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 APPELLEES LEWIS S. CORR, JR. AND THOMAS WILLIAMS, AS EXECUTORS OF THE ESTATE OF NORMA F. CORR, AND AS TRUSTEES UNDER THE NORMA F. CORR REVOCABLE TRUST WITH ASSIGNMENT OF CROSS–ERROR

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**BRIEF OF APPELLEES LEWIS S. CORR, JR.**
**AND THOMAS WILLIAMS,**
**AS EXECUTORS AND TRUSTEES**

Appellees, Lewis S. Corr, Jr. and Thomas Williams, as Executors of the Estate of Norma F. Corr (the "Executors"), and as Trustees of the Norma F. Corr Revocable Trust (the "Trustees") (referred to in both capacities as the "Executors/Trustees"), by counsel, as and for their Brief of Appellee in opposition to the Brief of Appellant filed by the Appellant, Nancy C. Jimenez ("Jimenez"), state:

## I. STATEMENT OF THE CASE

At the time of her passing on May 22, 2012, Norma F. Corr ("Decedent") owned 95 shares ("Decedent's Shares") of the stock of Capitol Foundry of Virginia, Inc. ("Capitol" or the "Company"), a closely-held corporation, which had been founded by the Decedent's previously deceased husband. J.A., Vol. I, p. 137, ¶ 11. The Executors currently hold 30.6 of the Decedent's Shares ("Remaining Decedent's Shares"). J.A., Vol. I, p. 138, ¶¶ 13, 14. This case involves a dispute concerning how the Executors should convey the Remaining Decedent's Shares, in light of the terms of three instruments: (1) the Last Will and Testament of Norma F. Corr, dated July 17, 1992 (the "Will"), J.A., Vol. I, p. 137, ¶ 3, and pp. 143-52, (2) the Norma F. Corr Revocable Trust, dated July 17, 1992 (the

"Trust"), J.A., Vol. I, p. 137, ¶ 3, and pp. 153-74, and (3) a Shareholders' Agreement, dated December 16, 2002 ("Shareholders' Agreement"), J.A., Vol. I, p. 137, ¶ 4, and pp. 175-83.

In the weeks following the Decedent's death, counsel for the Executors conducted two meetings which involved all of the beneficiaries, including Jimenez, at which no mention was made of the Shareholders' Agreement. J.A., Vol. I, p. 390. Thus the Executors were proceeding on the basis that they would transfer the Decedent's Shares pursuant to the terms of the Will and Trust.

At the second meeting, Jimenez's counsel suggested that the Executors' counsel obtain the corporate record book from Capitol's corporate counsel, to see if there were any other things of interest in the minutes or any other agreements. J.A., Vol. I, pp. 390-91. The Executors' counsel did as requested and received from Capitol's corporate counsel, and saw for the first time, a copy of the Shareholders' Agreement. J.A., Vol. I, p. 391.

After the Executors' counsel circulated the Shareholders' Agreement in early August 2012, Jimenez, through counsel, asserted that pursuant to subparagraph 3(a) of the Shareholders' Agreement ("subparagraph 3(a)"), all of the Decedent's Shares had to be conveyed to the Company by the

Executors. The Executors/Trustees disagreed with the position taken by Jimenez, and they recognized that, if they and the beneficiaries could not find a way to resolve their disagreement on this issue, the appropriate course would be to file a declaratory judgment action to resolve it.

As it became apparent that the parties would be unable to resolve their dispute, the Executors/Trustees began preparing to file their declaratory judgment action. Before their declaratory judgment action was filed, on October 23, 2012, Jimenez filed her complaint ("Complaint") initiating this action and requesting a mandatory injunction and a decree of specific performance directing that the Company purchase from the Executors all of the Decedent's Shares, pursuant to the terms of subparagraph 3(a).

Consequently, on November 8, 2012, the Executors/Trustees filed their declaratory judgment action as a counterclaim ("Counterclaim") requesting the resolution of all of the disputes among the parties with regard to the Decedent's Shares.

Trial on the merits was conducted on October 1 and 2, 2013. As reflected in the Final Order entered on October 18, 2013, the Court made four rulings. Three of the four rulings are subject to this appeal, as follows:

2. Under the terms of the Will, the Trust, and subparagraph 3(d) of the shareholders' agreement (the "Shareholders' Agreement") (Joint Ex. 3), and the circumstances and facts presented in this action, subparagraph 3(a) of the Shareholders' Agreement is not applicable;

3. In light of the foregoing ruling, it is not necessary for the Court to address the contention of the Defendants that subparagraph 3(a) of the Shareholders' Agreement does not create a binding agreement which can be enforced by this Court; therefore, such contention is moot, and the Court declines to rule on it; and

4. Corr has properly exercised the Corr Stock Option pursuant to subparagraph 6 of Article IV.B. of the Trust, as modified by the agreed order ("Agreed Order") (Joint Ex. 6) entered by this Court on November 15, 2012, by his execution and delivery of the Exercise of Option by Lewis S. Corr, Jr. to Purchase Company Shares in Accordance with the Terms of the Norma F. Corr Revocable Trust ("Exercise of Option") (Corr Ex. 4) dated November 29, 2012.

## II. STATEMENT OF FACTS

The Decedent had three children: Lewis S. a/k/a Jim or Jimmy Corr, Jr. ("Corr"), Patricia C. a/k/a Tricia Williams ("Williams") and Jimenez. J.A., Vol. I, p. 136, ¶ 2. The Decedent passed away on May 22, 2012. J.A., Vol. I, p. 137, ¶ 8. The Decedent had executed the Will and the Trust. J.A., Vol. I, p. 137, ¶ 3.

The Will is what is commonly referred to as a "pour over" will. Pursuant to the terms of the Will, the Decedent's Shares, along with the rest of her property, of every kind and description, "pour over" to the

Trustees to be administered and distributed according to the terms of the Trust. J.A., Vol. I, p. 146, Art. VII. Under the terms of the Trust, because the Decedent was predeceased by her husband, the Trustees are to divide all assets received, including the Capitol stock, into three separate shares, equal in value, for each of the Decedent's children, which then may be distributed outright and free of trust at the request of each child. J.A., Vol. I, p. 158, Art. IV(B)(3). The distribution of the Capitol stock is subject to another provision (the "Corr Stock Option"), which applies "[n]otwithstanding anything herein to the contrary," and which gives Corr an "exclusive right and option to purchase (i) any or all shares of stock" in Capitol, which the Trust may own after the death of the Decedent. J.A., Vol. I, pp. 159-61, Art. IV(B)(6).

As of the date of Decedent's death, Capitol had 105 shares of stock outstanding, of which the Decedent owned 95 shares, and Corr and Jimenez owned 5 shares each. J.A., Vol. I, p. 137, ¶ 11.

