In The

Supreme Court of Virginia

RECORD NO. 140112

NANCY C. JIMENEZ,

Appellant,

v.

LEWIS S. CORR, JR., Individually, LEWIS S. CORR, JR., as Executor of the ESTATE OF NORMA F. CORR, and as Trustee under the NORMA F. CORR REVOCABLE TRUST, THOMAS WILLIAMS, as Executor of the ESTATE OF NORMA F. CORR, and as Trustee under the NORMA F. CORR REVOCABLE TRUST, and CAPITOL FOUNDRY OF VIRGINIA, INC.,

Appellees.

BRIEF OF APPELLEE LEWIS S. CORR, JR., INDIVIDUALLY WITH ASSIGNMENT OF CROSS-ERROR

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

ASSIGNMENT OF CROSS-ERROR
ASSERTED BY ALL APPELLEES 6

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES
RELATING TO ASSIGNMENTS OF ERROR & CROSS-ERROR 6

A. THE TRIAL COURT CORRECTLY REFUSED TO APPLY SUBPARAGRAPH 3(A) OF THE SHAREHOLDERS' AGREEMENT, BUT ERRED IN DECLINING TO RULE THAT SUBPARAGRAPH 3(A) IS TOO UNCERTAIN TO BE ENFORCEABLE 6

B. THE TRIAL COURT PROPERLY CONSTRUED SECTION 3(D) OF THE SHAREHOLDERS' AGREEMENT TO GIVE EFFECT TO – NOT SILENTLY OBLITERATE – MOTHER'S LONGSTANDING ESTATE PLANNING INSTRUMENTS 7

1. Standard of Review 7

2. The Trial Court Properly Understood its Task of Interpretation: Ascertaining the Parties' Intent through the Words of the Contract, Viewed in Light of the Context, Circumstances and Conditions of the Parties Who Executed It 8

3. The Trial Court's Construction Correctly Applies the Plain Words of the *Entire* Contract in their Stipulated and Undisputed Context 12

4. Overwhelming Evidence Was Adduced at Trial to Establish that the Parties, by Executing the Shareholders' Agreement, Did Not Intend to Wipe Out Existing Estate Planning Documents 17

(a) The Undisputed Evidence Demonstrated that the Shareholders' Agreement Addressed a Specific Concern, Unrelated to Invalidating Signatories' Existing Estate Plans 19

(b) The Overwhelming Weight of the Evidence Demonstrated Mrs. Corr's Unwavering Intent to Preserve Her Son's Purchase Option – Both Before and After Signing the Shareholders' Agreement 24

C. THE TRIAL COURT PROPERLY RULED THAT CORR EFFECTIVELY EXERCISED THE CORR STOCK OPTION 38

CONCLUSION AND STATEMENT OF RELIEF SOUGHT 39

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

Page(s)

CASES

Caplan v. Bogard,
264 Va. 219, 563 S.E.2d 719 (2002) 8

Carmody v. F.W. Woolworth Co.,
234 Va. 198, 361 S.E.2d 128 (1987) 8

Cascades North Venture Ltd. Partnership v. PRC Inc.,
249 Va. 574, 457 S.E.2d 370 (1985) 19

Eure v. Norfolk Shipbuilding & Drydock Corp.,
263 Va. 624, 561 S.E.2d 663 (2002) 17

Fletcher v. Fletcher,
253 Va. 30, 480 S.E.2d 488 (1997) 15

Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc.,
200 Va. 593, 106 S.E.2d 595 (1959) 19

Hooper v. Musolino,
234 Va. 558, 364 S.E.2d 207 (1988) 13

Online Resources Corp. v. Lawlor,
285 Va. 40, 736 S.E.2d 886 (2013) 7, 18

Preferred Sys. Solutions, Inc. v. GP Consulting, LLC,
284 Va. 382, 732 S.E.2d 676 (2012) 7, 17

Schockey v. Westcott,
189 Va. 381, 53 S.E.2d 17 (1949) 19

Schuiling v. Harris,
286 Va. 187, 747 S.E.2d 833 (2012) 9

Tuomala v. Regent Univ.,
252 Va. 368, 477 S.E.2d 501 (1996) 8

Virginia Elec. & Power Co. v. Norfolk S. Ry. Co.,
278 Va. 444, 683 S.E.2d 517 (2009) 7, 8, 18

TREATISES

5 Arthur L. Corbin, Joseph M. Perillo, & Margret N. Knifflin,
Corbin on Contracts, § 24.7 (rev. ed. 1998 & Supp. 2012) 11

11 Samuel L. Williston & Richard A. Lord,
A Treatise on the Law of Contracts, § 30:6
(4th ed. 2012 & Supp. May 2014) 11

Bogert, *The Law of Trusts and Trustees*, § 961 (rev. 2d ed. 1983) 15

OTHER AUTHORITY

American Law Institute,
Restatement (Second) of Contracts, § 202 (1981) 10

BRIEF OF APPELLEE
LEWIS S. CORR, JR., INDIVIDUALLY

COMES NOW appellee Lewis S. Corr, Jr., individually (hereinafter referred to in this capacity as "Jim Corr"), by counsel, and for his response to the brief of appellant Nancy Jimenez ("Jimenez"), respectfully states as follows.

STATEMENT OF THE CASE

Jim Corr adopts the Statements of the Case set forth by: (a) appellees Lewis S. Corr, Jr., and Thomas Williams in their capacities as Executors and Trustees (hereinafter the "Executors/Trustees"), Br. of Appellees Lewis S. Corr, Jr., and Thomas Williams as Executors and Trustees, at 1-4 (hereinafter "Ex./Tr. Br."); and (b) Capitol Foundry of Virginia, Inc. (the "Company"), Br. of Appellee [Company], at 1-3 (hereinafter "Co. Br.").[1]

STATEMENT OF FACTS

Jim Corr adopts the Statements of Facts of the Executors/Trustees, Ex./Tr. Br. at 4-6, and the Company, Co. Br. at 4-7, and submits the following, additional statement of background facts to supplement them.

---

[1] Defined terms in these incorporated statements of the case and statements of facts, such as "Will," Trust," and "Corr Stock Option," are used in the same manner in this brief.

