IN THE

Supreme Court of Virginia

RECORD NO. 171708

SARAH YANCEY MAY,

Appellant,

v.

R. A. YANCEY LUMBER CORPORATION,

Appellee.

BRIEF OF APPELLEE

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SCV: Submitted on 08-10-2018 13:53:06 EDT for filing on 08-10-2018

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INTRODUCTION

This is a family dispute over a family business. Richard A. Yancey, Jr. ("Dick"), E. Daniel B. Yancey ("Dan"), and Sarah Yancey May ("Sarah") are adult siblings who, along with their spouses, own R.A. Yancey Lumber Corporation ("the Company"). Since its founding in 1959, the Company has operated two distinct business segments: a sawmill ("Mill Business") and real estate holdings used to grow, harvest and sell timber to third parties ("Timber Business"). Dick and Dan want to sell the Mill Business. Sarah does not.

The Virginia Stock Corporation Act ("the Act") permits a corporation to sell assets without shareholder approval unless the sale would leave the corporation without a "significant continuing business activity." Va. Code § 13.1-724(A). The statute does not define "significant continuing business activity." However, it does provide a default "safe harbor" delineating conditions under which a corporation "will conclusively be deemed to have retained a significant continuing business activity." *Id.* Notably, the statute also authorizes corporations, through shareholder-approved bylaws or articles of incorporation, to modify the safe harbor and define what is a significant continuing business activity in a way that reflects a corporation's individual circumstances. *Id.*

Exercising this authority, the Company amended its bylaws in December of 2015 and again in March of 2016 to set forth the circumstances under which either the Timber Business and/or Mill Business would constitute a significant continuing business activity. Sarah objected to the bylaw amendments as a precursor to a sale of the Mill Business. However, she waited until the sale was about to close to mount a legal challenge to the bylaw amendments. This appeal is Sarah's last-ditch effort to scuttle the sale.

The circuit court properly dismissed Sarah's Complaint for several reasons. First, Sarah's assertion that the Company could not alter the statutory safe harbor through its bylaws is contrary to both the plain language and legislative history of Virginia Code § 13.1-724. The statute specifically authorizes corporations to alter the default safe harbor to suit their specific circumstances via a "shareholder-approved bylaw." This flexibility reflects Virginia's historical approach to corporate governance.

Second, Sarah's argument that altering the statutory safe harbor requires approval by more than two-thirds of the shareholders is legally and factually flawed. To safeguard against unscrupulous conduct, the statute requires shareholder approval to alter the statutory safe harbor, but the General Assembly chose not to impose a "supermajority" voting

requirement on such alterations. This manifests the longstanding preference in Virginia that corporations are governed by the will of the majority, and it is consistent with the Act and the Company's governing documents, both of which allow a simple majority of a corporation's shareholders to amend its bylaws. Ultimately, even if the statute did require approval by two-thirds of the shareholders to alter the safe harbor, Sarah's argument fails because **the bylaw amendment was ultimately approved by the holders of roughly 70% of the Company's shares**.

Third, the evidence established that the Timber Business is a significant continuing business activity under the amended bylaws and, indeed, by any reasonable metric. Thus, the circuit court properly held that shareholder approval is not required for a sale of the Mill Business.

Finally, though she objected to the bylaw amendments at every step, Sarah took no legal action to assert her rights. She even rejected efforts by the Company to resolve the dispute via arbitration or mediation. Instead, Sarah waited more than 18 months, until the sale of the Mill Business was about to close, to challenge the amendment of the Company's bylaws. This was an obvious attempt to scare the buyer and scuttle the deal. The circuit court correctly found that Sarah's strategic filing contravenes principles of equity and is barred by the doctrine of laches.

STATEMENT OF THE CASE

Sarah filed her Complaint and a Motion for Temporary Injunctive Relief on August 11, 2017. *Appendix ("App."), 1-34*. The Complaint sought declaratory judgment that the Company's amendment of its bylaws was illegal and injunctive relief to enjoin the proposed sale of the Mill Business. *App. 14-16.* No other claims were asserted. *Id.*

The Company filed a Demurrer, Plea in Bar, and Answer to Sarah's Complaint. *App. at 35-48*. The Company's Plea in Bar asserted (i) that the Timber Business constitutes a "significant continuing business activity" under Virginia Code § 13.1-274 and (ii) that Sarah's claims were barred by the doctrines of laches and unclean hands. *App. 46-47*.