After entry of an agreed order ("Agreed Order") on November 15, 2012, and pursuant to section 303 of the Internal Revenue Code, as a tax-beneficial means of raising cash for estate taxes, on or about November 29, 2012, Capitol purchased 64.4 of Decedent's Shares from the Executors ("Capitol's 303 Redemption"). J.A., Vol. I, p. 138, ¶¶ 12-13.

Capitol's 303 Redemption was undertaken pursuant to a written Stock Redemption Agreement, J.A., Vol. I, pp. 226-229, which was entered into pursuant to a resolution of the Board of Directors of the Company passed by a unanimous vote. The Company's Board was made up of all of the Decedent's children, including Jimenez and Corr, as a result of which the Company's purchase of the 64.4 shares was done with the approval of all parties to this action.

On November 29, 2012, after Capitol's 303 Redemption was concluded, Corr exercised the Corr Stock Option pursuant to a written instrument, the Exercise of Option by Lewis S. Corr, Jr. to Purchase Company Shares in Accordance with the Terms of the Norma F. Corr Revocable Trust ("Corr Exercise of Option"), dated November 29, 2012. Record, Corr Tr. Ex. 4; J.A., Vol. II, pp. 571-73.[1]

Under the terms of the Agreed Order, the Executors are holding the Remaining Decedent's Shares (30.6 shares) pending the conclusion of this case. J.A., Vol. I, p. 138, ¶ 14.

[1] The copy of the Corr Exercise of Option contained in the Appendix is incomplete, as it is missing pages 3 and 4.

## III. ASSIGNMENT OF CROSS-ERROR

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. Record, Executors'/Trustees' Bench Trial Memorandum, filed October 1, 2013, pp. 4-6; J.A., Vol. I, pp. 345-49, 449; J.A., Vol. II, p. 579.

## IV. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES RELATING TO ASSIGNMENTS OF ERROR

### A. APPROPRIATELY, THE TRIAL COURT DID NOT RULE THAT SUBPARAGRAPH 3(A) OF THE SHAREHOLDERS' AGREEMENT COULD BE ENFORCED, BUT IT ERRED IN FAILING TO RULE THAT IT IS NOT ENFORCEABLE. (ASSIGNMENT OF ERROR 4 AND ASSIGNMENT OF CROSS-ERROR 1).

For purposes of discussing the issue addressed under this heading, it is assumed that, contrary to the argument set forth later in this brief, this Court has determined that subparagraph 3(d) of the Shareholders' Agreement does not preclude the application of subparagraph 3(a). Since the issue addressed concerns the enforceability of a contract provision, it is a matter of law and, as such, is subject to *de novo* review in this Court. *E.g.*, *Schuiling v. Harris*, 286 Va. 187, 192-93, 747 S.E.2d 833, 836 (2013).

#### 1. The "Deemed" 8/20/12 Contract

Subparagraph 3(a) of the Shareholders' Agreement states, in its entirety:

> (a) Death of an Agreeing Shareholder. Subject to subparagraph (d) hereof, on the death of an Agreeing Shareholder, all of the Shares of Stock owned by such Agreeing Shareholder shall be sold by his personal representative and shall be purchased by the Company or the remaining Shareholders for the purchase price and under the terms set forth in Section 4. Such offer shall be deemed made and accepted on the ninetieth (90th) calendar day following the date of death, whether actually made and accepted or not.

J.A., Vol. I, p. 176. The first sentence of subparagraph 3(a) states that, upon the death of one of the Company's shareholders, the Capitol stock of such shareholder must be sold by his or her personal representative to the Company "***or***" the remaining shareholders (emphasis added). Upon the Decedent's death, the "remaining shareholders" were Jimenez and Corr, each of whom currently owns five shares.

According to the second sentence of subparagraph 3(a), the offer to sell and purchase the Decedent's Shares described in the first sentence was "deemed made and accepted . . ., whether actually made and accepted or not," on the 90th day following the Decedent's date of death (August 20, 2012)[2].

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[2] In paragraph 19 of Jimenez's Amended Complaint, she states: "[p]ursuant to the Agreement, on August 20, 2012 (the ninetieth (90th) calendar day following the death of Norma F. Corr), the Estate's offer to sell, and the Corporation's or Remaining Shareholders' agreement to purchase, was deemed made and accepted." J.A., Vol. I, p. 56, ¶ 19. Nevertheless, in quoting subparagraph 3(a) on page 4 of Brief of Appellant, Jimenez omits the second sentence.

Thus, pursuant to subparagraph 3(a), the Executors, Jimenez, Corr, and the Company, were "deemed" to have entered into a contract, as of August 20, 2012 (the "8/20/12 Contract"), the operative term of which would be along the lines of the following:

> The Executors hereby agree to sell to Jimenez, Corr ***or*** the Company, and Jimenez, Corr and the Company hereby agree to purchase from the Executors all of the Decedent's Shares.

The 8/20/12 Contract consists of bilateral obligations between the Executors, on the one hand, and Jimenez, Corr and the Company, on the other. Jimenez, Corr and the Company, ***as obligors***, have an obligation to purchase the Decedent's Shares from the Executors, ***as obligees***. At the same time, the Executors, ***as obligors***, are obligated to sell the Decedent's Shares to Jimenez, Corr or the Company, ***as obligees***.

### 2. The Executors, as Obligors, and Jimenez, Corr or the Company, as Obligees

Jimenez, as one of three obligees, seeks to enforce the 8/20/12 Contract. In paragraph 22 of her Amended Complaint, Jimenez alleges that the Executors failed to "tender or deliver" the Decedent's Shares on October 19, 2012 (which is 60 days after August 20, 2012), and goes on to request, in her prayer for relief, that the Executors be ordered to "tender" the Remaining Decedent's Shares to the Company and the remaining shareholders. J.A., Vol. I, pp. 56, 60.

Paragraph 5 of the Shareholders' Agreement provides:

> Closing.
>
> The closing ("Closing") of any transaction contemplated by this Agreement shall occur within sixty (60) days after the date the Shares are offered or are deemed offered, as the case may be. An Agreeing Shareholder (or his personal representative) selling Shares to the Company or Shareholders in accordance with the terms of this Agreement shall, at Closing, ***deliver*** the certificate(s) representing the Shares, endorsed in blank, to the Company or Shareholders in accordance with the terms of this Agreement.

J.A., Vol. I, p. 178 (emphasis added). The request by Jimenez that the Executors "tender" the Decedent's Shares to herself, Corr or the Company is not consistent with the language of paragraph 5, which requires that the Executors "deliver" Decedent's Shares.