In 1970, after years of experience working for others in the foundry business, Lewis S. Corr, Sr. ("Mr. Corr") – the father of Jimenez and Jim Corr, and husband of the decedent – founded Capitol as a broker and reseller of castings for heavy infrastructure, such as stormwater and wastewater utilities. 1 Tr. 177, 1 JA 407. The business was incorporated in 1976, with Mr. Corr initially the sole shareholder. Jt. Stip. ¶ 1, 1 JA 136.

In 1976, Jim Corr was invited by his father to join the family business. Jim worked in virtually every aspect of it – from the "yard" where inventory was stored, to the front office – and was ultimately made Vice President. In late 1981, Mr. Corr agreed to allow Jim to become a shareholder in the company, permitting him to purchase five newly-issued shares. 1 Tr. 178-79, 1 JA 408-09.

Earlier in 1981, Jim's younger sister, Jimenez, needed a job. Mr. Corr hired her to handle clerical tasks including accounts payable and receivable. 1 Tr. 42-43, 180, 1 JA 272-73, 410.

In 1992, Mr. Corr and Mrs. Corr, on the advice of their longtime attorney, retained Lewis W. Webb, III ("Webb") to advise them on estate planning and business succession issues. After several months of discussions, the couple executed "mirror-image," "pour over" wills and trusts, including the Will and Trust at issue. 1 Tr. 140, 1 JA 370.

Pursuant to each of the mirror-image wills, the decedent's assets "pour over" into the decedent's trust at death. Each trust has as its beneficiaries the three Corr children: Jim Corr, Jimenez, and their sister Patricia. Assets that "pour over" into the trust are divided into three equal shares, one for each child. Each trust grants Jim Corr an option to purchase some or all of the shares of Company stock owned by the trust, utilizing the cash Jim otherwise would inherit from the trust. In effect, the parents' trusts provided Jim the opportunity to "spend his inheritance" to acquire a controlling interest in the Company after the death of the last parent to die, with the proceeds going (via the trust) to his sisters. Jt. Exs. 1, 2, 4, 5; 1 JA 143-52, 153-74, 184-93, 194-218.

Mr. Corr passed away on December 30, 1999. His shares of Company stock were transferred to Mrs. Corr outright by the executors of Mr. Corr's estate. Jt. Stip. ¶ 8, 1 JA 137; 1 Tr. 168, 1 JA 398.

Following her father's death, Jimenez repeatedly insisted that Mrs. Corr give five of the shares of Company stock owned by Mrs. Corr to her, so that Jimenez's ownership would be equal to her brother's. 1 Tr. 165, 173, 1 JA 395, 403. Both Mrs. Corr and Jim Corr were concerned that, if such a gift were made, Jimenez might seek to sell the shares and thereby

transfer ownership of a portion of the family business to outsiders. 1 Tr. 188, 1 JA 418.

Accordingly, Jim Corr, acting at his mother's direction, asked the Company's regular counsel, Lawrence R. Siegel ("Siegel"), to prepare instruments to give the Company a "right of first refusal" in the event that Jimenez sought to sell shares gifted to her. 1 Tr. 189-90, 1 JA 419-20. The result of the request was the Shareholders' Agreement, executed on December 16, 2002. Jt. Stip. ¶ 4, 1 JA 137.

Siegel and Jim Corr each testified unequivocally at trial that at no time during the making of the request for, drafting of, or discussion of what became the Shareholders' Agreement was there any request or suggestion that it was intended to, would, or should supersede or otherwise have any impact upon the estate planning documents of Mrs. Corr. 1 Tr. 114-15 (Siegel), 192 (Corr), 1 JA 344-45, 422. Mr. Siegel did not draft the Shareholders' Agreement to supersede these estate planning documents or otherwise affect them in any way. 1 Tr. 113-15, 1 JA 343-45.

Webb testified at trial that he had a 20-year-long estate planning relationship with Mrs. Corr and that she treated him as a *confidante* with whom she shared her concerns regarding her children and strife in the family. 1 Tr. 162-63, 1 JA 392-93. Webb testified unequivocally that Mrs.

Corr never indicated to him any interest in superseding or altering, or intention to supersede or alter, her estate planning documents. 1 Tr. 159-62, 1 JA 389-92. To the contrary, Webb testified to, and authenticated correspondence with his client and other documents in his files that confirmed, Mrs. Corr's continuing understanding, *after* the execution of the Shareholders' Agreement, that the stock purchase option granted to her son Jim through her Trust remained in full force and effect, and her continuing intention that Jim should have control and ownership of the business when she was gone. 1 Tr. 155-56, 1 JA 385-86.

Webb also testified to, and identified numerous documents relating to, efforts he made to assist Mrs. Corr and her children with potential modification of her estate planning documents and business succession plans in the face of strife within the family. These efforts included a family meeting in October, 2005, in which Mrs. Corr, Jim Corr, Jimenez and Tricia all participated. The upshot of all of these efforts, however, was that Mrs. Corr elected to make no changes whatever to the Will or the Trust. 1 Tr. 156-60, 1 JA 386-90.

ASSIGNMENT OF CROSS-ERROR
ASSERTED BY ALL APPELLEES

1. The trial court erred by failing to rule that subparagraph 3(a) of the Shareholders Agreement is not enforceable, on the ground that it is uncertain with regard to material terms. 1 Tr. 115-23, 219, 1 JA 345-53; Final Order, ¶ 3, at 2, 2 JA 575-76.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES
RELATING TO ASSIGNMENTS OF ERROR & CROSS-ERROR

A. THE TRIAL COURT CORRECTLY REFUSED TO APPLY SUBPARAGRAPH 3(A) OF THE SHAREHOLDERS' AGREEMENT, BUT ERRED IN DECLINING TO RULE THAT SUBPARAGRAPH 3(A) IS TOO UNCERTAIN TO BE ENFORCEABLE (ASSIGNMENT OF ERROR IV AND ASSIGNMENT OF CROSS-ERROR I)

The threshold, and case-dispositive, question posed in this appeal is whether the "mandatory purchase on death" provision of the Shareholders' Agreement is enforceable at all, in the face of its obvious and incurable uncertainty as to material terms. If this provision is not enforceable, there is no relief that Jimenez may be afforded in this action, and the trial court's decision must be affirmed.

The Executors/Trustees and the Company have addressed this threshold issue at length on brief. Ex./Tr. Br., Section IV.A, at 7-22; Co. Br., Section V.B, at 18-26. Jim Corr adopts these arguments (including the discussions of the standard of review) in their entirety.

