we made subpoena to that's been no

1 response.

2 THE COURT: Okay.

3 MR. WORKMAN: So, we did not know this.

4 THE COURT: Okay. Okay.

5 Why are we going to go through this exercise? Why
6 wouldn't I turn it over to Mr. O'Shea as a receiver to go
7 through this and have him report back to me. And then for
8 me to determine what sanctions would be needed for failure
9 to comply with the Court's Order.

10 Tell me that, Mr. Howard.

11 I haven't sat through supplemental proceedings since
12 I was a baby lawyer in front of Judge McGowen. And I'm
13 not inclined to conduct a hearing -- I don't know why we
14 wouldn't do this either through depositions or just turn
15 it over to Mr. O'Shea and let him do it. If people are
16 monkeying around with the Court's Order, there will be
17 sanctions.

18 MR. HOWARD: I'm trying to understand where they
19 would be monkeying around with the Court's Order.

20 THE COURT: Where are the Dayspring documents that
21 Mr. Roberson has just testified to under oath that exist
22 and have not been supplied pursuant to subpoena?

23 MR. HOWARD: Well, Your Honor, I don't control
24 Dayspring.

25 THE COURT: Okay. Well, you do represent

1 Mr. Roberson, correct?

2 MR. HOWARD: I do, Your Honor.

3 THE COURT: And I think as part of your counsel to
4 him he should understand that when a subpoena's issued to
5 a entity that he is a one-third or previously one-third
6 but still in control of, that he needs to comply with the
7 subpoena.

8 MR. HOWARD: There are persons to which that subpoena
9 was issued. I apologize --

10 THE COURT: I mean, look, why are we playing games?
11 This is just costing everybody more money. That's what
12 this comes down to.

13 MR. HOWARD: I don't suspect that anybody's playing
14 games. I don't understand that.

15 THE COURT: Well. Where are the documents? Why
16 hasn't this been done?

17 Mr. Fayssoux?

18 MR. FAYSSOUX: Your Honor, as a friend to the Court
19 on this, I actually represent Rick Thoennes who is not
20 subject to this proceeding.

21 THE COURT: Okay.

22 MR. FAYSSOUX: However, I'm almost sure that these
23 are matters of public record. That there is a Bond for
24 Title recorded on this property that Mr. Roberson was
25 testifying about. And I mean, I don't know anything about

1 production of subpoena, who didn't do it, who did do it,
2 but I do believe that there are public records, that
3 evidence, that there is indeed a Bond for Title. And that
4 there is indeed a large mortgage on this property from the
5 bank.

6 THE COURT: A Bond for Title between who?

7 MR. FAYSSOUX: Between the church and the group
8 called Dayspring.

9 THE COURT: Okay.

10 MR. FAYSSOUX: That they --

11 THE COURT: That supposedly Nesbitt --

12 MR. FAYSSOUX: -- sell to the church -- of course,
13 technically a violation of the terms of the mortgage. But
14 they did have an agreement to sell the property to the
15 church, I don't know the amount or anything like that, but
16 they -- and I think it's probably of record. I don't know
17 from sure but something in my mind tells me that it is.
18 It could be found easily.

19 THE COURT: Well, it can be found when a subpoena is
20 issued.

21 MR. FAYSSOUX: Yes, sir, I understand that.

22 THE COURT: And we wouldn't be going through this
23 wast of time.

24 MR. LIGHTSEY: I agree. Yes, sir.

25 THE COURT: I don't know what everybody thinks is

1 going on but this is -- when a subpoena is issued, it's
2 a -- you must comply with it or face the consequences.
3 This case been gone on for how long? Five years? I don't
4 know.

5 MR. LIGHTSEY: Six.

6 THE COURT: Six. It is coming down to the end. I'm
7 not inclined to sit here all day and go through a thorough
8 examination like this when I think Mr. O'Shea can probably
9 do it and make a report to the Court.