By definition, as a verb, "tender" means to present or offer something for acceptance, in this case the Decedent's Shares. Merriam-Webster, http:\\www.merriam-webster.com\dictionary\tender (last visited June 12, 2014) ("to present for acceptance"); *New Oxford American Dictionary*, 1788 (3rd ed. 2010) ("offer or present (something) formally").

Such a meaning suggests, and Jimenez appears to contend, that if the Decedent's Shares had been "tendered" on October 19, 2012, Jimenez, Corr, and the Company would have been in a position to reach an agreement among themselves as to who was to receive how many

shares.[3] However, paragraph 5 of the Shareholders' Agreement does not provide for a "tender" of Decedent's Shares.

Rather, paragraph 5 requires that the Executors "deliver the certificate(s) representing the [Decedent's Shares] endorsed in blank," to Jimenez, Corr or the Company in accordance with the terms of the 8/20/12 Contract. Thus, in order to comply with the requirements of paragraph 5, the Executors had to know by October 19, 2012, to whom, among Jimenez, Corr or the Company, they were required to convey the Decedent's Shares, if any, under the terms of the 8/20/12 Contract. Unless a binding and enforceable contract was created on August 20, 2012, as to who would receive the Decedent's Shares, there was no basis for the Executors to "deliver" such shares to anybody on October 19, 2012.

The Record reflects that, as of August 20, 2012, no voluntary agreement among the Executors, the Company, Jimenez and Corr had been reached for conveyance of the Decedent's Shares. Jimenez makes the point that the Company did not demonstrate any intention or desire to purchase any of the Decedent's Shares (beyond those purchased under

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[3] Such an "agreement to agree" would not have been enforceable, if a voluntary agreement had not been reached. *See*, *e.g.*, *Allen v. Aetna Cas. Ins. and Sur. Co.*, 222 Va. 361, 363-64, 281 S.E.2d 818, 819-20 (1981) (an agreement to "effect a full and final settlement" of a tort claim was not enforceable).

Capitol's 303 Redemption) and that Corr has only expressed an interest in purchasing shares pursuant to the terms of the Trust. Br. of Appellant 23-24. Assuming, for the sake of argument, that those claims are true, the Record also reflects that, Jimenez's position, as set forth in her Complaint filed on October 23, 2012, was that the Company was required to purchase ***all*** of the Decedent's Shares. Record, Complaint, filed October 23, 2012. Consequently, as of August 20, 2012, Jimenez, herself, was not offering to purchase any of the Decedent's Shares from the Executors.

Consequently, as of August 20, 2012, there was no voluntary agreement among the Executors, Jimenez, Corr and the Company as to the disposition of the Decedent's Shares. Thus, there was no basis for the Executors to deliver shares to any of them on October 19, 2012, unless the 8/20/12 Contract was sufficiently certain as to how many shares were to be delivered to Jimenez, Corr or the Company, in the absence of a voluntary agreement among them.

Under long-standing precedent established by this Court, a contract which is uncertain with regard to a material term is not a binding and enforceable contract. In *Rolfs v. Mason*, 202 Va. 690, 119 S.E.2d 238 (1961), the contract at issue contained the following paragraph:

> The parties of the first part agree that if they should sell the two lots adjoining this tract on the east, they shall give the parties of the second part first choice.

*Id.* at 691, 119 S.E.2d at 239. Successors of the "parties of the second part" sought specific performance, successors of the "parties of the first part" demurred to the complaint, and the trial court sustained the demurrer. *Id.* at 691-92, 119 S.E.2d at 239-40. This Court affirmed the ruling of the trial court on the ground that the contract provision at issue did "not provide for a mode whereby the price can be ascertained with certainty." *Id.* at 695, 119 S.E.2d at 242. In reaching its decision, this Court stated:

> It is well settled that a contract must be complete and certain and that the essential elements of price and terms of sale must have been agreed upon before a court of equity will specifically enforce the contract.

*Id.* at 692, 119 S.E.2d at 240 (citing *Duke v. Tobin*, 198 Va. 758, 761, 96 S.E.2d 758, 761 (1957) (affirming a trial court decree declaring that a contract could not be specifically enforced because certain terms for the payment of the consideration were uncertain and indefinite)). *See also Allen*, at 364, 281 S.E.2d at 820 (agreement to enter into settlement agreement not enforceable where there was no method or formula for determining amount payable in settlement).

Two months ago, in the case of *Dean v. Morris*, 756 S.E.2d 430, 2014 Va. LEXIS 63 (Apr. 17, 2014), this Court ruled that an oral contract

could not be enforced due to the uncertainty of a material term. The trial court had ruled that the plaintiffs had proved by clear and convincing evidence that there existed an oral contract between a wife and a husband that the wife's children would receive one-third of the husband's estate, if she predeceased the husband. *Id*. at *5, 756 S.E.2d at 432. This Court agreed that "upon review, the record contains clear and convincing evidence to support the trial court's determination that an agreement existed." *Id.* at *7, 756 S.E.2d at 433. Nevertheless, this Court reversed the trial court based on its finding that there was no clear and convincing evidence that the portion of the estate to be passed to the wife's children was one-third, as opposed to some other percentage, and therefore determined that a binding contract had not been created. *Id.* at *12-13, 756 S.E.2d at 434-35.

In reaching its conclusion, this Court relied on its previous reversal of a similar trial court decision, and stated that:

> The record in that case contained clear and convincing evidence that the defendant promised to compensate the plaintiff but fell short of proving by clear and convincing evidence "that there was [a] meeting of the minds respecting essential terms – the amount to be paid or bequeathed by [the decedent] and the persons to whom the payment or bequest would be made."

*Id.* at **9-10, 756 S.E.2d at 434 (quoting *Blincoe v. Blincoe*, 209 Va. 238, 244-45, 163 S.E.2d 139, 144 (1968) (reversing trial court ruling that oral contract did exist requiring one-half of decedent's estate to be transferred to plaintiff)).

Jimenez asks this Court to disregard its well-established authority concerning specific performance of contracts with citations to a number of opinions in damage suits in which this Court mentions a policy of trying to avoid discarding agreements. In doing so, however, Jimenez ignores the distinction this Court has made between suits for damages and actions, such as this one, in which specific performance is sought.

In the case of *McDaniel v. Daves*, 139 Va. 178, 123 S.E. 663 (1924), this Court, in affirming a trial court award of damages for breach of contract, recognized the point being made by Jimenez, that the law is loath to declare contracts void for uncertainty, but went on to say:

> Courts of equity sometimes refuse to exercise their discretionary jurisdiction in specific performance under circumstances which would not bar an action at law for damages. The same degree of certainty is not required in an action to recover damages for a breach of contract as in a suit in equity for specific performance.