B. THE TRIAL COURT PROPERLY CONSTRUED SECTION 3(D) OF THE SHAREHOLDERS' AGREEMENT TO GIVE EFFECT TO – NOT SILENTLY OBLITERATE – MOTHER'S LONGSTANDING ESTATE PLANNING INSTRUMENTS (ASSIGNMENTS OF ERROR I, II, III, VI, VII, VIII)

1. Standard of Review.

This issue presents mixed questions of law and fact, as to which there are distinct standards of review. "Ordinarily, it is the duty of the court to construe a written contract when it is clear and unambiguous on its face," *Online Resources Corp. v. Lawlor*, 285 Va. 40, 54, 736 S.E.2d 886, 893-94 (2013), and construction poses a question of law as to which review in this Court is *de novo*, *Virginia Elec. & Power Co. v. Norfolk S. Ry. Co.*, 278 Va. 444, 458, 683 S.E.2d 517, 525 (2009). "[B]ut when a contract is ambiguous it is necessary to resort to parol evidence to ascertain the intention of the parties," *Online Resources*, 285 Va. at 54, 736 S.E.2d at 893-94.

The threshold determination of whether the contract is ambiguous is, in and of itself, a question of law for the Court, reviewed *de novo. Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 391, 732 S.E.2d 676, 680 (2012). Once the trial court has determined that there is ambiguity, and considered parol evidence in aid of construction, a mixed question of law and fact is posed, and this Court "give[s] deference

to the trial court's factual findings and view[s] the facts in the light most favorable to . . . the prevailing parties below, in order to review the trial court's application of the law to the facts." *Caplan v. Bogard*, 264 Va. 219, 225, 563 S.E.2d 719, 722 (2002) (citing *Carmody v. F.W. Woolworth Co.*, 234 Va. 198, 201, 361 S.E.2d 128, 130 (1987)). *See also Tuomala v. Regent Univ.*, 252 Va. 368, 375, 477 S.E.2d 501, 505 (1996) ("[w]e review the evidence in the light most favorable to . . . the prevailing party at trial").

2. The Trial Court Properly Understood its Task of Interpretation: Ascertaining the Parties' Intent through the Words of the Contract, Viewed in Light of the Context, Circumstances and Conditions of the Parties Who Executed It.

The essence of Jimenez's attack on the trial court's interpretation of the Shareholder's Agreement is to suggest that the Court failed to conduct a narrow and mechanistic grammatical analysis of the single sentence of that agreement which Jimenez insists should have been the only permissible focus of the trial court's inquiry. In so doing, Jimenez mischaracterizes both what the trial court did below, and what this Court has instructed trial courts to do when they interpret contracts.

"[T]he primary focus in considering disputed contractual language is for the court to determine the parties' intention." *Virginia Elec. & Power*, 278 Va. at 458, 683 S.E.2d at 525. In searching for intention, however, this

Court's jurisprudence does not demand that trial courts undertake a narrow and rigid linguistic analysis, donning blinders as to the context and circumstances in which the parties' agreement was forged. Quite to the contrary:

> We review a circuit court's interpretation of a contract de novo and "'have an equal opportunity to consider the words of the contract within the four corners of the instrument itself.'" [citations omitted]
>
> > The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.
>
> [citations omitted] We construe the contract as a whole, giving therms their ordinary meaning *unless some other meaning is apparent from the context.* [citation omitted] The various provisions are *harmonized*, giving effect to *each* when reasonably possible, *and are construed considering the circumstances under which they were executed and the condition of the parties.* [citation omitted]

Schuiling v. Harris, 286 Va. 187, 192-93, 747 S.E.2d 833, 836 (2012) (emphases added).

This Court's formulation of the task of interpretation as something more than mechanistic grammatical parsing of isolated phrases is squarely within the mainstream of the Anglo-American common law of contract, as

reflected in virtually every authority. Consider, for example, the *Restatement (Second)*:

> **§ 202. Rules in Aid of Interpretation**
>
> * * *
>
> (2) Words and other conduct are interpreted *in the light of all the circumstances*, and if the *principal purpose* of the parties is ascertainable it is given *great weight*.
>
> * * *
>
> *Comments:*
>
> (b) *Circumstances.* The meaning of words and other symbols commonly depends on their context; the meaning of other conduct is even more dependent on the circumstances. In interpreting the words and conduct of the parties to a contract, *a court seeks to put itself in the position they occupied at the time the contract was made.* When the parties have adopted a writing as a final expression of their agreement, *interpretation is directed to the meaning of that writing in the light of the circumstances.* See §§ 209, 212. The circumstances for this purpose include *the entire situation*, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know. *See* § 201.

American L. Inst., *Restatement (Second) of Contracts*, § 202 (1981) (emphases added).

Professor Corbin's treatise reaches precisely the same conclusion. In answering a self-posed question, "are words [in a contract] ever so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation," he is emphatic:

> It is therefore *invariably necessary*, before a court can give any meaning to the words of a contract and can select a single meaning rather than other possible ones as the basis for the determination of rights and other legal effects, *that extrinsic evidence be admitted to make the court aware of the "surrounding circumstances*,*"* including the persons, objects, and events to which the words can be applied and which caused the words to be used.

5 Arthur L. Corbin, Joseph M. Perillo, & Margret N. Knifflin, *Corbin on Contracts*, § 24.7 (rev. ed. 1998 & Supp. 2012) (emphasis added).

Professor Williston's treatise is similarly unequivocal:

> **§ 30:6. Ambiguity as a prerequisite to interpretation and construction—Interpretation and construction of unambiguous written contracts.**
>
> * * *
>
> While unambiguous contract language is generally interpreted without resort to extrinsic evidence, *it need not be interpreted in a vacuum*; the underlying goal in interpreting a contract is to ascertain the intent of the parties, and *the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent.* Moreover, the test for determining the meaning of contract language is not what the parties intended it to mean but what a reasonable person in the position of the parties when the contract was entered, *aware of all relevant circumstances,* would have thought it meant.

11 Samuel L. Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 30:6, at 108-13 (4th ed. 2012 & Supp. May 2014) (emphasis added).