On September 15, 2017, the circuit court held an evidentiary hearing on the Company's Plea in Bar and Sarah's Motion for Temporary Injunctive Relief. The circuit court heard live testimony from four witnesses. *App. at 55-255*. The circuit court also received evidence through facts, exhibits and affidavits that were stipulated by the parties. *App. 281-409*.

On September 21, 2017, the circuit court granted the Company's Plea in Bar and dismissed the case. The circuit court rejected Sarah's reading of Virginia Code § 13.1-274. *App. 445-51*. It found that the Company's amended bylaws were "both legal and in full force and effect,"

(*App. 452*) and that the Timber Business is a significant continuing business activity under the bylaws such that any sale of the Mill Business did not require approval of the shareholders. *App. 453*. The circuit court also found in favor of the Company on the issue of laches and explained in detail the evidentiary basis for its ruling. *App. 453-58*.

On September 27, 2017, the circuit court entered its final order denying Sarah's Emergency Motion for Temporary Injunctive Relief, granting the Company's Plea in Bar, and entering final judgment in favor of the Company. *App. 415-416*.

STATEMENT OF FACTS

A. Ownership of the Company.

Richard A. Yancey, Sr. founded the family lumber business in Albemarle County in 1949. *App. 52* (¶¶ 1-2). He incorporated the Company along with his wife and son, Dick, in 1959. *App. 399* (¶ 3). The Company currently has six shareholders. Sarah and her ex-husband, Bill May, together own just over one-third of the total outstanding shares of the Company. *App. 53* (¶ 12.) Dick, Dan, and their respective wives, Jane and Betsy, collectively own the remaining two-thirds of the outstanding shares of the Company. *App. 53* (¶ 8). Dick, Dan, and Sarah are also the Directors of the Company. *App. 52-53* (¶¶ 5-7).

B. The Mill and Timber Businesses

The Company has maintained two distinct businesses since its beginning in 1959. In fact, the Company's Articles of Incorporation, which describe the purposes for which the Company was formed, contemplate the operation of both the Mill and Timber Businesses. *App. 294* (¶ 2). The Company's Mill Business purchases pine from third parties and processes it into pine lumber and chips to provide to customers throughout the Southeast. *App. 3* (¶ 3).

The Company's Timber Business is comprised of 25 parcels of land totaling 2,467.93 acres in Albemarle, Nelson, Louisa, and Greene Counties. *App. 53* (¶ 13). The Timber Business parcels are assessed for tax purposes at a fair market value of over $7,600,000. *App. 400-01* (¶8). The parcels are generally populated with relatively slow-growing hardwood, rather than pine, and the hardwoods are harvested at irregular intervals and sold to third parties. *App. 400-401* (¶ 8). While the Company does not sell timber every year, the Timber Business has the potential to create considerable revenue and profits. *App. 179-81*. It generated $286,000 of profit in 2016 (*App. 137*), and Sarah conceded that another tract of hardwoods was expected to sell for "about $700,000" at the time of the evidentiary hearing in 2017. *App. 137-38*.

The profitability of the Mill Business also fluctuates. *App. 404* (¶21). While recent years have been profitable (*Id.*), Sarah conceded at hearing that the Mill Business did not make any money between 2008 and 2011. *App. 135-36*. In fact, the operating costs of the Mill Business during that timeframe were supported by a credit line that is secured by the assets of the Timber Business. *Id.*

Thus, revenue and net income generated by the two segments of the Company are in constant flux. In any given year, the Timber Business might constitute 20% of the Company's assets and net income, making it a significant continuing business activity under the default safe harbor in Code § 13.1-724.

C. Rationale and Preparation for Sale of the Mill Business

Dick is now 80, and Dan is 78. *App. 179*. They no longer wish to manage the operations of the Mill Business, a demanding and sophisticated business that has only grown more so over time. *App. 401*, (¶¶ 7, 11-12). Sarah is also well-past traditional retirement age. *Id.* Sadly, if there is one thing on which the Yanceys agree, it is that the family does not get along with each other. *App. 179*. Asked point blank whether the family gets along, Sarah responded "No, we do not." *App. 143*. The third generation of Yanceys lack the desire and experience to run the Mill

Business, and Dick and Dan believe it is in the best interests of all the shareholders to sell that portion of the Company. *App. 401* (¶¶11-12).