*Id.* at 190, 123 S.E.2d at 666.

Since Jimenez, as obligee, is seeking to enforce the obligation of the Executors, as obligors, to convey shares to herself, Corr or the Company,

she was required to establish that the 8/20/12 Contract was sufficiently certain as to the number of Decedent's Shares, if any, to be conveyed to each of them such that the Executors could deliver to each the appropriate number of shares. Again, the operative term of the 8/20/12 Contract would be along the lines of the following:

> The Executors hereby agree to sell to Jimenez, Corr ***or*** the Company, and Jimenez, Corr and the Company hereby agree to purchase from the Executors all of the Decedent's Shares.

The word "or" in the 8/20/12 Contract creates uncertainty.

> "*Every* use of "and" or "or" as a conjunction involves some risk of ambiguity (citation omitted) (emphasis in original) . . . . Authorities agree . . . that *or* has an inclusive as well as an exclusive sense. Hence:
> " . . . .
> "The 'inclusive or': A or B, or both."
> "The 'exclusive or': A or B, but not both"

*SouthTrust Bank v. Copeland One, L.L.C.*, 886 So.2d 38, 42 (Ala. 2003) (quoting Bryan A. Garner, *A Dictionary of Modern Legal Usage* 624 (2nd ed. 1995)). *See also* Reed Dickerson, *The Fundamentals of Legal Drafting*, 104-14 (2nd ed. 1986).

Jimenez appears to contend that in subparagraph 3(a), the word "or" should be given an exclusive sense, such that all of the Decedent's Shares are required to be conveyed to either the Company or Jimenez and Corr. Br. of Appellant 21-22. However, she provides no reason why it would not

make just as much sense, or more, to give the word “or” its inclusive sense, such that some of the Decedent’s Shares could be conveyed to the Company, while others are conveyed to Jimenez or Corr.

To the extent that Jimenez is contending that either Corr or the Company has waived his or its right to purchase shares under subparagraph 3(a), Br. of Appellant 23-24, so that she is entitled to purchase all of the Remaining Decedent’s Shares, the record is devoid of any evidence, let alone “clear, precise and unequivocal evidence,” of an intent on the part of either to relinquish a known right. *See Stuarts Draft Shopping Ctr., L.P. v. S-D Assocs.*, 251 Va. 483, 489-90, 468 S.E.2d 885, 889 (1996) (reversing trial court decision to submit waiver issue to jury, where evidence was lacking, as a matter of law) (citations omitted).

Such a contention also overlooks the fact that, as of August 20, 2012, the position of Jimenez was that the Company was required by subparagraph 3(a) to purchase all of the Decedent’s Shares and thus, as of August 20, 2012, she was not offering to purchase any of the Decedent’s Shares. Consequently, if, as of August 20, 2012, Corr and the Company had waived their rights to purchase the Decedent’s Shares under subparagraph 3(a), Jimenez had waived her right to do so, as well.

In seeking to enforce her own rights, as an obligee, to purchase shares from the Executors, as obligors, she must rely on the 8/20/12 Contract. However, because that contract does not provide an amount of shares to which Jimenez is entitled, or a method for calculating such amount, she is in the same position as the plaintiffs in *Dean* and in *Blincoe* who were denied enforcement of contracts which might otherwise have been enforceable, because the terms of the contracts were uncertain as to what percent of an estate's assets such plaintiffs were entitled to receive. *Dean*, 2014 Va. LEXIS 63, at *9-10, 756 S.E.2d at 433-34; *Blincoe*, 209 Va. at 244, 163 S.E.2d at 144.

To the extent that Jimenez may be suggesting that, under subparagraph 3(a), all of the Remaining Decedent's Shares should be conveyed only to the Company or herself, Br. of Appellant 24, she is necessarily asking the Court to add language to the Shareholders' Agreement, a request that she, herself, contends may not be granted. *See* Br. of Appellant 13 (citing *Jones v. Harrison*, 250 Va. 64, 68, 458 S.E.2d 766, 769 (1995) (Virginia courts "do not rewrite contracts to insert provisions that have been omitted by the parties") (citations omitted)). *See also Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 330, 609 S.E.2d 49, 56 (2005) (court cannot add to the plain language of a

contract); *Rolfs*, 202 Va. at 695, 119 S.E.2d at 242; *Duke*, 198 Va. at 759, 96 S.E.2d at 760 ("'the court cannot make a contract' for the parties") (citation omitted). This principle is even more important in the case of the Shareholders' Agreement which, as a restraint on alienation, must be strictly construed. *Monacan Hills, Inc. v. Page*, 203 Va. 110, 114, 122 S.E.2d 654, 657 (1961) (in holding that a restriction in a corporation's by-laws regarding the sale of its stock was a contract between the corporation and the shareholders, the Court notes that "it is also well settled that such restrictions are to be strictly construed.").

### 3. The Executors, as Obligees, and Jimenez, Corr or the Company, as Obligors

Jimenez cites *Corbin on Contracts* and Virginia Code § 8.01-30 for the proposition that subparagraph 3(a) creates a joint and several obligation on the part of the Company, Jimenez and Corr to purchase the Decedent's Shares from the Executors, which joint and several obligation is enforceable by the Executors against all three of them. Br. of Appellant 22-23. On page 25 of the Brief of Appellant, Jimenez contends that, where two persons are subject to a common burden, the burden should be borne equally. Indeed, where one or more obligors share a joint obligation, which is performed by one of the joint obligors, the performing joint obligor can

seek contribution from the other joint obligors, so that the burden of the whole obligation is borne equally.

However, nothing in her cited authorities supports the proposition that one of the joint obligors can require the obligee to seek performance of the obligation from all of the obligors, equally. To the contrary, Virginia Code § 8.01-30, cited by Jimenez herself, provides that the obligee of the joint obligation may seek performance of the obligation from "any one or any intermediate number" of the joint obligors. Then, it is up to the joint obligors from whom performance has been obtained to decide whether they will seek contribution from the non-performing joint obligors. There is no requirement that they do so.

Thus, hypothetically, if the Court was to determine that the 8/20/12 Contract is enforceable by the Executors, they could choose to seek performance of the joint obligation to purchase the Decedent's Shares from any one of Jimenez, Corr, or the Company, or any 2 or all 3 of them. For example, under Virginia Code § 8.01-30, the Executors could choose to require the Company and Corr to purchase all of the Decedent's Shares, at which point, the Company or Corr, or both, could seek to require Jimenez to purchase a *pro rata* portion of the Decedent's Shares. However, they would not be required to do so.