Far from shirking some narrowly-conceived duty to do nothing more than diagram a single sentence, the trial court did just as this Court and

these authorities suggest. It analyzed the contract at issue in light of the known context, circumstances and condition of the parties. And for good measure, it also permitted the development of a full record of extrinsic evidence of the parties' intent that could be considered by both it and, in the event of appeal, this Court. While the trial court did not make a detailed set of formal findings of law and of fact on the record, it is unmistakable from the language of the court's final order and its discussion of the merits from the bench that the court analyzed subparagraph 3(d) of the Shareholders' Agreement from each of these frames of reference – and determined that the proper conclusion regarding the parties' intent was the same *regardless* which interpretive route was pursued. The trial court's analysis is sound and should not be disturbed on appeal.

3. The Trial Court's Construction Correctly Applies the Plain Words of the *Entire* Contract in their Stipulated and Undisputed Context.

Jimenez's argument, at its core, is that the absence, in subparagraph 3(d) of the Shareholders' Agreement, of a *specific* reference to a trust for the benefit of "immediate family" members *must* be construed silently to render ineffective the known, undisputed, longstanding estate planning instruments of one of the signatories (indeed, the nearly 90%

shareholder). Such a reading finds no support in the larger contract itself, even if viewed in absolute isolation; it is untenable when viewed in context.

"A contract must be construed *as a whole* to determine the parties' intent with respect to specific provisions." *Hooper v. Musolino*, 234 Va. 558, 569, 364 S.E.2d 207, 212 (1988) (emphasis added). Taken as a whole, however, there is simply nothing in the Shareholders' Agreement from which the trial court remotely could have discerned an intent to upend the existing estate plans of the signatories.

First, the language of subparagraph 3(d) that precedes the definition of "immediate family" expresses an unmistakable intent to grant shareholders broad rights of transfer within their respective families. The opening sentence of subparagraph 3(d) itself states a right in purposefully broad terms: "An Agreeing Shareholder *shall have the right* to convey or bequeath his/her shares to a member of such Agreeing Shareholder's immediate family." Sh. Agmt., ¶ 3(d) (emphasis added); 1 JA 177. That right, moreover, exists both in life and after death, permitting both *inter vivos* conveyances and testamentary dispositions: "Such *right* shall apply during such Agreeing Shareholder's lifetime and shall also apply subsequent to the demise of such Agreeing Shareholder, and then be applicable to such Agreeing Shareholder's executor or administrator." *Id.*

(emphasis added). And lest there be any question of the primacy of this broad right over the "mandatory sale" provisions of subparagraph 3(a), the first words of subparagraph 3(a) provide an explicit "carve-out": "Subject to subparagraph (d) hereof . . . ." Sh. Agmt. ¶ 3(a), JA 176.

The plain language of subparagraph 3(d) itself thus makes clear the parties' intent to create a broad right of familial conveyance, applicable both in this life and thereafter. The definition of "immediate family" comes, textually, only *after* the broad right has been pronounced, and there is no reason to read it as placing a restriction upon the broad right it follows; there are no words to suggest that the four simple categories of permitted recipients ("children, spouses, parents and siblings") must be read to restrict the *means* by which conveyances to persons in those categories may be made.[2]

When the focus shifts to the Agreement as a whole, one searches in vain for any indication of an intent to limit Agreeing Shareholders' choices in estate planning tools, let alone invalidate *existing* estate planning

[2] The brief listing of family members, by category, obviously is less detailed than an exhaustive "catalog" that sought to deal with relationships in minute detail – distinguishing, for instance, among degrees of sanguinity (such as half siblings) and relations (such as stepparent) created by marriage. This absence of detail reinforces the conclusion that the "immediate family" definition was not intended to restrict the broad right articulated in the preceding two sentences.

documents of the signatories. The Agreement's recitals relate only a "mutual[] desire" to "provide for" the purchase of shares in the event of a shareholder's desire to dispose of them during lifetime, death, or disability. Sh. Agmt. recital B, 1 JA 175. It is impossible to discern from this generalized purpose any intent to invalidate the signatories' own estate plans.

It is entirely appropriate, in light of broad right of conveyance granted through subparagraph 3(d) and the absence of any textual basis for reading a hypertechnical restriction into that right, to construe subparagraph 3(d) as contemplating conveyance to an immediate family member both outright, or through a common estate planning instrumentality such as a trust for that family member's benefit.

Contrary to Jimenez's argument on brief, the trustee of such a trust does not become an impermissible "owner" of the stock. The trustee holds mere legal title; he or she "is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument." *Fletcher v. Fletcher*, 253 Va. 30, 35, 480 S.E.2d 488, 491 (1997) (quoting Bogert, *The Law of Trusts and Trustees*, § 961, at 2 (rev. 2d ed. 1983)). Equitable title rests in the family member who is the beneficiary; each child's share is

held separately and vests *immediately* in him or her; and all principal of and income from that share is reserved exclusively for his or her support and maintenance. Trust, art. IV.B.3, 1 JA 23.

Moreover, it is instructive to note that the trustee for a beneficiary need not *ever* become vested with any title to stock at all; thus the evil Jimenez seeks to combat is a hypothetical one, not an inevitability. Mrs. Corr's Will specifically provides for direct distribution to her beneficiaries, bypassing the trust entirely:

> In the event any of [the] property given, devised or bequeathed to the Trustee of such trust agreement is, under the terms of such trust agreement, to be distributed immediately to any beneficiary thereof, outright and free of trust, then such property may be transferred *directly* to such beneficiary by my Executor, *without the necessity of passing through such trust.*

Will, art. VII, second para., 1 JA 146 (emphases added).

As the Company has argued at greater length on brief, Co. Br., Section V.A.3, at 15-18, the fact that the stock may pass directly from executor to child, without moving through the Trust, undercuts entirely the hypertechnical, hypothetical argument advanced by Jimenez on brief.

4. Overwhelming Evidence Was Adduced at Trial to Establish that the Parties, by Executing the Shareholders' Agreement, Did Not Intend to Wipe Out Existing Estate Planning Documents.

As argued in the preceding section, analysis of subparagraph 3(d) and the larger Shareholders' Agreement of which it is a part, even undertaken in isolation, provided ample opportunity for the trial court to find no expression of intent on the part of the parties to destroy their own estate planning documents. The trial court, however, did not stop there; it also permitted the development of a record of extrinsic evidence in the event it determined that subparagraph 3(d) is ambiguous – and that record provides overwhelming evidence that the parties harbored no such intention.

