

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. 2017-001551
Lower Court Case No. 2008-CP-23-5739

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SC Court of Appeals

Andrew P. Ballard.....Respondent,

v.

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

Of Whom Rick Thoennes, III, is the.....Appellant.

**RECORD ON APPEAL
VOLUME I OF II**

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2008 MAY -4 AM 9:22
6

FOR THE THIRTEENTH JUDICIAL CIRCUIT

FILED CLERK OF COURT
PAUL B. WICKENS, VER
GREENVILLE, SC

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

ORDER

vs.

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

ENTERED COMPUTER

Defendants.

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Roberson wrote Thoennes on December 28, 2007:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

12. The evidence demonstrates that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.



The Hon. Edward W. Miller
Circuit Judge

Greenville, South Carolina

5-3, 2010

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2010 MAY -4 AM 9: 22
CASE NO: 2008CP2305739

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

Andrew P Andy Ballard vs. Tim Roberson

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 4th day of April, 2010, and a copy mailed first class this 4th day of April, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Frank S. Holleman III Wyche Burgess
Freeman & Parham, P.A. P.O. Box 728
Greenville, SC 296020728
Hannah Rogers Metcalfe Wyche, Burgess,
Freeman & Parham, P.A. P.O. Box 728
Greenville, SC 296020728

Joshua Howard Haynsworth, Sinkler, Boyd, Pa
Po Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

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

Form 164BNC (Revised 12/1/2007)

United States Bankruptcy Court – District of South Carolina
J. Bratton Davis United States
Bankruptcy Courthouse
1100 Laurel Street
Columbia, SC 29201-2423

Case Number: 11-07438-hb

Chapter: 7

In re: *(Debtor(s) name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address)*

Frederick Richard Thoennes III
aka Rick Thoennes
4007 State Park Road
Greenville, SC 29609

Last four digits of Social Security or other Individual Taxpayer
No(s)(if any): xxx-xx-7707

Entered By The Court
3/26/12

DISCHARGE OF DEBTOR

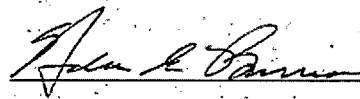
Filed By The Court

03/26/12
L. Jefferson Davis IV
(Acting)
Clerk of Court
US Bankruptcy Court

It appearing that the debtor is entitled to a discharge, **IT IS ORDERED:**

The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Columbia, South Carolina
March 26, 2012
Document 27 – 5



United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION

**EXPLANATION OF BANKRUPTCY DISCHARGE
IN A CHAPTER 7 CASE**

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a discharged debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the discharged debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged.

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes;
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.
- j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans.

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

Notice Recipients

District/Off: 0420-7

User: owen

Date Created: 3/26/2012

Case: 11-07438-hb

Form ID: 164BNC

Total: 55

Recipients of Notice of Electronic Filing:

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aty	Andrew A. Powell	ecfnotices@rtt-law.com
aty	James Calhoun Sarratt	jimsarratt@bellsouth.net
aty	Mary R. Powers	mpowers@rtt-law.com

TOTAL: 5

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Frederick Richard Thoennes, III	4007 State Park Road	Greenville, SC 29609
541879380	Allied Casework Supply	3280 Green Pointe Parkway, Suite 100	Norcross GA 30092
541879381	Andy Ballard	c/o Wyche Burgess Freeman & Parham	PO Box 728 Greenville SC 29602
541879382	Bank of America	PO Box 15710	Wilmington DE 19886
541879383	Bob & Amy Ward	621 Brixton Circle	Simpsonville SC 29681
541879384	Brown Massey Evans McLeod Haynsworth	PO Box 2464	Greenville SC 29602
541944360	C & K of Greenville, Inc.	107 Pebble Creek Way	Taylors, SC 29687
541879386	Carroll H. Roe	Attorney at Law	PO Box 10529 Greenville SC 29603
541879387	Chad and Kelly Odom	25 Parkins Lake Road	Greenville SC 29607
541879388	Clayton Tile	PO Box 6151	Greenville SC 29606
541879389	Cornerstone National Bank	1670 E. Main Street	Easley SC 29640
541879390	DON EVELYN LAND OWENS	DON OWENS	305 TARA LANE Seneca SC 29672 - 6924
541935480	FIA CARD SERVICES, N.A.	PO Box 15102	Wilmington, DE 19886-5102
541879391	FIA Card Services	PO Box 15019	Wilmington DE 19886
541879392	FIA Card Services	PO Box 15710	Wilmington DE 19886
541879393	Frederick Richard Thoennes	414 Lodgewood Trail	Greer SC 29651
541934919	GATEWAY SUPPLY CO INC	PO BOX 2826	COLUMBIA SC 29202
541905845	GRANDSOUTH BANK	LOAN DEPARTMENT	PO BOX 6548 GREENVILLE, SC 29606
541879394	Gateway Supply Company	1312 Hamrick Street	Columbia SC 29201
541879395	Golden Strip	PO Box 1176	Greenville SC 29606
541879396	Grandsouth Bank	c/o Bradley K. Richardson, Atty.	133 Straight Drive Anderson SC 29625
541879397	Greenville County Tax Collector	301 UNIVERSITY RIDGE STE 700	GREENVILLE, SC 29601
541879398	Greenville First	100 Verdae Blvd.	Greenville SC 29607
541879399	Greenville First Bank	100 Verdae Blvd.	Greenville SC 29607
541879400	Hot Springs Pool and Spa	678 Woodruff Road	Greenville SC 29607
541879401	IRS	Centralized Insolvency Operation	PO Box 7346 Philadelphia PA 19101
541879402	James C. Parham	Attorney at Law	PO Box 728 Greenville SC 29602
541879403	Jeff Lynch Appliance	17 Roper Mountain Road	Greenville SC 29607
541879404	Josh Howard, Attorney	Haynesworth, Sinkler, Boyd	75 Beattie Place, #1100 Greenville SC 29601
541879405	Lightning Center	5200 Wade Hampton Blvd.	Taylors SC 29687
541879406	Lyles & Lyles, LLC	PO Box 773	Charleston SC 29401
541879407	Lyn and Jeffery Becker	PO Box 8353	Norfolk VA 23503
541937514	MASTERBRAND CABINETS INC	ATTN DAVID KUNKEL	ONE MASTERBRAND CABINETS DRIVE JASPER IN 47546
541945052	MR. MICHAEL A BABINICZ	MR. ALBERT R BABINICZ	4 CUTLER WAY GREENVILLE SC 29615
541879408	Mark Els	115 Fairview Drive	Greenville SC 29609
541879409	Masterbrand Cabinets, Inc.	PO Box 77527	Chicago IL 60675
541879411	Palmetto Bank	306 E. North Street	Greenville SC 29601
541879412	Piedmont Natural Gas	PO Box 533500	Atlanta GA 30353
541879413	Primary Financial Services	3115 North 3rd Avenue, Suite 112	Phoenix AZ 85013
541879414	Rogers Townsend & Thomas	PO Box 100200	Columbia SC 29202
541879415	Roy's Wood Products INC	PO Box 1300	Lugoff SC 29078
541879416	SC Dept. of Revenue	PO Box 12265	Columbia SC 29211
541879418	SDI Funding/Ludwig Properties	127 W. Antrim Drive	Greenville SC 29607
541929724	STONE LEDGE AT LAKE KEOWEE OA INC	C/O JOHN WILSON	331 BLUE WATER WAY WEST UNION SC 29696
541879417	Scott Clark Floor	1000 Hwy. 25 N.	Travelers Rest SC 29690
541879419	Sherwin Williams	306-A Wade Hampton Blvd.	Greenville SC 29609
541879421	Stoneledge at Lake Keowee	Owners Association, Inc.	331 Blue Water Way West Union SC 29696
541914689	The Palmetto Bank	Loss Mitigation & Recovery Department	815 North Main Street Anderson, SC 29621
541879422	Travelers Insurance	CL&Specialty Remit Center	Hartford CT 06183
541879423	Wells Fargo	PO Box 14547	Des Moines IA 50306

TOTAL: 50

Form 195BNC (Revised 03/06/2013)

United States Bankruptcy Court – District of South Carolina

J. Bratton Davis United States
Bankruptcy Courthouse
1100 Laurel Street
Columbia, SC 29201-2423

Case Number: 11-07438-hb

Chapter: 7

In re: *(Debtor(s) name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address)*

Frederick Richard Thoennes III
aka Rick Thoennes
4007 State Park Road
Greenville, SC 29609

SSN: xxx-xx-7707

Entered By The Court
3/28/13

ORDER DISCHARGING TRUSTEE AND CLOSING CASE

Filed By The Court

3/28/13

L. Jefferson Davis IV
(Acting)
Clerk of Court
US Bankruptcy Court

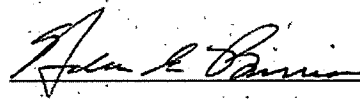
The trustee having certified that the estate of the above-named debtor(s) has been fully administered,

IT IS ORDERED THAT:

The case trustee is discharged as trustee of the estate of the above named debtor(s) and the bond is cancelled.

The Chapter 7 case of the above named debtor(s) is closed.

Columbia, South Carolina
March 28, 2013
Document 35



United States Bankruptcy Judge

Notice Recipients

District/Off: 0420-7

User: richardso

Date Created: 3/28/2013

Case: 11-07438-hb

Form ID: 195BNC

Total: 4

Recipients of Notice of Electronic Filing:

ust	US Trustee's Office	USTPRegion04.CO.ECF@usdoj.gov
tr	Randy A. Skinner	trustee@skinnerlawfirm.com
aty	James Calhoun Sarratt	jimsarratt@bellsouth.net

TOTAL: 3

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Frederick Richard Thoennes, III	4007 State Park Road	Greenville, SC 29609

TOTAL: 1

FILED-CLERK OF COURT
GREENVILLE COUNTY
PAUL E. WILSON, CLERK
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT
2013 OCT -3 P 11 39

Andrew P. (Andy) Ballard,

Case Number: 2008-CP-23-5739

Plaintiff,

ORDER OF JUDGMENT

vs.

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

Defendants.

This matter is before the Court for the determination of the fair value of the plaintiff's ownership interest in Warpath Development, Inc., for purposes of the judicially forced buyout ordered by the Court in its Order of May 4, 2010. Based upon the evidence presented to the Court by both parties and by the court-appointed appraiser at the hearing held on August 6, 2013,¹ 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.

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

²The 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.

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

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WILKINSON, JR.

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739**

Andrew P Andy Ballard

Warpath Development Inc

**Tim Roberson
Rick Thoennes III**

**Rick Thoennes
Warpath Development
Inc**

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(j) 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; (formal 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 Code

10/3/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on **3rd day of October, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **3rd day of October, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Frank S. Holleman III 601 West Rosemary Street, Suite 220
Chapel Hill, NC 275160728
Hannah Rogers Metcalfe Metcalfe & Atkinson, LLC 9 Toy
Street Greenville, SC 29601

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
PAUL B. WICKENS IMER
COUNTY OF GREENVILLE FOR THE THIRTEENTH JUDICIAL CIRCUIT
2014 MAR 27 PM 4 49

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.

Under Rule 62(d), SCRCF, 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), SCRCF, 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."

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.

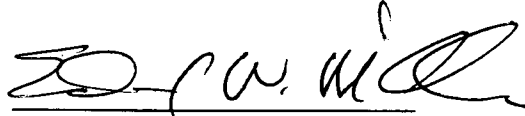
At the conclusion of argument on defendants' motion, the Court indicated that it would deny the stay unless the defendants posted a bond for 125% of the amount of the judgment, which is the minimum amount set forth in the local rules of the U.S. District Court for the District of South Carolina, and 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

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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739

Andrew P Andy Ballard

Warpath Development Inc

Tim Roberson

Rick Thoennes

Rick Thoennes III

Warpath Development
Inc

2014 MAR 27 PM 4 49

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.
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☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) 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: (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

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Additional Information for the Clerk: _____

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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.

3/27/2014

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **27th day of March, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **27th day of March, 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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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
FILED-CLERK OF COURT
GREENVILLE COUNTY
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
PAUL B. WICKENSIMMER

Andrew P. (Andy) Ballard, 2014 MAR 27 PM 4 49 CASE NO.: 2008-CP-23-5739

Plaintiff,

vs.

RULE TO SHOW CAUSE

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

Defendants.

TO: DEFENDANTS AND THEIR ATTORNEY, JOSHUA L. HOWARD:

Judgment having been rendered, an execution issued, a Nulla Bona return having been made to the Execution, and upon reading and considering the Affidavit and Petition for Supplementary Proceedings, it is hereby:

ORDERED, that Tim Roberson, individually and as an officer of Defendant Warpath Development, Inc., Rick Thoennes, and Rick Thoennes, III all appear before the Honorable Edward W. Miller, Circuit Court Judge, at the Greenville County Courthouse, 305 E. North Street, Greenville, South Carolina, Courtroom 4 on APRIL 23 at 10:00

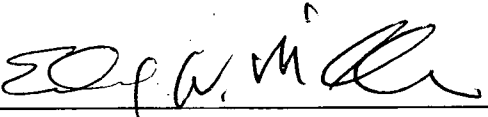
a.m./p.m. then and there to answer under oath concerning each of Defendants' assets, and TO SHOW CAUSE why Defendants' property should not be applied toward the satisfaction of the Judgment set out in the Petition for Supplementary Proceedings, and why a receiver should not be appointed to ascertain by investigation, marshal and protect any revenue-generating assets and income of the Defendants.

YOU ARE FURTHER ORDERED to bring with you all documents listed in the attached Petition for Supplemental Proceedings and shown in the attached **EXHIBIT A**, YOU ARE FURTHER RESTRAINED, PENDING FURTHER COURT ORDER, from disposing of or

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transferring any property including, any property in which you have any interest, wheresoever located, or transferring any funds, or use of funds in which you have access, other than for ordinary living expenses.

AND IT IS SO ORDERED.


Edward W. Miller, Circuit Court Judge

3/27, 2014

EXHIBIT A

- A. Financial statements, profit and loss statements, balance sheets, journals, ledgers, accounting statements and reports for Defendants since January 1, 2007.
- B. Tax returns (both federal and state) for the years 2007–2012.
- C. Bank statements, savings account passbooks, and checkbooks for the years 2007–2014.
- D. Credit card statements for the years 2007–2014.
- E. All broker account statements for the years 2007–2014.
- F. Deeds, leases, mortgages, notes, deeds of trust, and agreements of any kind. Including leases and lease options.
- G. Payment schedules, records of payments on leases, notes and any indebtedness and copies of cancelled checks for same.
- H. Records of payments and receipts for purchases and labor and copies of cancelled checks for same.
- I. List of current jobs and projects, identifying the owner (including address of owner) and location of the job or project.
- J. All documents showing payments or transfers to or for the benefit of any of the Defendants to any officer, director, other agent, shareholder, relative, and affiliated business, including but not limited to, checks, receipts, wire transfers, money orders, and cashiers checks.
- K. Closing documents on any sale or purchase of any assets since 2007.
- L. Wage statements for the years 2007–2014.
- M. Records of ownership, rental, mortgage, security or use of real or personal property, including titles to any cars, trucks or other vehicles or equipment.

- N. Any documents prepared by any of the Defendants for a bank or lender, including but not limited to, credit applications, written appraisals, financial statements, and lists of assets.
- O. All records of stock ownership.
- P. All records of stocks, bonds, debentures, bank accounts, certificates of deposit, and any other financial accounts owned by the Defendants.
- Q. All business licenses and permits.
- R. All reports to shareholders and reports to any government agencies.
- S. All appraisals of property owned by any of the Defendants, both real and personal.
- T. Copies of all insurance policies covering any property owned by Defendants since January 1, 2007.
- U. All business plans and documents.
- V. Corporate Minute Book for corporate Defendant.
- W. A complete list of Defendants' equipment, tools and assets.
- X. A list of all Defendants' accounts receivables, with names and addresses of each person or business owing funds to Defendants.
- Y. A list of all companies in any state or foreign country (including corporations, LLC's and partnerships) in which Defendants have been associated for the period 1 January, 2007 to date. Provide your role in such company, the status of that company, and current projects (including construction and development) now underway by said company.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739

Andrew P Andy Ballard

Warpath Development Inc S.C.

Tim Roberson

Rick Thoennes

Rick Thoennes III

Warpath Development
Inc

FILED-CLERK OF COURT
2014 MAR 27 PM 4 49

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(j) 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; (formal 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)

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Circuit Court Judge

Judge Code

3/27/2014

Date

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ATTORNEY(S) FOR THE PLAINTIFF(S)

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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
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.

ORDER APPOINTING RECEIVER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 APR 23 PM 12 01

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.

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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.

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.

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).

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

- 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;

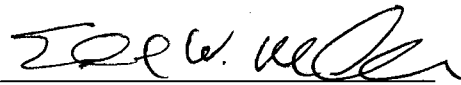
D. Transfer or Encumber the Property:

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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739

Andrew P Andy Ballard Warpath Development Inc

Tim Roberson
Rick Thoennes III

Rick Thoennes
Warpath Development
Inc

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.
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- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
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☐ 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: _____

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2014 APR 23 PM 12 01

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:

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.

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4/23/2014

Circuit Court Judge

Judge Code

Date

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

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Greenville, SC 29602-0728

Amos A. Workman Wyche, P.A. P.O. Box 728 Greenville,
SC 29602-0728

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 PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
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

CHARGING ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 APR 23 PM 12 01

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

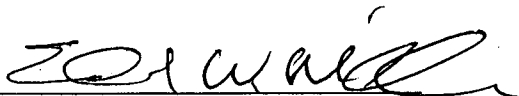
or any entity owned or controlled by any of them is a member. This Charging Order is directed to the defendants, to entities owned or controlled by any defendant, and to the following limited liability companies, as well as any other limited liability companies that are identified as entities in which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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP2305739

Andrew P Andy Ballard Warpath Development Inc

Tim Roberson
Rick Thoennes III

Rick Thoennes
Warpath Development
Inc

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(j) SCRPC: ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ **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 _____

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.

4/23/2014

Circuit Court Judge

Judge Code

Date

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

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 PLAINTIFF(S)

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.

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **11-07438-hb**

Adversary Proceeding Number: **14-80131-hb**

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The relief set forth on the following pages, for a total of 30 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
09/03/2015**



Entered: 09/03/2015


US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re,

Frederick Richard Thoennes, III,

Debtor(s).

Andrew P. (Andy) Ballard,

Plaintiff(s),

v.

Frederick Richard Thoennes, III,

Defendant(s).

C/A No. 11-07438-HB

Adv. Pro. No. 14-80131-HB

Chapter 7

**ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

THIS MATTER came before the Court on the Motion for Summary Judgment (“Motion”) filed by Defendant Frederick Richard Thoennes, III (“Thoennes”)¹ and the Objection of Plaintiff Andrew P. Ballard (“Ballard”).² Ballard’s Complaint, filed after Thoennes’ bankruptcy discharge was entered, asks the Court to find that the debt owed to him is not affected by Thoennes’ discharge. Thoennes’ Motion asserts that, even accepting all allegations of the Complaint as true, judgment should be entered in his favor as a matter of law.³ Pursuant to Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, the Court finds that the Motion should be granted in part and denied in part.

¹ ECF No. 23, filed May 20, 2015.

² ECF No. 31, filed July 10, 2015.

³ When considering the Motion, the Court reviewed the record that included the Complaint and attached exhibits, Thoennes’ Motion and attached exhibits, the docket in the Chapter 7 bankruptcy case and Ballard’s Objection and attached exhibits pursuant to the standard of review set forth in Fed. R. Civ. P. 56.

PROCEDURAL HISTORY AND UNDISPUTED FACTS

This dispute involves the ownership and control of Warpath Development, Inc. (“Warpath”), a company formed to develop a marina and related properties on Lake Keowee, South Carolina. After Ballard’s business relationship with Thoennes and the other partners of Warpath began to deteriorate, Ballard filed a lawsuit against them in state court in July 2008 (the “State Court Action”).⁴ Ballard alleged various causes of action, including shareholder oppression seeking judicial dissolution as relief.⁵ After a three-day trial, an order in the State Court Action was entered on May 4, 2010, finding Thoennes and the other defendants liable for shareholder oppression and ordering them to buy out Ballard’s shares in Warpath (the “Trial Order”).⁶ A summary of the state court’s findings in the Trial Order follows.

Ballard is the organizer of Warpath. After Ballard and the defendants discussed the defendants’ potential participation in Warpath, the parties entered into a Stock Purchase Agreement dated May 29, 2007. Under the parties’ Stock Purchase Agreement, the defendants became the majority shareholders after receiving 80,000 of the 100,000 shares authorized to be issued by Warpath’s Articles of Incorporation.⁷ After the defendants acquired 80% ownership of the corporation, they became unhappy about the development of Warpath and decided they wanted Ballard out of the corporation. The defendants then removed Ballard as a director by refusing to elect him as one of four directors at the first shareholders meeting after they obtained

⁴ *Andrew P. (Andy) Ballard, individually and derivatively on behalf of Warpath Development, Inc. v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development Inc.*, C/A No. 2008-CP-23-5739.

⁵ ECF No. 1, Ex. A.

⁶ *Id.* at Ex. B.

⁷ Of the 80,000 shares, 20,000 were purchased from Ballard (who owned 40,000 shares at that time) for \$1,000,000 paid for by one of the state court defendants other than Thoennes, and 60,000 shares were issued from the corporation itself in exchange for future services.

control of the corporation. Thereafter, 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 or updates on the status of the development.

After the defendants elected themselves as directors, they passed a board resolution proposing Warpath issue additional shares “in order to raise capital, pay expenses and offer employee incentives.”⁸ The Board then presented the resolution to the shareholders, which was passed by the votes of the defendants, with Ballard dissenting. However, the shareholders of Warpath never authorized an amendment of the Articles of Incorporation to increase the amount of authorized shares beyond 100,000. Thus, this resolution was contrary to the Articles of Incorporation, and any issuance of stock by Warpath beyond the 100,000 shares already issued would be in violation of the Articles of Incorporation. Upon the issuance of the additional 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.”⁹

Ballard’s State Court Action sought relief under S.C. Code §§ 33-14-300¹⁰ and 310,¹¹ which govern judicial dissolutions of corporations. The Trial Order concluded

⁸ ECF No. 1 at Ex. B.

⁹ *Id.*

¹⁰ This statute is titled “Grounds for judicial dissolution” and provides:

The circuit courts may dissolve a corporation . . . (2) 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[.]

S.C. Code Ann. § 33-14-300.

¹¹ This statute is titled “Procedure for judicial dissolution” and states, *inter alia*:

In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order . . . (4) 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).

that under those statutes, a court may “provid[e] for the purchase at their fair value of shares or 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 any shareholder.” S.C. Code §§ 33-14-300(2)(ii), 310(d)(3) and (d)(4). However, in this case, the Trial Order found that the defendants only “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),”¹² omitting a finding that they acted in a “fraudulent” manner to the corporation or any shareholder. The Trial Order concluded that “the proper equitable remedy [was] 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) . . .”¹³

Although the Trial Order found liability on the part of Thoennes and the other defendants, no damages or debt amount was established at that time. The state court defendants, including Thoennes, appealed the Trial Order.

While this appeal was pending,¹⁴ Thoennes filed a voluntary petition for Chapter 7 relief on December 2, 2011. Thoennes’ Schedule F acknowledged a debt to Ballard and described the claim as “business debt” with the amount “unknown.”¹⁵ Ballard was included on Thoennes’ creditor matrix through his counsel.¹⁶ A “Notice of Chapter 7 Bankruptcy Case,

¹² ECF No. 1 at Ex. B (emphasis added).

¹³ *Id.*

¹⁴ Oral argument in the appeal did not take place until February 27, 2012.

¹⁵ C/A No. 11-07438-hb, ECF No. 1, filed Dec. 2, 2011. Ballard is listed on Thoennes’ Schedule F as follows: Andy Ballard, c/o Wyche Burgess Freeman & Parham, P.O. Box 728, Greenville, SC 29602.

¹⁶ *Id.* Ballard is listed on Thoennes’ creditor matrix in the same manner as Thoennes’ Schedule F.

Meeting of Creditors & Deadlines” was issued the same day, providing the date, time, and location of the first meeting of creditors and the deadline of March 19, 2012, to file a complaint objecting to the discharge of the debtor or to determine the dischargeability of a particular debt.¹⁷

In his initial Statement of Financial Affairs, Thoennes described the pending State Court Action as “breach of contract” and indicated it was dismissed.¹⁸ An Amendment was filed on March 6, 2012, that included the Trial Court Order.¹⁹ On January 20, 2012, a Notice in Thoennes’ bankruptcy case was entered and served, instructing creditors who wish to share in any distribution of funds to file a proof of claim.²⁰ The deadline for filing a proof of claim was set at 90 days after the mailing of the notice, or April 19, 2012. On March 26, 2012, Thoennes was granted a discharge under 11 U.S.C. § 727²¹ and Thoennes’ case was closed on March 28, 2013.²² It is undisputed that Ballard received notice of Thoennes’ bankruptcy, the applicable deadlines, and Thoennes’ discharge. Ballard did not file a motion for relief from the automatic stay, a proof of claim, a motion to conduct an examination of Thoennes pursuant to Fed. R. Bankr. P. 2004, or otherwise participate in Thoennes’ bankruptcy case while it was pending.

Approximately five months after Thoennes’ discharge was entered, the South Carolina Supreme Court affirmed the Trial Order on August 29, 2012, finding:

¹⁷ *Id.* at ECF No. 5.

¹⁸ *Id.* at ECF No. 1.

¹⁹ *Id.* at ECF No. 21.

²⁰ *Id.* at ECF No. 14.

²¹ *Id.* at ECF No. 27. Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

²² *Id.* at ECF No. 36 (the bankruptcy case was closed after the closing an adversary proceeding brought by another party against Thoennes, *Odom, et al. v. Thoennes, III*, Adv. Pro. No. 12-80053-hb (Bankr. D.S.C. 2012)).

illegal or fraudulent conduct is not required under section 33-14-300(2)(ii), and we agree with the circuit court that the evidence in the record shows oppression by the majority in this instance . . .

....

We find the record evinces a clear intent by Appellants to “freeze-out” Ballard and exclude him from involvement with Warpath and from the benefits of ownership . . . We therefore affirm the circuit court’s ***finding of oppression*** and its requirement that Appellants purchase Ballard’s stock at fair market value.

Ballard v. Roberson, 399 S.C. 588, 595, 597–98, 733 S.E.2d 107, 110, 112 (2012) (emphasis added) (footnote omitted). The State Court Action was remanded and a valuation hearing to determine the fair value of Ballard’s ownership interest in Warpath was held on August 6, 2013. In a subsequent Order Appointing Receiver entered on April 23, 2014, the state court found that “[a]t 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 [valuation] hearing.”²³

On October 3, 2013, the state court entered an Order of Judgment (“Judgment”) finding the fair value of Ballard’s ownership interest to be \$3,589,297, and ordering the state court defendants, jointly and severally, to pay Ballard that amount within 90 days of entry of the Judgment and in exchange, Ballard would relinquish his shares in Warpath.²⁴ The Judgment was appealed by the state court defendants on December 20, 2013, and they filed a request for stay pending appeal on January 7, 2014, which was denied on March 27, 2014.²⁵

Meanwhile, Ballard served Thoennes with Post-Judgment Interrogatories and Requests for Production of Documents.²⁶ On March 7, 2014, Thoennes responded by

²³ ECF No. 1 at Ex. F.

²⁴ *Id.* at Ex. G.

²⁵ *Id.* at Ex. H.

²⁶ *Id.* at Ex. I.

objecting to each request on grounds that any debt to Ballard was discharged on March 26, 2012, pursuant to § 727 and, because the discharge is a permanent injunction, Ballard is prohibited from collecting the Judgment from Thoennes.²⁷ Ballard asserts, and Thoennes does not dispute, this was the first time Thoennes raised his discharge as a bar to collection in the context of the State Court Action.

More than two years after Thoennes' bankruptcy discharge, Ballard filed this adversary proceeding in the bankruptcy court on November 17, 2014. Finally, as a result of the pending state court appeal, the Judgment was reduced to \$3,125,000 on July 15, 2015 (the "Final Judgment"). *Ballard v. Roberson*, No. 2015-UP-364, 2015 WL 4275343, at *4–5 (S.C. Ct. App. July 15, 2015). The hearing in this Court on the instant Motion was held on July 21, 2015.