The lumber industry was profitable in 2014, and the Mill Business had a good year. *Id.* Thus, the Company began exploring a potential sale of the Mill Business, and in July of 2015, it engaged an investment banking company to solicit purchase officers. *App. 402* (¶ 14). If the Company fails to sell the Mill Business when market conditions are favorable, it may not have another opportunity to sell in the foreseeable future. *App. 404* (¶ 21).

D. Amendments to Bylaws

In December 2015, the Company amended its bylaws. *App. 402* (¶ 16).[1] At that time, the bylaws were subject to amendment by a majority vote of the entire Board of Directors or at a shareholders meeting by a majority vote "of all the stock voting at such meeting." *App. 304*. The Company's approach to bylaw amendments is in keeping with Virginia law. *See*, Va. Code § 13.1-714.

Among the amendments approved in December of 2015 was the addition of Article XII, which confirms that either the Mill Business or the Timber Business constitutes a significant continuing business activity

[1] The amendments to the bylaws were comprehensive in scope and went well beyond defining the Timber Business as a "significant continuing business activity." *Compare,* Bylaws (*App. 301-305*) *with* Amended and Restated Bylaws (*App. 314-322*).

without the other "if the fair market value of the retained business assets constitutes at least 25% of the fair market value of all of the Corporation's assets" before the sale or other disposition. *App. 335-336*. The Amended Bylaws defined "fair market value" as "the most recent assessed value for tax purposes." *App. 336*. On December 16, 2015, four of the Company's six shareholders voted in favor of the amendment. *App. 326*. Sarah May attended the meeting and voted against the amendment. Bill May did not attend the meeting, but Sarah's son, Patrick, exercised Bill May's proxy and voted against the amendment, as well. *Id.*

The Company subsequently realized that, because the parcels in the Timber Business are eligible for land use tax deferrals, defining "fair market value" by reference to "the assessed value for tax purposes" could create confusion. Thus, the Company amended Article XII of the Bylaws again to define "fair market value" as "the most recent gross land and improvement values determined by the local tax authority for local taxation of real property owned by the Corporation, irrespective of any land use deferral." *App. 375*.

This amendment was approved at a duly-noticed special meeting of the shareholders on March 25, 2016. *App. 362*. This time, Bill May attended in person, and he "voted in favor of the amendment." *Id.* Sarah

abstained from the vote. *Id.* Thus, five of the six shareholders holding nearly 70% of the Company's shares of stock voted in favor of the second amendment. *App. 362*. Ultimately, the amendment to the bylaws was approved by more than two-thirds of the shareholders.

E. Sarah's Interference with the Sale of the Mill Business and Eleventh-Hour Lawsuit.

Sarah objected to the amendment of the bylaws in 2015 and again in 2016 as an improper attempt by her brothers to control the sale of the Mill Business. *App. 7* (¶ 34); *144-45*. Her personal counsel wrote a letter objecting to the proposed amendment as contrary to Virginia Code § 13.1-724. *App. 410*.

On May 3, 2017, after almost two years of marketing the Mill Business through an investment banker, the Company executed a letter of intent to sell the Mill Business for $10 million. *App. 402* (¶ 15). She again objected to the execution of the letter of intent. *App. 391* (¶ 2). Though she consistently objected to the sale of the Mill Business, Sarah admitted at the hearing that she would consider selling the Mill Business for $20 million. *App. 150*.

Thus, for almost two years, Sarah objected to the amendment of the bylaws and her brothers' attempts to sell the Mill Business, but she did not seek any legal recourse during that time. In fact, Sarah rejected attempts

by the Company's counsel to resolve the dispute between Sarah and her brothers through arbitration or mediation. *App. 210-11.*[2]

Instead, she tried to scare away the buyer by other means. Acting outside any authority to do so on behalf of the Company, Sarah called the potential buyer ("Graycliff") and stated that she opposed the sale of the Mill Business and had the votes to block it. *App. 408* (¶ 5). As a direct result of Sarah's interference, Graycliff imposed a "break-up fee" of $250,000 to cover its costs if the transaction did not close. *App. 408* (¶ 6).