That said, what is set forth in the preceding paragraph is indeed hypothetical, as the 8/20/12 Contract fails completely for lack of consideration. As noted above, due to the uncertainty as to the number of shares each is entitled to buy, neither Jimenez, Corr nor the Company has a right to enforce the obligation of the Executors to sell them the Decedent's Shares. Therefore, there is no consideration for the obligation of Jimenez, Corr and the Company to purchase Decedent's Shares from the Executors. Consequently, that obligation may not be enforced by the Executors. *See Turner v. Hall*, 128 Va. 247, 250-51, 104 S.E. 861, 863 (1920) (in the reverse circumstances, recognizing as a general principle that an "agreement to sell without a corresponding agreement to buy is not enforceable by either party" (citation omitted)).

**4. Conclusion**

For the reasons set forth above, Jimenez is not entitled to the specific performance relief she seeks, and therefore, the trial court's judgment entered against her on her Amended Complaint should be affirmed. Moreover, because subparagraph 3(a) of the Shareholders' Agreement and the 8/20/12 Contract are uncertain with regard to a material term, the trial court's judgment ordering the Executors to convey the Remaining

Decedent's Shares to the Trustees for conveyance pursuant to the terms of the Trust should be affirmed.[4]

### B. THE TRIAL COURT CORRECTLY RULED THAT, BASED ON THE TERMS OF THE WILL, THE TRUST AND SUBPARAGRAPH 3(D) OF THE SHAREHOLDERS' AGREEMENT, SUBPARAGRAPH 3(A) OF THE SHAREHOLDERS' AGREEMENT IS NOT APPLICABLE TO THE DISPOSITION OF THE DECEDENT'S SHARES. (ASSIGNMENTS OF ERROR 1-3, 6-8)

To the extent that subparagraph 3(d) of the Shareholders' Agreement is determined to be unambiguous, the interpretation of subparagraph 3(d) by the trial court is subject to *de novo* review in this Court. *E.g.*, *Schuiling v. Harris*, 286 Va. 187, 192-93, 747 S.E.2d 843, 836 (2013). To the extent that subparagraph 3(d) is determined to be ambiguous and questions of fact are considered, factual evidence presented by the prevailing party is to be accepted. *Bott v. Snellenburg & Co.*, 177 Va. 331, 337, 14 S.E.2d 372, 374 (1941). "Of great importance is the construction which the parties themselves put on the contract." *Id.* at 339, 14 S.E.2d at 375.

[4] The unenforceability of the 8/20/12 Contract and subparagraph 3(a), as applied to the circumstances of this case, would not affect enforceability of the rest of the Shareholders' Agreement, as Section 16 provides that: "[i]n the event that any of the provisions of this Agreement are held to be unenforceable, the remainder of this Agreement shall remain in full force and effect."

By its terms, subparagraph 3(a) of the Shareholders' Agreement is "subject to" subparagraph 3(d), which states as follows:

> (d) An Agreeing Shareholder shall have the right to convey or bequeath his/her shares to a member of such Agreeing Shareholder's immediate family. 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. The term "immediate family" shall be defined as children, spouses, parents and siblings of such Agreeing Shareholder.

J.A., Vol. I, p. 177. Under subparagraph 3(d), the Decedent, as a Capitol shareholder, had the right to convey her stock to members of her immediate family and that right continued to apply after her demise and to be applicable to the Executors. The term "immediate family" in subparagraph 3(d) includes "children." And, as noted above, under the Decedent's Will and Trust, the only recipients of the Decedent's Shares are her three children, Corr, Jimenez and Williams. The Trust calls for the conveyance or transfer of stock to all three, without consideration, subject to the right of one of them, Corr, to pay consideration for some or all of the stock.

Whether paid for or not, each such transfer would represent a "conveyance" to a member of the Decedent's immediate family, as provided in subparagraph 3(d). According to Merriam-Webster's online

dictionary, in a legal sense, “convey” means “to change the ownership of (property) from one person to another,” and is synonymous with “transfer.” Merriam-Webster, http:\\www.merriam-webster.com\dictionary\convey (last visited June 12, 2014). *See also New Oxford American Dictionary* 380 (3rd ed. 2010) (transfer the title to [property]). Thus, in order to “convey” something, one need only to change or transfer its ownership. The presence or absence of consideration is not relevant to the meaning of “convey.”

Jimenez contends that the Decedent’s estate plan technically does not fit the terms of subparagraph 3(d) because: (1) the stock would go from the Executors to the Trust, which is a separate entity, unto itself, and is not a member of Decedent’s immediate family, or (2) the stock goes from the Executors to the Trustees, and one of the Trustees, the Decedent’s son-in-law, is not a member of the Decedent’s “immediate family.” Br. of Appellant 13-15. However, this Court has held that a beneficiary is the equitable owner of property held in trust and the trustee “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)).

In substance, subparagraph 3(d) of the Shareholders' Agreement provides that a party to the Shareholders' Agreement can avoid disposition of his or her shares under subparagraph 3(a) by creating an estate plan which results in his or her shares going to members of his or her "immediate family." No technical requirements are provided as to how that outcome may, or may not, be reached.

In the case of the Decedent's estate plan, the only people who could conceivably have received her Capitol stock as of the date of her death are her three children, all of whom meet the definition of "immediately family." Nothing in subparagraph 3(d) prevents its application simply because her Will briefly allows legal title of her shares to lie with her Trustees, and equitable title with her children, before conveying, with or without consideration, complete title to her children.

This estate plan is a type of plan that is widely used, in which a trust is simply a vehicle for distributing a decedent's assets. The Shareholders' Agreement shows no intent to preclude use of such a commonly used device. The trial court appropriately recognized that the Will and the Trust operated together as one estate plan, the effect of which was an outcome

that fits within the parameters of subparagraph 3(d) of the Shareholders' Agreement, namely the conveyance of her Capitol stock to her children, i.e., her "immediate family" members.[5] Thus, the trial court did not err in ruling that subparagraph 3(d) precludes the application of subparagraph 3(a) with regard to the Decedent's Shares.

### C. THE TRIAL COURT'S RULING THAT CORR PROPERLY EXERCISED THE CORR STOCK OPTION SHOULD BE AFFIRMED. (ASSIGNMENT OF ERROR 5)

To the extent it may be determined that matters which were ruled upon by the trial court were not pleaded, the standard of review is whether the trial court abused its discretion in ruling upon such matters. *Hensley v. Dreyer*, 247 Va. 25, 30, 439 S.E.2d 372, 375 (1994).