Ballard's Complaint alleges four causes of action: (1) Thoennes failed to assert his discharge in the State Court Action and is barred from raising it as a defense to payment of the Final Judgment²⁸ by laches, estoppel, and/or waiver; (2) Thoennes is barred from raising his discharge as a defense to the Final Judgment by virtue of failing to include material information in his bankruptcy petition and thereby concealing assets (unclean hands); (3) the Final Judgment is excluded from the discharge by § 523(a)(19) because Thoennes engaged in conduct constituting fraud, deceit, or manipulation in connection with the purchase and sale of securities and/or the debt is for violations of South Carolina's securities laws;²⁹ and (4) any

²⁷ *Id.* at Ex. J.

²⁸ Although not entered until after the Complaint was filed, the Final Judgment amount represents the amount of the debt in controversy relevant to this Motion.

²⁹ Ballard did not specifically plead that Thoennes violated South Carolina's securities laws; rather, the Complaint refers to § 523(a)(19) in general, not a specific subsection. *See Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x 556, 563 (4th Cir. 2008). The Court will, therefore, construe the Fourth Cause of Action of the Complaint liberally solely for purposes of this Motion.

post-petition³⁰ acts of shareholder oppression by Thoennes against Ballard and any resulting portion of the Final Judgment survived the bankruptcy discharge.

Thoennes argues that the relief requested by Ballard should be denied as a matter of law because: (1) the equitable bases for relief would require the Court to use its equitable powers under § 105 in contravention of the plain language of § 727 and applicable law; (2) § 523(a)(19) is inapplicable to the debt in question because it did not arise from a violation of South Carolina's securities laws or from fraud, deceit, or manipulation in connection with the purchase or sale of any security; and (3) any oppressive post-petition conduct by Thoennes is a part of Ballard's pre-petition claim, which was discharged.

DISCUSSION AND CONCLUSIONS OF LAW

I. JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(a) and (b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and the parties have consented to this Court entering a final order in this matter.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[S]ummary judgment should be granted in those cases in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 738 (D.S.C. 2001).

³⁰ Although Ballard used the term "post-discharge" in his pleadings, § 727 discharges debts from the date of the order of relief. See *infra* at 28.

The fact that there exists an important, difficult or complicated question of law is not a bar to a summary judgment where it is clear there is no genuine issue of a material fact. Resolution of the legal issues will not be rendered easier by going through the trial when there is no issue of fact to be tried. In this regard, summary judgment is appropriate when the parties merely dispute the significance of the events but do not dispute which events actually occurred.

Bradacs v. Haley, 58 F. Supp. 3d 514, 521 (D.S.C. 2014) (internal quotation marks and citations omitted).

On summary judgment, the court must “view the facts and the reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *United Rentals, Inc. v. Angell*, 592 F.3d 525, 530 (4th Cir. 2010). If the movant provides evidence sufficient to establish its right to judgment, “the non-movant must proffer countering evidence sufficient to create a genuine factual dispute.” *In re Proveaux*, C/A No. 07-05384-JW, 2008 WL 8874286 at 3 (Bankr. D.S.C. Mar. 31, 2008) (quoting *In re Dig It, Inc.*, 129 B.R. 65, 66 (Bankr. D.S.C. 1991)). “A genuine issue of fact exists when there is sufficient evidence on which a reasonable jury could return a verdict for the non-moving party.” *Orgain v. City of Salisbury, Md.*, 305 F. App’x 90, 97 (4th Cir. 2008). An issue of fact is considered material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986).

III. BALLARD’S EQUITABLE CLAIMS

a. ***BALLARD’S CLAIMS FOR EQUITABLE RELIEF MUST BE DENIED AS A MATTER OF LAW GIVEN THE STATUTORY FRAMEWORK OF §§ 523 AND 727***

Some relief under §§ 523 and 727 that may have been applicable to the facts here is time barred. *See* 11 U.S.C. §§ 523(c) and 727(e); Fed. R. Bankr. P. 4004(a) and 4007(c). As a result, Ballard’s Complaint asserts that the Court should use § 105(a) to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,”

to enforce the equitable theories of laches, estoppel, waiver, and unclean hands, and allow pursuit of the Final Judgment against Thoennes.

The Supreme Court recently addressed the scope and application of § 105(a) in *Law v. Siegel*, ___ U.S. ___, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), where the debtor was found to have committed fraud. The Supreme Court held that the equitable remedy for the debtor's misconduct fashioned by the bankruptcy court was unauthorized. The Court explained that under § 105(a), a bankruptcy court has statutory authority to issue any order that is "necessary or appropriate" to carry out the provisions of the Bankruptcy Code. *Id.* at 1194. However, it is "hornbook law" that § 105(a) does not allow a bankruptcy court to "override explicit mandates of other sections of the Bankruptcy Code." *Id.* Because the bankruptcy court's order contravened an express provision of the Code, the Court held that the bankruptcy court's relief "exceeded the limits of its authority under § 105(a) and its inherent powers." *Id.* at 1195.³¹

In light of *Siegel*, given the comprehensive statutory framework under §§ 523 and 727 and express provisions of the Code that provide methods to challenge or revoke the debtor's discharge and to except certain debts from the discharge, invocation of § 105 as a basis for the relief requested by Ballard is outside this Court's authority. *Id.* at 1194 (stating that although

³¹ The *Siegel* decision has since been used as the basis to limit bankruptcy courts' equitable authority in various contexts. See *In re Montes*, 526 B.R. 397, 403 (Bankr. D.N.M. 2015) (finding that because of *Siegel*'s "cautions against straying too far from the Code language, whether in the name of 'good faith,' equity, or something else," and because "[t]here are plenty of Code-based ways to protect creditors and the integrity of the bankruptcy system if need be," there is no *per se* prohibition against filing a Chapter 13 case before a prior Chapter 7 case has been closed if the discharge has been entered in the first case and the debts in the two cases do not overlap); *In re Alexander*, C/A No. 11-74515-SCS, 2014 WL 3511499, at *14 (Bankr. E.D. Va. July 16, 2014) *aff'd*, 524 B.R. 82 (E.D. Va. 2014) (finding that the bankruptcy court could not use § 105(a) to enter an order establishing that the creditor had a valid first-priority lien on the property at issue because invoking § 105(a) to do so "would negate the express effect of § 544 . . ."); *In re Kutumian*, C/A No. 13-14675-B-7, 2014 WL 2024789 (Bankr. E.D. Cal. May 15, 2014) (denying the debtor's request for damages for civil contempt under § 105(a) in connection with a willful violation of the automatic stay in addition to actual damages under § 362(k)(1) because the debtor sought to recover attorney's fees and costs that were expressly unavailable under § 362(k)(1) and controlling case law, even though courts have traditionally recognized § 362(k)(1) damages and § 105(a) contempt sanctions as two available remedies for stay violations).

a bankruptcy court has statutory authority to issue any order necessary to carry out the provisions of the Code under § 105(a), “in exercising those statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions”). Therefore, Ballard’s reliance on these equitable principles and § 105(a) is misplaced and Thoennes is entitled to summary judgment on Ballard’s equitable causes of action as a matter of law.

Although this determination disposes of Ballard’s equitable demands, the Court will comment further on the applicability of each theory of equitable relief claimed by Ballard.

b. *CONSIDERING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT, BALLARD’S EQUITABLE CLAIMS FAIL AS A MATTER OF LAW*

i. UNCLEAN HANDS

Ballard claims Thoennes failed to disclose material information on his bankruptcy petition and schedules in order to obtain a discharge and is, therefore, precluded from asserting his bankruptcy discharge in response to efforts to enforce the Final Judgment.

“The purpose of the unclean hands doctrine is to prevent a court from aiding or abetting a party in the commission of a fraud or other misconduct.” *In re Lafferty*, 469 B.R. 235, 245–46 (Bankr. D.S.C. 2012) (quoting *In re Janssens*, 449 B.R. 42, 65 (Bankr. D. Md. 2010)). Even assuming Thoennes failed to include material information on his petition and schedules, as discussed above, § 727 provides a specific remedy to address any such conduct within certain time limits before entry of discharge and additional time to request revocation of discharge on grounds asserted here. Ballard had notice of the bankruptcy and applicable deadlines and failed to act. Ballard has failed to show the Court, even viewing the facts in the light most favorable to him, how the theory of “unclean hands” offers relief.

ii. LACHES, ESTOPPEL, & WAIVER

Ballard contends Thoennes cannot assert his bankruptcy discharge in response to efforts to enforce the Final Judgment under the theories of laches, estoppel, and waiver because Thoennes did not raise his discharge in the State Court Action until responding to post-judgment discovery requests and did not correctly list details of the State Court Action on his initial bankruptcy petition and schedules. Ballard argues he has been prejudiced as a result of these facts because he believed Thoennes' discharge would not apply to the Final Judgment and if Thoennes asserted his discharge earlier, Ballard claims he "could" have filed a proof of claim seeking distribution from the bankruptcy estate, filed an adversary proceeding pursuant to §§ 523 or 727, or sought other relief in the state court.

After a careful review of the timeline of relevant events in this case, Thoennes' bankruptcy, and the State Court Action, the Court finds no merit within this record to Ballard's argument that he was in some way prejudiced by Thoennes' actions or failure to act. Section 523(a)(3), which was not asserted by Ballard as a basis to enforce the Final Judgment, states that a discharge under § 727 does not discharge a debt:

neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request[.]

11 U.S.C. § 523(a)(3). Under this section, “[t]o be properly listed, the name and address of the creditor must be stated.” *In re Circle K Corp.*, 198 B.R. 784, 789 (Bankr. D. Ariz. 1996).

Further,

[b]y its plain terms, however, [§ 523(a)(3)] is designed to protect only the creditor who is completely absent from the debtor’s schedules, and who does not receive actual notice of the bankruptcy case. It is not structured or intended as a punitive measure to preserve all pre-petition money obligations which a debtor may not schedule to the penny, or as to which a debtor may not describe the factual and legal basis with Holmesian accuracy and conciseness. It is not intended as a safe haven for creditors with actual knowledge of a pending bankruptcy case who neglect to promptly evaluate and advance their interests in the case. Rather, it is intended to act in organic conjunction with numerous other provisions of the Bankruptcy Code and Rules, which operate on the understanding that debtors and creditors in bankruptcy cases have independent obligations to safeguard their own interests in anticipation of the grant of discharge in bankruptcy.

In re Bowen, 89 B.R. 800, 805 (Bankr. D. Minn. 1988).

Section 523(a)(3) describes the nature of the notice a debtor must give to a creditor to avoid an exception to discharge on lack of notice grounds, and Thoennes met its requirements. Ballard was listed as a creditor on Thoennes’ Schedule F and included on the creditor matrix and it is undisputed that he received timely notice of Thoennes’ bankruptcy, the applicable deadlines, and his discharge. The fact that the State Court Action was not accurately described on Thoennes’ initial Statement of Financial Affairs is of no consequence and provides no basis for equitable relief and the Bankruptcy Code does not require a debtor to assert his discharge in a different manner. *See In re Burdel*, 126 B.R. 278, 279 (Bankr. N.D. Ohio 1991) (stating that § 523(a)(3)(B) “places a burden on creditors with knowledge of a bankruptcy proceeding to act in order to protect their rights. This furthers the bankruptcy policy of affording a fresh start to the debtor by preventing a creditor, who knew of a bankruptcy proceeding but who did not receive a formal notification, from standing back, allowing the bankruptcy to proceed

without adjudication of his claim, and then asserting that the debt owed him is nondischargeable. (citing *Matter of Compton*, 891 F.2d 1180, 1187 (5th Cir. 1990))).

The doctrine of equitable estoppel:

applies in the bankruptcy context when four criteria are met: 1) the party estopped knew the relevant facts; 2) the party estopped intended for its conduct to be acted or relied upon, or the party acting had the right to believe the conduct was so intended; 3) the party acting was ignorant of the true facts; and, 4) the party acting relied on the conduct to its injury.

In re JK Harris & Co., LLC, 512 B.R. 552, 560 (Bankr. D.S.C. 2012) (quoting *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996)). Under South Carolina law, “[a]s related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” *Rushing v. McKinney*, 370 S.C. 280, 294, 633 S.E.2d 917, 924 (Ct. App. 2006) (quoting *S. Dev. Land & Golf Co., v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993)).

There is no evidence in the record to support lack of knowledge, as Ballard had the relevant facts at his disposal. Ballard knew or had the facts necessary to determine that unless challenged in a timely fashion, the discharge injunction would be entered and could apply to relieve Thoennes from debts of creditors given notice of his bankruptcy and within the scope of § 727. Ballard failed to act timely to protect his rights and has shown no legal obligation requiring Thoennes to assert his discharge beyond scheduling Ballard as a creditor and giving notice of the bankruptcy. Ballard has not shown the Court any facts to support a finding that Thoennes intended for Ballard to rely, that Ballard had a right to rely on Thoennes’ acts or failure to act, or that Ballard did in fact rely on Thoennes’ acts or failure to act.

Waiver may be found where a party voluntarily relinquishes a known right or claim A waiver also does not require consideration to be valid and may be either expressed or implied. Consequently, acts inconsistent with the

continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.

In re Workman, 373 B.R. 460, 465 (Bankr. D.S.C. 2007) (citing federal and South Carolina case law). Similarly, South Carolina law provides “[w]aiver is the voluntary and intentional relinquishment of a known right. It may be implied from circumstances indicating an intent to waive. Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver.” *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478–79, 451 S.E.2d 924, 929 (Ct. App. 1994) (citations omitted).

Ballard cites two Seventh Circuit cases in support of his waiver argument. However, both cases are factually distinguishable and, therefore, offer no support. In the first case, after the jury returned a verdict in favor of the plaintiff, one of the defendants argued the trial court erred in refusing to grant him leave to plead the affirmative defense of discharge in bankruptcy. *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 955 (7th Cir. 1998). The first trial began in September 1990, but was declared a mistrial after the jury could not reach a verdict. *Id.* at 954. On the eve of the second trial, which began on July 11, 1994, the defendant asserted for the first time that he filed for bankruptcy relief in 1992 and received a discharge on April 13, 1992; therefore, all claims against him should be dismissed because of his bankruptcy discharge. *Id.* at 967–68. After the trial court denied the defendant’s motion to dismiss, finding that the defendant waived this affirmative defense under Fed. R. Civ. P. 8(c), the defendant then sought to amend his answer to assert this defense, which was also denied. *Id.* at 968. The Seventh Circuit held that the trial court did not abuse its discretion in denying defendant’s request for leave to amend. *Id.* The court found that the trial court acted reasonably because two years had passed from the time the discharge was entered to when the defendant first raised it as a defense on the eve of trial, despite actively participating in two

pretrial settlement conferences in the interim. *Id.* Additionally, the defendant's purported defense of discharge was insufficient as a matter of law under § 523(a)(3) because, unlike this case, the record in *Gagan* failed to include any notice or actual knowledge on the plaintiff's part of the defendant's bankruptcy due to the fact that the defendant's schedules did not list the plaintiff as a creditor or give his address. *Id.*

The second case, *Bauers v. Bd. of Regents of Univ. of Wisc.*, 33 F. App'x 812 (7th Cir. 2002), is also ineffective. The dispute in *Bauers* concerned federal causes of action arising from the plaintiff's employment termination. *Id.* at 815. The plaintiff received a bankruptcy discharge in 1997 and brought a lawsuit against her employer ten months later in 1998, after her employment ended earlier that year. *Id.* The defendant asserted a counterclaim for conversion of funds during the plaintiff's employment. After the jury found in favor of the defendant's counterclaim and awarded damages, the plaintiff filed a Fed. R. Civ. P. 60(b) motion to vacate the judgment, arguing for the first time that the counterclaim had been discharged in her bankruptcy proceeding. *Id.* The plaintiff did not list the defendant as a creditor in her bankruptcy schedules, did not plead discharge in bankruptcy as an affirmative defense to the counterclaim, and did not inform the defendant of her discharge during the pendency of the lawsuit. *Id.* at 817. The Seventh Circuit, therefore, found the trial court properly denied the plaintiff's motion because she waived this affirmative defense under Fed. R. Civ. P. 8(c). *Id.*

Unlike *Gagan* and *Bauers*, Thoennes' bankruptcy was filed after the liability determination was made, but before the State Court Action was finalized. Most importantly, Ballard was listed on Thoennes' bankruptcy schedules and creditor matrix and received notice of Thoennes' bankruptcy, applicable deadlines, and his discharge. Even viewing the facts in

the light most favorable to the non-movant, Ballard has failed to show as a matter of law how Thoennes' conduct in defending himself on appeal and thereafter in state court could be interpreted as a voluntary relinquishment of his right to assert his discharge in bankruptcy. Ballard has not directed the Court to any authority that created any obligation or affirmative duty imposed on Thoennes to assert his discharge before he did so, nor any act or failure to act that could be interpreted as a waiver under the authorities presented in support.³²

Lastly, "[l]aches is 'defined as neglect to assert [a] right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as [a] bar in [a] court of equity.'" *In re Kean*, 207 B.R. 118, 123 (Bankr. D.S.C. 1996) (quoting BLACK'S LAW DICTIONARY 786 (5th ed. 1979)). "Laches is sustainable only on proof of both of two elements: '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Id.* (quoting *In re Paul*, 194 B.R. 381 (Bankr. D.S.C. 1995)). Additionally, under South Carolina law:

[I]f a party, knowing his rights does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice.

Emery v. Smith, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004). "Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner."

RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 199, 644 S.E.2d 730, 734–35 (2007) (citation omitted).

³² Although Ballard argued Thoennes waived his right to assert "discharge in bankruptcy" as an affirmative defense under Rule 8(c), SCRCP, Ballard has failed to show how that rule is applicable to the facts set forth in the timeline of this case because in the State Court Action the Trial Order that determined liability had already been entered and that matter was on appeal at the time Thoennes filed for bankruptcy relief and received his discharge.

Even viewed in the light most favorable to Ballard, he has failed to show how the facts support a finding of a lack of diligence or unreasonable delay. *See Shay v. Austin*, 466 F. Supp. 2d 664, 671 (D.S.C. 2006) (granting the plaintiff's motion for summary judgment because, even assuming the defendant could establish prejudice, the defendant could not establish unreasonable delay based on the facts of the case). Thoennes asserted his discharge through the bankruptcy proceeding itself, which occurred during the pendency of the State Court Action, by listing Ballard as a creditor and giving him notice of the bankruptcy, the applicable deadlines, and the discharge. Ballard has failed to establish any obligation requiring Thoennes to assert his discharge at an earlier date or in a different manner.

Based on the foregoing, Thoennes is entitled to summary judgment on these causes of action as a matter of law.

IV. BALLARD'S CLAIMS PURSUANT TO 11 U.S.C. § 523(A)(19)

There is no applicable time limit for a § 523(a)(19) determination. *See Fed. R. Bankr. P. 4007*. This provision provides that Thoennes discharge under § 727 did not discharge the Final Judgment if it:

(A) is for--

- (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
- (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from -

- (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
- (ii) any settlement agreement entered into by the debtor; or
- (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19).

Here it is undisputed that § 523(a)(19)(B) is satisfied because there was a judgment entered against Thoennes by the state court. It is also clear that no court has determined that Thoennes committed fraud.³³ The issues are: (a) whether the Final Judgment is for Thoennes' violation of South Carolina's securities laws; and/or (b) whether it is for Thoennes' deceit or manipulation in connection with the purchase or sale of any security.

a. THE FINAL JUDGMENT IS NOT FOR A VIOLATION OF STATE SECURITIES LAWS

The state court's Trial Order that led to the Final Judgment found, in relevant part, that Thoennes was liable for shareholder oppression, from which Ballard sought relief pursuant to S.C. Code Ann. §§ 33-14-300 and 310. These provisions are found under Chapter 14 of the South Carolina Business Corporation Act of 1988, which is titled "Dissolution." Ballard contends the term "State securities laws" under § 523(a)(19)(A)(i) includes the state statute relevant here because it allows for the buyout of securities as a remedy to shareholder oppression.

One of the central purposes of the Bankruptcy Code is to provide the debtor with a "fresh start." See *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991). In light of this, the Supreme Court has adopted a rule of construction that requires exceptions to discharge to be interpreted narrowly. See *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) ("[E]xceptions to discharge should be confined to those plainly expressed[.]" (internal quotation marks omitted)); see also *In re Rountree*, 478 F.3d 215, 219 (4th Cir. 2007) ("When considering the applicability of an exception to discharge, we construe the exception narrowly 'to protect the purpose of providing debtors a fresh start.'" (quoting *In re Biondo*, 180 F.3d 126, 130 (4th Cir. 1999))); 4 COLLIER ON

³³ At the hearing on the Motion, Ballard's counsel admitted that fraud was not at issue.

BANKRUPTCY ¶ 523.05 (16th ed. 2012) (“In determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.”).

Whether a debt is for a violation of securities laws under § 523(a)(19)(A)(i) has been addressed by the Tenth Circuit in *Okla. Dep’t of Sec., ex rel. Faught v. Wilcox*, 691 F. 3d 1171 (10th Cir. 2012). In *Wilcox*, the Oklahoma Department of Securities brought lawsuits against investors in a Ponzi scheme perpetrated by a third party to recoup funds distributed in the Ponzi scheme on grounds of unjust enrichment, fraudulent transfer, and equitable lien. *Id.* The debtors were among those sued and were found liable only on the basis of unjust enrichment. *Id.* After the debtors filed for bankruptcy relief, the Oklahoma Department of Securities initiated an adversary proceeding to have the judgment debts excepted from their discharge pursuant to § 523(a)(19). *Id.* at 1173. On appeal, the Tenth Circuit found that, based on the plain language of the statute, the debts did not fall under § 523(a)(19) because the judgments were not “for a violation” of securities laws due to the fact that the debtors were not charged with securities violations and were only found liable for unjust enrichment, even though the matter involved a third party’s violation of securities laws. *Id.* at 1175. The plain language of the statute and *Wilcox* instruct this Court to find that the Final Judgment does not fit within the provisions of § 523(a)(19)(A)(i).

Even though the *Wilcox* court’s findings were based on the plain language of the statute, it also looked to the statutory history of § 523(a)(19) to further support its conclusion.

[Section] 523(a)(19) was enacted as part of the Sarbanes–Oxley Act in 2002. The Senate Report on the draft legislation indicates it was enacted to address perceived loopholes in securities laws after the Enron debacle. The early language of § 523(a)(19)(A) excepted from discharge a judgment that “arises under a claim relating to” securities violations. The language was subsequently changed to except a judgment that “is for” securities violations.

Id. (internal citations and footnote omitted); *see also In re Sherman*, 658 F.3d 1009, 1016 (9th Cir. 2011) (“The § 523(a)(19) exception, enacted as part of the Sarbanes–Oxley Act, responded to concerns that the Bankruptcy Code ‘permitted wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations.’ S. Rep. No. 107–146, at 8 (2002). Specifically, Congress sought to address the obstacles posed by the fact that the elements of various securities violations do not perfectly overlap with the elements of fraudulent conduct within the meaning of § 523(a)(2)(A), frequently forcing the SEC to relitigate otherwise resolved cases before a bankruptcy judge because the violator was not collaterally estopped from challenging the claim of fraud. 148 Cong. Rec. S7418, S7419 (2002). In other words, one reason Congress enacted the exception was to target those parties who are guilty of securities violations, in order to ensure that judgments for securities violations are treated, in bankruptcy, like judgments for fraud.”), *abrogated by Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013). The Tenth Circuit also reasoned that the legislative history “consistently refers to ‘holding accountable those who incur debts by *violating* our securities laws’” *Id.* (emphasis in original) (quoting S. Rep. No. 107-146 at 8).

Considering the plain language of § 523(a)(19)(A)(i) and the reasoning of *Wilcox*, which was more closely related to a violation of securities laws than the instant matter, the Court finds the Final Judgment does not indicate a debt “that is for the violation of . . . any of the State securities laws, or any regulation or order issued under such . . . State securities laws.” The state court found Thoennes liable for shareholder oppression, not any violation of securities laws. *See In re Gilley*, C/A No. 12-11443, 2013 WL 4460499, at *3 (Bankr. M.D.N.C. Aug. 19, 2013) (finding that a settlement order that did not include the debtor’s

admission of guilt sufficiently established the debt was for violations of securities laws because the complaint only alleged violations of securities laws, unlike the *Wilcox* debtors who were not charged with violations of securities laws), *aff'd per curiam sub nom. Gilley v. S.E.C.*, 590 F. App'x 227 (4th Cir. 2015). The judicial dissolution statute that provides for the purchase of securities as a remedy to Thoennes' oppression does not produce a debt for violations of state securities laws or regulations. Accordingly, the debt owed to Ballard is not an exception to Thoennes' discharge pursuant to § 523(a)(19)(A)(i).

b. THE FINAL JUDGMENT IS NOT FOR COMMON LAW FRAUD, DECEIT, OR MANIPULATION IN CONNECTION WITH THE PURCHASE OR SALE OF SECURITIES

The Trial Order specifically found the state court “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).”³⁴ The South Carolina Supreme Court “affirm[ed] the circuit court’s *finding of oppression* and its requirement that [the state court defendants] purchase Ballard’s stock at fair market value.” *Roberson*, 399 S.C. at 597–98, 733 S.E.2d at 112. The state court expressly omitted any finding of fraudulent conduct and there was no finding of deceit or manipulation. However, Ballard contends the findings of the Trial Order “implicate” that Thoennes committed deceit or manipulation in connection with the purchase or sale of a security. Additionally, Ballard claims there is a causal link between Thoennes’ shareholder oppression and the purchase or sale of securities sufficient to satisfy § 523(a)(19)(A)(ii).

i. ANY ALLEGED DECEIT OR MANIPULATION WAS NOT IN CONNECTION WITH THE PURCHASE OR SALE OF SECURITIES

In support of his argument that the debt is for deceit or manipulation “in connection with the purchase or sale of any security,” Ballard relies on *In re Pre-Press Graphics Co.*,

³⁴ ECF No. 1, Ex. B (emphasis added).

Inc., 307 B.R. 65 (N.D. Ill. 2004). In *Pre-Press Graphics*, a Chapter 11 debtor sought to subordinate a shareholder creditor's claim to the claims of other creditors pursuant to § 510(b), which provides in relevant part: "[f]or the purpose of distribution under this title, a claim . . . for damages arising from the purchase or sale of such a security . . . shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security" 11 U.S.C. § 510(b). The issue before the court was whether the creditor's claim for shareholder oppression "arose from" the purchase or sale of the debtor's securities such that it should be subordinated to other creditors. *Pre-Press Graphics*, 307 B.R. at 71. The court found that the term "arises from" should be interpreted broadly in that context to include "claims beyond those arising at the time stock is issued[.]" *id.* at 75, so long as there is some causal link between the purchase or sale of a security and the claim at issue. *Id.* at 78.

After a careful review of that case, the Court finds that *Pre-Press Graphics* lends no support to Ballard's legal argument. It is true that there is some factual similarity between the underlying debt in this case and *Pre-Press Graphics*; however, Ballard's assertion that the statutory terms "arises from" and "in connection with" should be interpreted the same must fail. *Pre-Press Graphics* involved analysis of the legislative history of and purpose behind § 510(b), which resulted in a broad interpretation of the term "arises from." Not only did Congress use different terms in the relevant statutes, §§ 510(b) and 523(a)(19) also have no common purpose or legislative history. Further, unlike the *Pre-Press Graphics* court's broad interpretation of § 510(b), "[w]hen considering the applicability of an exception to discharge, we construe the exception narrowly 'to protect the purpose of providing debtors a fresh start.'" *Rountree*, 478 F.3d at 219 (quoting *Biondo*, 180 F.3d at 130). Any interpretation of the "arises

from” portion of § 510(b) found in *Pre-Press Graphics* is simply inapplicable to the “in connection with” language found in § 523(a)(19)(A)(ii).