When her efforts to unilaterally skewer the deal failed, Sarah waited until August 11, 2017, only three weeks before the sale of the Mill Business was set to close, to file a Complaint and bring a legal challenge to the amendment of the bylaws in 2015 and 2016. *App. 408* (¶ 7). Regardless of merit, the strategic timing of Sarah's Complaint had the desired effect of interfering with the sale of the Mill Business, as Graycliff was unwilling to close the transaction because of the lawsuit. *Id.*

[2] The Company even invited Sarah to present the issue to Allen Goolsby, a pre-eminent practitioner on Virginia corporate law who helped draft the statute in question. *App. 210-11.*

STANDARD OF REVIEW

Sarah asserts that the circuit court's ruling on the Company's Plea in Bar is subject to a *de novo* standard of review. This is incorrect. "If the parties present evidence on [a] plea *ore tenus*, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010); *see also, Vasquez v. Commonwealth*, 291 Va. 232, 248 (2016) (noting that the Court reviews "fact finding with the highest degree of appellate deference.")

The circuit court's ruling on the Plea in Bar was based not solely on its interpretation of § 13.1-724, but on the substantial volume of documentary and testimonial evidence presented. In particular, the rulings that the amendments to the bylaws were valid, that the Timber Business is a significant continuing business activity and that the doctrine of laches barred Sarah's claims were factual findings based on the circuit court's assessment of the evidence presented by the parties and the credibility of the witnesses. Thus, the circuit court's rulings are entitled to "the highest degree of appellate deference," and this Court must not disturb the grant of the plea in bar unless that decision was without any evidentiary support.

Likewise, with respect to Sarah's motion for temporary injunctive relief, the circuit court's declination of Sarah's request for an injunction "cannot be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it." *Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 258 Va. 140, 149 (1999) (citing *W.S. Carnes, Inc. v. Board of Supervisors of Chesterfield County*, 252 Va. 377, 385 (1996)).

ARGUMENT

I. Virginia Code § 13.1-724 Does not Require the Company to Obtain Approval of Two-Thirds of the Shareholders to Sell the Mill Business.

The crux of Sarah's Appeal is that Va. Code § 13.1-724 requires the Company to obtain approval from more than two-thirds of the shareholders – and her approval in particular – to sell the Mill Business. However, Sarah's arguments contravene the plain language of the statute, its legislative history and purpose, and Virginia's flexible approach to corporate governance.

A. The Circuit Court Properly Interpreted Virginia Code § 13.1-724(A).

1. Statutory Construction of Virginia Code § 13.1-724(A)

The interpretation of a statute begins with the plain language employed by the legislature. "When a statute is unambiguous, we must

apply the plain meaning of that language." *Appalachian Power Co. v. State Corp. Comm'n.*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012); *see also, Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) ("We . . . assume that the legislature chose, with care, the words it used when it enacted the relevant statute and we are bound by those words as we interpret the statute.") The "plain, obvious, and rational meaning of a statute is always preferred over a curious, narrow, or strained construction." *Harward v. Com., 229 Va. 363, 365, 330 S.E.2d 89, 90 (1985).* In matters of statutory construction, the General Assembly is presumed to understand existing law when it enacts a statute. *Philip Morris USA Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007)*; *Shaw v. Com., 9 Va. App. 331, 334, 387 S.E.2d 792, 794 (1990)*.

These rules guide the Court's consideration of Code § 13.1-724(A), which provides:

> A sale, lease, exchange or other disposition of the corporation's assets, other than a disposition described in § 13.1-723, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. Unless the articles of incorporation or a shareholder-approved bylaw otherwise provide, if a corporation retains a business activity that represented at least 20 percent of total assets at the end of the most recently completed fiscal year, and 20

> percent of either (i) income from continuing operations before taxes or (ii) revenues from continuing operations for that fiscal year, in each case of the corporation and any of its subsidiaries that are consolidated for purposes of federal income taxes, the corporation will conclusively be deemed to have retained a significant continuing business activity.