While the trial court did not make a specific finding that subparagraph 3(d) is ambiguous, it certainly could have justified doing so. As this Court has instructed as recently as last Term, the essence of ambiguity lies in the possibility that a text may be understood in more than one way:

> "Whether the language of a contract is ambiguous is a question of law that we review de novo." *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 391, 732 S.E.2d 676, 680 (2012). We have said that "[c]ontract language is ambiguous when 'it may be understood in more than one way or when it refers to two or more things at the same time.'" *Id*. (quoting *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 632, 561 S.E.2d 663, 668 (2002)). Ordinarily, it is the duty of the court to construe a written contract when it is clear and

> unambiguous on its face, but when a contract is ambiguous it is necessary to resort to parol evidence to ascertain the intention of the parties.

Online Resources, 285 Va. at 54, 736 S.E.2d at 893-94; *see also Va. Elec. Power*, 278 Va. at 460, 683 S.E.2d at 526 ("[a]n ambiguity exists when the contract's language is of doubtful import").

In the known, stipulated, and undisputed context within which the Shareholders' Agreement was executed – coming against a backdrop in which mirror-image estate planning instruments, including trusts into which company stock would flow at death, had been executed by both parents and had remained in place, undisturbed, for a decade – subparagraph 3(d)'s use of the generic terms "children, spouses, parents and siblings," without including a specific reference to trusts benefitting such persons, may be read as ambiguous as to on the status of such trusts as permitted transferees. The definition may be read to include trusts, as nothing more than a common vehicle to accomplish transfers to such persons – or it may be read, by want of a specific mention, to exclude them.

When a threshold finding of more than one possible reading is made, it is not merely permissible, but necessary, to consider parol evidence:

> [T]he rule excluding parol evidence has no application where the writing on its face is *ambiguous, vague, or indefinite*. In such a case, the proper construction of the contract is an issue for the trier of fact, and the court should receive extrinsic evidence to ascertain the intention of the parties and to establish the real contract between them.

Cascades North Venture Ltd. Partnership v. PRC Inc., 249 Va. 574, 579, 457 S.E.2d 370, 373 (1995) (emphasis added) (citing *Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc.*, 200 Va. 593, 596, 106 S.E.2d 595, 597 (1959); *Schockey v. Westcott*, 189 Va. 381, 389, 53 S.E.2d 17, 20 (1949)).

The trial court did precisely that, permitting the parties to develop a record of extrinsic evidence relating to the parties' intent. That record included the testimony of the drafters of all of the instruments that must be read together, the testimony of every living signatory, and testimony and documents evidencing communications with Mrs. Corr, the one signatory no longer available to testify. Collectively, this evidence provides a powerful aid to the true task of interpretation, discerning the parties' intent.

(a) The Undisputed Evidence Demonstrated that the Shareholders' Agreement Addressed a Specific Concern, Unrelated to Invalidating <u>Signatories' Existing Estate Plans</u>.

The undisputed evidence was that the Shareholders' Agreement was adopted to address a specific evil that has nothing to do with upending signatories' existing estate planning documents. In particular, as Jim Corr explained at trial, Mrs. Corr wanted, and Jim Corr

concurred in the need for, a “right of first refusal” to prevent Jimenez from selling any shares Mrs. Corr was giving her, thereby transferring part ownership of the Company outside the family:

> Q. You heard Mr. Webb testify that your mother – your mother reported to him that Nancy was pressuring her to give her some stock?
>
> A. Yes, sir.
>
> * * *
>
> Q. Did you also hear Nancy have such discussions with your mother?
>
> A. Yes, I did.
>
> Q. Was it on one occasion or multiple occasions?
>
> A. Multiple occasions. . . .
>
> * * *
>
> Q. Did you ever learn from a conversation with your mother regarding any concerns she might have about what Nancy would do with any stock that she gave her?
>
> A. Yes, sir. She was concerned that Nancy, being for the most part money hungry, would take the shares of stock and try to sell them to somebody outside of the family . . . .
>
> Q. And why did that concern your mother?
>
> A. It was a family business and she didn’t want outsiders in the family business.
>
> Q. Was this a concern that you also shared?

A. Yes, sir, I did.

* * *

Q. And at the time . . . the only shareholders in the business were you and your mother; is that right?

A. Yes, sir.

Q. Did your mother ultimately determine that she was going to give Nancy some shares of stock?

A. Yes, sir, she did. . . .

* * *

Q. Did your mother at some point seek some legal advice regarding what might be done to prevent the sale of those shares outside the family?

A. Yes, she did. She –

Q. What did she do?

A. She wanted a Right of First Refusal where assuming Nancy would try to sell the shares outside the family we could at least match the offer and buy the shares so they wouldn't leave the family.

* * *

Q. So did mother – did mother go to see a particular lawyer about this issue?

A. She had me contact Larry Siegel. That was the company attorney at the time . . . and she wanted me to see what could be done to get this right of first refusal that she was asking for.

* * *

Q. And is the Shareholders' Agreement that we have seen in court today what you ultimately got from Mr. Siegel?

A. It is ultimately what we got. . . .

1 Tr. 187-91, 1 JA 417-21.

On brief, Jimenez argues at length that the trial court erred by construing only Mrs. Corr's intent, rather than the intent of "all" of the parties to the Shareholders' Agreement. Br. of Appellant at 30-37. Yet as the preceding excerpt makes clear, the trial court had before it substantial evidence regarding the *actual* intent of the only current shareholders of the Company in seeking the drafting of, and entering into, the Shareholders' Agreement: to give them, and the Company, a means to prevent Jimenez's anticipated, future stock holdings from falling into non-family hands.

The only substantive intent for the trial court to consider was that of Mrs. Corr and Jim Corr. Jimenez conceded at trial that she had no involvement whatever in the request for or drafting of the Shareholders' Agreement. To the contrary, she saw it for the first time when it was placed in front of her for signature:

Q. You were not involved in the drafting of the Shareholders' Agreement in any way, were you?

A. No, I was not.

Q. In fact, the first time you saw the Shareholders' Agreement is the day you signed it wasn't it?

A. Yes.

Q. Have you ever had any conversations with Mr. Siegel about what was going into the Shareholders' Agreement?

A. No, I did not.

* * *

Q. Are you aware of your mother ever instructing Mr. Siegel that she wanted the Shareholders' Agreement to displace or change her estate planning documents?