The wrongful conduct here, according to the state court, was for shareholder oppression. Ballard has not shown how the facts indicate this wrongful conduct occurred “in connection with the purchase or sale of any security.” The record, even considered in the light most favorable to Ballard, does not support Ballard’s claims pursuant to § 523(a)(19)(A)(ii).

ii. NO “DECEIT OR MANIPULATION” WAS FOUND BY THE TRIAL COURT

Although the Court concludes the debt is not “in connection with the purchase or sale of any security” and summary judgment may be granted on these findings alone, it will also address the parties’ other dispute: whether the debt “is for . . . deceit or manipulation.”

The South Carolina Supreme Court has previously held “that the terms ‘oppressive’ and ‘unfairly prejudicial’ pursuant to S.C. Code Ann. § 33-14-300 are elastic terms whose meaning varies with the circumstances presented in a particular case.” *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 602, 541 S.E.2d 257, 266 (2001). In adopting a case-by-case analysis for determining whether a party has acted “oppressively,” the *Kiriakides* court reasoned:

While business corporation statutes may attempt to provide certainty and clarity in the law to enhance the attractiveness of doing business, the definition of oppression has been left to judicial construction on a case-by-case basis. Such an approach has been suggested by the Model Close Corporation Supplement which expressly indicates that no attempt has been made to statutorily define oppression, fraud or prejudicial conduct, leaving these “elastic terms” to judicial interpretation . . . The judicial construction of the definition of oppressive conduct is well-suited to the diversified, fact-specific disputes among shareholders of closely-held corporations. However, the judicial development of a meaningful standard for defining oppressive conduct, apart from fraud or mismanagement, is a difficult task.

Id. at 602–03 (quoting Sandra K. Miller, *Should the Definition of Oppressive Conduct by the Majority Shareholders Exclude a Consideration of Ethical Conduct and Business Purpose*, 97 DICK. L. REV. 227, 229–30 (Winter 1993)).

Non-dischargeability provisions are to be interpreted narrowly. *Kawaauhau*, 523 U.S. at 62, 118 S. Ct. 974. Additionally, as this Court previously expressed in *In re Pujdak*, 462 B.R. 560, 574–75 (Bankr. D.S.C. 2011), the Court’s dischargeability determination is limited to the language in the Trial Order.³⁵ “The inclusion of § 523(a)(19)(B) strips the bankruptcy court of its ability to determine whether the debtor did in fact violate the securities laws [or commit fraud, deceit, or manipulation in connection with the purchase or sale of any security]; therefore, the non-bankruptcy court’s liability determination should have preclusive effect in the nondischargeability action.” *Id.* at 574 (citations omitted). Section 523(a)(19) does not add any new elements for this Court to consider in determining whether the debt is dischargeable. “Thus, a determination of dischargeability under § 523(a)(19) is made when the state court makes a finding of a violation of the state securities laws [or for fraud, deceit, or manipulation in connection with the purchase or sale of any security] and a judgment is entered.” *Id.* at 575.³⁶ Therefore, the Court concludes that, as a matter of law, the underlying

³⁵ There is a split in authority regarding the substantive area in which a bankruptcy court can adjudicate matters under § 523(a)(19). This Court has previously adopted the narrow view that § 523(a)(19)(B) requires the debt to be memorialized in a settlement or order from a nonbankruptcy forum. *Pujdak*, 462 B.R. at 574–75 (citations omitted); see also *In re Collier*, 497 B.R. 877, 903 (Bankr. E.D. Ark. 2013); *In re Bundy*, 468 B.R. 916, 922 (Bankr. E.D. Wash. 2012); *In re Anderson*, C/A No. 10-20651-TLM, 2012 WL 3133827, at *1 (Bankr. D. Idaho Aug. 1, 2012); *In re Jafari*, 401 B.R. 494, 497 (Bankr. D. Colo. 2009); *In re Zimmerman*, 341 B.R. 77, 80 (Bankr. N.D. Ga. 2006). Other courts adopting the broad view find that a bankruptcy court can determine the liability, damages, and dischargeability of the debt for securities violations and securities fraud and issue its own judgment to satisfy § 523(a)(19)(B). See *In re Sato*, 512 B.R. 241, 251 (Bankr. C.D. Cal. 2014); *In re Hill*, 495 B.R. 646, 661 (Bankr. D.N.J. 2013); *In re Jensen-Ames*, 2011 WL 1238929, *8 (Bankr. W.D. Wash. Mar. 30, 2011); *In re Jansma*, 2010 WL 282511, *5 (Bankr. N.D. Ill. Jan. 21, 2010); *In re Chan*, 355 B.R. 494, 505 (Bankr. E.D. Penn. 2006).

³⁶ Unlike § 523(a)(19), other subsections of § 523(a) may require additional proof or different elements than the underlying action in order to determine whether the debt is dischargeable. Compare 11 U.S.C. § 523(a)(11) with 11 U.S.C. § 523(a)(4); see also *Pujdak*, 462 B.R. at 575 (“The merits of the § 523(a)(19) discharge exception are indistinguishable from the merits of the underlying legal claim. Unlike other subsections of § 523(a) (i.e.,

judgment giving rise to the debt must actually “be for” deceit or manipulation in connection with the sale or purchase of a security – not merely insinuate that deceit or manipulation could have occurred as argued here.

Moreover, in light of South Carolina’s fluid definition of “oppressive” under S.C. Code Ann. § 33-14-300, the state court had the opportunity to explicitly find Thoennes’ oppressive conduct was also deceitful and/or manipulative. While each of these terms connote negative conduct of varying degrees, the record does not indicate and Ballard has not shown how the record before the Court establishes that the finding of oppression equals deceit or manipulation. Pursuant to the plain meaning of the bankruptcy statute, a review of the Trial Court Order and the Final Judgment indicates that the state court did not make a finding of deceit or manipulation. Therefore, in response to Thoennes’ Motion, Ballard has not “proffer[ed] countering evidence sufficient to create a genuine factual dispute.” *Proveaux*, 2008 WL 8874286 at 3 (quoting *Dig It, Inc.*, 129 B.R. at 66).

Additionally, legislative history shows “[t]he early language of § 523(a)(19)(A) excepted from discharge a judgment that ‘*arises under a claim relating to*’” common law fraud, deceit, or manipulation in connection with the purchase or sale of any security. *Wilcox*, 691 F. 3d at 1175 (emphasis added) (citations omitted). However, “[t]he language was subsequently changed to except a judgment that ‘*is for*’” common law fraud, deceit, or manipulation in connection with the purchase or sale of any security. *Id.* (emphasis added). The Final Judgment does not indicate a debt that “is for” any of these.

§ 523(a)(2), (4), (6), (7), and (9)), which establish exceptions to discharge defined by elements specified in the Bankruptcy Code, the § 523(a)(19) discharge exception is defined, at least in part, in terms of claims established under specified non-bankruptcy statutes.” (quoting *Chan*, 355 B.R. at 503)).

Finally, it appears the terms “deceit” and “manipulation” were included in § 523(a)(19) to incorporate certain violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, which use these specific terms. *See e.g.* 15 U.S.C. § 77t (1995) (providing a different penalty for violators of securities laws if the violation “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement”); 15 U.S.C. §§ 78i (titled “Manipulation of securities prices”) and 78j (titled “Manipulative and deceptive devices” and prohibiting “in connection with the purchase or sale of any security” the use of “any manipulative or deceptive device”); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199, 96 S. Ct. 1375, 1384, 47 L. Ed. 2d 668 (1976) (finding that use of the term “manipulative” in federal securities law “is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”). The legislative history of § 523(a)(19) states that “[u]nder current laws, state regulators are often forced to ‘reprove’ their fraud cases in bankruptcy court to prevent discharge because remedial statutes often have different technical elements than the analogous common law causes of action.” S. Rep. 107-146, 16. It is most logical that Congress included these terms of art to prevent “wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations” and to close this “loophole” to allow “defrauded investors [to] recoup their losses and to hold accountable those who incur debts by violating our securities laws.” *Id.* at 10. The statute is not directed to the facts at hand.

Thoennes is entitled to summary judgment on Ballard’s § 523(a)(19) claims.

V. THOENNES' POST-PETITION LIABILITY

The findings above may indicate that Thoennes has prevailed in various battles, but it is unclear who will prevail in the overall war. While Thoennes' discharge is applicable to the Final Judgment, that discharge has its limits. *See O'Loughlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) (finding the creditor's claims against the Chapter 9 debtor for its pre-discharge violations of the ADA were barred by the discharge, but the post-discharge claims that arose from additional "illegal conduct occurring after discharge" were not barred by the discharge); *see also Holcombe v. US Airways, Inc.*, 369 F. App'x 424, 428 (4th Cir. 2010) (finding plaintiff's discrimination claims against the Chapter 11 debtor arising from discriminatory acts that occurred after confirmation of the plan were not discharged, and rejecting plaintiff's "continuing violation" theory that her pre-confirmation claims persisted into the post-confirmation period).

Section 727 of the Bankruptcy Code states in relevant part:

a discharge under subsection (a) of this section discharges the debtor from ***all debts that arose before the date of the order for relief*** under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C § 727(b) (emphasis added). Thoennes' Chapter 7 petition was filed on December 2, 2011. Because § 727(b) discharges debts that arose before the date of the order for relief, any portion of the Final Judgment that arose before that date is within the scope of the discharge.³⁷

³⁷ Section 301 of the Bankruptcy Code provides:

(a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.

The Final Judgment required Thoennes and the other defendants to buy out Ballard's interest in Warpath for a certain price, which was established as a lump sum value. The Court later noted there was "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 [August 6, 2013 valuation] hearing."³⁸ Therefore, the conduct resulting in the Final Judgment was not abated post-petition. These facts are sufficient to create a dispute of fact on this issue: *Is any portion of the obligation set forth in the Final Judgment a claim that arose after the date of the order for relief?*

This question must be answered not through summary judgment, but through an analysis of disputed facts. The state courts have litigated this dispute since 2008. The state courts heard the evidence and applied state law, resulting in the Trial Court Order and the Final Judgment. Consequently, the state courts are likely in a better position to make this determination in an efficient manner and may be the only forum that is appropriate. *See Pujdak*, 462 B.R. at 574–75. How the Final Judgment could be divided, if appropriate, and where such a determination should take place are issues for another day. However, at this point it is clear that this portion of Thoennes' motion for summary judgment must be denied.

IT IS, THEREFORE, ORDERED that summary judgment is **granted** in favor of Thoennes on all of Ballard's claims except the cause of action titled "Post-Discharge Conduct."

AND IT IS SO ORDERED.

(b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

¹¹ U.S.C. § 301.

³⁸ ECF No.1, Ex. F.

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TOTAL: 8

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Frederick Richard Thoennes, III,

Debtor.

Andrew P. (Andy) Ballard

Plaintiff,

vs.

Frederick Richard Thoennes, III,

Defendant.

Chapter 7

Case Number 11-07438-hb

Adversary Number 14-80131-hb

CONSENT ORDER

This matter comes before this Court by consent of the parties to a dismissal of this Adversary Proceeding under F.R.C.P. 41(a)(2) in accordance with the following findings of fact and conclusions of law of the Court:

1. Defendant Frederick Richard Thoennes, III's ("Thoennes") Chapter 7 petition was filed on December 2, 2011.
2. In accordance with 11 U.S.C. § 727(b), only those "debts that arose before the date of the order for relief [*i.e.*, the petition date]" are discharged by this court's discharge order dated March 26, 2012 ("Discharge Order").
3. The debt in question arises from an Order in favor of Ballard entered May 4, 2010, which was affirmed by the South Carolina Supreme Court in August 2012, and a Judgment in favor of Ballard entered on October 3, 2013 ("Judgment") in the action filed in the Court of Common Pleas in the County of Greenville, South Carolina, styled as *Andrew P. Ballard, individually and derivatively on behalf of Warpath Development, Inc. v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development, Inc.*, C/A No. 2008-CP-23-5739 ("State Court Action").
4. The amount of the Judgment ultimately was reduced to \$3,125,000 by the Court of Appeals of South Carolina ("State Court Judgment Amount").
5. Any portion of the State Court Judgment Amount that is attributable to oppression by Thoennes occurring on or after December 2, 2011, is not discharged by the Discharge

Order.

6. The state court is in a better position to make the determination of whether all or any portion of the State Court Judgment Amount is attributable to oppression by Thoennes occurring on or after December 2, 2011.
7. This Adversary Proceeding is dismissed without prejudice in order for Ballard to seek this determination from the state court.
8. Ballard is not barred by virtue of this Order of Dismissal from bringing this issue back to this Court if it becomes necessary to do so.
9. The foregoing paragraphs are denominated as both Findings of Fact and Conclusions of Law to the extent that they constitute the same.

With the Consent of the appearing parties,

IT IS SO ORDERED.

WE SO CONSENT:

/s/Jason M. Ward

Jason M. Ward, Esq.
DICKERSON & WARD, LLC
PO Box 1208
Simpsonville, SC 29681
Phone: 864-399-7888
Fax: 864-349-5058
Email: Jason@DickersonWard.com

ATTORNEYS FOR DEBTOR/DEFENDANT

/s/William M. Wilson III

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ATTORNEYS FOR PLAINTIFF

**FILED BY THE COURT
10/27/2015**



Entered: 10/28/2015


US Bankruptcy Judge
District of South Carolina

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aty	Wallace K. Lightsey	wlightsey@wyche.com
aty	William M Wilson, III	bwilson@wyche.com

TOTAL: 8

The Supreme Court of South Carolina

Andrew P. (Andy) Ballard, Respondent,

v.

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

Appellate Case No. 2015-002036
Lower Court Case No. 2008-CP-23-05739

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SC Court of Appeals

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Few, J., not participating.

Columbia, South Carolina

September 8, 2016

cc:

Wallace K. Lightsey, Esquire

Joshua L. Howard, Esquire

The Honorable Paul B. Wickensimer

The Honorable Jenny Abbott Kitchings, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
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 ALLOWING ENFORCEMENT OF
FULL AMOUNT OF JUDGMENT AGAINST
RICK THOENNES III**

This matter is before the Court on the motion ("Motion") of Plaintiff Andrew P. (Andy) Ballard ("Ballard") for the Court to make a determination as to what portion of the Judgment this Court entered in favor of Ballard against Rick Thoennes III ("Thoennes III") on October 3, 2013 ("Judgment"), is attributable to oppression by Thoennes III occurring on or after the date Thoennes III filed a petition for bankruptcy on December 2, 2011 ("Petition"), and as a result was not discharged in the bankruptcy filing. The Motion was heard by the Court on January 27, 2017, along with several other motions. All parties were represented at the hearing by their respective counsel. The Court took the Motion under advisement and now enters this Order granting the Motion and allowing Ballard to enforce the full amount of the Judgment against Thoennes III.

Ballard requested the Court find that the entire amount of the Judgment of \$3,125,000¹ be found to be attributable to oppression that occurred after the Petition filing and therefore was not discharged in bankruptcy. In the alternative, Ballard asked the Court to apportion the Judgment amount between the time period before December 2, 2011, and the time period on or after December 2, 2011. Thoennes III's position is that the Judgment was discharged in bankruptcy and therefore that no amount of the Judgment is attributable to oppression occurring after the Petition date. The Court rejects the position of Thoennes III, grants the Motion of Ballard, and finds that Thoennes III is liable for and should share in the entirety of the Judgment amount of \$3,125,000, which is fully attributable to oppression occurring on or after the Petition date.

The factual and procedural background of this long-protracted litigation are set forth in the numerous prior orders of this Court, the 2012 decision of the South Carolina Supreme Court, and the 2015 decision of the South Carolina Court of Appeals, and will not be repeated here except to the extent particular facts are pertinent to the instant motion. Ballard originally presented this issue to the Bankruptcy Court, which determined in its October 27, 2015, Order (included in the Record as Exhibit B to the Motion) that any portion of the Judgment attributable to oppression occurring on or after the Petition date was not discharged in bankruptcy. The Bankruptcy Court further concluded that the state court is in the best position to make the determination of whether all or part of the Judgment is attributable to post-Petition oppression, which resulted in the present Motion. Specifically, the Bankruptcy Court made the following findings of fact and conclusions of law in its Order:

¹ This court entered Judgment in favor of Ballard against all of the defendants—jointly and severally, including Rick Thoennes III—on October 3, 2013, for \$3,589,297. The Judgment was reduced to \$3,125,000 on appeal by the South Carolina Court of Appeals. The South Carolina Supreme Court denied certiorari to review the decision of the Court of Appeals, and therefore the Judgment in that amount is now final.

1. Defendant Frederick Richard Thoennes, III's ("Thoennes") Chapter 7 petition was filed on December 2, 2011.
2. In accordance with 11 U.S.C. § 727(b), only those "debts that arose before the date of the order for relief [*i.e.*, the petition date]" are discharged by this court's discharge order dated March 26, 2012 ("Discharge Order").
3. The debt in question arises from an Order in favor of Ballard entered May 4, 2010, which was affirmed by the South Carolina Supreme Court in August 2012, and a Judgment in favor of Ballard entered on October 3, 2013 ("Judgment") in the action filed in the Court of Common Pleas in the County of Greenville, South Carolina, styled as *Andrew P. Ballard, individually and derivatively on behalf of Warpath Development, Inc. v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development, Inc.*, C/A No. 2008-CP-23-5739 ("State Court Action").
4. The amount of the Judgment ultimately was reduced to \$3,125,000 by the Court of Appeals of South Carolina ("State Court Judgment Amount").
5. **Any portion of the State Court Judgment Amount that is attributable to oppression by Thoennes occurring on or after December 2, 2011, is not discharged by the Discharge Order.**
6. The state court is in a better position to make the determination of whether all or any portion of the State Court Judgment Amount is attributable to oppression by Thoennes occurring on or after December 2, 2011.
7. This Adversary Proceeding is dismissed without prejudice in order for Ballard to seek this determination from the state court.

(*Id.* (emphasis added)). This Order of the Bankruptcy Court was entered by consent and was not appealed. Ballard subsequently presented the instant Motion to this Court.

Ballard contends, and this Court so finds, that Thoennes III's oppression of Ballard continued unabated through the hearing date on August 6, 2013, when this Court heard evidence of valuation and ultimately determined the amount of the Judgment to be entered against Thoennes III. As this Court has held in two prior orders, Ballard presented undisputed evidence at the August 6, 2013, valuation hearing "that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the

hearing.” (Order Appointing Receiver at 3 (Exhibit C to Motion); Charging Order at 2 (Exhibit D to Motion)). These orders were not appealed; they are the law of the case; and Thoennes III is therefore precluded from challenging these prior findings now. In addition, the Court reaffirms this finding of fact based on the evidence presented by Ballard at the August 6, 2013, hearing, which was not refuted or even challenged at that time by the defendants, including Thoennes III.²

Because this Court has found that the oppression of Thoennes III continued through the time of the valuation hearing in August 2013, following which the Judgment was entered on October 3, 2013, it necessarily follows that some or all of the amount of the Judgment was attributable to oppression by Thoennes III that occurred after he filed the bankruptcy Petition on December 2, 2011. Because the Bankruptcy Court held that the amount of the Judgment that is attributable to post-Petition conduct was not discharged in the bankruptcy, Ballard is entitled to an order indicating the amount of the Judgment that was not discharged in bankruptcy and for the enforcement of said Judgment amount. Otherwise, Thoennes III would have a license to continue his oppression into perpetuity simply because it began pre-discharge. *See O’Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) (finding the creditor’s claims against the Chapter 9 debtor for its pre-discharge violations of the ADA were barred by the discharge, but the post-discharge claims that arose from additional “illegal conduct occurring after discharge” were not barred by the discharge); *see also Holcombe v. U.S. Airways, Inc.*, 369 Fed. Appx. 424, 428

² In particular, Ballard testified to, and presented documentary evidence of, joint conduct by all of the defendants, including Thoennes III, that continued their exclusion of Ballard from any participation in or knowledge of the management and planning for Warpath, that kept from Ballard any information concerning plans or discussions for financing the project, and that “the wrongful conduct has continued since 2011 through the presen[t].” Transcript of Record, p.22, lines 21-22 (Aug. 6, 2013) (statement by Mr. Lightsey summarizing the evidence transcribed at pages 20-22). Testimony from the court-appointed expert corroborated the evidence presented by Ballard. *See, e.g., id.* at 67-68, 76-78 (testimony of Perry Woodside).

(4th Cir. 2010) (finding plaintiff's discrimination claims against the Chapter 11 debtor arising from discriminatory acts that occurred after confirmation of the plan were not discharged).

The only issue is how much of the \$3.125 Million Judgment against Thoennes III is attributable to oppression after his December 2, 2011, Petition. The Judgment amount was based upon the valuation of the company at the time of the hearing on August 6, 2013, which was after the Petition. Thus, the amount of the valuation, and hence the Judgment, would not increase or decrease based upon the amount of oppression or the time period of oppression. Indeed, the severity or length of the oppression would not be relevant to the valuation or Judgment amount. Instead, it is the existence of the oppression that matters. Accordingly, if the oppression simply existed after the bankruptcy discharge, then it follows that the full amount of the Judgment is attributable to this oppression. Given that the law of the case is that the oppression existed all the way up to the valuation hearing on August 6, 2013, it necessarily follows that the full amount of the Judgment is attributable to the oppression occurring after the Petition date and therefore was not discharged.

The fact that the oppression began before the Petition date is irrelevant. Otherwise, as discussed above, Thoennes III would have a license to continue his oppression into perpetuity simply because it began pre-discharge. Also, the bankruptcy court rejected this argument, as it declined to discharge the entire Judgment even though it was unquestionable that the oppression was occurring prior to the Petition date. The idea that oppression occurring following the Petition date fully supports the Judgment amount even though the oppression began prior to the Petition date may be analogized to the theory of joint and several liability in tort law.

In sum, for the reasons above, I find and conclude the following (which are denominated interchangeably as Findings of Fact and Conclusions of Law):

1. The oppression by Thoennes III continued unabated through the hearing date of August 6, 2013;
2. The Judgment is wholly attributable to and supported by oppression of Thoennes III occurring after the Petition date of December 2, 2011;
3. Under the Bankruptcy Court Order, it follows that none of the Judgment was discharged in bankruptcy;
4. Thoennes III remains subject to and liable for the full amount of the Judgment; and
5. Ballard may pursue collection efforts against Thoennes III for the entire amount of the Judgment.

Accordingly, **IT IS ORDERED** that Ballard's Motion is granted, that the Judgment amount is attributable in full to oppression occurring after the Petition date, that the Judgment was not discharged in the bankruptcy Petition, and that Ballard may enforce the entire amount of the Judgment against Thoennes III.

IT IS FURTHER ORDERED that the Order Appointing Receiver entered April 23, 2014 (as modified in the Order Modifying Order for Receivership entered February 17, 2017), applies in full to Rick Thoennes III. In footnote 1 of the Order Appointing Receiver, the Court ruled that the Findings of Fact applied to all Defendants but that the relief granted therein would not apply to Thoennes III until it was determined whether his bankruptcy discharge applied to the Judgment. Because this Court and the Bankruptcy Court have now ruled that the Judgment was not discharged in bankruptcy, the relief granted in the Order Appointing Receiver now fully applies to Thoennes III.

IT IS FURTHER ORDERED that the Charging Order entered April 23, 2014, applies in full to Rick Thoennes III. In footnote 1 of the Charging Order, the Court ruled that the relief granted therein would not apply to Thoennes III until it was determined whether his bankruptcy discharge applied to the Judgment. Because this Court and the Bankruptcy Court have now ruled

that the Judgment was not discharged in bankruptcy, the relief granted in the Charging Order now fully applies to Thoennes III.

IT IS SO ORDERED.

Edward W. Miller
Judge, South Carolina Circuit Court

_____, 2017
Greenville, South Carolina

Electronic signature page to follow



Greenville Common Pleas

Case Caption: Andrew P Andy Ballard , plaintiff, et al vs. Tim Roberson ,
defendant, et al
Case Number: 2008CP2305739
Type: Order/Other

So Ordered

s/ Edward W. Miller

Electronically signed on 2017-03-29 13:36:28 page 8 of 8

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Andrew P. Ballard,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2008-CP-23-05739

**ORDER DENYING DEFENDANT
RICK THOENNES, III'S
MOTION TO ALTER OR AMEND**

THIS MATTER initially came before me for a hearing on January 27, 2017 on the Plaintiff's motion regarding the apportionment of a judgment entered on October 3, 2013. Specifically, the Plaintiff sought to determine what value, if any, was attributable to Defendant Thoennes, III on or after the date that Defendant Thoennes, III filed a petition for bankruptcy.¹ This Court entered an order on April 18, 2017 stating that the Plaintiff may enforce the entire judgment amount against Defendant Thoennes, III. Accordingly, Defendant Thoennes, III filed the current motion to alter or amend the Court's April 18, 2017 order.

Having considered the arguments contained in the present motion, I do not find that Defendant Thoennes, III has provided a sufficient basis upon which the original decision of this Court should be altered. Accordingly, the Defendant's Motion to Alter or Amend Judgment is DENIED.

IT IS SO ORDERED.

Edward W. Miller
Presiding Judge

Greenville, South Carolina
July _____, 20____

Electronic Signature Page to Follow.

¹ Defendant Thoennes, III filed a petition for bankruptcy on December 2, 2011.



Greenville Common Pleas

Case Caption: Andrew P Andy Ballard , plaintiff, et al vs. Tim Roberson ,
defendant, et al
Case Number: 2008CP2305739
Type: Order/Other

So Ordered

s/ Edward W. Miller

Electronically signed on 2017-07-13 16:22:58 page 2 of 2

UNITED STATES DISTRICT COURT

District of South Carolina

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

vs.

FREDERICK THOENNES

Case Number: 6:11-2053 (1)

USM Number: 23062-171

James W. Fayssoux, Jr., RET
 Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1 on August 23, 2011
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:1344,18:1349	Please see information	01/09	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.
- ☐ Forfeiture provision is hereby dismissed on motion of the United States Attorney.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

August 23, 2011
 Date of Imposition of Judgment

s/ Henry F. Floyd
 Signature of Judge

Henry F. Floyd, United States District Judge
 Name and Title of Judge

September 1, 2011
 Date

DEFENDANT: FREDERICK THOENNES

CASE NUMBER: 6:11-2053

PROBATION

The defendant is hereby sentenced to probation for a term of 3 years. Defendant shall pay the mandatory \$100.00 Special Assessment fee. The defendant shall pay Restitution in the amount of \$39,876.41 at a rate of 100.00 per month. The payment rate may be readjusted if circumstances should change. Interest on the restitution is waived. Payments of restitution shall begin 30 days after entry of judgment.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the Probation Office. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: FREDERICK THOENNES
CASE NUMBER: 6:11-2053**CRIMINAL MONETARY PENALTIES**

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 4.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	<u>\$100.00</u>	<u>\$</u>	<u>\$39,876.41</u>

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case(AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Freddie Mac	\$141,162.54	\$23,527.09	
Bank of America	\$98,095.92	\$16,349.32	
TOTALS	\$239,258.46	\$39,876.41	

☐ Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☒ The interest requirement is waived for the ☐ fine ☒ restitution.
☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: FREDERICK THOENNES
CASE NUMBER: 6:11-2053

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$100.00 Special Assessment due immediately and \$39,876.41 Restitution, balance due
☐ not later than _____, or
☒ in accordance with ☒ C, ☐ D, or ☐ E, or ☐ F below: or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☒ Payment of Restitution in equal monthly installments of \$100.00, to commence 30 days after the date of this judgment; or
- D ☐ Payment in equal _____ (weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after entry of judgment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and Corresponding Payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andrew P. Ballard,

Respondent,

v.

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

Appellants.

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

Opinion No. 27161
Heard February 7, 2012 – Filed August 29, 2012

AFFIRMED

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

Wallace K. Lightsey, of Wyche Burgess Freeman &
Parham, and Hannah Rogers Metcalfe, of Metcalfe
and Atkinson, both of Greenville, for Respondent.