#### 1. Corr's Exercise of the Corr Stock Option is Within the Scope of the Counterclaim

In support of her contention that the trial court erred in ruling that Corr had properly exercised his Corr Stock Option, Jimenez cites the opinion of this Court in *Ted Lansing Supply Co. v. Royal Aluminum and Construction Corp.*, 221 Va. 1139, 277 S.E.2d 228 (1981). In *Ted Lansing*, this Court reversed a judgment entered on a counterclaim, where the trial court

[5] The Executors/Trustees incorporate by reference the Statement of Facts and Section B.4 of the argument set forth in the Brief of Appellee filed by Lewis S. Corr, Jr., individually.

sustained plaintiff's motion to strike as to the only cause of action (express warranty) pled in the counterclaim, but entered judgment against the plaintiff on a cause of action (implied warranty) which the Court had interjected, *sua sponte*, over plaintiff's objection. *Id.* at 1142, 277 S.E.2d at 230. In similar fashion, this Court, in *Hensley*, reversed a judgment ordering rescission for mutual mistake of fact, where the only claim pled was actual fraud. *Id.* at 31, 439 S.E.2d at 376.

The Executors'/Trustees' Counterclaim does not assert a claim for specific relief against Jimenez. Rather, the Counterclaim alleges in general terms the events and circumstances surrounding the disputes with Jimenez, in order to describe the positions of the parties and to seek a declaration from the trial court concerning how to proceed with regard to the Decedent's Shares, the Will, the Trust, the Corr Stock Option, subparagraphs 3(a) and 3(d) of the Shareholders' Agreement, Capitol's 303 Redemption and a scrivener's error in the Trust.

After the Agreed Order (J.A., Vol. 1, pp. 219-225) was entered on November 15, 2012, Capitol's 303 Redemption was concluded and Corr exercised the Corr Stock Option on November 29, 2012. Jimenez and her counsel were aware of, and involved in, these events and, among other things, they received copies of the documents executing Capitol's 303

Redemption and the Corr Exercise of Option. *See* Br. of Appellant 29, n.5 (noting time of delivery of Corr Exercise of Option on November 29, 2012, and indicating that the timing of the delivery exercise was timely.)

Stated otherwise, they did not need additional allegations in the Counterclaim to know (1) that Corr had exercised the Corr Stock Option, (2) that the Counterclaim asked the trial court "to determine the rights of the parties named herein with regard to the Corr Stock Option . . . ," and (3) that Corr's exercise of the Corr Stock Option was "with regard to the Corr Stock Option."

Because consideration of the Corr Exercise of Option was within the scope of the prayer of the Counterclaim seeking a determination of the rights of the parties "with regard to the Corr Stock Option," this Court's holdings in *Ted Lansing* and *Hensley* do not apply to this case.

**2. The Trial Court Did Not Abuse its Discretion in Ruling on the Corr Exercise of Option**

Alternatively, the trial court acted within the bounds of its discretion under Virginia Code § 8.01-377 when it ruled on the validity of the Corr Exercise of Option. As recognized in *Hensley*, under Virginia Code § 8.01-377, if there is a variance between the facts adduced at trial and the applicable pleading, a trial court has the option of "having the facts

determined and rendering judgment, but only on the condition that no prejudice results." *Id.* at 30, 439 S.E.2d at 375.

Jimenez cannot establish that she was prejudiced by the trial court's ruling on the validity of the Corr Exercise of Option. In fact, it was her counsel who first raised the issue when he introduced the Corr Exercise of Option and asked questions about it during his deposition of Corr taken on August 29, 2013, 33 days before the trial of this action. For the Court's convenient reference, copies of the pages in which counsel for Jimenez had Corr identify the Corr Exercise of Option and asked questions about it are attached hereto as **Exhibit A**.[6] This is contrary to her contention that no discovery was conducted on the Corr Exercise of Option. Br. of Appellant 26-27.

Jimenez's counsel was also the first to raise the issue at trial. During his opening statement, he made the point that, because none of Decedent's Shares were owned by the Trust as of "90 days after the death Norma Corr," Corr did not have the right to exercise his option. J.A., Vol. I, pp. 241-42.

[6] Because Jimenez's Petition did not mention the lack of discovery as a basis for her position, the Trustees did not include the attached copies of deposition pages in the Appendix.

Then, during the opening statement presented by counsel for Corr, Jimenez's counsel interrupted to make the point that, based on language he had required in the Agreed Order, entry of the Agreed Order did not deprive Jimenez of her argument that Corr could not, and did not, exercise the Corr Stock Option validly, because none of the Decedent's Shares were in the Trust by 90 days after the death of Norma Corr. J.A., Vol. I, pp. 256-57.

Crucially, Jimenez's counsel did not object when counsel for Corr introduced the written Corr Exercise of Option and examined Corr about his submission of the Corr Exercise of Option to the Trustees on November 29, 2012. J.A., Vol. I, pp. 427-29; Vol. II, pp. 571-73.

The first time that counsel for Jimenez contended (briefly) that the Corr Exercise of Option was not before the trial court did not occur until close to the end of the presentation of evidence during a colloquy he had with the trial court while he was cross-examining Corr. J.A., Vol. I, p. 447.

The next day, during closing argument, counsel for the Executors/Trustees directed the trial court's attention to the Corr Exercise of Option and began to argue against the contention of Jimenez's lawyer that such an exercise was not valid since it occurred after 90th day following Norma Corr's death. J.A., Vol. II, p. 481.

At that point, Jimenez's counsel interrupted and made an argument, on the merits, as to why the Agreed Order did not allow Corr to exercise his option after 90th day following the Decedent's death. *Id.* p. 482. Only after counsel for the Executors/Trustees tried to resume his closing did Jimenez's counsel interrupt again to suggest that the Corr Exercise of Option was not before the trial court because it was not in the pleadings. *Id.* p. 482-83.

Counsel for the Executors/Trustees then directed the Court's attention to the language of the Counterclaim, after which he proceeded with his closing argument, explaining how the Agreed Order, by extending the Corr Stock Option deadline from 90 days after the Decedent's death to November 29, 2012, did indeed give Corr the ability to exercise his option validly on November 29, 2012. *Id*. p. 484.

The greatest amount of attention to this issue occurred during the announcement by the trial court of its decision and the surrounding discussion, appearing on pages 534-54 of Volume II of the Joint Appendix. After considerable discussion about whether the Final Order should include a provision indicating that the Corr Exercise of Option was valid, and in the interest of trying to avoid a separate piece of litigation over what seemed to be a fairly simple and straightforward issue, the trial court asked Jimenez's

counsel, “as an officer of the Court, . . . do you have evidence that for some reason the offer presented by Mr. Corr, the option to exercise the Option was not properly done?” *Id*. 547-48.