A. I'm not aware because I wasn't part of those conversations.

Q. Right. . . . Did you ever become aware any other way that she had given Larry Siegel that kind of instruction?

A. No, I have no knowledge of that.

1 Tr. 59-60, 1 JA 289-90.

The record is clear that Jimenez had no involvement with the Shareholders' Agreement other than to sign it. The record similarly is clear that she signed the Agreement for one simple reason: without it, she would receive no gift of stock. Jimenez's suggestion that the intent of the parties

to the Shareholders' Agreement, other than Mrs. Corr, was somehow ignored by the trial court is simply manufactured from whole cloth.

(b) The Overwhelming Weight of the Evidence Demonstrated Mrs. Corr's Unwavering Intent to Preserve Her Son's Purchase Option – Both Before and After Signing the Shareholders' Agreement.

There is overwhelming evidence in the record that Mrs. Corr understood *and intended* that her estate planing documents continue in force after the execution of the Shareholders' Agreement; that she understood and intended that Jim Corr continued to have the option that she and Mr. Corr had granted in 1992; that she never indicated any contrary intention to her estate planning attorney of more than 20 years or her company counsel of similar longevity, and that she never indicated any such intention or understanding, orally or in any writing, to any other disinterested person.

The testimony of the drafter of the Shareholder's Agreement provides a telling place to start. Lawrence Siegel, the Company's longstanding corporate counsel, drafted the Shareholders' Agreement at the request of Mrs. Corr, communicated through her son, Jim Corr. Siegel was not told, when drafting the Agreement, that Mrs. Corr had a trust agreement; he

knew only generally that Mrs. Corr's and her late husband's estate planning work had been done by another law firm. 1 Tr. 113, JA 343.

But Siegel was very clear that Mrs. Corr never expressed any intention to upend her own estate plan by requesting and executing the Shareholders' Agreement:

> Q. Did you ever receive any indication from Mrs. Corr that she wanted[,] in drafting this Shareholders' Agreement[,] to exclude trust from the permissible transferees?
>
> A. *Absolutely not.* . . .
>
> Q. Did she ever indicate to you that a purpose in crafting this Shareholders' Agreement was to change part of her estate plan?
>
> A. *Not at all.*
>
> Q. Did she ever indicate to you that she, by asking you to draft this agreement, wanted to render part of her estate plan moot or ineffective?
>
> A. *Absolutely not.*
>
> Q. [D]id anybody speaking on her behalf ever make those sorts of indication[s] to you, that she wanted to change an estate plan?
>
> A. *No not at all*.

1 Tr. 114-15, JA 344-45 (emphases added).

Jim Corr, who communicated with Siegel on his mother's behalf on this issue, confirmed at trial that there was simply no discussion at all about rendering Mrs. Corr's existing estate planning instruments invalid:

> Q. Was there ever any discussion with Mr. Siegel that [your] mother wanted to change her estate planning documents or estate planning instruments by signing this Shareholder Agreement?
>
> A. No, there was never any discussion on that.
>
> * * *
>
> Q. Okay. Did you ever hear your mother have a conversation with him saying . . . words to the effect of . . . I want this Shareholders' Agreement to override this Trust Agreement I have had in place for ten-plus years?
>
> A. *Absolutely no, never heard her say that.*
>
> Q. To your knowledge, did she ever say it to anybody else[,] that this is what she wanted to accomplish through the Shareholders' Agreement?
>
> A. No, sir.
>
> Q. Did your mother ever indicate to you that she wanted to eliminate the option that was granted to you in your father's Trust and in her Trust?
>
> A. My mother did not like change. Once she had set her mind on something that is pretty much the way she wanted it to be.

Q. So . . . did she ever indicate that to you?

A. *No sir, she never indicated it to me or to anyone else in my presence.*

1 Tr. 191-93, 1 JA 421-23 (emphasis added).

The trial court also heard at length from the drafter of the Will and the Trust, Mrs. Corr's longtime estate planning attorney. Mr. Webb provided, through testimony and contemporaneous records drawn from his extensive file stretching over 20 years, even more compelling evidence that Mrs. Corr never harbored any intent to disturb the estate plan she and her husband put into place two decades before her ultimate death.

Mr. Webb's professional relationship with Mrs. Corr was continuous and uninterrupted across the span of these two decades; he served as her sole estate planning counsel and sole estate planning professional in the 12 years that passed between her husband's death and her own. 1 Tr. 163, 1 JA 393. Their relationship was a close one; Mrs. Corr confided in Mr. Webb regarding her difficulties with her family, not merely occasionally, but "[a]ll of the time." 1 Tr. 162, 1 JA 392.

In detailed testimony that occupies almost 50 pages of the trial transcript, 1 Tr. 128-75, 1 JA 358-405, Mr. Webb described his interactions with Mrs. Corr and her family regarding the parents' estate plans and, ultimately, their estates. Webb's testimony provides compelling evidence

of the importance, and persistence, of the plan for Jim Corr to have the opportunity to own and control the family business after his parents' deaths.

This direction was clear from the first meetings Webb had with the Corrs. In a letter dated February 17, 1992, following an initial meeting, Webb outlined the major aspects of a proposed estate plan, and sought direction from the couple on several issues. One such issue was the extent to which they sought to divide their estate equally among their children, since they had *already* determined that Jim Corr should own the business after they were gone:

> . . . [I] have set forth a tentative estate plan for your approval, followed by some issues that will need to be addressed.
>
> * * *
>
> Equalization of Estate. Please tell me to what extent you want your estate to be distributed equally among your children, *considering that you desire your son to own the business after the death of you [Mr. Corr] and your wife.*

Letter, Lewis W. Webb, III to Lewis S. Corr, Feb. 17, 1992, at 1, 3, 2 JA 564, 566 (emphasis added).

Two months later, Mr. Webb had completed the task of preparing a draft will and trust agreement for Mr. Corr, noting that his wife's would be "mirror images" of his own once finalized. He transmitted them under cover of a letter dated April 29, 1992, in which Jim Corr's stock purchase option is the first substantive matter mentioned:

> As we discussed, the [enclosed estate planning] documents *give your son an option to purchase the business assets for a price equal to the federal estate tax value agreed upon with the IRS*. . . .
>
> The documents for Mrs. Corr . . . will be "mirror images" of the above documents. I will draft them once you are comfortable with these drafts.

Letter, Lewis W. Webb, III, to Lewis S. Corr, Apr. 29, 1992, at 1-2, 2 JA 567-68 (emphasis added).