JUSTICE HEARN: Relationships in business, like any other relationship, can quickly turn sour when they are predicated on unmet expectations, whether justified or not. Andrew Ballard worked for years crafting a plan for a marina through Warpath Development, Inc., the business he had incorporated for this very purpose. He eventually sought the investment and involvement of Tim Roberson, Rick Thoennes, Rick Thoennes, III (collectively, individual Appellants) to help realize this idea. When the marina did not develop the way the individual Appellants had hoped, they began to exclude Ballard from involvement with Warpath, leading Ballard to file suit against the individual Appellants and Warpath (collectively, Appellants). The circuit court found Appellants had acted oppressively to Ballard as a minority shareholder and ordered the purchase of Ballard's stock at fair market value. The court also ordered the individual Appellants to place 60,000 shares of Warpath stock in escrow. On appeal, Appellants argue that the facts do not support the court's holdings. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ballard incorporated Warpath for the development of a marina on Lake Keowee in Pickens County, South Carolina. After several years of working with Duke Energy Carolinas, LLC, which owned the lakefront property, Warpath entered into a lease with Duke to use the property as indicated on the Conceptual Plan Ballard had negotiated with Duke.

Subsequently, Ballard began talks with the individual Appellants about their possible involvement with Warpath, and eventually the four men entered into a Stock Purchase Agreement. At that time, the corporation had issued only 40,000 shares of stock, all of which were owned by Ballard, although the Articles of Incorporation authorized the issuance of 100,000 total shares. Under the Agreement, the individual Appellants paid Ballard \$1,000,000 "in exchange for 20,000 shares of Ballard's 40,000 and [received] from the corporation [60,000] additional shares so that Ballard [would] hold

20% of the stock and the other 80% [would] be held by Roberson, Thoennes and Thoennes III when all shares are finally issued.¹"

The Agreement also detailed the duties of each of the parties: 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. The Agreement also acknowledged Ballard had already obtained a lease from Duke and approvals from Duke and Pickens County, but it stated final permits were still pending.

Incorporated into the lease with Duke was the Plan for the marina. The Plan included general numbers for certain details, including a projected number of 100-200 boat slips. The individual Appellants had reviewed the Plan and the proposed numbers prior to signing the agreement and knew that it guaranteed no more than 100 slips. A few months after the parties entered into the Agreement, they met with Duke and discovered that boat slips were available only on a portion of the anticipated area, which meant the architect could only squeeze in 102 slips, not the maximum of 200.

Upset over this decrease in the projected income due to significantly fewer slips than they had hoped for, the individual Appellants 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. They eventually sent Ballard an e-mail asking that he return the \$1,000,000 they had paid him in full or at least return a portion of it if he wanted to move forward. Ballard declined both of those options, and he subsequently was removed as a director at the first shareholders' meeting a few months later. At that same meeting, however, all three of the other shareholders were elected to the board and appointed as officers. Immediately thereafter, the individual Appellants—with the dissent

¹ The 60,000 shares of stock from Warpath were issued directly to Roberson, Thoennes, and Thoennes, III immediately after the Agreement was signed.

of Ballard—approved the issuance of an additional 900,000 shares "for the purpose of raising capital, paying expenses and offering employee incentives." This issuance would be in direct conflict with the Articles of Incorporation, which only authorized 100,000 shares and the Agreement, which stated Ballard would ultimately own 20% of the corporation. No motion was made to amend the Articles.

Realizing this increase in shares would dilute his holdings to 2%, Ballard initiated this lawsuit, alleging a violation of the Agreement and seeking an injunction preventing the issuance of the additional stock. In response, Appellants counterclaimed for fraud, breach of contract, breach of contract accompanied by a fraudulent act, and promissory estoppel. After discovery, Ballard amended his complaint to include shareholder derivative claims that the individual Appellants had breached the Agreement with respect to duties owed to Warpath and allegations of oppression of the minority shareholder. Appellants then amended their answer and counterclaimed for fraud, breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and violation of South Carolina Code Section 35-1-501 (Supp. 2011) in connection with the sale of securities.²

A jury trial commenced, but the jury was discharged when Appellants dismissed their counterclaims with prejudice. Thus, only Ballard's equitable claims remained. The circuit court³ found sufficient evidence of oppression and ordered Appellants to purchase Ballard's stock at fair market value. Additionally, the court ordered that the individual Appellants place 60,000 of

² Within a few weeks of filing their amended answer and counterclaims, a shareholders meeting was held at which Ballard was elected a director at the motion of the individual Appellants, but no meeting of directors has been called since. While there apparently have been some discussions with Ballard regarding the permits, he has not received any updates from the directors about efforts to finance the company.

³ Since 2007, Judge Miller has been designated by the Chief Justice as one of three business court judges in this State.

their shares in escrow pursuant to Section 33-6-210(e) of the South Carolina Code (2006). This appeal followed.

STANDARD OF REVIEW

"A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). Therefore, we may find facts according to our own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001). 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.* at 387, 544 S.E.2d at 622.

ISSUES PRESENTED

- I. Did the circuit court err in finding that Appellants had acted oppressively and with unfair prejudice to Ballard?
- II. Did the circuit court err in requiring the individual Appellants to place 60,000 shares of Warpath stock into escrow?

LAW/ANALYSIS

I. EVIDENCE OF OPPRESSION

Appellants first contend there is insufficient evidence to support the circuit court's finding that they acted oppressively and ordering the purchase of Ballard's stock at fair market value. We disagree.

Section 33-14-300(2)(ii) of the South Carolina Code (2006) allows the circuit court to dissolve a corporation if a shareholder has 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)." In an action to dissolve a corporation on the grounds stated in section 33-14-300, a court may instead order the corporation or other shareholders to purchase the shares of any shareholder at fair market value. S.C. Code. Ann. § 33-14-310(d)(4) (2006).

In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), we established how a court should determine whether majority shareholders have acted oppressively within the meaning of section 33-14-300. *Kiriakides* involved Atlas Food Systems and Services, Inc., a family owned close corporation, where the oldest brother, Alex, was the majority shareholder owning 57.68% of the shares. *Id.* at 591, 541 S.E.2d at 260. His siblings John and Louise, the plaintiffs in the case, owned 37.7% and 3% of the corporation, respectively. *Id.* John and Louise brought a lawsuit against Alex and the corporation seeking, among other things, judicial dissolution for oppression. *Id.* at 593, 541 S.E.2d at 261. In establishing the proper considerations for finding oppression, we observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." *Id.* at 602, 541 S.E.2d at 266. We also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." *Id.* at 603, 541 S.E.2d at 266. Although we declined to set out specific factors in *Kiriakides*, we observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders." *Id.* at 605 n.28, 541 S.E.2d at 267 n.28.

Examining the facts of the case, we found it "present[ed] a classic situation of minority 'freeze out'" and noted several factors including Alex paying Louise less than was owed to her based on her ownership; Alex's conduct in transferring 21% of a wholly owned subsidiary to his children

instead of to a partnership which included John and Louise; Alex and his family receiving substantial benefits from ownership of the company through employment while Louise and John had no such expectations of benefit; Atlas having no intention of declaring dividends in the near future; Atlas's extremely low buyout options for John and Louise, offering them \$4,000,000 in 1998 when John had been told by an accountant in 1995 that his interest alone was worth \$10,000,000; and there being no market otherwise for John and Louise's stock. *Id.* at 605-06, 541 S.E.2d at 268.

We acknowledge that the facts before us are not as egregious as those in *Kiriakides*, which included actual fraud by Alex upon the minority. However, illegal or fraudulent conduct is not required under section 33-14-300(2)(ii), and we agree with the circuit court that the evidence in the record shows oppression by the majority in this instance. The concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." *Id.* at 604, 541 S.E.2d at 267 (quoting Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 790-91 (2000)). Ballard here, like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.

In particular, e-mail communications between the other shareholders clearly indicate their desire to oust Ballard. The individual Appellants wanted to convince Ballard to return his 20% interest in Warpath in the hopes that "he [would] take his [\$1,000,000] and run [] after a little threatening, posturing and whining." Furthermore, when discussing what options to give Ballard, Thoennes, III posited, "Don't we want to get him out of the deal?" Although at trial the individual Appellants sought to downplay the implications of these electronic exchanges, this enunciation of their intent to force out Ballard simply contextualizes their subsequent actions.

Ballard, who had conceptualized this project and had been the sole shareholder as well as a director and officer of Warpath, was not elected to

the board although the three individual Appellants were elected and subsequently appointed themselves officers. Furthermore, the individual Appellants then passed a corporate resolution authorizing 900,000 new shares of stock in violation of both the Agreement and the Articles of Incorporation. Issuance of this additional stock would result in the dilution of Ballard's ownership interest in violation of the Agreement—from 20% to 2%. Although the individual appellants deride the implication of this increase by noting that this dilution would affect all the shareholders with equal force, this contention ignores the larger problems with the resolution. Issuance of this additional stock is in direct conflict with the Articles, which have never been amended⁴ to allow such an increase, and is contrary to the agreed upon allocations of the Agreement. Additionally, this issuance would allow Roberson to avoid his contractual obligation to provide the needed capital under the Agreement because the first reason listed for this issuance was "for the purpose of raising additional capital."

This increase also permitted the corporation to use the extra stock for "employee incentives," granting the majority more control over the allocation of benefits flowing from the corporation. There seems to be no plan to hire Ballard as an employee, and at trial Roberson stated his clear intention to hire various members of his family to assist in the enterprise.⁵ Thus, Roberson would allow his own family to profit from his ownership—through both

⁴ Although James Fayssoux, who served as the attorney for the corporation, stated in his deposition that amending the Articles was implicit at the meeting, he admitted no resolution had been passed authorizing the filing of the paperwork necessary to amend the Articles.

⁵ Although Appellants sought to dismiss this consideration as hypothetical, Roberson stated at trial that after spending time at the lake with his niece and her family, he decided her husband was "the guy [he] want[s] running this thing" and "asked them if they would consider the job as on-site managers." He further testified making that decision "attracted . . . [his] whole family basically" including his eighty-nine year old mother, his older sister, and his younger sister, who moved to the area "to be a part of what's happening." It thus appears Roberson's decision to hire his family was more than "gross speculation," as claimed in Appellants' brief.

salary and, under the new resolution, stock incentives—while not affording Ballard similar benefits. This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends. *See Moll, supra*, at 758 (noting that "the close corporation investor typically looks to salary rather than dividends for a share of the business returns because the earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits" (internal quotation omitted)). By increasing the amount of shares, the majority would be allowed further means through which to dictate and control the allocation of returns in favor of their own interests, and to the exclusion of Ballard's.

Moreover, Ballard has not been allowed to meaningfully participate in the development for lack of communication. Appellants admit they have not directly kept him updated on the progress of the permits although Ballard has attempted to stay informed on the status of the permits by maintaining contact with Duke, the engineers, and the Department of Health and Environmental Control. While Appellants contend they elected him as a director in an attempt to include him again, Thoennes admitted at trial that they have not had a directors' meeting since Ballard's election nor have they sent him any updates on financing.

We find the record evinces a clear intent by Appellants to "freeze-out" Ballard and exclude him from involvement with Warpath and from the benefits of ownership.⁶ Although we acknowledge some harm alleged is arguably prospective, the statute envisions future harm, providing that a court can find oppression where the majority "will act" in a manner oppressive to the minority. Moreover, Ballard should not be prejudiced because he has sought to proactively protect his legal rights and did not wait for the complete evisceration of his involvement once he understood the Appellants meant to

⁶ In the dissent's view of the facts, no one action by Appellants is so egregious as to warrant a finding of oppression. We, however, agree with the circuit court judge, that the evidence as a whole clearly demonstrates oppression by the majority.

force him out of the corporation.⁷ We therefore affirm the circuit court's finding of oppression and its requirement that Appellants purchase Ballard's stock at fair market value.

II. ESCROW OF STOCK

The individual Appellants also argue the circuit court erred in requiring them to place 60,000 shares of Warpath stock in escrow pursuant to section 33-6-210(e). We disagree.

Section 33-6-210(e) requires that "the corporation must place in escrow shares issued for a contract for future services or benefits or for a promissory note." Although the individual Appellants argue that Ballard should have requested the shares be placed in escrow at the time the agreement was entered into, the language of the statute is a clear mandate to the corporation to escrow stock when shares have been issued in anticipation of future services. *See Edwards v. State Law Enforcement Div.*, 395 S.C. 571, ___, 720 S.E.2d 462, 464 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). However, the individual Appellants aver that the \$1,000,000 which they paid Ballard pursuant to the Agreement was in exchange for not only the 20,000 shares owned by Ballard, but also for the remaining 60,000 shares issued by the corporation. We agree with the circuit court that the weight of the evidence and the Agreement itself are directly contrary to this assertion.

The agreement states that Roberson, Thoennes, and Thoennes, III would pay Ballard "the sum of \$1,000,000 in exchange for 20,000 shares of

⁷ The dissent would have us require a showing of "imminent harm" to obtain relief under section 33-14-300(2)(ii) for future oppression. While we agree with the dissent that our analysis must be undertaken with caution, we see no need to impose a further requirement of "imminent harm" on minority shareholders seeking to protect their rights. Appellants have not asked us to engraft this requirement onto section 33-14-300(2)(ii), and the statute itself contains no such prerequisite.

Ballard's 40,000 and [would] receive from the corporation additional shares." "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Looking simply at the language of the agreement, it states the money tendered is "in exchange for the 20,000 shares" and the shares from the corporation are separate. Furthermore, the \$1,000,000 was paid to Ballard directly and not the corporation. Although the individual Appellants argue that it would make sense to pay Ballard money owed to the corporation because he was the sole shareholder at the time, this entirely ignores the corporate form and the fact that the yet unissued 60,000 shares came directly from the corporation, not Ballard. Because the individual Appellants issued the check to Ballard, the corporation did not receive any money in exchange for the stock. Furthermore, the Agreement itself illustrates the "future services or benefits" that each party would perform by requiring the execution of separate agreements defining the respective duties of the parties.

Read as a whole, the language of the Agreement therefore indicates that the money exchanged was for the 20,000 shares previously held by Ballard and the remaining 60,000 shares were exchanged in anticipation of the services listed. Additionally, because we give great deference to the credibility determinations of the circuit court, we find it compelling that despite conflicting testimony,⁸ the court determined that the money had been paid solely for the 20,000 shares directly from Ballard and the corporation had not otherwise been compensated for its issuance of the remaining 60,000 shares. We therefore find no error in the circuit court's finding that the individual Appellants must place 60,000 shares in escrow in accordance with section 33-6-210(e).

⁸ This inconsistency existed not just between Appellants and Respondent, but even between the individual Appellants. At trial, when Thoennes was asked "[Y]ou [and your son] didn't buy those forty thousand shares when you paid Andy Ballard a million dollars. You've still got to earn them, right?" he responded simply, "Sure." However, his son testified, "In my opinion we were giving him a million dollars for eighty percent of the corporation."

CONCLUSION

Based on the foregoing, we affirm the circuit court's order directing Appellants to purchase Ballard's stock for fair market value and requiring the individual Appellants to place 60,000 shares of stock in escrow.

BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my view, no oppressive conduct toward a minority shareholder has occurred in this case, and the possibility of future oppression is too remote to justify an equitable remedy.

Pursuant to S.C. Code Ann. § 33-14-300(2)(ii) (2006), dissolution of a corporation is appropriate when a court determines 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 . . . to any shareholder.” In applying this statute, courts must exercise caution in finding conduct to be oppressive. *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 597-98, 541 S.E.2d 257, 263 (2001) (quoting official comment that “[t]he court should be cautious in the application of these grounds so as to limit them to genuine abuse . . .”). Although the statute permits dissolution when those in control *will act* in an oppressive manner, such a finding must be made as cautiously as a finding of past oppression. Thus, I would limit the application of the statute to instances in which the probability of future abuse is a near certainty. That is, a showing of imminent harm must be made. In my view, the evidence in this case fails to establish that oppression has occurred or is imminent.

I agree with the majority that a court-mandated buyout may be appropriate when a minority shareholder “faces a trapped investment and an indefinite exclusion [from] participation in business *returns*.” *Kiriakides* at 604, 541 S.E.2d at 267 (citation omitted; emphasis added). In my view, however, the evidence does not demonstrate that Ballard has been or is in imminent danger of being excluded from *returns*, despite his exclusion from *management*.

Engaging in a power struggle for control of a corporation is permissible if acceptable tactics are employed in the struggle. *Id.* at 598, 541 S.E.2d at 263. By the same token, transferring management of a venture from one shareholder to another is not oppressive if based on a valid business reason. *See also Cooke v. Fresh Exp. Foods Corp., Inc.*, 169 Or. App. 101, 110, 7 P.3d 717, 722 (Or. App. 2000) (“Courts give significant deference to the

majority's judgment in the business decisions that it makes, at least if the decisions appear to be genuine business decisions.""). In this case, although Appellants were disgruntled with Ballard and removed him as manager of the project, it is undisputed that the project remains in the developmental stage. The likelihood is small that any investor will see a return on investment in the near future. Ballard does not argue that Appellants are seeking to liquidate the corporation's assets or transfer them to other entities. Thus, I do not understand how the majority finds evidence of oppression in the fact that Ballard is unlikely to see a return on his investment in the near future.

The majority also finds that the stock authorization was intended as a means for Roberson to avoid his contractual obligation to provide long-term financing. I do not agree that Roberson's obligation to obtain long-term financing was a commitment to provide all capital needed by the corporation, and it is axiomatic that a corporation may authorize and issue stock for the purpose of raising additional capital. Moreover, in my view the Agreement in this case did not prohibit such action but rather established what the initial stock distribution would be among the various investors.

I also do not find significant the board's failure to amend the articles of incorporation when it authorized the additional shares. This action did not violate the articles, which specified the number of *issued* shares rather than the number of *authorized* shares. Moreover, in my view the absence of a specific amendment to the articles of incorporation is no more than a technicality when the same votes that authorized the shares would also have amended the articles.

The majority reasons that Appellants' intent was to gain greater control over allocation of returns on the parties' joint investment. However, as the majority shareholders, Appellants already had full control of the corporation and its distribution of profits and benefits. Thus, the question is not whether the majority shareholders were seeking control but whether they would have abused or did abuse that control. *See Kiriakides, supra.*

I also do not find it significant that the majority shareholders failed to communicate information to Ballard since, by the time it could be fairly said they should have communicated financial information to him, Ballard had filed suit against them. Nor would I imply that a minority shareholder is entitled to be apprised of every detail of a firm's operations, even in a closely held corporation. In my view, Ballard has not shown that he was deprived of information he needed to protect his interests as a shareholder. *See Masinter v. WEBCO Co.*, 164 W.Va. 241, 256-57, 262 S.E.2d 433, 443 (W. Va. 1980) ("The fact that [the minority shareholder] received diminished financial information after his removal as a director and officer may reflect nothing more than the practical recognition that an officer-director needs more financial information, in order to intelligently exercise his responsibilities, than does a shareholder. On the other hand, upon a fuller factual development, the withholding of information may be linked to the 'freeze-out' in that it may have denied him relevant information.").

Likewise, I do not find evidence of oppression in the fact that one of the Appellants planned to employ several family members at the marina. Not only would the planned marina require the services of several employees, but Ballard does not contend that he wished to be employed or have his own family members employed in the operation. Thus, there is no reason to conclude that Appellants intended to deprive Ballard of a benefit he expected. On the contrary, the evidence in the record indicates that Ballard intended to participate only in the development of the project and subsequent returns on investment. Thus, any plans by Appellants to employ family members would be entirely appropriate in the absence of excessive compensation to them.

In sum, although evidence in this case may point to the possibility of oppressive intent by Appellants, it is far from conclusive in establishing that such an eventuality would have become a reality. In my view, this evidence falls well short of the standard articulated in *Kiriakides*. Thus, I respectfully dissent.

TOAL, C.J., concurs.

**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.

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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]

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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.

**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.

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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.

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company. Based on those assumptions, the resulting value of 100% Equity of the Company is \$7,178,594

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III. Conclusion

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

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE ²⁰⁰⁸ JUL 30 P 4:20 IN THE COURT OF COMMON PLEAS

Andrew P. (Andy) Ballard,

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
Plaintiff PAUL R. WICKENSIMER CASE NO.: _____

2008-CP-23-5139

vs.

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

Defendants.

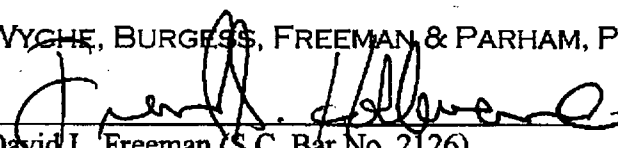
SUMMONS

ENTERED COMPUTER

TO THE DEFENDANT, TIM ROBERSON:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, P.O. Box 728, Greenville, SC 29602-0728, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.


David L. Freeman (S.C. Bar No. 2126)
Frank S. Holleman (S.C. Bar No. 2564)
Hannah R. Metcalfe (S.C. Bar No. 73046)
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
fhollenman@wyche.com
hmetcalfe@wyche.com

Dated: 7/30/08
Greenville, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE 30 P 4: 20

2008-CP-23-513Q

Andrew P. (Andy) Ballard,

FILED: CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

CASE NO.: _____

vs.

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

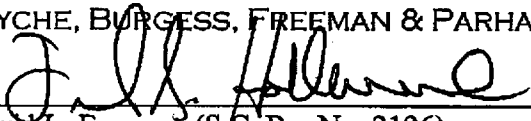
SUMMONS

Defendants.

TO THE DEFENDANT, RICK THOENNES:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, P.O. Box 728, Greenville, SC 29602-0728, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.


David L. Freeman (S.C. Bar No. 2126)

Frank S. Holleman (S.C. Bar No. 2564)

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

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

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Andrew P. (Andy) Ballard,

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
DAVID L. FREEMAN
WICKENSIMER

vs.

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

Defendants.

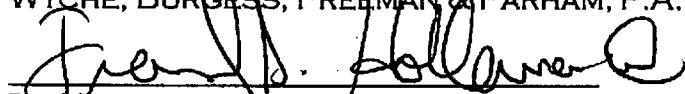
2008-CP-23-5139
CASE NO.: _____

SUMMONS

TO THE DEFENDANT, RICK THOENNES, III:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, P.O. Box 728, Greenville, SC 29602-0728, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.



David L. Freeman (S.C. Bar No. 2126)

Frank S. Holleman (S.C. Bar No. 2564)

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

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

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2008 JUL 30 P 4: 20

2008-CP-23-5730

Andrew P. (Andy) Ballard,

Plaintiff, ED-CLERK OF COURT CASE NO.:
GREENVILLE CO. S.C.
PAUL B WICKENS IMR

vs.

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

SUMMONS

Defendants.

TO THE DEFENDANT, WARPAT DEVELOPMENT, INC.:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, P.O. Box 728, Greenville, SC 29602-0728, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.


David L. Freeman (S.C. Bar No. 2126)

Frank S. Holleman (S.C. Bar No. 2564)

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

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

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

2008 JUL 30 PM 4:20 COURT OF COMMON PLEAS

2008-CP-23-5130

Andrew P. (Andy) Ballard,

Plaintiff,

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

CASE NO.: _____

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.

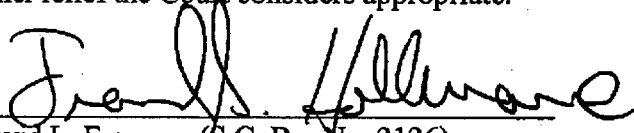
17. A temporary and a permanent injunction against the defendants barring the issuance of stock by the defendants are in the public interest and would not result in an undue burden on the defendants.

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.

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

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 12
27

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:

[Handwritten signatures of witnesses, each preceded by a checkmark]

Warpath Development, Inc.

[Signature of Andrew P. Ballard]
Its: President

[Signature of Andy Ballard]
Andy Ballard

[Signature of Rick Thoennes]
Rick Thoennes

[Signature of Rick Thoennes, III]
Rick Thoennes, III

[Signature of Tim Roberson]
Tim Roberson

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Andrew P. (Andy) Ballard,

Plaintiff

vs.

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
DAVID K. SIMPSON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2008 JUL 30 P 4: 20

2008- CP - 23 - 5139

(Please Print)

Submitted By: Frank S. Holleman III/Hannah R. Metcalfe

Address: Wyche, Burgess, Freeman & Parham P.A.

Post Office Box 728

Greenville, SC 29602

SC Bar #: 2564/73046

Telephone #: 864-242-8200

Fax #: 864-235-8900

Other:

E-mail: fholleman@wyche.com/hmetcalfe@wyche.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199) <u>Interpleader Action</u>	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650)		

Submitting Party Signature:

Date: July 30, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

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

ANSWER AND COUNTERCLAIM OF
DEFENDANTS TIM ROBERSON,
RICK THOENNES, RICK THOENNES
III AND WARPATH DEVELOPMENT,
INC.

(Jury Trial Demanded)

FILED
GREENVILLE
COUNTY
CLERK
2008 SEP 22
11:22

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

FOR A FIRST DEFENSE

1. The Defendants admit the allegations contained in Paragraph 1 of the Complaint.
2. The Defendants admit the allegations contained in Paragraph 2 of the Complaint.
3. The Defendants admit the allegations contained in Paragraph 3 of the Complaint.
4. The Defendants lack information sufficient to admit or deny the allegations of Paragraph 4 of the Complaint, therefore deny the same and demand strict proof.
5. The Defendants admit the allegation contained in Paragraph 5 of the Complaint.
6. The Defendants lack information sufficient to admit or deny the allegations of Paragraph 6 of the Complaint, therefore deny the same and demand strict proof. Defendants acknowledge the Plaintiff represented to the Defendants, inter alia, that Plaintiff was the sole shareholder of the Corporation as of the closing of the transactions contemplated by that certain Stock Purchase Agreement dated May 29, 2007 ("Agreement").

7. The Defendants admit the allegations contained in Paragraph 7 of the Complaint.

8. In response to Paragraph 8 of the Complaint, Defendants assert that the terms of the Agreement speak for themselves, therefore demand no response. However, to the extent a response is necessary, the Defendants admit so much of the allegations of said paragraph 8 as alleged that the parties agreed that at the time of the closing of the transaction contemplated by the Agreement that the common stock of Warpath Development, Inc. (the "Corporation") would be owned 20% by Plaintiff, 40% by Tim Roberson, 20% by Rick Thoennes, and 20% by Rick Thoennes III. Defendants deny any and all allegations of said paragraph 8 of the Complaint that vary from what has been admitted in paragraph 8 of this Answer.

9. In response to Paragraph 9 of the Complaint, Defendants assert that the terms of the Agreement speak for themselves, therefore demand no response. However, to the extent a response is necessary, the Defendants admit so much of the allegations contained in Paragraph 9 of the Complaint in so far that the parties agreed that additional equity contributions of capital would be made by Tim Roberson and that Roberson's capital contributions, including such additional equity contribution would enjoy a preferred status. Defendants deny any and all allegations of said paragraph 9 of the Complaint that vary from what has been admitted in paragraph 9 of this Answer.

10. The Defendants admit so much of the allegations contained in Paragraph 10 of the Complaint as allege that a duly noticed meeting of the shareholders of the Corporation was held of which the Plaintiff and Plaintiff's counsel attended and participated, and that at such meeting the shareholders of the Corporation elected the Directors of the Corporation in accordance with the Corporation's By-Laws. Defendants deny any and all allegations of said

paragraph 10 of the Complaint that vary from what has been admitted in paragraph 10 of this Answer.

11. The Defendants admit so much of the allegations in Paragraph 11 that alleges that the Directors of the Corporation took actions expressly reserved to them under the South Carolina Business Corporation Act of 1988 ("the Act") including the authorization of additional shares. The Defendants further admit that portion of the allegations contained in Paragraph 11 in so far that the aggregate increase in the number of authorized shares was proposed by the Directors and approved by the shareholders of the Corporation, in accordance with the Act, at duly noticed shareholder's meeting which was attended by Plaintiff and one of his lawyers and in which the Plaintiff participated. The Defendants deny the remaining allegations contained in Paragraph 11 of the Complaint.