10 Mr. O'Shea, would you agree that's something you
11 could do given the proper authority?

12 MR. O'SHEA: Yes, Your Honor, it is.

13 THE COURT: Okay. Which is what I would circuit.

14 MR. HOWARD: I have no opposition to the deposition,
15 to conduct this by deposition. I think that's probably
16 appropriate. I have no opposition to that. I do --
17 before there's the appointment of Mr. O'Shea, I did
18 represent to my clients, there is a potential conflict
19 that I have with Mr. O'Shea. He's an expert witness on
20 the other side of a case in which I'm involved. And at
21 some point I'm going to have to depose Mr. O'Shea. And
22 so, I just --

23 THE COURT: Well, he's been deposed before, how is
24 that a conflict?

25 MR. HOWARD: Well, it's -- well, I just got to make

1 sure. He's supposed to be serving as a neutral in this
2 circumstance. So, I represented that to my clients and I
3 think it's -- Mr. O'Shea may be deemed acceptable. But I
4 just want to make sure it's clear on the record, it's
5 potentially a conflict.

6 MR. LIGHTSEY: I don't think it's a conflict, Your
7 Honor. If it is we would waive it.

8 THE COURT: Let's turn it over to him. Let's get it
9 get it done. Give him the power, the authority to collect
10 these records. And I'm telling you failure to do it is
11 going to result in sanctions. Monetary or otherwise.
12 We're sitting in here with one, two, three, four, five
13 lawyers. How much do you think that's costing? We're
14 talking about judicial economy. Mr. O'Shea can do this
15 less expensively than we can do this today. So --

16 And I'm sorry to cut you off in the middle of your
17 examination, Mr. Workman--

18 MR. WORKMAN: No, I understand, Your Honor. I fully
19 understand.

20 THE COURT: What I would like to see then is -- I'm
21 just ordering the named Defendants with the exception of
22 Mr. Thoennes the Third, based on his bankruptcy filing, to
23 comply with the subpoena requests. The only other Rule to
24 Show Cause that I want to see in this is when they don't
25 and we're back up here for sanctions. And I'm going to

1 appoint Mr. O'Shea as the receiver and let him get to
2 work.

3 I don't think 18-9-130 applies in this matter because
4 he is not going to have the authority to sell anything
5 pending the outcome of the case. We are going to Marshall
6 the assets. And I would just caution everyone that if
7 they are trying to secrete assets, which would be subject
8 to satisfy a judgment, that there will be sanctions.
9 There's a Court Order that they comply with. And contempt
10 of court can include all kinds of remedies. I'll let the
11 lawyers explain that to the clients.

12 But at this time, anything else? I'm sorry.

13 MR. WORKMAN: That's all right, Your Honor, but I
14 would like to complete the record to introduce these--

15 THE COURT: All right, which you've already asked.
16 That's fine.

17 MR. WORKMAN: -- identify the Dayspring property.

18 THE COURT: Okay.

19 MR. WORKMAN: Plaintiff's No. 2.

20 THE COURT: All right.

21 If you all need to--

22 MR. WORKMAN: Thank you, Your Honor.

23 THE COURT: -- convene depositions to finish this,
24 certainly that's part of it. Okay? But this is, you
25 know, we're just not going to sit around and spin our

1 wheels. Still would have to do this anyway. The
2 collection of the records and all that sort of thing.
3 Okay?

4 Thank you, Mr. Roberson, you can step down.

5 MR. HOWARD: Fair enough.

6 THE COURT: All right, I'm going to sign the Orders.

7 MR. FAYSSOUX: Thank you, Your Honor.

8 MR. LIGHTSEY: Thank you, Your Honor.

9 THE COURT: Thank y'all.

10 (WHEREUPON, Plaintiff's Exhibit No. 2 was marked for
11 identification and received into evidence.)

12 (WHEREUPON, the proceedings were concluded.)
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