In response, Jimenez’s counsel raised an issue (addressed in more detail below) for which no evidence was required, since it was simply an issue of interpreting documents already admitted in evidence, specifically Art. IV(B)(6) of the Trust, J.A., Vol. I, pp. 159-61, and the written Corr Exercise of Option, J.A., Vol. II, pp. 571-73. Jimenez’s counsel wound up agreeing that no matter which way the option was construed as being exercised, the financial payment by Corr would be the same. *Id*. pp. 552-53. However, he contended that one way could provide the Trust with a greater amount of collateral than the other for any payment for which Corr may provide a note to the Trust. *Id*.

Jimenez’ contention that the Court found the Corr Exercise of Option to be invalid and, therefore, modified is not correct. To the contrary, as reflected in the Final Order, the trial court ruled that Corr did exercise the Corr Stock Option validly on November 29, 2012, J.A., Vol. II, p. 576, ¶ 4.

Moreover, Trustees’ counsel and Corr’s counsel did not modify the written Corr Exercise of Option. Rather, in order to accommodate the concern raised by Jimenez’s counsel, they agreed that the option would be

closed in the way that provided the greater amount of collateral to the Trust for any such note. *Id.* p. 553. That agreement is reflected in the Final Order. J.A., Vol. II, pp. 576-77.

By the time the trial court made its ruling, it was within its discretion, pursuant to Virginia Code § 8.01-377, to determine the facts that had been presented in the trial and to render a judgment based on them. *Hensley*, at 30, 439 S.E.2d at 375.

Importantly, Jimenez had not objected to the introduction of the Corr Exercise of Option or to the testimony solicited by Corr's attorney concerning the Corr Exercise of Option. In analogous circumstances, this Court has ruled that where a party did not timely object to the admission of certain evidence, such party could not challenge a trial court's overruling of its motion to strike based on such evidence. *Banks v. Mario Indus. of Va. Inc.*, 274 Va. 438, 456, 650 S.E.2d 687, 696 (2007). Thus, the trial court had before it, without objection from Jimenez, the evidence it needed to consider a judgment on the validity of the Corr Exercise of Option and it had the discretion to do so pursuant to Section 8.01-377.

The lack of prejudice to Jimenez is demonstrated by the facts outlined above. First, Jimenez took discovery concerning the Corr Exercise of Option. Second, she brought it up in her opening statement. Third,

during the opening statement presented by Corr's counsel, she interrupted to argue against a valid exercise of the Corr Stock Option. Fourth, during the Executors'/Trustees' counsel's closing argument, she again argued against Corr's right to validly exercise the Corr Stock Option. Fifth, the trial court have her counsel the opportunity to proffer any evidence he had to support her contention that the Corr Exercise of Option was not properly done. Sixth, in response to that question, he raised arguments based on the language of the Trust and the language of the Corr Stock Option, arguing their inconsistency, but proffering no additional evidence. Seventh, concerning the point raised about the potential amount of collateral available to secure a note from Corr in payment for the stock, the Trustees and Corr agreed to close the conveyance of stock to Corr in the manner that provided the greater amount of collateral.

Jimenez cites *Virginia Hardwood Lumber Co. v. Hughes*, 140 Va. 249, 124 S.E. 283 (1924), which holds that the party receiving an acceptance of an offer to contract has the "right to prescribe . . . any conditions as to . . . mode of acceptance, or other matters . . . ." *Id*. at 257, 124 S.E.2d at 285.

Art. IV(B)(6) of the Trust authorizes the Trustees to accept Corr's exercise of the Corr Stock Option. The relevant part of Art. IV(B)(6) of the Trust states:

> Notwithstanding anything herein to the contrary, upon the second to die of the Grantor and her husband, the Grantor's son, Lewis S. Corr, Jr., is hereby granted and given the exclusive right and option to purchase (i) any or all shares of stock in Capital [*sic*] Foundry of Virginia, Inc., or any successor entity thereto, which Trust A herein may own, . . . . The option shall be exercised by written notice delivered to the Trustee within ninety (90) days of the date of the second to die of the Grantor and her husband.

J.A., Vol. I, pp. 159-60. As reflected in the above language, the only information Corr needs to provide in exercising the Corr Stock Option is sufficient information to determine about how many shares he wanted to purchase. There is no requirement beyond that.

The relevant part of the Corr Exercise of Option states:

> By his signature to this instrument, Jim exercises his option to purchase the minimum number of Trust Shares (to be allocated to the shares of the Trust for Tricia and Nancy) as required to provide Jim with ownership of 67% of the issued and outstanding voting common shares of the Company remaining after all Section 303 Redemptions and all adjustments thereto have been completed, when added to (i) the five shares of Company stock Jim already owns, and (ii) the one-third (1/3) of the Trust Shares to be allocated to the share of the Trust for Jim . . . .
> The shares to be purchased by Jim in accordance with the exercise of his option as described in this paragraph are referred to as the "Purchased Shares." Jim will purchase half of the Purchased Shares from the portion of the Trust Shares

> allocated to the share of the Trust for Tricia and will purchase half of the Purchased Shares from the portion of the Trust Shares allocated to the share of the Trust for Nancy.

Record, Corr Tr. Ex. 4, p. 3. The first sentence quoted above provides the method by which the number of shares as to which Corr is exercising his option can be calculated in order to allow him to achieve his goal of owning 67% of all issued and outstanding Capitol shares. Thus, the first sentence provides the Trustees with all the information they need under the terms of Art. IV(B)(6) of the Trust.

Jimenez's concern relates to language in the Corr Exercise of Option quoted above which appears to indicate that shares would be allocated to the Decedent's three children, Jimenez, Corr and Williams, before the Corr Exercise of Option was closed. Her contention is that the shares should be allocated among the three children only after the Corr Exercise of Option is closed, which, in turn, would result in more shares being available as collateral for any note that Corr might provide in payment for the shares purchased. J.A., Vol. II, pp. 552-53. At the same time, Jimenez does recognize that, no matter which way the Corr Exercise of Option is closed, Corr will purchase the same number of shares and pay the same amount. *Id.*

From the perspective of the Trustees, the language that concerns Jimenez is not language they are bound to follow. As mentioned above, the Trustees, in order accept Corr's exercise of his stock option, need only know how many shares he intends to buy pursuant to the Corr Stock Option. Managing the Remaining Decedent's Shares within the trust before the Corr Exercise of Option is closed is their responsibility, and they are not obligated to proceed according to any of Corr's directions (other than the number of shares to be purchased) that may have been set forth in the Corr Exercise of Option. When Jimenez's concern about the collateral surfaced at the close of the trial, it was not a difficult decision for the Trustees to agree that the Corr Exercise of Option would be closed in the manner that would address her concern.