12. The Defendants deny the allegations contained in Paragraph 12 of the Complaint

13. The Defendants deny the allegations contained in Paragraph 13 of the Complaint.

14. The Defendants deny the allegations contained in Paragraph 14 of the Complaint.

15. The Defendants deny the allegations contained in Paragraph 15 of the Complaint.

16. The Defendants deny the allegations contained in Paragraph 16 of the Complaint.

17. The Defendants deny the allegations contained in Paragraph 17 of the Complaint.

18. The Defendants deny the allegations contained in Paragraph 18 of the Complaint.

19. The Defendants deny the allegations contained in Paragraph 19 of the Complaint.

FOR A SECOND DEFENSE

20. The Defendants re-allege Paragraphs 1 through 19 of this Answer and Counterclaim, as specifically set forth herein.

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

FOR A THIRD DEFENSE

22. The Defendants re-allege Paragraphs 1 through 21 of this Answer and Counterclaim, as specifically set forth herein.

23. 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
AND BY WAY OF COUNTERCLAIM
(Breach of Contract)

24. The Defendants re-allege Paragraphs 1 through 23 of this Answer and Counterclaim, as specifically set forth herein.

25. The Plaintiff and Defendants entered into the Stock Purchase Agreement on May 29, 2007 (the "Agreement").

26. In the Agreement, the Plaintiff warranted and represented that he held the necessary approvals from Duke Power and Pickens County in order to build the development per conceptual plans for Warpath Landing.

27. The Plaintiff did not hold the necessary approvals from Duke Power and Pickens County to build the development per the conceptual plans for Warpath Landing. This action is in breach of the Agreement.

28. As a result of Plaintiff's breach, the Defendants have suffered damages in lost time and expense.

FOR A FIFTH DEFENSE
AND BY WAY OF COUNTERCLAIM
(Reliance and Promissory Estoppel)

29. The Defendants re-allege Paragraphs 1 through 28 of this Answer and Counterclaim, as specifically set forth herein.

30. The Plaintiff promised that he had all necessary approvals from Duke Power and Pickens County to build the development per the conceptual plans for Warpath Landing.

31. The Defendants relied on Plaintiff's promise to their detriment.

32. The Plaintiff expected the Defendants to rely on such promise.

33. The Defendants have suffered a loss by relying on the Plaintiff's promise.

34. Plaintiff is liable for the time and expense incurred in obtaining such approvals.

FOR A SIXTH DEFENSE
(Breach of Contract with a Fraudulent Act)

34. The Defendants re-allege Paragraphs 1 through 33 of this Answer and Counterclaim, as specifically set forth herein.

35. Upon information and belief, Plaintiff, willfully and with fraudulent intent, induced Defendants to enter into the Stock Purchase Agreement ("Agreement") by purposefully and falsely representing that it he obtained all necessary approvals from Duke Power and Pickens County to build the development per the conceptual plans for Warpath Landing.

36. Defendants reasonably relied on Plaintiff's misrepresentations and Plaintiff intended Defendants to so rely. Defendants suffered damages as a direct and proximate result of Plaintiff's fraudulent inducement, which are separate and distinct from the damages attributed to Plaintiff's accompanying breaches of the Agreement.

37. Plaintiff's acts were intentional, grossly negligent, reckless, wanton and willful. Defendants are therefore, entitled to recover both actual and punitive damages.

FOR A SEVENTH DEFENSE

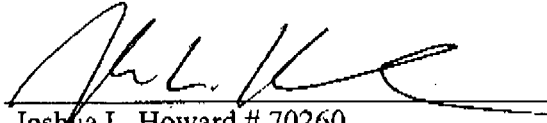
38. The Defendants deny each and every allegation of the Complaint not hereinabove specifically admitted, modified, or explained.

WHEREFORE, this Defendant prays for judgment as follows:

1. For an order dismissing Plaintiff's complaint;
2. Declare that the Plaintiff is not entitled to any injunction or other relief from Defendants;
3. An order awarding Defendants damages on their counterclaims;
4. Costs of this Action; and
5. Any other relief to the Defendants that the court feels is proper.

[Signature Below]

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. L. Howard", written over a horizontal line.

Joshua L. Howard # 70260
Haynsworth Sinkler Boyd, P.A.
P. O. Box 2048
Greenville, SC 29602
Telephone: 864-240-3200
Facsimile: 864-240-3300
jhoward@hsblawfirm.com

Attorneys for Defendants

Greenville, South Carolina
August 28, 2008

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

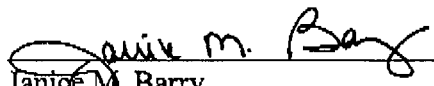
C.A. No. 2008-CP-23-5739

CERTIFICATE OF SERVICE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2008 SEP -2 A 11:24

I HEREBY CERTIFY that a true and correct copy of the ANSWER AND COUNTERCLAIM OF DEFENDANTS TIM ROBERSON, RICK THOENNES, RICK THOENNES III, AND WARPAT DEVELOPMENT, INC. was served upon all counsel of record on this the 28th day of August, 2008, via U.S. Mail, postage prepaid, addressed as follows:..

David L. Freeman, Esquire
Frank S. Holleman, Esquire
Hannah R. Metcalfe, Esquire
Wyche, Burgess, Freeman & Parham, P.A.
P.O. Box 728
Greenville, SC 29602


Janice M. Barry
Legal Assistant to Joshua L. Howard
Haynsworth Sinkler Boyd, P.A.
75 Beattie Place, Eleventh Floor (29601)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3202
(864) 240-3300 (facsimile)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2008 APR 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.

CM

CASE NO.: 2008-CP-23-5739
123 SC
TELETYPE

**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

44 E. Camperdown Way

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

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.

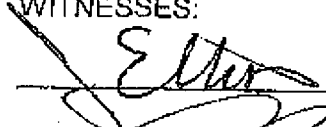
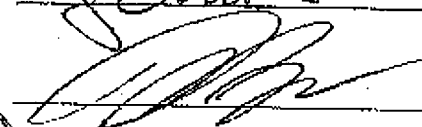
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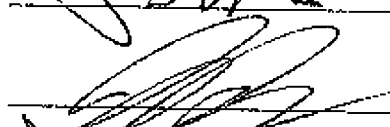
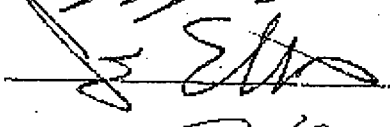
10. This Agreement shall be binding on the parties hereto, their heirs, successors and assigns.

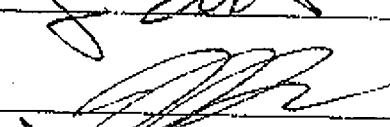
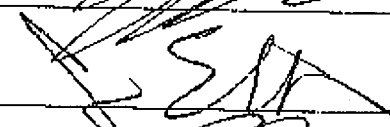
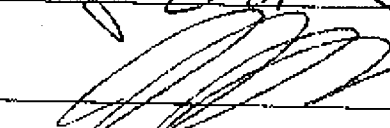
11. No part of this Agreement may be assigned without written consent of all parties.

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

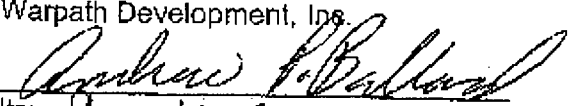
WITNESSES:

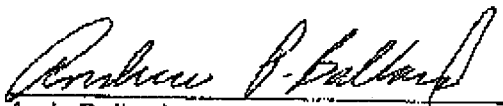



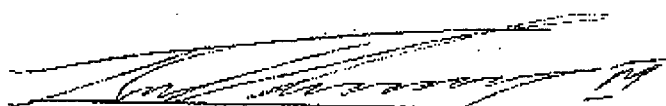




Warpath Development, Inc.


Its: President


Andy Ballard


Rick Thoennes


Rick Thoennes, III


Tim Roberson

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

2008-08-25 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.,

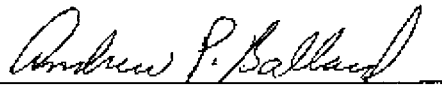
Defendants.

COURT
CLERK
CLERK

CASE NO.: 2008-CP-23-5739

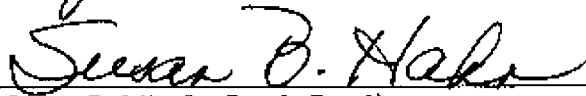
VERIFICATION

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

Sworn to this 24th day of
August 2009



Notary Public for South Carolina

My Commission expires: 2/21/2012

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

2009 SEP -9)

IN THE COURT OF COMMON PLEAS
A II: 57

Andrew P. (Andy) Ballard,)

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

Plaintiff,)

v.)

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

Defendants.)

FILED-CLERK OF COURT
GREENVILLE CO. SC
PAUL B. WICKENS, CLERK

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.

COUNTERCLAIMS

GENERAL ALLEGATIONS

83. 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.

84. 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."

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

86. 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.

87. After consideration, Ballard accepted the counterproposal.

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

89. 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.

90. 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.

91. 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.

92. 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.

93. 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.

94. 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)

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

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

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

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

99. 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)

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

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

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

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

FOR A THIRD COUNTERCLAIM
(Fraud)

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

105. 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.

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

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

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

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

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

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

112. The Defendants had a right to rely therein.

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

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

FOR A FOURTH COUNTERCLAIM
(Negligent Misrepresentation)

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

116. 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.

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

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

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

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

121. 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)

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

123. 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.

124. 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.

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

126. 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,



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Attorneys for the Defendants

Greenville, South Carolina
September 9, 2009

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

)
) 2009 SEP -9 A 11:57

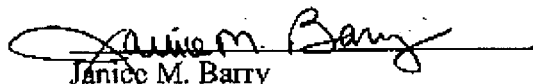
) C.A. No. 2008-CP-23-5739

) FILED-CLERK OF COURT
) GREENVILLE CO. S.C.
) PAUL B. WICKENSIMER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the ANSWER AND COUNTERCLAIMS OF DEFENDANTS TIM ROBERSON, RICK THOENNES, RICK THOENNES III, AND WARPAT DEVELOPMENT, INC., TO PLAINTIFF'S FIRST AMENDED COMPLAINT was served upon all counsel of record on this the 9th day of September, 2009, via U.S. Mail, postage prepaid, addressed as follows:

Frank S. Holleman, Esquire
Hannah R. Metcalfe, Esquire
Wyche, Burgess, Freeman & Parham, P.A.
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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.

**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 33-6-210 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 33-6-210(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

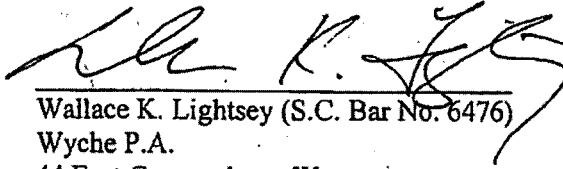
situations, Hendley, *supra*, 676 F. Supp. at 1330, and courts of other states have likewise rejected the application of a marketability discount. See Chiles, *supra*; Charland, *supra*.

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

2013 AUG 16 P 4:53

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENBARGER

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.

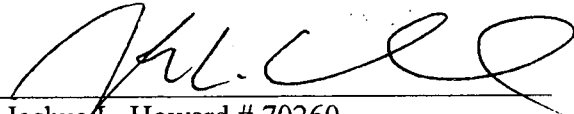
CONCLUSION

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.

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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.
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DETROY, PORTLAND, ME.

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 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 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 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).⁹ 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).¹⁰

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.¹¹ 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.¹² 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.¹³ Kaplan notes that there is no generally accepted definition of "reasonably speedy" in connection with applying the Maine Business Corporation Act¹⁴ 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.¹⁵ 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."¹⁶ 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."¹⁷

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."¹⁸ 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 time¹⁹ 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."²⁰ 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] ²¹ that it has a "very thin margin of available working capital"²² and that it must rely on "opportunistic

tic" liquidations and refinancings to meet its "existing obligations." ²³ 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. ²⁴ 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 ²⁵ 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 ²⁶ would reasonably require" ²⁷ and that the Special Master has failed to provide them. ²⁸ 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 ²⁹ as security for the promissory note to Kaplan. ³⁰ 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, ³¹ 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. ³²

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 ³³ 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. ³⁴ 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, ³⁵ 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 ³⁶ 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

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.³³ The parties agree that, under Maine law, I have discretion to award prejudgment interest³⁴ and that Maine law has a presumption in favor of such awards.³⁵ The defendants do not challenge the Special Master's finding that First Hartford can pay prejudgment interest,³⁶ 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.³⁷

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(f)(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."³⁸ 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,³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² 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,⁴³ but differ as to whether the interest should be compound. The prejudgment interest statute⁴⁴ does not address compounding but Kaplan argues that Maine case law and one of my previous cases show that prejudgment interest should be compound.⁴⁵ *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.⁴⁶ *McLoon* held that prejudgment interest under the appraisal rights statute was a substantive right rather than a "procedural device to encourage expeditious litigation."⁴⁷ *McLoon's* logic therefore has no application here. It is true that in *Warren v. United Parcel Service, Inc.*,⁴⁸ 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.⁴⁹ 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.⁵⁰ An award of compound interest could upset the balance the Special Master has worked so hard to achieve,⁵¹ 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 *Fratous 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,⁵⁶ federal law does.⁵⁷ [**197] Accordingly, the plaintiff's objections to the interest rates are **OVERRULED**, but his objection to the non-payment of postjudgment interest on postjudgment 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.⁵⁸ "[A] finding of liability alone without a corresponding determination on damages does not suffice to start the clock on postjudgment interest."⁵⁹ Rather, postjudgment interest begins to accrue when it becomes possible to ascertain money damages in a "meaningful way."⁶⁰ "[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."⁶¹ 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 plaintiffs 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

FILED-CLERK OF COURT
GREENVILLE CO. SC
PAUL B. WICKRE
2014 JAN -9 A 9 49

IN THE COURT OF COMMON PLEAS

Andrew P. (Andy) Ballard,

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

Plaintiff,

MOTION TO STAY EXECUTION

v.

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

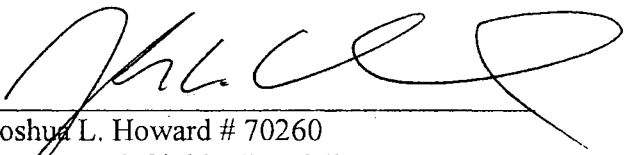
Defendants.

YOU WILL PLEASE TAKE NOTICE that the undersigned, on behalf of Defendants, moves, pursuant to S.C. Code Ann. § 18-9-130 (as amended effective January 1, 2012), Rule 62, SCRCP, and Rules 205 and 241, SCACR, for a stay of execution of the judgment entered in this matter on October 2, 2013 pending the resolution of an appeal noticed by Defendants on December 20, 2013. (Notice attached as Exhibit A). Defendants contend no bond is necessary to secure the payment of the judgment should this matter be affirmed on appeal.

This motion is made pursuant to the above cited authorities and is supported by other applicable law, the arguments of counsel, and any other material the court may receive. Counsel for the Defendants hereby certifies that pursuant to Rule 11, SCRCP, he/ she conferred with opposing counsel prior to filing this motion in an attempt in good faith to resolve the matter contained herein.

Signature Page Follows

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Attorneys for the Defendants

Greenville, South Carolina
January 7, 2014

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

RECEIVED
DEC 23 2013
SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

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

v.

Tim Roberson, Rick Thoenes, Rick Thoenes III,

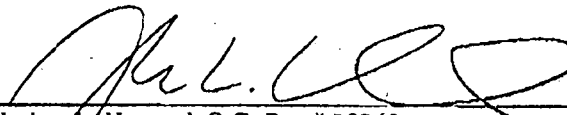
and Warpath Development, Inc. Appellants.

NOTICE OF APPEAL

Appellants Tim Roberson, Rick Thoenes, Rick Thoenes, III, and Warpath Development, Inc. hereby appeal the following orders and judgment of the Honorable Edward W. Miller:

1. The Court's October 3, 2013, Order of Judgment. A motion for Reconsideration and/or for a New Trial or Hearing of the Court's Order of Judgment was timely brought on October 11, 2013.
2. The Court's November 8, 2013, Order denying Appellants' Motion for Reconsideration and/or for New Trial or Hearing made pursuant to Rule 59, SCRCP.

Appellants were made aware of and provided a copy of the Court's November 8, 2013, Order denying Appellant's Motion for Reconsideration and/or for a New Trial or Hearing by email from Plaintiff's counsel on December 19, 2013. There was no previous correspondence received regarding this decision. Appellants did not receive notification of the issuance of the November 8, 2013 Order from the Clerk of Court. As such, Appellants having received written notice on December 19, 2013 of the Court's denial, this notice is timely in accordance with Rule 203 of the South Carolina Rules of Appellate Practice.



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Attorneys for Appellants

Dated: December 20, 2013
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-23-05739

RECEIVED

DEC 23 2013

SC Court of Appeals

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

v.

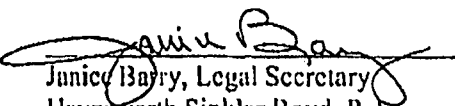
Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of DEFENDANTS' NOTICE OF
APPEAL was served upon all counsel of record on this the 20th day of December, 2013, by U.S.

Mail, postage prepaid, to the following:

Wallace K. Lightsey, Esquire
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED: CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKES, CLERK

IN THE COURT OF COMMON PLEAS

Andrew P. (Andy) Ballard,

Plaintiff,

vs.

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

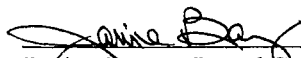
Defendant(s).

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of DEFENDANTS' MOTION TO
STAY EXECUTION was served upon all counsel of record on this the 7th day of January, 2014,
by U.S. Mail, postage prepaid, to the following:

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Andrew P. (Andy) Ballard,
☐ Plaintiff

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc.,
☒ Defendant.

IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS, CLERK

2014 JAN -9 A 9:49

CASE NO.
2008-CP-23-5739

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
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- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendants' Motion to Stay Execution

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendants

January 7, 2014

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

S. Mansel

Date Filed:

CK 1054796

☒ MOTION FEE COLLECTED: 25.00

☐ CONTESTED - AMOUNT DUE:

Haynsworth
Sinkler
Boyd

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
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

**PLAINTIFF'S MOTION TO DETERMINE
THE PORTION OF THE JUDGMENT
AMOUNT AGAINST RICK THOENNES III
THAT IS ATTRIBUTABLE TO POST
PETITION CONDUCT**

Plaintiff Andrew Ballard moves the Court to make a determination as to what portion of the Judgment this Court entered in favor of Ballard against Rick Thoennes III on October 3, 2013 ("Judgment," attached as Exhibit A), is attributable to oppression occurring on or after the date Thoennes filed a petition for bankruptcy on December 2, 2011. Plaintiff respectfully requests that this Court find that the entire amount of the Judgment of \$3,125,000 be found to be attributable to oppression that occurred after the bankruptcy filing. In the alternative, Plaintiff requests the court to apportion the Judgment amount between the time period before December 2, 2011, and the time period on or after December 2, 2011.

The basis for this motion is that this question was presented to the Bankruptcy Court, which determined in its Order (attached as Exhibit B) that the state court is better positioned to make this determination. The Bankruptcy Court made the following findings of fact and conclusions of law in its Order:

1. Defendant Frederick Richard Thoennes, III's ("Thoennes") Chapter 7 petition was filed on December 2, 2011.
2. In accordance with 11 U.S.C. § 727(b), only those "debts that arose before the date of

the order for relief [*i.e.*, the petition date]” are discharged by this court’s discharge order dated March 26, 2012 (“Discharge Order”).

3. The debt in question arises from an Order in favor of Ballard entered May 4, 2010, which was affirmed by the South Carolina Supreme Court in August 2012, and a Judgment in favor of Ballard entered on October 3, 2013 (“Judgment”) in the action filed in the Court of Common Pleas in the County of Greenville, South Carolina, styled as *Andrew P. Ballard, individually and derivatively on behalf of Warpath Development, Inc. v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development, Inc.*, C/A No. 2008-CP-23-5739 (“State Court Action”).
4. The amount of the Judgment ultimately was reduced to \$3,125,000 by the Court of Appeals of South Carolina (“State Court Judgment Amount”).
5. Any portion of the State Court Judgment Amount that is attributable to oppression by Thoennes occurring on or after December 2, 2011, is not discharged by the Discharge Order.
6. The state court is in a better position to make the determination of whether all or any portion of the State Court Judgment Amount is attributable to oppression by Thoennes occurring on or after December 2, 2011.
7. This Adversary Proceeding is dismissed without prejudice in order for Ballard to seek this determination from the state court.
8. Ballard is not barred by virtue of this Order of Dismissal from bringing this issue back to this Court if it becomes necessary to do so.
9. The foregoing paragraphs are denominated as both Findings of Fact and Conclusions of Law to the extent that they constitute the same.

(Order, attached at Ex. B.)

The basis of this motion is that Thoennes’s oppression of Ballard continued unabated through the hearing date in August 2013 when this Court heard evidence of valuation and ultimately determined the amount of the Judgment to be entered against Thoennes. This Court has held in multiple orders that Ballard presented undisputed evidence at the August 2013 valuation hearing “that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the hearing.” (Order

Appointing Receiver at 3 (attached as Exhibit C); Charging Order at 2 (attached as Exhibit D).)

These orders were not appealed and are the law of the case. Further, the Judgment has been affirmed, with a slight modification of the amount, on appeal. Because this Court has found that the oppression of Thoennes continued through the time of the valuation hearing in August 2013, following which the Judgment was entered on October 3, 2013, it necessarily follows that all, or at least a significant portion, of the amount of the Judgment was attributable to oppression by Thoennes that occurred after he filed bankruptcy on December 2, 2011. Because the Bankruptcy Court held that this amount was not discharged in the bankruptcy, Ballard is entitled to an order indicating the amount of the Judgment that was not discharged in bankruptcy and for the enforcement of said judgment amount.

This motion is supported by the above-cited authority; this Court's orders; the record before the Court in this action; any supporting memorandum that may be filed at or before the hearing on this motion, and any affidavits or materials that may be provided at or prior to the hearing on this motion.

Respectfully submitted,

s/ William M. Wilson III

Wallace K. Lightsey (S.C. Bar No. 6476)

William M. Wilson III (S.C. Bar No. 15808)

Amos A. Workman (S.C. Bar No. 6231)

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Attorneys for Plaintiff Andrew P. (Andy) Ballard

September 21, 2016

Certificate of Consultation

The undersigned hereby affirms that, prior to filing the foregoing motion, he consulted with opposing counsel and attempted in good faith to resolve the matter at issue in this motion.

s/ Wallace K. Lightsey
Wallace K. Lightsey

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Andrew P. (Andy) Ballard,)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2008-CP-23-5739**DEFENDANT THOENNES, III's
MEMORANDUM IN OPPOSITION
MOTION TO APPORTION OF
JUDGMENT****INTRODUCTION**

This matter was before the Court on January 27, 2017 wherein the Plaintiff moved this Court to apportion the underlying judgment against Defendant Rick Thoennes, III for alleged post bankruptcy petition conduct. The Court heard arguments from all parties, took the matter under advisement, and encouraged both sides to find an amicable solution in the interim. Unfortunately, a settlement of this issue appears unattainable and the parties now await the Court's decision on this novel issue.

Defendant Rick Thoennes, III submits this brief argument in further support of his position that any individual liability determined in the May 4, 2010 Final Order finding shareholder oppression and subsequent Valuation and Order of Judgment dated October 2, 2013, is completely discharged by the December 2011 bankruptcy filing and subsequent Order Discharging the Debtor dated March 3, 2012.

ARGUMENT

The only issue before the Court with regards to Defendant Rick Thoennes, III is whether or not he engaged in any post bankruptcy activity that somehow led to the determination of value in the 2013 Order of Judgment. Essentially, what if anything did Defendant Rick Thoennes, III individually do after December of 2011 which became a basis for the Court's determination of liability and valuation in 2013. The Defendant has argued and further submits in the attached Affidavit that he has engaged in no activity whatsoever with regards to Warpath following his 2011 bankruptcy filing (Exhibit A). He has not been consulted by the ownership nor participated in any decision making with regards to the Warpath development since his 2011 filing.

As the valuation hearing transcript reflects, Defendant Thoennes, III was never individually mentioned nor was he offered by either party as a witness in the 2013 hearings which ultimately resulted in the \$3,589,297.00 judgment. The subject 2013 valuation order never made a finding of fact that Rick Thoennes, III, or any defendant for that matter, engaged in continuous shareholder oppression. As the record will reflect, a subsequent Order Appointing a Receiver, which had nothing to do with any parties' post bankruptcy activity, suggests for the very first time that this Court made a finding at the valuation hearing that "shareholder oppression had continued unchanged and unabated." (Order of Judgment, p. 2, paragraph 4).

It never happened. This tortured description of the previous Valuation Order then became the basis of confusion for the Bankruptcy Court which assumed this Court did in fact make a finding of post-bankruptcy oppression by Defendant Rick Thoennes, III. *In Re Rick Thoennes, III v. Andy Ballard*, 536 B.R. 680, 700 (2015).

Although the Court was never asked to make such a determination until the Bankruptcy 2015 Order, the record and evidence clearly show that Defendant Thoennes, III engaged in no post bankruptcy activity whatsoever with regards Warpath Development, Inc. and certainly did not engaged in any activity that was oppressive or somehow harmful to the Plaintiff.

Defendant Thoennes, III was never asked by any party to resume any activity in the company nor would he as he believed his participation and ownership was terminated by his 2011 filing. At the hearing this honorable Court appeared to have concerns with the fact that Defendant Thoennes, III never took any action after the 2010 Order to legally distance himself from the Company. However, the actual bankruptcy filings show that this Defendant listed the shares as a scheduled asset which he necessarily forfeited with that filing. These documents also confirm he did not claim any exemption status or retain ownership as to those shares. (Exhibit B - Bankruptcy Filing, page 10 and 13).

Moreover, the bankruptcy filing in 2011, years before Valuation Order and Receiver Order, reveal this Defendant believed and asserted that Warpath as a company has ended in 2011. (Exhibit B – Bankruptcy Filing, page 37).

This debt was fully discharged under core bankruptcy law and the facts of the case. Federal Code Provisions, specifically, 11 U.S.C 524 states in part:

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

In order to consider or establish post bankruptcy activity that results in renewed liability, there would be a required showing of some new act. Ownership of the escrowed shares of Warpath stock would have arisen before 2011 bankruptcy filing. The Plaintiff is unable to identify a single act by Defendant Thoennes, III post bankruptcy and solely relies on the fact that "he still owned it" as evidence of post-petition conduct. However, mere continued ownership would not amount to a new act or conduct that would affect the 2011 discharge. Continuous violation theories have been soundly rejected by the Courts. *Holcombe v. US Airways, Inc.*, 369 F. App'x 424, 428 (4th Cir. 2010). There is absolutely no evidence of any oppression or misconduct by Defendant Thoennes, III after December of 2011 - which all parties agree would be the only time period for which he could have liability. The ownership of Warpath shares of stock, to the extent it still existed post bankruptcy, began over a decade earlier. Nothing "new" has occurred since bankruptcy. This entire issue and the Plaintiff's attempts to claw the Defendant back out of the protection of bankruptcy are based on a sentence in an unrelated Order that suggests a finding this Court never made.

CONCLUSION.

Defendant Thoennes, III respectfully requests the Plaintiff's Motion be denied.

FAYSSOUX & LANDIS, P.A.

s/ James W. Fayssoux, Jr.

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Attorney for Defendant Rick Thoennes, III.

Dated: February 21, 2017
Greenville, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Andrew P. (Andy) Ballard,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C. A. No. 2008-CP-23-05739**NOTICE OF MOTION AND MOTION TO
ALTER AND/OR AMEND JUDGMENT**

Defendant Rick Thoennes, III, ("Thoennes III") by and through his undersigned counsel, will move the Court at a date and time to be set by the Court for an order altering or amending its Order granting Plaintiff Andrew P. (Andy) Ballard's ("Ballard") motion to determine the portion of the judgment amount against Defendant Rick Thoennes, III, that is attributable to post-petition conduct (the "Motion"), which was filed on April 18, 2017 (the "Order"). This motion is made pursuant to Rules 52 and 59, SCRPC, and is based on the previous arguments and submissions by Thoennes III in opposition to Ballard's Motion and on the following grounds.