In another two months' time, following further discussions, the Corrs' estate planning documents were finalized and ready for signature. One change had been made – the provision permitting the executor to distribute assets directly to beneficiaries, bypassing the trust, was added – but the emphasis on Jim Corr's purchase rights remained unchanged:

> I enclose a draft Last Will and Testament and Revocable Trust, revised pursuant to our most recent discussion. The two changes are . . . (ii), upon the second-to-die of you and your wife, to distribute the assets outright to your children, *subject to your son's right to purchase of the business assets.* I believe that you did want to delay distribution for <u>any</u> of your children.

Letter, Lewis W. Webb, III, to Lewis S. Corr [Sr.], June 30, 1992, at 1, 2 JA 569 (first emphasis added; underlining in original).

The mirror-image wills and trusts were signed in Mr. Webb's presence 17 days later. 1 Tr. 140, 1 JA 370; Will, at 9, 1 JA 16 (executed July 17, 1992); Trust, at 21, 1 JA 38 (same).

Mr. Corr's health began failing in the late 1990s, and he passed away in late 1999. Mr. Webb and his firm were retained to assist with administration of Mr. Corr's estate. At an initial estate planning meeting in January, 2000, copies of Mr. Corr's will and trust were distributed to Mrs. Corr, Jim Corr and Jimenez. 1 Tr. 147-48, 1 JA 377-78. In a subsequent estate administration meeting on August 8, 2000, attended by Jimenez, there was a discussion of Jim Corr's option to purchase the Company's stock upon his mother's passing. 1 Tr. 148, 1 JA 378.

In the years that followed, Webb continued to consult with Mrs. Corr regarding her estate planning needs. *Id.* He discussed the details of those discussions, gleaned from detailed, contemporaneous file notes, at trial; his testimony and file confirmed that Mrs. Corr reiterated, repeatedly, her intention that Jim have the opportunity to own the Company after her passing.

On January 3, 2001, Webb discussed with Mrs. Corr potential changes that might be considered to her trust to address the "tight" timeframe provided for determination of the price at which Jim Corr's option

would be executed.[3] The entire premise of the discussion, testified Webb, was that Jim Corr's stock purchase option remained in place:

> Q. So was there any question in the discussions between you and Mrs. Corr at this point that Jim's option was alive and well?
>
> A. That was the basis of the conversation, and the last document talks about Jim having the opportunity to buy less than a hundred percent if he wanted.
>
> Q. And is that in fact what the option says in the executed agreement, he could buy some or all?
>
> A. Yes.

1 Tr. 153, 1 JA 383.

Later that same year, in May, 2001, in a telephone conference with Webb, Mrs. Corr reiterated her intentions for business succession: "Jimmy to run the business," read Webb's contemporaneous notes of the conversation. 1 Tr. 154, 1 JA 384.

The Shareholders' Agreement was prepared the following year, in late 2002, and executed by Mrs. Corr, Jim Corr and Jimenez on December 16, 2002. Sh. Agmt. at 1, 1 JA 40.

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[3] The Trust provides that Jim Corr must exercise the option within 90 days of death of the second parent to die, purchasing the stock at the Internal Revenue Service's ("IRS") finally-determined estate tax value. Trust, art. IV.B, subpara. 6, at 7-9, 1 JA 24-26. As Webb explained, there was unlikely to be a final determination on the stock valuation, for estate tax purposes, within 90 days of death. 1 Tr. 152-53, 1 JA 382-83.

Of critical importance for present purposes, Webb continued to speak with his client, following the execution of the Shareholders' Agreement, regarding her business succession intentions. On April 22, 2003, Webb's contemporaneous notes of his conversation reflect Mrs. Corr's firm resolve:

> Q. And in the middle of the page [of contemporaneous notes], is there some note with respect to Jimmy [Jim Corr] running the business?
>
> A. Yes. The note reads, *"Business can't run without Jimmy. Jimmy and Nancy [Jimenez] can't get along. Separate out."* The three dots[4] reflect a therefore, "let Jimmy start using his inheritance."
>
> Q. And when it says, "Business can't run without Jimmy," is that something she told you or something that you came up with on your own?
>
> A. No, that would be Norma [Mrs. Corr].
>
> Q. Okay. Now this is 2003, correct?
>
> A. Yes, sir.

1 Tr. 155-56, 1 JA 385-86 (emphasis added).

Discussions of the continuing viability of Jim Corr's stock purchase option occurred again in 2005 in the context of meetings convened by Webb to assist the family in evaluating an unsolicited buyout offer from an entity that was both competitor and supplier. It was a point, testified Webb,

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[4] Webb's notes use the mathematical symbol for "therefore," three dots arranged in the general shape of a pyramid (∴).

at which the family members needed "to figure out . . . what to do with the business and try to bring some harmony to the family in a very stressful situation." 1 Tr. 157, 1 JA 387.

These 2005 discussions went on over several weeks; Webb held separate meetings with Jim Corr, on the one hand, and sisters Jimenez and Tricia, on the other.

> Q. Did there come a time in 2005 when you thought it might be useful to convene the family and explore whether some revisions to estate planning might be appropriate?
>
> A. Yes. . . . [explaining buyout offer]. [T]his was a point to try to figure out whether to cash out or if not going to cash out, figure out what to do with the business . . . .
>
> Q. And how did you go about that? Did you just have one big meeting, or did you have some pre-meetings?
>
> A. Well, the thought was given the tension in the family to try to stimulate some discussion and try to build a process where the family could try to cooperate. I had a separate meeting with Tricia and Nancy [Jimenez], then a separate meeting or probably a phone conversation with Jim. I tried to have a clean slate so everybody could bring ideas and concerns to the table, and then from there drafted some options there to put in front of the family as a whole to start to consider.

1 Tr. 156-57, 1 JA 386-87.

Following these consultations, Webb convened a family meeting on October 3, 2005. 1 Tr. 159, 1 JA 389. This meeting, however, yielded no change in the estate plan that had been fashioned in 1992:

Q. . . . Did Mrs. Corr as a result of that meeting where you talked about options, did she change anything in her estate [plan]?

A. She did not.

Q. Did she indicate to you any intention to change anything in her estate plan?

A. She did not. In fact, the meetings were not there to produce changes in her estate plan at her initiation. The meetings were there to try to bring peace in the family. *She liked her estate plan as it was,* but was open to any alternate plan that the family could agree to if it would reduce stress in the family.