**3. Conclusion**

The validity of Corr's exercise of the Corr Stock Option is within the scope of the relief sought in the Counterclaim which asks for determination of the rights of the parties "with regard to the Corr Stock Option." If not, the trial court was well within its discretion under Virginia Code § 8.01-337 to consider and determine the facts that had been presented during the course of the trial and render its ruling that Corr had validly exercised the

Corr Stock Option.[7] Thus, for all of the reasons set forth above, the trial court's ruling should be affirmed.

## V. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the reasons set forth above, the Executors/Trustees respectfully request that the trial court's Final Order be affirmed in all regards, except that the trial court's ruling set forth in paragraph 3 of the set forth in the Final Order concerning the enforceability of subparagraph 3(a) of the Shareholders' Agreement be reversed and judgment entered declaring subparagraph 3(a) of the Shareholders' Agreement to be unenforceable under the circumstances of this case.

[7] The trial court's ruling will spare the court system and the parties from further litigation that might otherwise be needed to resolve Jimenez's concern about the Corr Exercise of Option.

Respectfully submitted,

**LEWIS S. CORR, JR., as Executor of the ESTATE OF NORMA F. CORR, and as Trustee of the NORMA F. CORR REVOCABLE TRUST and THOMAS WILLIAMS, as Executor of the ESTATE OF NORMA F. CORR, and as Trustee of the NORMA F. CORR REVOCABLE TRUST**

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*Counsel for Appellees, Lewis S. Corr, Jr., and Thomas Williams, as Executors of the Estate of Norma F. Corr, and as Trustees under the Norma F. Corr Revocable Trust*

## VI. CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, in compliance with Rule 5:26(h), fifteen (15) bound copies of the foregoing, along with one (1) electronic version on CD, in Adobe Acrobat Portable Document Format ("PDF"), were hand-delivered to the Clerk of this Court, and three (3) bound copies, with one (1) electronic copy on CD, of the foregoing were sent by UPS Ground Transportation to:

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By: _____
Of Counsel

# EXHIBIT A

VIRGINIA: IN THE CIRCUIT COURT CITY OF VIRGINIA BEACH

| | | |
|---|---|---|
| NANCY C. JIMENEZ, Plaintiff, | : | |
| v. | : | AT LAW NUMBER CL12-5816 LEWIS S. CORR, JR. |
| LEWIS S. CORR, JR., ET AL, Defendants. | : | |

DEPOSITION UPON ORAL EXAMINATION
OF **LEWIS S. CORR, JR.**

AUGUST 29, 2013

VIRGINIA BEACH, VIRGINIA

APPEARANCES:

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EXHIBIT
tabbies
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**LEWIS S. CORR, JR.**

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1 MR. ALBERT: I'm sorry, could you clarify?
2 When you say "your shares," are you referring to
3 the shares that he presently owns or the shares
4 that he might get through the operation of the
5 Trust?
6
7 BY MR. BAUMGARTNER:
8 Q I'm saying that you -- let's clarify it. You
9 contend that you are entitled to get 10.2 shares of stock
10 out of the 30.6 shares that the Estate owns, correct?
11 A Yes.
12 Q All right. And would you agree then that
13 mathematically Nancy Jimenez is entitled to receive 10.2
14 shares, correct?
15 A Yes.
16 Q And Patricia is entitled to receive 10.2 shares,
17 correct?
18 A Yes.
19 Q But you contend that your shares are going to be
20 distributed in kind, correct? That you are going to get
21 10.2 shares given to you, and that you are going to purchase
22 some of the 10 shares that are supposed to go to each Nancy
23 and Patricia?
24 A I believe that is the way this works.
25 Q All right. Why are your 10.2 shares exempt from



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1 the Option?
2 A I didn't write the documents.
3 Q Okay. So you don't know is the answer?
4 A I don't know.
5 MR. ALBERT: Objection to the
6 characterization of his testimony.
7 Q Okay.
8 A I don't know legally why one would be exempt and
9 one wouldn't be exempt.
10 Q Okay. But it is your contention that you get your
11 10.2 shares exempt from the effect of the Option?
12 A It is my understanding.
13 Q Okay. And that's the manner in which you have
14 exercised your Option, you have exercised your Option only
15 as to the shares owned by Patricia and Nancy, correct?
16 MR. ALBERT: I'm going to object to the
17 question to the extent that you are asking him to
18 construe an Option that's not -- (A), it is not
19 in evidence before him or not an exhibit before
20 him, and (B), is a complex legal instrument. The
21 Option speaks for itself.
22 MR. BAUMGARTNER: Well, since we happen to
23 have a copy here, let's have him take a look at
24 that.
25 MR. ALBERT: I said the Option speaks for



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1 itself. The exercise in the Option speaks for
2 itself. Are we going to mark this?
3 MR. BAUMGARTNER: Yes, we are. And that
4 will be Number 15.
5 (Whereupon, a document title
6 Exercise of Option was marked as **Exhibit**
7 **Number 15** to the deposition.)
8
9 BY MR. BAUMGARTNER:
10 Q I have passed you a document we have marked as
11 Exhibit Number 15. Do you recognize this as an Exercise of
12 Option?
13 A Yes, sir.
14 Q And did you sign this document?
15 A I signed it twice.
16 Q All right. Once as an individual and once as the
17 Cotrustee of the Estate? Of the Trust, excuse me.
18 A Yes, sir.
19 Q And on Page 3 you -- the first paragraph after the
20 words "Exercise Purchase Option for Trust Shares." Do you
21 see that?
22 A Yes, sir.
23 Q All right. It says, "By his signature to this
24 Trust instrument, Jim exercises his Option to purchase the
25 minimum number of Trust shares, open paren, to be allocated



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1 to the shares of the Trust for Trisha and Nancy." Do you
2 see that?
3 A Yes.
4 Q What language of the Trust Option are you relying
5 on to allocate that purchase to their shares as opposed to
6 the shares of the Trust generally?
7 A It is my belief that -- and understanding that the
8 shares technically go to each individual, and my Option is
9 exercise on the shares that are given to the individual.
10 Q Okay. Prior to -- after the death of your mother
11 and prior to the July 2nd meeting with Lewis Webb, did you
12 have any -- I don't want to know what the discussions with
13 counsel are. I just want to know if you sought counsel
14 between the death of your mother and the meeting with
15 Mr. Webb in July?
16 MR. ALBERT: Objection, relevance.
17 A What kind of counsel?
18 Q Either corporate or individual.
19 A I don't think I sought counsel at that time.
20 There would have been no reason I could see to talk to
21 counsel in that time.
22 Q You were aware of the Purchase Option in the Trust
23 prior to your mother's death, correct?
24 A Yes.
25 Q After your mother's death, did you have a concern



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