ARGUMENT

I. THE COURT SHOULD ALTER AND/OR AMEND THE ORDER TO FIND THAT PLAINTIFF'S MOTION SHOULD BE DENIED BECAUSE THE CLAIM WAS DISCHARGED IN BANKRUPTCY

Under South Carolina law, "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 36 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). "A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is

usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* “There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.*

An issue is not preserved for appeal unless it has been ruled upon by the trial court. “When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCR, motion to obtain a ruling, the appellate court may not address the issue.” *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 248 (Ct. App. 2006). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Id.*

A. The Debt Was Discharged in Bankruptcy

First, the Court should amend the Order to hold that none of the Judgement can be apportioned to Thoennes III because the entire debt was discharged by the bankruptcy court. At the conclusion of an individual debtor's bankruptcy proceedings commenced under Chapter 7 of the Bankruptcy Code, the debtor ordinarily receives a Chapter 7 discharge which, with a few exceptions, “discharges the debtor from all debts that arose before the date of the order for relief.” 11 U.S.C. § 727(b). The term “debt” is defined in the Bankruptcy Code as “liability on a claim.” 11 U.S.C. § 101(12). “Claim”, as used in the definition of “debt”, is defined as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). “Congress intended to adopt the broadest possible definition of the term ‘claim,’ so that a bankruptcy case would deal with all of the debtor’s legal obligations.” *In re Stewart Foods, Inc.*, 64 F.3d 141, 144 (4th Cir. 1995). The purpose of the discharge is to provide the “honest but unfortunate debtor” with a fresh start and a “‘new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.’” *Local Loan Co. v. Hunt*, 292 U.S. 234, 244–45, 54 S.Ct. 695, 78 L.Ed. 1230 (1934).

The determinative factor in this case is whether Ballard had a “claim” against Thoennes III prior to the March 26, 2012. After the issuance of the court’s order dated May 3, 2010 (the “2010 Order”), Ballard possessed an unliquidated “right to payment,” which is encompassed under the definition of a “claim” under 11 U.S.C. § 101(5). Ballard’s “claim” was clearly identified as an unsecured nonpriority claim by Thoennes III’s petition for Chapter 7 bankruptcy filed on December 2, 2011. *See* Def. Mot. in Opp. dated Feb. 21, 2017, Ex. B, p. 17. As the bankruptcy court determined, its order of discharge applied to Ballard’s claim against Thoennes III. *See In re Thoennes*, 536 B.R. 680, 700 (Bankr. D.S.C. 2015).

The fact that the value of Ballard’s shares was left undetermined by the 2010 Order does not exempt the claim from the order of discharge. To the contrary, Ballard had every right to file a proof of claim against Thoennes III’s bankruptcy estate, and the bankruptcy court would have been authorized to fix the estimated value of Ballard’s unliquidated claim for the purpose of the claim’s allowance. 11 U.S.C. § 502(c). However, “Ballard did not file a motion for relief

from the automatic stay, a proof of claim, a motion to conduct an examination of Thoennes pursuant to Fed. R. Bankr. P. 2004, or otherwise participate in Thoennes' bankruptcy case while it was pending." *See In re Thoennes*, 536 B.R. at 686. Accordingly, the ruling of the bankruptcy court is entitled to res judicata effect because "[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." *Austin v. Specialty Transp. Servc.*, 358 S.C. 298, 320 (Ct. App. 2004).

According to the bankruptcy court's order, none of Ballard's claim survives the order of discharge. As the bankruptcy court explained, "Because § 727(b) discharges debts that arose before the date of the order for relief, any portion of the Final Judgment¹ that arose before the date of the order is within the scope of the discharge." *See In re Thoennes*, 536 B.R. at 700. Here, the entirety of the debt arose before the date of the order of discharge filed March 26, 2012. In its order filed May 4, 2010, the Court concluded that the "totality of circumstances demonstrates that the individual defendants acted oppressively toward Ballard as the minority shareholder," and, as a result, "that the proper equitable remedy is to provide for the purchase of Ballard's shares at their fair value by the defendants." *Id.* at pp. 10, 13. Accordingly, the only matter left for subsequent disposition by the 2010 Order was the valuation of Ballard's shares to allow the parties sufficient time to locate share valuation experts.

Though the case has taken a long and twisting path through the appellate process, the Court's essential holding of the 2010 Order remains in effect today which concludes that Ballard is entitled to a judicially ordered buy-out of his shares because of the defendants' conduct prior to May 4, 2010. Furthermore, no subsequent order of this Court has made any binding determination awarding Ballard additional damages for conduct that occurred after May 4, 2010.

¹ Under the bankruptcy court's order, the "Final Judgment" was entered on July 15, 2015 when the South Carolina Court of Appeals reduced Ballard's share valuation to \$3,125,000.

This conclusion is confirmed by the Court's Order of Judgment filed on October 3, 2013 (the "Order of Judgment"). The Order of Judgment states that its decision was limited to "the determination of 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." See Order of Judgment, p. 1. The Order of Judgment mentions no additional theories of recovery or awards of relief, and it is devoid of any mention of oppressive conduct that occurred after the entry of the 2010 Order. See *id.* Rather, the Order of Judgment merely set the value of Ballard's shares as set forth in the 2010 Order.

Moreover, there is no reported case in South Carolina providing that a plaintiff may circumvent the protections of bankruptcy because the defendant's conduct continued until after the date of discharge. Though there is no exact corollary, perhaps the closest theory under state law would be akin to a "continuing tort" theory under which the statute of limitations does not begin to run until after negligent conduct of a continuing nature ceases. However, such a theory was soundly rejected by the South Carolina Supreme Court in *Harrison v. Bevilacqua*, 354 S.C. 129 (2003).

Furthermore, the cases cited by the Court's order are inapplicable. In *Holcombe v. US Airways, Inc.*, 369 Fed. Appx. 424, 429 (4th Cir. 2010) (unpublished), the plaintiff's "single, unitary 'continuing violation' claim which accrued pre-confirmation and has persisted into the post-confirmation period" was rejected by the Fourth Circuit because the plaintiff's "failure to file a proof of claim after receiving notice...means her claim as to any pre-confirmation actions did not survive the discharge." Since the "severity or length of the oppression would not be relevant," see Order filed Apr. 18, 2017, Ballard's single, continuing claim is subject to discharge because Ballard also had notice of the bankruptcy action and chose not to file a proof

of claim. Similarly unavailing, *O'Loughlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000), concerns “not a single failure, but repeated failures, to accommodate.” Thus, the *O'Loughlin* court’s concerns about defendants using earlier instances of illegal conduct to avoid liability for separate subsequent instances is abated.

B. The Court’s Finding of Post-Petition Oppression Is Not Binding

Second, the Court should amend the Order to hold that its previous finding of fact relating to continued oppression does not apply to Thoennes III. As referenced above, the sole basis for the Order’s finding of post-petition oppression by Thoennes III derives from the Charging Order and Receiver Order, which the Order concludes became the law of the case. This holding is erroneous because these specific findings of fact did not become the law of the case.

Under South Carolina law, an order which “decides nothing about the merits of the case...does not establish the law of the case.” *Ballenger v. Bowen*, 313 S.C.476 (1994). “The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right.” *Weil v. Weil*, 299 S.C. 84 (Ct. App. 1989). “Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.” *Id.*

Neither the Charging Order nor the Receiver Order finally determined a substantial right of any party or affected the merits of the case. As the South Carolina Supreme Court explained in *Vasiliades v. Vasiliades*, 231 S.C. 366 (1957), an order appointing a receiver is “related to [a] provisional remed[y] pending the action and do[es] not constitute a decision upon the merits,” thus the Receiver Order could not have been immediately appealed. Similarly, the Charging

Order merely directed the defendants and certain entities to refrain from issuing or receiving any distributions but to instead direct them to the appointed receiver. *Id.* Accordingly, the Charging Order decided nothing as to the merits of the case, and such a provision remedy could not have been appealed by any party. Furthermore, as discussed below, no final determination of any right as to Thoennes III was entered by these orders as he was explicitly excepted from the relief granted. Therefore, the Court's finding of fact relating to continued oppression was merely dicta that is not binding upon Thoennes III.

Even if these orders were finally determined a substantial right, Thoennes III was not a party to the matters decided by the Charging Order and Receiver Order, thus any res judicata effect of these orders cannot be asserted against him. In order for res judicata to bar a matter that has become the law of the case, the following elements must be met: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former matter. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992).

Here, none of the res judicata elements are met. First, there is no identity of parties between the Order and the Receiver Order or the Charging Order. As both orders explicitly provide, "The relief granted herein is not entered against defendant Rick Thoennes III." See Charging Order at p. 1; Receiver Order at p. 1. Second, there is no identity of the subject matter. The Receiver Order dealt only with the Court's appointment of a receiver, and the Charging Order dealt only with the Court directing the defendants and certain entities to direct all distributions to the receiver. Neither order dealt with a finding of fact regarding whether any post-petition oppression by Rick Thoennes III occurred. Finally, as explained above, there was no adjudication on the merits because the appointment of a receiver or charging order as to distributions are provisional remedies which do not constitute a final decision on the merits.

Furthermore, if there was such an adjudication at either proceeding, Thoennes III did not have any notice or opportunity to be heard at the hearing. Because these orders concerned only the appointment of a receiver and entities issuing distributions to the other defendants, Thoennes III's presence was not required. Accordingly, the findings of fact entered by the Court in the Receiver Order and the Charging Order are not the law of the case and are not res judicata to Thoennes III.

C. There is No Evidence of Post-Petition Oppression

Third, even if the Court's findings of post-petition oppression were the law of the case, the Court should amend the Order to hold that its previous findings of post-petition oppression were erroneous. According to the Order, the Court's finding is based upon "undisputed evidence at the August 6, 2013 valuation hearing, 'that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the hearing.'" This language originates from two orders issued by the Court on April 23, 2014, one appointing a receiver (the "Receiver Order") and the other directing the defendants and certain entities to direct all distributions to the receiver (the "Charging Order"). *See* Receiver Order filed Apr. 23, 2014; Charging Order filed Apr. 23, 2014. Notably, the orders mention only oppressive conduct by the "defendants" generally. *See* Charging Order at p. 2; Receiver Order at p. 3. However, neither order describes any conduct individually attributable to Thoennes III, and both orders explicitly state that their relief "is not entered against defendant Rick Thoennes III." *See* Charging Order at p. 1; Receiver Order at p. 1.

To the extent that this finding of fact applies to Thoennes III, such a finding is erroneous as the record contains no such evidence. As the valuation hearing transcript reveals, Thoennes III was not offered by either party as a witness at the August 6, 2013 hearing, and no witness

offered any testimony about his actions following the filing of his bankruptcy petition. (*See* Hearing Tr. dated Aug. 6, 2013). Thoennes III is rarely mentioned by any witness, and the only time his name is referenced relates to his signature on two letters seeking financing, both of which are dated before the filing of his petition for bankruptcy. *See id.*, p. 193-196. Accordingly, the transcript of the August 6, 2013 hearing contains no evidence of post-petition oppression by Thoennes III. Even if the

To the contrary, the only evidence in the record conclusively establishes that Thoennes III did not participate in any post-petition oppression. In his affidavit, Thoennes III averred that he believed that his filing for bankruptcy “forever ended” his involvement with Warpath. Aff. of Thoennes III, ¶ 2. His “sole involvement with Warpath since 2011” consisted of his signing a settlement agreement giving Ballard his shares of Warpath stock, which he “though they were already gone.” *Id.* Since the filing of his bankruptcy petition in December 2011, Thoennes II “has not been asked by any principal or owner of Warpath to participate in any way with the regards to the company” and he “sincerely believed this matter was resolved.” *Id.* at ¶ 3. As the bankruptcy petition reflects, Thoennes III indeed attempted to surrender his shares, listing his 20% interest in Warpath Development, Inc. as an asset. *See* Def. Memo. in Opp. dated Feb. 21, 2017, Ex. B., p. 10. Accordingly, the only specific evidence of Thoennes III’s post-petition conduct conclusively establishes that Thoennes III took no actions with respect to Warpath because he believed his involvement with that entity had ended forever.

CONCLUSION

For the foregoing reasons, Defendant Rick Thoennes, III, respectfully submit that this Court should alter or amend the Order.

Respectfully submitted,

s/Adam C. Bach

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Attorneys for Defendant Rick Thoennes, III

April 28, 2017

Greenville, South Carolina

1 STATE OF SOUTH CAROLINA)

) COURT OF COMMON PLEAS

2 COUNTY OF GREENVILLE)

) 2008-CP-23-5739

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Andrew Ballard

TRANSCRIPT OF RECORD

-vs-

Tim Roberson, Warpath etal

August 6, 2013
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 Lighsey, Esquire
Attorney for the Plaintiff

Joshua L. Howard, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

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.

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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

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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.

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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

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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

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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

Ballard vs. Warpath, et al

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 our position that the wrongful
22 conduct has continued since 2011 through the present 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?

Ballard vs. Warpath, et al

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?

Ballard vs. Warpath, et al

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

Andy Ballard - Cross Examination by Mr.
Howard
Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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.

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Andy Ballard - Redirect Examination by Mr.
Lightsey
Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Andy Ballard - Recross Examination by Mr.
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 invited 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?

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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.

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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:

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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 ---

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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 was 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.

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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
Barryard 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 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 in 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

Ballard vs. Warpath, et al

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.

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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

Ballard vs. Warpath, et al

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.

Ballard vs. Warpath, et al

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

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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
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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.

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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,

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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.

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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

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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 ---

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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

Ballard vs. Warpath, et al

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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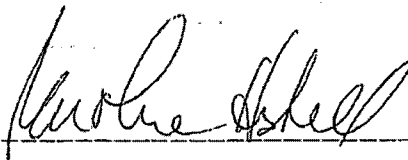
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Ballard vs. Warpath, et al

1
2 I, the undersigned Caroline Hiskell, Official
3 Court Reporter for the Thirteenth Judicial Circuit of the
4 State of South Carolina, do hereby certify that the
5 foregoing is a true, accurate, and complete transcript of
6 record of all the proceedings had and evidence introduced
7 in the trial of the captioned case, relative to appeal, in
8 the Common Pleas Court of Greenville County, South
9 Carolina on the 26th day of August, 2013.

10 I do further certify that I am neither of
11 kin, counsel, nor interest to any party hereto.

12
13
14 

15 Caroline Hiskell, Thirteen Circuit Court Reporter
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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

ANDREW BALLARD

vs.

TIM ROBERSON, ET AL

PLAINTIFF)

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.

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JOSHUA L. HOWARD, ESQ.

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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

5
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

8

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 tide 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?

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

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

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

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

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?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

- 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?

TIMOTHY ROBERSON-DIRECT BY MR. WORKMAN

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.

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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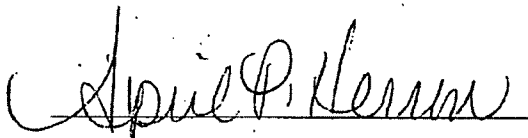
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, 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 the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Greenville County, South Carolina, on the
23rd day of April, 2014.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

August 6, 2014



APRIL P. HERRON, Court Reporter

State of South Carolina
County of Greenville

Court of Common Pleas

Andrew P. Ballard, et al)
)
 Plaintiff,) Transcript of Record
 v.) 2008-CP-23-05739
)
 Tim Roberson, Rick Thoennes, Rick Thoennes III, and
 Warpath Development, Incorporated.)
)
 Defendant.)

January 27, 2017
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, Esquire
Attorney for the Plaintiff

Amos Workman, Esquire
Attorney for the Plaintiff

Joshua Howard, Esquire
Attorney for Defendant Tim Roberson

James Fayssoux Sr., Esquire
Attorney for Defendant Rick Thoennes III

Michael Oshea, Esquire
Appointed Receiver

Lisa Scott
Circuit Court Reporter

I N D E X

WITNESSPAGE

No Witnesses.

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

No Exhibits.

P R O C E E D I N G S

* * * * *

THE COURT: Are you ready?

MR. LIGHTSEY: Would you like me -- would you like me to proceed?

THE COURT: Yes, please.

MR. LIGHTSEY: May it please the Court?

There's several matters before you this morning in connection with this case. I know you're familiar with the facts and the background of this case.

All of the pending matters relate to collection of the judgement that you entered against the defendants in October of 2013, which was affirmed by the Court of Appeals with a slight reduction in the amount in July of 2015.

After that occurred, the defendant sought further review from the State Supreme Court. It denied cert in September of last year.

This case was filed in 2008. It has been pending now for nine years. The defendants have lost every step of the way. Every time they have come into court, they have lost on the legal issues and factual issues, but they have succeeded in dragging this case out for nine years, through two

1 trials, through two appeals, multiple hearings
2 before you. It's time for them to pay the piper.
3 The day of reckon has come, and they're still in
4 here asking you for mercy.

5 Tim Roberson even has the audacity to ask the
6 Court for relief from judgement on the ground that
7 Duke Power terminated the lease as a result of his
8 own failure to carry out his contractual obligations
9 that he assumed in his agreement with Andy Ballard.

10 It is undisputed, Your Honor, that the reason
11 Duke terminated the lease is that the defendants did
12 not develop the property as they agreed to do in
13 their contract with Mr. Ballard.

14 I will hand up a copy of the notice of
15 termination -- or the actual termination. And it
16 states explicitly that the lease is being terminated
17 for failure to comply with the consensual plan
18 required by the lease for nonperformance by the
19 lessee.

20 Their own failure, the defendants' own failure
21 and Tim Roberson's own failure to carryout their
22 contractual obligations is the reason that Duke
23 terminated this lease. Roberson agreed to provide
24 the necessary capital to obtain financing for this
25 development.

1 He's basically coming in now and saying, "Well,
2 I tried," and he wasn't able to do it. The contract
3 does not say, "I agree to try to get the financing
4 for this development." What the contract says is
5 that Tim Roberson will provide the necessary capital
6 to obtain long-term financing. And he never did
7 that, and we know why.

8 There was testimony about this in the
9 2000 trial -- 2010 trial. There were findings of
10 fact in the year 2010 order about this. Roberson
11 recognized before he ever signed this contract with
12 Andy Ballard that he would have to likely have to
13 put up 60 percent of the cost of the development in
14 order to get financing. He acknowledged that in an
15 e-mail that was sent before the contract was signed.

16 After the contract was signed, Duke Power did
17 not approve the 200 boat slips that Roberson had
18 based his cash -- cash projection on. They approved
19 only 102 boat slips. And Tim Roberson decided then
20 that he didn't like the economics of the deal that
21 he had already agreed to, that the projected income
22 was going to be less than what he had been
23 threatened.

24 So he and the other defendants then tried to
25 improve the economics of the deal for themselves for

1 purely selfish reasons by trying to force
2 Mr. Ballard out. And when he came in and stopped
3 them from squeezing him out, then tried to wipe out
4 the value of his equity and interest in the company,
5 and this is why Duke terminated the lease nine years
6 later.

7 Because instead of simply doing what they had
8 agreed in their contract to do, they put their
9 energy and efforts into forcing Mr. Ballard out.
10 That's what they're still trying to do today, to
11 wipe out the value of his investment in this
12 company.

13 It's time to put an end to this. It's time for
14 them to pay the piper. They've had two trials.
15 They've had two appeals. They have had more than
16 their share of due process. To do anything less
17 would make a mockery of the last nine years of
18 litigation that they've put us through, that they've
19 put you through, the South Carolina Court of
20 Appeals, and the South Carolina Supreme Court.

21 They're here asking you to make all of that
22 irrelevant, all of the last years -- last nine years
23 of work that we've been through. We're begging you,
24 don't let them get away with this. After nine years
25 of litigation, nine years of our seeking justice

1 where we have won every step of the way, let them
2 off the hook now and reward them for stringing this
3 out for so long would be an utter travesty.

4 There're four matters before the Court, four
5 specific matters. We have moved to modify the
6 receivership that you put in effect three years ago
7 to make it one receivership in aid of execution and
8 to authorize the receiver to begin distributing
9 assets, pay down with the judgement.

10 We've also made a motion to determine that all
11 or a part of the judgment as to the defendant Rick
12 Thoennes III is attributable to oppression -- acts
13 of oppression that were committed by him after his
14 bankruptcy in 2010.

15 The receiver, Mike Oshea, is here, sitting in
16 the back here. He has filed a motion on his own
17 behalf to compel the transfer of Tim Roberson's
18 interest in several LLC's into the receivership, and
19 that's before the Court.

20 And then finally, Mr. Roberson has -- has moved
21 for relief from judgment.

22 So those are the four things before you in
23 terms of Mr. Wilson, and Mr. Workman and I have
24 provided an argument on those. We can take those
25 however -- however you wish, or we can just -- we

1 can just go ahead with our -- with our motions
2 and -- and proceed from there, however the Court
3 wishes.

4 THE COURT: That's sort of an opening
5 statement. Anything you want to tell me?

6 MR. FAYSSOUX: Your Honor, other than I -- I
7 disagree. Your Honor, I'll be -- I've been on the
8 periphery with this case, not near as long as the
9 rest of y'all. I got involved strictly on behalf of
10 Rick Thoennes III.

11 The reason why you haven't seen me at any of
12 these hearings and the reason why we haven't been a
13 part of this case is because Rick Thoennes filed
14 bankruptcy at the end of 2011, beginning of 2012.
15 He has been discharged from this debt. That's why
16 we haven't been involved in these hearings until
17 now.

18 Recently, they filed this motion based on what
19 we think is a tortured sentence out of one of your
20 orders, that is a finding you never made. And
21 they're trying to claw him back in and claim that
22 there was some finding by you of misconduct post
23 your 2010 liability order and in between your
24 valuation order by my client. He hadn't had
25 anything to do before that.

1 I'm happy to argue the merits of that motion
2 after I hear what Mr. Wilson and Mr. Lightsey has to
3 say, but that's -- that's why I'm here, on the
4 bankruptcy issue.

5 THE COURT: Okay.

6 MR. HOWARD: Judge Miller, you -- you and I
7 have seen each other for a number of years on this
8 case and I go back to the beginning. And so,
9 certainly, I've been up here, and we've walked
10 through this with Mr. Holleman and now Mr. Lightsey
11 and everybody else involved.

12 Mr. -- what we stand before you today is,
13 certainly, to disagree with their assessment of
14 where we stand today. Certainly, disagree with
15 their assessment of our motion, and to -- we can
16 argue that at the appropriate time.

17 I would just say that Mr. Roberson had made
18 continuous -- continuous efforts that have been put
19 on the record and in the transcripts, which I would
20 incorporate here and throughout this entire
21 proceeding.

22 And those efforts have been to do nothing more
23 than to develop the Warpath Marina. And he's
24 done -- he's made effort after effort after effort
25 after effort, and they're all documented in the

1 transcripts.

2 Even up until the last day, as you can see from
3 his affidavit, there were further efforts ongoing.
4 This was all part of a conversation that
5 Mr. Lightsey and I were engaged in and -- and trying
6 to reach a resolution of this.

7 And, ultimately, Duke Energy made their
8 decision and they unilaterally pulled it over the
9 objection of Mr. Roberson. He continued to fight
10 and continued to fight all the way up until the
11 point that they just wouldn't hear from us anymore
12 or from Mr. Roberson anymore.

13 And so that's why we stand in front of you
14 today. And we could talk about the Rule 60(B) (5).
15 I'm prepared to discuss it. And -- and I understand
16 that they're going to disagree with it. And I
17 understand that what we leave to you in this case,
18 it's an equitable matter. It's an equitable
19 decision. And we leave to you to determine upon
20 your good conscience what you're going to do in this
21 matter and how the Court is going to proceed. I
22 appreciate you're time.

23 THE COURT: All right. Any -- you listed
24 the -- the motions in order. Is there any reason
25 not to follow that? The first one is to modify the

1 receivership.

2 Any -- all right. Let's go with it.

3 MR. WORKMAN: Thank you, Your Honor. Amos
4 Workman for the plaintiff.

5 Very short, Your Honor. A motion -- a
6 receivership order was appointed in aid of
7 execution, subject to an appeal back in April of '14
8 under 15-6510 of the South Carolina Code, as well as
9 the Section 15-39430 of the Code.

10 The powers were somewhat confined under that
11 order because of the pending appeal. The receiver
12 was entitled to locate, identify, and marshal assets
13 and do related discovery, but was unable to or was
14 ordered not to dis -- dispose of any assets or
15 distribute any assets pending the appeal.

16 Now, of course, as Mr. Lightsey has stated, all
17 appeals have been exhausted. The judgment is in
18 place, and no part of the judgment has been paid.
19 The receiver has in his possession now assets that
20 could be paid over to the plaintiff to be applied
21 toward the judgment. And we anticipate that he will
22 gain other assets that should be paid over to the
23 plaintiff to be applied toward reduction of the
24 judgment.

25 So we are asking the Court to direct the

1 receiver to pay over these assets to the counsel for
2 the plaintiff so that we can apply them toward the
3 satisfaction of the judgment. And we would ask that
4 these powers be ongoing as I think are clearly
5 allowed by statute so that he may continue to seize
6 any assets of any of the defendants to be delivered
7 to plaintiff's counsel to be applied toward
8 satisfaction of the judgment.

9 So we request that the receivership order be
10 modified accordingly in view of the fact of the
11 exhaustion of appeals and our right to proceed with
12 execution levy, with the aid of the receiver. Thank
13 you.

14 THE COURT: All right. Just -- what is the
15 total amount of the judgment as of today? Do y'all
16 know?

17 MR. LIGHTSEY: With interest, Your Honor,
18 it's -- I would say it's roughly three-and-a-half
19 million. It's reduced to 3,125,000 by the Court of
20 Appeals. And with interest, it's -- I think it's
21 seven-and-a-half percent at that time for two years.
22 It gets it up to about 3.5, but I don't have the
23 precise.

24 THE COURT: Okay. All right. And how much --
25 how many assets -- what's the size of the asset that

1 the -- Mr. Oshea, you ---

2 MR. OSHEA: Your Honor, at this moment, what
3 I've been doing is maintaining a bank account, as
4 directed, paying Mr. Roberson's monthly expenses.
5 The amount that exceeds those payments at this point
6 is approximately \$64,000. And I've collected a
7 total of about 261,000 since my appointment in the
8 case of Mr. Thoennes.

9 I have been just offsetting the exact amount,
10 what is needed for his monthly bills, against the
11 draw from his salary and/or draw from the business.

12 THE COURT: Okay.

13 MR. OSHEA: So there's nothing available for
14 him.

15 THE COURT: Okay.

16 MR. LIGHTSEY: And for future purposes, Your
17 Honor, this is part of the receiver's request to
18 transfer ownership interest into the receivership.

19 Mr. Roberson has a substantial ownership
20 interest in the LLC that has some local commercial
21 property that's being rented. The -- the mortgage
22 on that property is completely paid off now.

23 The property is generating about \$50,000 a
24 month in profits. And so if we could -- if we could
25 get that into the receivership, that would be a

1 significant contribution toward getting this
2 judgment paid down.

3 Mr. Roberson also owns a significant interest
4 in property in Anguilla that's valued at \$3 million,
5 and then some additional commercial property in
6 Greenville that's -- that's valued at
7 \$2-point-something million.

8 THE COURT: Okay. All right. What do y'all
9 want to tell me?

10 MR. FAYSSOUX: Just on behalf of the
11 Thoennes's, Your Honor, Rick Thoennes Sr. and Rick
12 Thoennes III. We'll address the issue with Rick
13 Thoennes III in a second with regards to the
14 bankruptcy. I don't think he has anything
15 whatsoever to do with any modification to the order
16 of receiver so it wouldn't matter.

17 With regards to Senior, I just would simply say
18 that he has cooperated completely from day one in
19 terms of disclosure of assets and supplemental
20 proceedings, depositions, just informal meetings
21 with the attorneys any time they ask to be
22 completely upfront about where he is with his
23 assets.

24 It's a no-asset case as it applies to Rick
25 Thoennes Sr. He's got a 2007 Pontiac, a Sea-Doo,

1 some furniture that's in a house that's upside down
2 if you consider his wife's ownership and interest.
3 I don't know if the receiver can find anything any
4 different, other than we've cooperated. So whatever
5 your decision is.

6 THE COURT: So you don't mind him paying the
7 \$64,000 over to counsel?

8 MR. FAYSSOUX: That's not our money. That's
9 Roberson's money.

10 THE COURT: Anything?

11 MR. HOWARD: Yes, Your Honor. One thing I
12 forgot to say earlier is that Mr. Roberson regrets
13 that he's unable to attend today. His wife is in
14 surgery and has had surgery. She's been basically
15 continuously in the hospital since Christmas. And
16 unfortunately due to that circumstance, he's not
17 able to attend today.