Q. And I take it that no such plan came out of that meeting?

A. No such plan came out.

1 Tr. 159-60, 1 JA 389-90 (emphasis added).

The arc of Lewis Webb's discussions with his client regarding her estate plan over a 20-year-long professional relationship was described in summary form near the end of Webb's direct testimony:

Q. Now during the 12 or so years that had passed from the time of Mr. Corr's death to Mrs. Corr's death, did she at any time tell you that she had taken actions that would affect the option in the trust agreement you had drafted for her?

A. *No. Never.*

Q. Did she ever tell you at any time in that roughly 12-year period that she *intended* to take some options to change what you had done in that trust agreement?

A. No, nothing that would have been done outside of amending the Trust itself.

Q. Did she ever – now you were counsel to her all through this period, right?

A. Yes.

* * *

Q. Did she ever express – did she ever inquire of you how she might change her estate plan to eliminate or make ineffective the purchase option she had given to her son?

A. *She never did.*

* * *

Q. Did she say anything to you that would suggest even indirectly that she had taken some action to undo this [purchase] option in the Trust in the estate planning documents that you prepared for her?

A. *Absolutely not.*

1 Tr. 161-64, 1 JA 391-94 (emphasis added).

The *only* thing offered at trial to counter this highly probative evidence of intent was the self-serving testimony of Jimenez herself, suggesting, incredibly, that the by-then elderly Mrs. Corr had had a secret conversation with Jimenez, in a car on the way to lunch or the hairdresser, in which Mrs. Corr stated to Jimenez that the Shareholders' Agreement "would make us [Jimenez and Jim Corr] equal shareholders." 1 Tr. 56, 1 JA 286. Jimenez conceded that she was unaware of any similar statement made by her

mother to any other person, and similarly unaware of any writing that would corroborate it. *Id.* Jimenez had no explanation for why Mrs. Corr would have confided this "intent" to her, but have hidden it from both the longtime corporate lawyer who actually drafted the Agreement, and her longtime estate planning counsel who had drafted the Trust being "trumped" and continued to advise Mrs. Corr regarding the Trust and Jim's stock purchase option.

While the trial court did not say so explicitly on the record, it is clear that the court did not credit Jimenez's self-serving testimony at all.

Moreover, Jimenez's tale is belied by her own statements and actions. Jim Corr testified that, after Jimenez learned of the purchase option during the administration of Mr. Corr's estate in 2000, Jimenez repeatedly denounced the option in statements to Jim Corr and Mrs. Corr:

> Q. Did there come a time after your father's death and after the distribution of the Will and the Trust agreement that Nancy [Jimenez] made statements to you regarding the stock purchase option that was contained in your father's Trust?
>
> A. Yes, sir. She was very upset about it.
>
> Q. What did she say?
>
> A. She said repeatedly that she viewed that as me stealing the company, and she complained to mom [Mrs. Corr] about it and anybody else who would listen.

* * *

Q. And just to be clear, this is a statement she made to you directly?

A. Yes, sir, directly to me.

Q. Said that you were stealing the company?

A. Yes. That is how she viewed it, that I was stealing the company, yes.

Q. And did you ever hear her make that kind of statement to your mother?

A. Yes, she did in my presence.

* * *

Q. Okay. Did there come a time when Nancy – when you became aware that Nancy was encouraging your mother to change her estate plan?

A. That was an ongoing problem with Nancy badgering and pestering my mother to change her Will.

Q. And what sort of changes?

A. She wanted the clause – the option that was in my mother's Will to be taken out where I had an option to buy any or all of the shares of stock . . . .

* * *

Q. And what was your mother's reaction when she was subjected to those requests?

A. At times she would actually – tears would come in her eyes and she would be upset. . . . In many instances she would be very upset, sometimes to the state of tears.

> Other times she would just clam up and just be beet red in the face upset.

1 Tr. 182-85, 1 JA 412-15.

Jimenez's concern, and her repeated efforts to persuade her mother to change her estate planning documents, of course would have been nonsensical if Mrs. Corr had rendered Jim Corr's stock purchase option ineffective by executing the Shareholders' Agreement, as Jimenez testified her mother had secretly told her.

C. THE TRIAL COURT PROPERLY RULED THAT CORR EFFECTIVELY EXERCISED THE CORR STOCK OPTION (ASSIGNMENT OF ERROR V)

A final challenge raised by Jimenez is that the trial court improperly ruled on the effectiveness of Jim Corr's exercise of his stock purchase option; Jimenez contends that the issue was not properly before the court.

The Executors/Trustees and the Company have addressed this issue at length on brief. Ex./Tr. Br., Section IV.C, at 26-37; Co. Br., Section V.C, at 26-30. Jim Corr adopts these arguments (including the discussions of the standard of review) in their entirety.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

This Court's prescription for the interpretation of a disputed contract does not require the trial court to close its eyes to the context, circumstances and condition of the parties that inform the words they choose.

There are ample grounds, in the text of the disputed Agreement itself, understood in its context, circumstances and the condition of the parties at the time it was executed, upon which to find subparagraph 3(d) unambiguous, permitting conveyances and transfers to immediate family members both outright and through common estate planning instrumentalities such as trusts. The trial court said as much when it observed that a conveyance through the instrumentality of a trust benefitting an immediate family member was "tantamount" to an outright conveyance to that family member. 2 Tr. 86, 1 JA 537.

But the trial court did not end its analysis at that point. Instead, it also examined direct evidence of intent. It heard substantial testimony, including from the drafters of these instruments and all living signatories. The parol evidence it heard overwhelmingly belies Jimenez's effort to read the Agreement as having silently wiped out longstanding estate planning documents. To the contrary, it affirms that the parties not only had no such

intent in entering into the Shareholders' Agreement, but understood and acted in reliance on the understanding that the purchase option for Jim Corr was alive and well and would govern the succession of the Company.

Jim Corr respectfully prays that this Court affirm the trial court's decision in all respects, save and except to reverse the trial court's determination, as expressed through paragraph 3 of the Final Order, not to rule on whether subparagraph 3(a) of the Shareholders' Agreement creates a binding agreement which can be enforced by the Court, and instead to enter final judgment that subparagraph 3(a) fails to create a duty that is susceptible of judicial enforcement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, in compliance with Rule 5:26(h), fifteen bound copes, with one electronic copy on CD, of the Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, three bound copies, with one electronic copy on CD, of the Brief of Appellee were served, via overnight delivery to the following:

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