18 The -- what I -- I did file earlier because I
19 did contact him last night. I don't know if you saw
20 it, but there's an affidavit in opposition to this
21 that we did file earlier. It's ---

22 THE COURT: I don't see it.

23 MR. HOWARD: That's if you got your copy.

24 MR. LIGHTSEY: Your Honor, we haven't received
25 this before.

1 MR. HOWARD: Your Honor, it's nothing more than
2 just a recitation of just where they sit right now
3 in their life.

4 MR. LIGHTSEY: I -- I have no objection to
5 this, Your Honor.

6 THE COURT: Okay.

7 MR. LIGHTSEY: I would note that the
8 investments listed under number seven are not
9 complete. There's the Anguilla property, and
10 there's also additional commercial property in
11 Greenville.

12 MR. HOWARD: Well, it is qualified by the ones
13 that distribute. The Anguilla property doesn't
14 distribute. It -- it has an asset value, but
15 that's -- that's the only reason I put that in
16 there.

17 The -- essentially, Your Honor, number one, we
18 object on the basis and fact that we have a pending
19 Rule 60(B)(5) motion at this point and pending --
20 pending appeal of that.

21 Number two, we object to the modification of --
22 on the basis that at least some portion of it, we
23 believe, is inequitable.

24 Mr. Roberson has around \$2,000 in Social
25 Security that he gets paid. Outside of that,

1 there's no salary. He doesn't carry a job.

2 He and Mrs. Roberson, at this point who is --
3 he's the sole supporter for, is in rather poor
4 health. They're having to carry a lot of fixed
5 expenses for later on, the ability to have a roof
6 over their head, have a health insurance supplements
7 obviously to -- to their Medicare, and -- and other
8 fixed expenses associated with that.

9 Those exceed any Social Security and any other
10 income he has right now. The only ability for him
11 to maintain even a minimal level of life is to
12 actually -- is to receive monies out of the -- out
13 of whatever is being collected by the receivership.
14 I think ---

15 THE COURT: Well, what about this other
16 property? He's got -- they're talking about over
17 \$5 million in property. Liquidate and give it over.
18 Where's the -- where's the \$50,000 a month going in
19 rent?

20 MR. HOWARD: From what I ---

21 THE COURT: Is that not right?

22 MR. HOWARD: That -- he does -- Your Honor, he
23 does not own that outright. That is owned -- he
24 owns less than 50 percent of that LLC, and the
25 property sits inside the LLC. That's another issue.

1 We can go ahead and bring it up, but the -- I
2 don't know that this Court has the authority to sign
3 over his membership interest into the receivership,
4 number one, because there are operating agreements
5 out there that govern that and the -- and the -- and
6 the ability of those members, of those LLC's, to
7 choose who's going -- who they're going to be a
8 member with. And so under those circumstances ---

9 THE COURT: Well, let me -- let me just say
10 this. This has been going on way too long. If he's
11 got an interest in \$5 million in property and this
12 LLC is getting \$50,000 a month in rents, I mean,
13 I -- I would not wish harm on anyone, but for him to
14 claim that he can't meet his expenses, but what's --
15 what's going on with the 50,000 a month?

16 MR. HOWARD: Well, Your Honor ---

17 THE COURT: Where is that?

18 MR. HOWARD: I apologize. Your Honor, he's --
19 they're using -- that money is necessary to meet the
20 expenses. There's been a portion ---

21 THE COURT: Well, I guess you could live a
22 pretty high lifestyle on \$50,000 a month.

23 MR. HOWARD: Your Honor, the receiver -- I
24 think the receiver can speak to that. His -- his
25 expenses, they're not -- are not 60 -- \$50,000 a

1 month.

2 THE COURT: Yeah, I -- I know. So where's the
3 money? That's my -- does the receiver -- all we're
4 talking about is putting the receiver in his shoes
5 in the -- in the LLC.

6 MR. HOWARD: Well, the LLC is an ongoing
7 company. What I was going to suggest ---

8 THE COURT: Yeah, that happens all the time.

9 MR. HOWARD: I understand. Now, you have --
10 you have other parties that have an interest in this
11 too. And I don't -- and coming in here and saying
12 that the receiver now has some operational -- has
13 his vote at this point ---

14 THE COURT: Right.

15 MR. HOWARD: --- affects those parties too.
16 And so I think that -- I mean, they're -- they
17 probably need to be joined on this motion at this
18 point.

19 THE COURT: Why?

20 MR. HOWARD: Because it affects their interest.
21 It's the -- it's modifying the operating agreement.
22 It's putting -- it's putting in place somebody that
23 they didn't choose to associate with.

24 THE COURT: Well, they chose to associate with
25 Mr. Roberson.

1 MR. HOWARD: Well, I understand that, Your
2 Honor, but there's ---

3 THE COURT: How old is this LLC?

4 MR. HOWARD: Excuse me?

5 THE COURT: How long has that LLC been in
6 existence? Do you know? Anybody know?

7 MR. LIGHTSEY: I don't know exactly, Your
8 Honor. It's -- it's been a while. They -- there
9 was a mortgage that it was paying on the property
10 that's all paid off now.

11 Since then, I think a substantial part of the
12 cash is just sitting on it. It did put some money
13 into capital improvements, put on a new roof. They
14 spent money on that. I think they repaved the
15 parking lot.

16 But -- but, essentially, it's -- it's sitting
17 on cash and -- and -- and it's been -- Mr. Roberson
18 does have a controlling interest. He -- he calls
19 the accountant and says, "I need a check for living
20 expenses." The accountant writes a check for
21 \$30,000, sends it to the receiver, and the
22 receiver's been signing it over until this most
23 recent -- until the appeal was completed, and then
24 he -- then he kept the cash that came in.

25 THE COURT: Well, who's on -- who are the other

1 members?

2 MR. HOWARD: Mr. Oshea might know that.

3 MR. OSHEA: If I might, Your Honor.

4 THE COURT: Yeah.

5 MR. OSHEA: In general, what this is was a
6 building that was a headquarters for a business that
7 Mr. Roberson previously owned. I believe it was
8 sold and incorporated some time in 2006 or -7.

9 At that point, they leased back the building to
10 the purchaser of the business on an escalating
11 lease. That lease right now, I believe, generates
12 62,500 a month. Mr. Roberson owns 48.167, some-odd
13 number, and there are seven other members. The next
14 closest is about 16 percent.

15 And I get the financials on the books of the
16 company. Mr. Roberson's equity interest right now
17 is approximately 1.6 million in the building, and
18 then the others are broken down. I can provide that
19 to the Court.

20 THE COURT: No. That's all right.

21 MR. OSHEA: So what happens is when -- and that
22 was the reason for my motion. I pay Mr. Roberson's
23 monthly bills. And when funds are needed, the way
24 it's normally worked is, I say, "Look, we're running
25 out of money here."

1 "Okay. I'll get in touch with the accountant."

2 Two days later, I get a check in the mail.
3 Deposit it into my receiver account, then pay the
4 bills, and that's how it goes. I do get the
5 financials on a quarterly basis. I don't think that
6 they're doing anything toward it.

7 My other concern is, that normally during the
8 year these payments are taken as loans against this
9 equity account, which has given me concern. And
10 I've talked to him and been approached by the IRS
11 because those, at the end of the year, really have
12 to become distributions.

13 And then that just piles on an additional tax
14 burden, and I think the IRS is about 100 something
15 thousand already. So he -- he does not have access
16 to that 62,000. He would be if the LLC chose to
17 distribute it.

18 THE COURT: Well, where is that -- where's that
19 money sitting? Do you know?

20 MR. OSHEA: The LLC has a bank account in North
21 Carolina. One of the partners -- actually, the next
22 largest at 16 something -- is an account that he
23 maintains the books and records. It -- it really
24 has no office, no facility. It just collects a rent
25 check every month which goes to North Carolina.

1 And that account has, I think, about 330,000 in
2 total right now. There is no mortgage on the
3 building. And the lease is due to be up, I believe,
4 in two years.

5 If it's not renegotiated, the LLC is carrying
6 the value of the business, less depreciation, about
7 8 million -- excuse me -- at about 3.3 million.

8 THE COURT: So where -- what building is this
9 just so I'll ---

10 MR. OSHEA: It's located up on Wade Hampton
11 Boulevard in Taylors, and it's a -- kind of an
12 office with mostly warehouse and shipping facility.

13 THE COURT: Okay. Yeah, anything?

14 MR. HOWARD: Well, Your Honor, you asked when
15 it was put in effect. It was 1999.

16 THE COURT: January 8th?

17 MR. HOWARD: I'm not sure if it was January. I
18 think it was June from what I can see.

19 THE COURT: Oh, June. No. It's in January.
20 The Secretary of State says January 8, 1999.

21 MR. HOWARD: Well, potentially. I'm just
22 looking at the operating agreement. Looks like it
23 was signed in June, so...

24 THE COURT: Well, those other people, it's a
25 corporate entity.

1 MR. HOWARD: Well, sure. It's going to --
2 potentially any order here is going to violate the
3 operating agreement.

4 THE COURT: How's that?

5 MR. HOWARD: Because -- because they get to --
6 if you're replacing Mr. Roberson with another --
7 with somebody else.

8 THE COURT: I'm not replacing him. He's a
9 receiver. He's controlling Mr. Roberson's interest
10 in that. He stands in his shoes.

11 MR. HOWARD: He's already receiving. I mean,
12 it's -- I don't know that there's a receiver mod ---

13 THE COURT: Well, you know, if he owns half of
14 that money and that's \$30,000 a month. It's going
15 to a bank account in North Carolina.

16 MR. HOWARD: Sure. It's a -- now, there are
17 managers of this entity too. And they've got to
18 make -- obviously, they're making decisions.

19 I -- you know, I don't represent TRG, so I'm
20 just ---

21 THE COURT: I know.

22 MR. HOWARD: --- I'm just suggesting to the
23 Court that there -- that this is an asset that has
24 to be maintained. There are decisions that they
25 make all the time about capital.

1 And -- and -- and so some of the money that's
2 coming in, there's obviously going to be a different
3 level of interest between what the receiver is
4 choosing to do and what the owners of this -- other
5 owners of this building might choose to do with the
6 capital that's coming in, and that puts things at
7 odds. And that's certainly an issue that they
8 would ---

9 THE COURT: Well, it would be at odds if
10 Mr. Roberson disagrees with what everybody else said
11 they were going to do.

12 MR. HOWARD: Well, sure. Mr. Roberson ---

13 THE COURT: Mr. Roberson, when he -- when he
14 lost this -- the conduct that led to this judgment,
15 he doesn't get to skate free from that.

16 MR. HOWARD: We completely understand, Your
17 Honor, and I'm not suggesting that he does. All I'm
18 suggesting is that I don't think the Court has the
19 authority to offset this operating agreement and
20 put ---

21 THE COURT: I have the authority to marshal the
22 assets of a -- of Mr. Roberson.

23 MR. HOWARD: I'm not -- I'm not suggesting ---

24 THE COURT: That's been confirmed by the
25 Supreme Court, right?

1 MR. LIGHTSEY: Yes, sir.

2 MR. HOWARD: I'm not stepping in your shoes,
3 Your Honor. I'm not trying to. I am not.

4 THE COURT: There's been plenty of times I'd
5 love to let you try it out for a while, or anybody
6 else for that matter.

7 Okay. I'm not sure. We've sort of jumped
8 around a little bit. We were talking about the
9 64,000.

10 MR. HOWARD: One of the issues is, they're
11 asking -- the point I was trying to make is that, as
12 it stands right now and what I was getting to is
13 that Mr. Roberson and Mrs. Roberson are not able to
14 even meet their fixed expenses based upon -- based
15 upon the Social Security received. And this is just
16 paying for -- paying for just -- just the basics of
17 keeping a roof over your head and the heat on. And
18 so from that ---

19 THE COURT: So that 30,000 a month comes in
20 handy?

21 MR. HOWARD: Well, he's not receiving 30,000 a
22 month.

23 THE COURT: Well, he could if he wanted to. I
24 haven't looked at the operating agreement.

25 MR. HOWARD: Well, no, I understand that. I'm

1 saying -- what I'm saying, Your Honor, is they're
2 asking -- and, number two, they're asking that he be
3 completely cut off, except for any social --
4 anything that's not -- and, number two, the receiver
5 will be directed to no longer obtain living expenses
6 to the defendants.

7 THE COURT: Well, let's talk about the -- the
8 island property. How's that owned?

9 MR. HOWARD: That's owned in a corporation, an
10 Anguilla corporation that's inside of an LLC here in
11 the US.

12 MR. LIGHTSEY: And that's -- that's part of the
13 receiver's motion as well, Your Honor.

14 THE COURT: I get that. Yeah. And that's
15 worth \$3 million?

16 MR. LIGHTSEY: That's -- I believe so.

17 THE COURT: And y'all have mediated all this?
18 Have y'all gotten together?

19 MR. HOWARD: Well, I -- I can't remember what
20 his -- do y'all have any idea? I can't remember
21 exactly what his interest in that is.

22 MR. LIGHTSEY: He's -- he has a third.

23 MR. HOWARD: He has other partners in it. And
24 there's -- and his partners have been paying some of
25 the expenses because he can't, so I don't know

1 exactly where his equity interest lies on that.

2 They've been trying to sell it. I mean, I know
3 that. They've been trying to sell it for -- since
4 day one. I mean, since -- just for at least six
5 years now. I mean, it's -- it's been -- there's
6 been an attempt to sell it and Mike may know more.

7 MR. OSHEA: I was going to say if I might, Your
8 Honor. When we're talking about a \$3 million value,
9 supposedly that's what the property is listed for
10 sale as in a complex down there that recently
11 changed ownership.

12 Mr. Roberson, it's my understanding, is
13 entitled to one-third of that. There are two other
14 partners. All along, they had for tax purposes
15 every year merged the rental income that came from
16 that property with their gateway property here in
17 Greenville for tax purposes. The IRS said to them
18 last year, they said, "No. From here forward, the
19 Anguilla corporation files separate from the other."

20 So depending on the value, Mr. Roberson has an
21 obligation to one of the partners of approximately
22 400,000, so one-third less 400,000.

23 The issue I have with it is, and I've had a
24 number of conversations with Brad Ruston over this
25 rental unit is, the company's worth, but not that

1 one, because it's actually an Anguilla corporation.
2 And what I've been told so far is that they're not
3 actually issuing stock, which is not all that
4 uncommon in offshore companies.

5 So from that standpoint, I was seeking to
6 clarify with the authorities down there if there's
7 stock to be issued, since there are two parties
8 here, that is a corporation to force us out of the
9 issuance to the plaintiff.

10 THE COURT: Okay. All right. Anything?

11 MR. HOWARD: Well, other than I don't want to
12 lose sight of the at least -- and I suggest this ---

13 THE COURT: Well, I don't want to make the guy
14 destitute, but he's sitting on a lot of assets. And
15 for him to claim that he's just -- can't buy
16 toothpaste is a little bit disingenuous.

17 MR. HOWARD: I'm not suggesting that, Your
18 Honor. If -- if -- but if this is put into effect,
19 the receiver be directed to not only pay living
20 expenses to the defendants, the only -- the only
21 exempt -- I mean, he's -- he's got exemptions
22 obviously under the law. His Social Security is it.
23 I mean, that's his only income that isn't subject --
24 basically, isn't subject to the receivership.

25 And so what I'm saying, Your Honor, is -- is --

1 is I'm asking for some equity here on this one so
2 that, you know, these ---

3 THE COURT: Well, that's what Mr. Ballard's
4 asking for.

5 MR. HOWARD: Well, I understand. I understand,
6 Your Honor.

7 THE COURT: Who's -- I -- I'm not picking at
8 you personally. This is not an easy thing.

9 MR. HOWARD: I understand. So, effectively, we
10 object to the motion. We disagree with it. And
11 I'll just -- just for purposes of the record, I
12 specifically object to their request on two. I
13 object to the receiver's fees and costs being paid
14 directly to the assets of the defendants' five.

15 And I don't know exactly what six is. As
16 necessary, the Court granted two additional powers
17 which may be necessary between these. I don't know
18 what they're asking for in that, so I think that's
19 too broad, too open-ended a request to be granted to
20 defendant to modify the order.

21 And so those are -- from their requests, those
22 are my objections and just noting it for the record.

23 THE COURT: Well, we're talking about -- now
24 about this \$64,000.

25 And how much money are you writing to them a

1 month, Mr. Oshea? Do you know? What's the ---

2 MR. OSHEA: Your Honor, it -- it varied. On
3 average, 5,000 a month, and that includes \$2,042
4 that he receives. In other words, I have him deduct
5 what he receives from Social Security from the
6 amount of bills that he requests to be paid. The
7 bulk of that is \$2750 a month to the mortgage on the
8 house and \$350 a month to HOA fees.

9 THE COURT: What's -- do you know the value of
10 the house?

11 MR. OSHEA: At this point, Your Honor, I've
12 been in touch with Grand South Bank, and it's
13 "underwater" approximately, according to them, 150-,
14 \$160,000.

15 I had an incident -- a couple of times, the
16 bank wanted the mortgage to be caught up, which I
17 did in the beginning. I think it was about 26,000.

18 Then a year ago October, I believe it was
19 October, I didn't realize there was a five-year
20 mortgage. It was due to be renewed. They said the
21 regulators require a pay down, so I paid down
22 approximately 11,000 on the -- the outstanding
23 balance.

24 But they're exposed. There are two other units
25 adjacent to Mr. Roberson's that he built up there

1 with a couple of partners. One of them just sold
2 where the bank lost about 147,000 deficiency on that
3 one.

4 So the bank's position has been, as long as you
5 continue to pay us, he continues to stay there. So
6 that is his -- his homestead, and it is getting paid
7 every month.

8 THE COURT: And what's the monthly amount that
9 you collect off of that local property?

10 MR. OSHEA: Oh, the -- the other units?

11 THE COURT: How -- where do we come up with the
12 \$64,000 balance? Where does that money come from?

13 MR. OSHEA: Oh, that comes from TRG. That goes
14 back to when I tell Mr. Roberson he's getting low.

15 And the reason there's that much in there at
16 the moment is at one point Mr. Howard had asked that
17 I arrange to pay some current legal fees, and I felt
18 that that was outside the purview of what I was
19 authorized, but Tim agreed to go and -- and take
20 some of that money. And I asked him before -- prior
21 by TRG, which they did do. And so that's included
22 in the amount, Your Honor.

23 THE COURT: So if I give you the 64,000, he
24 goes under -- the house goes under? He loses the
25 house? What...

1 MR. OSHEA: It would be my understanding, Your
2 Honor, that as Mr. Howard pointed out, his wife's
3 Social Security is approximately 2300,
4 Mr. Roberson's approximately 2,040 some-odd, so a
5 little over 4,000 between the two of them. And
6 that, to the best of my knowledge, is their only
7 income.

8 THE COURT: Mr. Workman?

9 MR. WORKMAN: Again, thanks, Your Honor.

10 I would point out as a matter of information to
11 the Court, it would be our view that in spending too
12 much money on this house, it's "underwater." It's
13 in foreclosure. And, in fact, the equity court in
14 Oconee County has already had a hearing on the
15 foreclosure of our judgment, authorizing of the sale
16 of the house, a public sale. That was all held in
17 abeyance until the appeals were exhausted. They've
18 been exhausted.

19 So the next step is for us to move for the sale
20 of that property, which we intend to do. If we
21 don't do it, Grand South Bank is going to do it.
22 They've informed the receiver of that, and so
23 they're waiting for us to take action. Otherwise,
24 they're going to bring the action to foreclose
25 themselves.

1 So I think the receiver's trouble that he's
2 sending all this money to Mr. Roberson for living
3 expenses, but it's going to a house that he's not
4 going to have much longer anyway. He needs to find
5 another ---

6 THE COURT: What would the time frame be? What
7 would the time frame be on that sale?

8 MR. WORKMAN: I'd say three -- three months.

9 THE COURT: Okay.

10 MR. WORKMAN: Thank you, Your Honor.

11 THE COURT: So -- and if you quit paying now,
12 what difference would it make?

13 MR. WORKMAN: I don't think it would make any
14 difference, Your Honor.

15 THE COURT: What difference would it make,
16 Mr. Howard? It's going to be sold anyway.

17 MR. HOWARD: I wasn't aware of the standing --
18 what the order was on that.

19 THE COURT: Yeah, I mean, that's right. Okay.
20 Well, I'm going to grant that motion.

21 All right. Are we...

22 MR. HOWARD: You are granting the total? We're
23 not going to have any ability to maintain any level
24 of life beyond what Social Security allows?

25 THE COURT: I'm -- don't try to put that on me.

1 It wasn't my conduct that initiated this lawsuit and
2 was it found that your client's conduct, among
3 others, is what caused these problems. So I -- you
4 know, I'm not going to carry that in my soul on
5 his ---

6 MR. HOWARD: I was just seeking clarification,
7 Your Honor.

8 THE COURT: Yeah, well, we're talking about the
9 64,000. What else was in that original? I jumped
10 around. The original -- the first motion was modify
11 the receiverships.

12 MR. LIGHTSEY: There's the -- the motion
13 concerning the allocation of the judgment in light
14 of Mr. Thoennes III's bankruptcy.

15 THE COURT: Before we do that, what -- what
16 is ---

17 MR. LIGHTSEY: The receiver's motion to
18 transfer the LLC interest into his possession.
19 That's just for Mr. Roberson, and then there's
20 Mr. Roberson's Rule 60(B)(5) motion.

21 THE COURT: Okay. So I -- I'm going to grant
22 the receiver's motion, so he's going to stand in the
23 shoes of Mr. Roberson with respect to the LLC.

24 And if the other members want to fight it out,
25 they -- they certainly would have standing. Come

1 back up here and spend more money.

2 All right. Does that take care --

3 Mr. Lightsey, you had listed four of them. That --
4 that takes care of one and three?

5 MR. LIGHTSEY: Yes, sir.

6 THE COURT: Okay. All right. Conduct
7 attributable to -- yeah, okay. All right.
8 Mr. Wilson, you're rising to speak.

9 MR. WILSON: Yes, thank you, Your Honor. May
10 it please the Court?

11 We did file a motion to determine the portion
12 of the judgment amount against Rick Thoennes III
13 that is attributable post-petition conduct. So it's
14 kind of a wordy phrase I know, but the situation is
15 that the judgment that you entered in October 2013
16 was against all three defendants, including Mr. Rick
17 Thoennes III.

18 And we are asking this Court to determine that
19 the entirety of that judgment against Mr. Thoennes
20 III, who's entered in October 2013, is we can
21 execute against it because it's attributable to his
22 oppression that it took place and occurred after he
23 was discharged from bankruptcy.

24 So let me begin just with a very brief
25 chronology. This Court did -- there was a trial

1 followed by an order in May 2010 where this Court
2 ordered all three defendants to buyout Mr. Ballard.

3 Then after that, while that was on appeal, on
4 December 2, 2011, Mr. Thoennes III filed his
5 bankruptcy petition and he was granted a discharge.

6 After that, two years later almost in August of
7 2013, this Court held a hearing to determine the
8 damages from the oppression and determined the
9 buyout amount. That was a valuation hearing in
10 August of 2013.

11 Following that hearing, this Court issued a
12 judgment dated October 3, 2013, for three -- it's
13 now reduced to 3.1 million plus interest.

14 That judgment -- that's a money judgment that
15 we have. That's what the receiver is collecting on.
16 That judgment was entered almost two years after
17 Mr. Thoennes III's bankruptcy discharge.

18 And so when we were attempting to collect on
19 that judgment, we came before this Court. When we
20 originally asked for Mr. Oshea to be appointed and
21 we originally asked for that order for a charging
22 order, Mr. Thoennes III's counsel, Wally, told us
23 that we needed to -- to agree not to pursue that
24 against Mr. Thoennes III because of the discharge.

25 We disagree. We believe that that judgment was

1 fully valid. We could pursue it, but because of the
2 automatic statement, we voluntarily agreed not to do
3 that.

4 And when this Court issued its order appointing
5 Mr. Oshea in April of 2014, it specifically put a
6 footnote on the first page that all the findings of
7 that order apply to Rick Thoennes III, but that the
8 execution, it would not apply as far as executing
9 against him because we had agreed to hold that in
10 abeyance. So that was all put on hold while we
11 would go into bankruptcy court and ask for
12 clarification.

13 So we then filed a proceeding with the
14 bankruptcy court asking the bankruptcy court to rule
15 that its discharge did not apply to that judgment
16 that you entered in October of 2013 for \$3-plus
17 million.

18 The bankruptcy court had a hearing. And at
19 that point, Rick Thoennes III asked the bankruptcy
20 court to discharge your judgment. And we asked the
21 bankruptcy court to rule that we could pursue it.
22 And the bankruptcy court refused to discharge it,
23 Judge.

24 They -- the bankruptcy court specifically ruled
25 that any portion of that October 2013 judgment that

1 is attributable to oppression by Mr. Thoennes III
2 occurring on or after the discharge of December 2,
3 2011, is not discharged.

4 So the bankruptcy court has made that ruling,
5 that any part of your judgment that was based upon
6 oppression after the discharge is not discharged and
7 we are free to pursue.

8 The court also ruled that you are the one in
9 the best position to make that determination of how
10 much oppression was based post-discharge.

11 So that is why we have filed this motion.
12 We're asking you to make that determination. And I
13 actually have two methods that I would like to
14 propose for you to make that determination.

15 The first method is that if you consider the --
16 the valuation hearing that you had in Aug -- August
17 2013, that was to set a value on this company, and
18 that value was set at 7-plus million and
19 Mr. Thoennes III as well as the other two defendants
20 ordered to pay -- we got a judgement for half that
21 amount. That's how much they had to pay over.

22 That judgment amount would not vary based on
23 the amount of oppression, based on the length of
24 oppression. The oppression could've occurred one a
25 day. It could've occurred a thousand days. The

1 valuation is the same, 7 million, buyout
2 three-and-a-half million.

3 For that reason, the fact that the oppression
4 of Mr. Thoennes continued all the way up to that
5 hearing in August 2013, it fully supports the
6 judgment amount, three-and-a-half million. And so
7 under that reasoning, the full judgment amount is
8 based on oppression that occurred after the
9 discharge.

10 And this Court has specifically ruled that the
11 oppression at issue continued all the way to that
12 valuation hearing in August 2013. So the fact that
13 some oppression also existed prior to the discharge
14 is irrelevant. Doesn't matter because he continued
15 to oppress.

16 And if we say, well, the whole judgement's
17 discharged, the bankruptcy court refused to order
18 that. That would -- because essentially that's a
19 license for him to continue his oppression
20 indefinitely, but the bankruptcy court ruled that to
21 the extent he continue his oppression after the
22 December 2, 2011, discharge, then that judgment is
23 valid. And we would submit that the full amount of
24 the judgment is valid.

25 The only alternative method that I would

1 propose this Court consider, I -- I would -- the
2 first one I kind of see is joint and several
3 liability. It's fully liable for all oppression
4 that happened after discharge.

5 The other method I would submit, I would
6 consider more of a time on the risk theory like we
7 see in insurance law. So if we look at the entire
8 period of oppression and then apportion a
9 percentage, well how much of that oppression
10 occurred before discharge and how much of that
11 oppression occurred after discharge?

12 Then that amount that occurred after his
13 discharge continued after that point all the way up
14 to the valuation hearing. That would be the amount
15 of the judgment that we -- that can be enforced
16 against him and it still stands.

17 The way to do that is, I looked at your
18 original May 2010 order where you ruled that there
19 had to be a buyout, and where you found that there
20 was oppression. And the first date that any
21 oppress -- oppressive conduct occurred was October
22 28, 2007.

23 If you read your May 2010 order, it says in
24 paragraph 22 that there was an e-mail on that date
25 by Mr. Thoennes III about getting Mr. Ballard out of

1 the deal. So if we say looking at that finding of
2 fact in the order, the oppression would've started
3 on October 28, 2007.

4 You also ruled that the oppression continued
5 all the way through the valuation hearing on Aug --
6 in August 2013. That ruling specifically made two
7 orders. One was an order appointing receiver; the
8 other was the charging order.

9 So the number of days from October 28, 2007,
10 when the oppression began, to August 6, 2013, when
11 the valuation -- the valuation hearing occurred is
12 2,110 days total period.

13 Now, if we start at the discharge which is
14 December 2, 2011, to that valuation hearing on
15 August 6, 2013, that's 614 days of oppression after
16 the discharge. So dividing 614 into 2,110 which is
17 approximately 29 percent of the judgment which has
18 been reduced to 3.125 million on appeal.

19 So 614 over 2 -- 2110 times 3.125 million
20 equals \$909,360. So if you just look at that
21 percentage apportionment, that would be the amount
22 of the judgment that we can enforce against Rick
23 Thoennes III.

24 We would ask the Court to rule that we can
25 enforce the entire judgment against him based on my

1 first theory, alternative ---

2 THE COURT: If I go with your second theory,
3 does that not then reduce the amount that you can
4 enforce against the other two?

5 MR. WILSON: No, Your Honor. The others did
6 not -- they did not file for bankruptcy, so they are
7 not seeking protection. But because he filed, the
8 bankruptcy judge ---

9 THE COURT: Well, no. What I'm saying is,
10 let's say I go, "Okay. 900,000 against this
11 defendant." Doesn't that impact what the other two
12 owe since it's joint and several liability?

13 MR. WILSON: I would say, Your Honor, that
14 we -- the joint and several liability, they are
15 jointly and severally liable for your judgment. So
16 as soon as we can collect from one, it would reduce
17 the amount that anybody else would have to pay.

18 If you divide that whole judgement by three and
19 they all paid equal shares, it would be, you know, a
20 little bit over 1 million each.

21 I'm not sure if I follow -- if I understand
22 your question correctly, so I apologize if I don't.

23 THE COURT: Well, I would think that Mr. Howard
24 would support your formula, right?

25 MR. FAYSSOUX: No.

1 THE COURT: Would reduce the amount that your
2 client would owe.

3 MR. HOWARD: Your Honor, I -- I don't have a
4 comment on that.

5 MR. WILSON: Your Honor ---

6 THE COURT: Am I wrong about that? If I order
7 1 million against one defendant, the other two then
8 are on the hook for 2 million, two-and-a-half,
9 whatever the fine numbers are.

10 MR. WILSON: Your Honor, as I understand joint
11 and several liability, we can pursue any one of
12 those defendants for the full amount of the
13 judgment -- the judgement against them because
14 they're jointly and severally liable.

15 If one defendant ended up paying, let's say the
16 full judgment, then he could turn around and seek
17 for the other two to contribute to that. But the
18 whole theory as I understand it ---

19 THE COURT: But if I make this ruling, then the
20 other two -- and then he can't collect more than a
21 million from the other two, right? You're asking me
22 to cut this pie into different pieces for each of
23 them to eat.

24 MR. WILSON: Well, I think what I'm asking Your
25 Honor is just for you to rule how much of the

1 judgment applies to post-discharge oppression for
2 Mr. Thoennes III and that that's the amount, but
3 he's been discharged the amount before that.

4 The other two don't have that. They
5 haven't asked -- they have not gone to a bankruptcy
6 court and sought a discharge..

7 THE COURT: Yeah, and they -- the bankruptcy
8 judge punted it.

9 MR. WILSON: She -- she did punt it in a way in
10 the sense that she felt that this Court was in a
11 better position to make this determination, and so
12 she dismissed without prejudice.

13 THE COURT: But our law is joint and several
14 liability.

15 MR. WILSON: I agree, Your Honor.

16 MR. LIGHTSEY: If I may, Your Honor, excuse me.

17 MR. WILSON: Go ahead.

18 MR. LIGHTSEY: The judgement against
19 Mr. Thoennes III would still be the full amount. It
20 would still be the ---

21 MR. WILSON: Right.

22 MR. LIGHTSEY: --- 3.1 million. The issue is,
23 how much of that can we collect in light of the
24 bankruptcy discharge?

25 MR. WILSON: Right.

1 MR. LIGHTSEY: So it doesn't -- whichever, of
2 course, we would -- we would like you to say the
3 whole amount if you did apportion it up on a time on
4 the risk kind of theory. You're broadening --
5 you're not changing the amount of the judgment
6 against Mr. Thoennes III or the others. You're just
7 saying, other than that, the -- the bankruptcy
8 discharge discharges his liability.

9 THE COURT: Well, actually, I would be
10 because -- you're not suggesting that if I
11 apportioned it for him to pay a third of it, that
12 against the other two you could still collect the
13 full amount?

14 MR. LIGHTSEY: Not if we collected that from
15 him.

16 MR. WILSON: Right.

17 MR. LIGHTSEY: Whatever we collected from
18 him ---

19 THE COURT: So it benefits the other two if
20 I ---

21 MR. LIGHTSEY: Correct. But it doesn't affect
22 their -- if we were not able to collect anything
23 from Mr. Thoennes III, we should still be able to
24 collect the entire amount from Mr. Roberson.

25 THE COURT: Right.

1 MR. LIGHTSEY: But, you know, you're right.
2 Whatever we actually collect from Mr. Thoennes III
3 would offset what the others owe.

4 MR. WILSON: Right.. Right.

5 THE COURT: And the same is true of the other
6 two? For instance, if the receiver sold the island,
7 then -- and he got an exorbitant amount for it, the
8 other two would benefit in the reduction of the
9 judgment amount.

10 MR. LIGHTSEY: That's right. And Mr. Roberson
11 could seek contributions from them. But as far as
12 our ability to collect from them, we -- we couldn't
13 double dip. We couldn't recover more than double.

14 But, again, that doesn't -- that doesn't affect
15 the size of the judgment. It's just the amount that
16 we would be entitled to collect from Mr. Thoennes
17 III. If we didn't get any from him or we only got a
18 small amount, the other two could still be on hook
19 for the ---

20 THE COURT: Well, let's say I apportioned it
21 and he paid it, does that relieve him from the
22 judgment?

23 MR. LIGHTSEY: He would be, yes. But combine
24 the fact of your apportionment plus the bankruptcy
25 discharge, he would then have no further liability

1 if we got that from him.

2 THE COURT: Okay. Would you agree with that,
3 Mr. Fayssoux?

4 MR. FAYSSOUX: Only that last statement, I
5 would, Your Honor. But I can say there's
6 considerable heartburn. We don't ever have to ---

7 THE COURT: How long you -- can we -- let's
8 just take about a three-minute break. Is that
9 agreeable with everybody?

10 MR. FAYSSOUX: Yes, sir.

11 MR. LIGHTSEY: Yes, sir.

12 THE COURT: All right.

13 (From 11:30 to 11:34 a.m., a recess was taken.)

14 THE COURT: All right. Let's proceed.

15 MR. FAYSSOUX: Please the Court? Thank you,
16 Your Honor.

17 Your Honor, for -- in case you need it, I'm
18 just going to pass up a brief binder that references
19 two of your previous orders and the bankruptcy
20 judge's order so we can be crystal clear on what she
21 actually said.

22 Your Honor, what -- what is strangely missing
23 from those tortured proposals of allocating the
24 judgement and how you're going to put some of this
25 liability on Mr. Thoennes is a single example of

1 this oppressive misconduct that they say you found.

2 The only thing they talked about was the e-mail
3 from 2007. And the problem is, when I -- when I
4 show you where this is coming from, I think -- I
5 think it's pretty frustrating.

6 Your Honor, here is what happened. Let's go
7 over that chronology of facts again. In 2010, you
8 have the finding of liability, May of 2010, where
9 you essentially said, and the Supreme Court
10 affirmed, there was a freezing out activity by my
11 client, Mr. Thoennes III, Sr., and Mr. Ballard. All
12 right. That's the basis of liability. That's the
13 only merits hearing you had on liability and conduct
14 and what they did.

15 Then you decided that there was going to be a
16 forced buyout of Mr. Ballard's shares. You were
17 going to hold a valuation hearing, according to the
18 record, almost immediately following that finding of
19 liability, but they appealed.

20 And so it went up to the Supreme Court and it
21 was sent back down strictly for a valuation hearing
22 then, which you ultimately had in 2013.

23 Now, Your Honor, in your finding of
24 liability -- excuse me -- so while it's up on the
25 Supreme Court, my client -- not just related to this

1 case. It certainly affected this case, but there
2 were millions of dollars of judgements from the
3 residential building disaster that he was a part of
4 that forced him into bankruptcy.

5 He filed bankruptcy in 2011, almost over a year
6 after your judgment in 2010. And I think it's
7 affirmed by the bankruptcy court in the first of
8 2012. And it discharges all debts. No question
9 about it, it discharges all debts that arose prior
10 to December of 2011, which of course would be this
11 case.

12 Your Honor, it's now sent back from the Supreme
13 Court for a remand specifically on valuation. You
14 had two hearings on that, June of 2013. And one of
15 the court appointed, I think, economists or
16 appraisers had not had an opportunity to finish the
17 report, so you had a brief hearing. No evidence was
18 put in, and then they basically -- you reconvened in
19 August of 2013 strictly for a valuation.

20 If I look at the first tab of your order on Tab
21 No. 1, it clearly says, "This matter is before the
22 Court to determine fair value of the plaintiff's
23 ownership." That's it. It's the only reason you're
24 there in 2013.

25 At that hearing, my client, Rick Thoennes III,

1 is never called to testify by either the plaintiffs
2 or the defendant, offers no testimony whatsoever.
3 Even more than that, his name is not mentioned one
4 single time in the entire transcript. I read it
5 last night. Y'all never talked about Rick Thoennes
6 III.

7 Moreover, you never talked at all about conduct
8 that was continuing and unabated. This new language
9 that's now been plugged in and they're seeking to
10 get around the bankruptcy ruling. In fact, you
11 talked about valuation of the shares, the 50 percent
12 ownership that you allocated to Mr. Ballard.

13 And so the question is, how in the world are we
14 here? How in the world when we've got an order
15 that's so clear that says you're there simply to
16 value the case, how are we now getting around the
17 bankruptcy order and why is Judge Burris so confused
18 about why there's post-bankruptcy conduct?

19 It's because in 2014, there's a sentence
20 inserted in the order appointing receiver. It has
21 nothing to do with continuing conduct.

22 If you look, Your Honor, on tab 2, page -- page
23 3 of tab 2, a sentence is inserted after the
24 valuation, which is why he's there that says, "At
25 the valuation hearing, plaintiff presented

1 undisputed evidence that the conducts of the
2 defendants' previously held shareholder oppression
3 and is continued unchanged until the time of that
4 hearing."

5 Judge, you never found that. You never even
6 addressed that. There isn't a shred of evidence in
7 that transcript of that record. There's no legal
8 order itself in that hearing. It never mentions
9 unabated or additional conduct. And the reason they
10 don't cite the one is there is none.

11 My client hasn't had the first thing to do with
12 Warpath since 2010. He certainly hasn't had the
13 first thing to do with Warpath since 2011. Not an
14 e-mail, not any phone communication, not a
15 negotiation.

16 His only involvement with Warpath since 2010
17 has been to respond to a barrage of schemists,
18 post-judgment discovery, and we were trying to find
19 out whether or not he was hiding interest of his
20 father, secreting money for his father. That's the
21 only involvement he's ever had in Warpath.

22 And so what's happened is, they've inserted a
23 sentence on an order referencing a previous order
24 that somehow magically has you making the finding of
25 continuing misconduct. And that sentence in the

1 order appointing the receiver is the one that they
2 took up to the bankruptcy court.

3 So the bankruptcy judge, you've got her order
4 there. I think it's number five. Your Honor, well
5 they -- they try to -- I guess they tried to get
6 around this bankruptcy ---

7 THE COURT: No. It's not number five.

8 MR. FAYSSOUX: It should be number five, Judge.

9 THE COURT: That's the decision.

10 MR. FAYSSOUX: That's the decision of the
11 bankruptcy judge.

12 THE COURT: Well -- oh, okay. I gotcha.
13 Reported decision.

14 MR. FAYSSOUX: Yes, sir. And if you'll turn
15 all the way, she basically granted summary judgement
16 on all the causes of action that they said to try to
17 get around the debt in subject. Just look at the
18 last page.

19 And she's basically referencing the fact
20 because you found there was undisputed evidence of
21 continuing misconduct by Mr. Thoennes, then you then
22 would have to make a determination of what -- what
23 portion of misconduct continued after the filing of
24 bankruptcy.

25 It's a complete farce, Judge. There was never

1 a hearing on that. There was no evidence of that.
2 There was never a finding of it. It was either
3 mistakenly or artfully put in a different order that
4 had nothing to do with that, and now has come on the
5 entire basis for challenging and basically
6 discarding the whole purpose of the bankruptcy.

7 You know, Your Honor, my client, he -- he took
8 the hit. He filed bankruptcy. He lost everything.
9 He lost his house. He lost all his assets and he
10 started over. And no one's cared about Rick
11 Thoennes III since he filed bankruptcy until he
12 started doing better with his business, which is
13 exactly what bankruptcy is for and what he's
14 supposed to do.

15 He's worked tirelessly since 2012 to
16 re-establish his reputation, re-establish his name.
17 He now has a company called the Rembrey. He's
18 building houses again and he's doing well.

19 And so now they want to take one sentence that
20 never should've been in there in the first place,
21 that there was no evidentiary basis for whatsoever
22 and they want to claw him back in and just disregard
23 the bankruptcy rules altogether.

24 Judge, it -- it is crystal clear on this. We
25 don't need to go to allocations or some sort of

1 tortured valuation process to get around joint and
2 several liability. My client's completely
3 discharged from this debt.

4 They -- not only is there no evidence in the
5 record, right now they can't make a single thing he
6 has done with Warpath, to Warpath, against Warpath
7 since 2007. Certainly, not since 2000 -- excuse
8 me -- 2010, your order, and certainly not since the
9 2011 discharge. He's out. So -- so this is an easy
10 one, Judge. We ask that you deny the motion.

11 THE COURT: Easy?

12 MR. FAYSSOUX: Yes, sir, it is. It's crystal
13 clear, Your Honor.

14 THE COURT: Why didn't he file a third-party
15 action against his codefendants?

16 MR. FAYSSOUX: Why -- why would he file a
17 third-party action against his codefendants?

18 THE COURT: You say he didn't do anything from
19 2007, that he was not part of the ongoing ---

20 MR. FAYSSOUX: I misspoke. I said -- I was
21 saying 2000 -- your order is 2010, Judge.

22 THE COURT: Yeah.

23 MR. FAYSSOUX: Right.

24 THE COURT: But you said his only conduct was
25 in 2007.

1 MR. FAYSSOUX: And I'm sorry. I corrected
2 myself. I misspoke. I meant to say 2010. Because
3 that's the -- obviously, you judged what happened
4 between 2007 and 2010, what you deemed he had
5 conduct along with his partners and around this
6 oppression. You had a finding, the judgment and the
7 ruling on liability. The hearing on the merits was
8 in 2010.

9 He's filing bankruptcy over a year later. It
10 was just a valuation for the liability that you
11 found in 2010. It had nothing to do with anything
12 that might've happened in 2011 or 2012 or going
13 forward, nothing.

14 And -- and -- and what's worse is, even if they
15 wanted to try to do that, they didn't put any
16 evidence in that and you weren't even asked to make
17 a finding of that. It was a sentence plugged in an
18 order six months after that hearing on a different
19 order that just kind of -- kind of relate back and
20 gave a convenient continuing misconduct finding.

21 Not only did you not find it, it never
22 happened. But it's had a pretty significant
23 implications going forward, and that's why we've
24 been on the periphery until now.

25 THE COURT: All right.

1 MR. LIGHTSEY: Your Honor, I need to correct a
2 misstatement Mr. Fayssoux has made and I don't think
3 it was intentional. He wasn't at the hearing. I
4 appreciate that he says he read the transcript.

5 We did put up evidence at the -- at the
6 valuation hearing in 2013 through Mr. Ballard's
7 testimony on the stand that all of the things that
8 the defendants together did, the controlling parties
9 of this company that was held to be oppression by
10 you and affirmed by the Supreme Court, that that had
11 continued up until the time of that -- that hearing.
12 So there is evidence in that transcript.

13 I don't think we named Mr. Thoennes personally,
14 but it was all three of them, that all of that --
15 everything that was -- you found to constitute
16 oppression that the Supreme Court affirmed had
17 continued to that day in 2013. So there is evidence
18 of that. It's completely wrong to say there's no
19 evidence of that.

20 It was all of the things that you talked about,
21 the fact that he hadn't been given any information
22 about the company, no financial information, he was,
23 you know, supposedly elected to the board of
24 directors. They didn't have any directors'
25 meetings, they didn't have any shareholders'

1 meetings. It was all of that. Every -- all of
2 that, and the effect of squeezing him out and that
3 was the oppression and that continued up to the time
4 of the hearing, and that is in the record.

5 MR. FAYSSOUX: Your Honor, he filed bankruptcy
6 in December of 2011. Any benefit he would've had,
7 any form of shareholder in this corporation is gone.
8 He's just completely disgorged of any interest, of
9 any benefit whatsoever in 2011. So how can he now
10 be penalized for something he doesn't even have?

11 They just give that broad-squeaking
12 generalization, "Well, they didn't do what they were
13 supposed to do, so it was continuing misconduct."
14 He -- he had nothing to do with Warpath from 2011
15 on. They -- they can't put a single piece of ---

16 THE COURT: What do you mean he had nothing to
17 do with it?

18 MR. FAYSSOUX: Judge, he was out. For one,
19 number one, he didn't have any shares. He didn't
20 have the shares since 2010.

21 THE COURT: Who had shares?

22 MR. LIGHTSEY: Your Honor, the shares were --
23 the shares were not -- the shares were not sold in
24 the bankruptcy.

25 MR. FAYSSOUX: So those --

1 MR. LIGHTSEY: They were not sold. He's
2 continues to have them, and he continued to be an
3 officer.

4 MR. FAYSSOUX: Right. Your Honor, I invite
5 them to tell just one thing, one act he did, one act
6 he did on behalf of Warpath since 2011, anything,
7 anything. And they can't point to anything.

8 Instead, it's just this one sentence concerning
9 the order that says you made a finding that you
10 never made. And I -- and I respectfully disagree
11 with Mr. Lightsey on that. I've read that
12 transcript. There's no evidence in there talking
13 about misconduct of Rick Thoennes at all.

14 THE COURT: Well, it's the defendants.

15 MR. FAYSSOUX: Even ---

16 THE COURT: It's one entity.

17 MR. FAYSSOUX: But, Judge, even -- okay.

18 Let's -- let's give him credit and say any of the
19 defendants were found to be doing things that
20 amounted to misconduct from 2011 through 2012
21 because that's all you can look at. You're looking
22 at the time you did the valuation order to the time
23 of bankruptcy.

24 That's what the judge is saying, that somehow
25 he had engaged in additional misconduct after the

1 bankruptcy discharge. There's no question
2 everything before it's gone, so he would've had to
3 have done something else after 2011 up until your
4 order of 2013 that amounted to oppression or
5 misconduct or something to that nature.

6 Nobody can identify a single thing he's done
7 because he had nothing to do with the company at
8 that time, absolutely nothing. And -- and the
9 problem is, Judge ---

10 THE COURT: Except that he owned it.

11 MR. FAYSSOUX: Well, Judge, even if you look in
12 the record, it was a valuation hearing. Y'all
13 weren't looking at conduct. That had already been
14 decided. You weren't looking at continuous conduct.

15 I'm sure Mr. Wallace made that -- excuse me --
16 Wallace made that in opening statement that the
17 conduct was continuing. Show me some evidence in
18 that record. Or more importantly, even if there was
19 some sort of evidence in that record, which there's
20 not, show me where you made a finding in the 2013
21 order that that existed. You didn't.

22 It's only in 2014 when they plug that sentence
23 back in there and basically intimated that maybe you
24 did have that finding in the order, even though it's
25 not there and it's not in the transcript. He's

1 discharged, Your Honor, absolutely.

2 THE COURT: Well, I say think if -- if he was
3 discharged absolutely, the Federal bankruptcy court
4 would've said that.

5 MR. FAYSSOUX: Because she looked at the one
6 order that they -- was part of the evidence they
7 presented, which was your order appointing
8 Mr. Oshea. And it's almost like an afterthought.
9 You're there. You find a valuation hearing.
10 Appointing Mr. Oshea has nothing to do with
11 continuing misconduct.

12 There's one sentence plugged in there that
13 says, "Oh, yeah, and at that last hearing, I found
14 that conduct was continuing," and that's what she
15 looked at.

16 And so she said, "Okay. Well, since you made
17 that finding, then you're in the best position to
18 decide what portion of this \$3 million judgement is
19 attributable to whatever my client did between 2 --
20 the end of 2011, basically 2012, and several months
21 into 2013, which is nothing.

22 Even if you -- even if you had a complete
23 merits hearing on it, Your Honor, and we started
24 back right now, that's essentially what we have to
25 do, is you have to have a new trial on what type of

1 conduct my client ---

2 THE COURT: He owned it.

3 MR. FAYSSOUX: Sir?

4 THE COURT: He owned it. He owned the shares
5 in the company.

6 MR. FAYSSOUX: Well, he ---

7 THE COURT: Look, I don't mean to imply
8 anything other than just using old adage, but when
9 you lie down with dogs, you get up with fleas. You
10 can't just come back later and say, "No. I didn't
11 have it."

12 MR. FAYSSOUX: Sure, Your Honor. Okay. I
13 agree with that. If you're guilty because you own
14 it, then you're guilty because you own it.

15 But what is the new act since the discharge?
16 Because there's no question under the bankruptcy,
17 that liability, that act arose, or whatever happened
18 initially that caused you to rule against him at the
19 initial 2010 hearing.

20 So it's not some sort of continuing thing just
21 because you found he oppressed in 2010. He
22 automatically does it through 2013. He has to have
23 some additional act. That's what the bankruptcy law
24 and the bankruptcy judge is saying, that if you
25 really did find that, then you have to determine

1 what those additional new acts were. He didn't do
2 anything new.

3 THE COURT: She's ordering me to do something
4 like that?

5 MR. FAYSSOUX: Yes, sir.

6 THE COURT: She has the jurisdiction and the
7 authority to order me to do that?

8 MR. FAYSSOUX: I don't know if she does, Your
9 Honor. I don't think she has the jurisdiction
10 certainly not to make you make an additional finding
11 or a finding you never made in the first place.

12 It's a mess. And it would've been discharged
13 by way of summary judgment at the bankruptcy court
14 level. There's no question about it. You can read
15 the order. It would've totally been discharged at
16 the bankruptcy level, except for this one sentence
17 that's pulled out of the order appointing receiver.
18 It doesn't have anything to do with it, and it's
19 pulled out and that's the basis.

20 THE COURT: She -- so that's her understanding?

21 MR. FAYSSOUX: Her understanding of what she
22 thought you found. She said that you litigated --
23 let me find the quote in here, Your Honor, so that
24 I'm not speaking out of turn.

25 It says, "The Court noted there was undisputed

1 evidence of conduct the defendants previously held
2 to conduct share -- to constitute shareholder
3 oppression that has continued and unchanged and
4 unabated until the time of the hearing."

5 All right. She's citing the receiver order
6 there, not the order of valuation.

7 Okay. "Therefore, the conduct resulting in
8 final judgment was not abated post-petition."

9 She's quoting you. And then she goes on to say
10 that this can't be answered through summary
11 judgment, that it's best to be done at the state
12 court level. You heard the evidence and apply the
13 law resulting in the trial court order. You're in a
14 better position to make this determination in an
15 efficient manner, and that's the only appropriate
16 form that may be appropriate.

17 THE COURT: But, you know ---

18 MR. FAYSSOUX: I'm sorry.

19 THE COURT: No. Go ahead.

20 MR. FAYSSOUX: I mean, even if we were to reset
21 and go back to that date, still invite them to tell
22 me something that he has done, but he owned it. But
23 that act of owning -- the act of owning it, if that
24 amounted to oppression just owning it and being with
25 the wrong people, if that amounted to oppression,

1 then there's no question that that act is discharged
2 because that act occurred before and arose before
3 2011. It's discharged.

4 THE COURT: Which is why I asked you why didn't
5 he take an affirmative action to distance himself
6 from the defendants who you apparently are saying
7 are the ones at fault? Why didn't he take -- why
8 didn't he file a third-party action against the
9 other defendants, some other action to get himself
10 distanced from this LLC?

11 MR. FAYSSOUX: Your Honor, I think -- honestly,
12 I don't know what else he thought he could do
13 because he was no longer actively participating at
14 all in the LLC.

15 THE COURT: Extricate himself.

16 MR. FAYSSOUX: Well, I guess he could've filed
17 a notice of dissolution.

18 But if we look at it like this, Your Honor, he
19 had -- if he had some ownership in the LLC or the
20 corporation, well, number one, the shares were
21 escrowed so he didn't have the shares yet, which
22 meant he had a right to have the shares if he had --
23 think about that.

24 If he -- if he had done certain things, build
25 the property, obtain financing, which it wasn't his

1 job, then maybe he could've earned those portions of
2 the shares that he would've been entitled to. But
3 he didn't do any of that. He wasn't part of that,
4 Your Honor.

5 And, quite frankly, if it was an asset, if
6 there was some value in it, if it was anything to
7 him being a part of that entity or corporation, he
8 would've given that up in the bankruptcy.

9 He had nothing to gain or nothing to benefit
10 from which is why he literally had nothing to do
11 with this hearing until -- or this case. You know,
12 from the appellate's standpoint at going forward,
13 he's not been a party. I mean, he's not even
14 participated in any of the testimony until we got
15 clawed back in. I firmly believe, Your Honor, you
16 should deny the motion.

17 THE COURT: Okay.

18 MR. LIGHTSEY: A couple of very brief points.
19 He was a party. He was represented by counsel. He
20 was a party to the appeal. Those findings in the
21 2014 orders were immediately appealable. They
22 could've appealed those. They didn't. Those are
23 now the law in the case, and so you don't have to
24 have another merits hearing on that. That's the law
25 of the case.

1 As far as the evidence that we presented in the
2 2013 hearing, to place that in context, that wasn't
3 just gratuitous evidence. You may recall there was
4 a legal issue that we discussed about what time
5 should the valuation be, should -- should the
6 valuation of the company be as of 2010? Should it
7 be as of the present?

8 And so we very deliberately consciously put in
9 evidence at that hearing that the conduct you found
10 to be oppression that continued up until that time,
11 so that that would support a -- a damages as of that
12 time, and I believe that is what the Court found in
13 determining the damages. So there was a reason for
14 that. It is in the record. It is a finding that
15 was made in 2014. That finding was not appealed,
16 and it's law of the case.

17 THE COURT: Okay. All right. Is that all the
18 motions?

19 MR. LIGHTSEY: It's Mr. -- Mr. Howard's motion.

20 THE COURT: It might be moot at this point,
21 but...

22 MR. HOWARD: I don't think it's moot. I think
23 that ---

24 THE COURT: No. Go ahead.

25 MR. HOWARD: Your Honor, we've moved that a

1 Rule 60(B)(5) motion for relief of judgement based
2 on the inequity of this prospective judgment
3 continuing at this point.

4 The basis of the debt -- the basis of it is
5 stated in Mr. Roberson's affidavit. We -- we rest
6 on the affidavit. We rest on the -- the -- the
7 evidence that's been in the record throughout this
8 about the -- as I stated earlier, about all the
9 evidence that Mr. Roberson has put into place to try
10 to make this happen, to try to bring this
11 development to bear.

12 It has not happened. It was unilaterally
13 removed by Duke Energy. And based off of Duke
14 Energy's actions and unilaterally taking away the
15 lease, it's left the corporation of Warpath
16 Development asset-less at this point.

17 The lease was the most significant asset of the
18 company. It's the only -- it was the only quite --
19 it was the only thing that gave right to development
20 of the land and -- and now it's gone.

21 So based off of Rule 60(B)(5), there's not a
22 lot of case law in South Carolina on it. There's a
23 fairly large amount of case law in the -- in Federal
24 courts on Rule 60(B)(5). It's the exact same as
25 the -- as the Federal rules of civil procedure.