2. The Statutory Safe Harbor Is Not a Mandatory Threshold.

In general, a corporation's board of directors may "sell, lease, exchange or otherwise dispose of any or all" of the corporation's assets in the "usual and regular course of business." Va. Code § 13.1-723. Shareholder approval is only required if a disposition of assets "would leave the corporation without a significant continuing business activity." Va. Code § 13.1-724(A). Section § 13.1-724 does not define what constitutes a "significant continuing business activity." That determination is largely left to individual corporations to decide.

The second sentence of § 13.1-724(A) does provide a safe harbor. The safe harbor establishes certain default criteria by which a corporation's retained assets will constitute a significant continuing business activity. Specifically, if the retained assets comprise 20% of the company's assets and either 20% of its net income or revenue for the preceding fiscal year, then the retained assets automatically qualify as a significant continuing business activity.

Sarah claims that the Company may not sell the Mill Business without her approval because the Timber Business does not meet this safe harbor. *Appellant's Brief, p. 20*. In effect, she argues that the statute sets a bare minimum below which shareholder approval is required. This is incorrect.

The statutory safe harbor is affirmative, not proscriptive. Corporations that meet the default safe harbor "**will conclusively be deemed** to have retained a significant continuing business activity." Va. Code § 13.1-724(A) (*emphasis added*). The purpose of the safe harbor is to protect corporations from interference by dissenting shareholders in clear cases, not to encumber corporations with a minimum threshold that must be cleared to sell assets or a segment of the corporation's business. When the statutory threshold is met, the corporation's sale of assets is immune to challenge by a dissenting shareholder. However, even where the threshold is not met, a corporation still may retain a significant continuing business activity. In other words, clearing the statutory test authorizes a corporation to sell its assets without shareholder approval, but failing to meet the statutory test does not necessarily mean that shareholder approval is required.

3. Corporations May Adopt Their Own Safe Harbor.

The conclusion that the safe harbor is not proscriptive is confirmed by the fact that the statute provides corporations flexibility to determine for themselves what constitutes a "significant continuing business activity." The statutory safe harbor begins with the phrase, **"[u]nless the articles of incorporation or a shareholder-approved bylaw otherwise provide . . .**" *Id.* This plain language gives corporations the ability – through their articles and/or bylaws – to alter the safe harbor and establish for their own unique circumstances what constitutes a significant continuing business activity.

Sarah argues that the "unless…otherwise provide[d]" language merely allows corporations "to opt out" of using the safe harbor. *Appellant's Brief, p. 24*. Sarah's contention is contrary to the plain meaning of the phrase: "[u]nless the [bylaws] otherwise provide." *Appalachian Power,* 284 Va. 695, 706. The General Assembly did not use language that would only allow corporations to "opt out" of the safe harbor. Instead, the General Assembly gave corporations the flexibility to deviate from the statutory safe harbor by "otherwise providing" criteria to measure significant continuing business activity in the corporation's articles or bylaws. The statute means what it says, and it must be interpreted and applied accordingly.

The leading commentator on Virginia corporate law confirms this interpretation of the statute's plain language, noting that "[t]he safe harbor can also be **altered** or rendered inapplicable by a provision in the articles of incorporation or a shareholder-approved bylaw." *Goolsby & Haas on Virginia Corporations,* 5th ed., § 13.2 at 307 (2015) (emphasis added).[3]

Sarah's arguments also run counter to Virginia's lenient approach to corporate governance and its history of allowing corporations to tailor provisions of the Act to their circumstances. Again, as noted by Mr. Goolsby, the "primary characteristic of the [Virginia Stock Corporation] Act is the flexibility that it provides both public and closely held corporations." *Id.,* Introduction, at xi. This flexibility is in keeping with Virginia's "view that greater governmental control of corporate affairs is not typically desirable" and "the advantages of increased judicial intervention into the corporate decision-making process are outweighed by the disadvantages." *Id*. Indeed, "most substantive requirements in the Act are modified by the

[3] Allen Goolsby is not only a commentator, but in fact drafted the statute in question. "Mr. Goolsby has been the principal draftsman of the Virginia Stock Corporation Act, including the 2005, 2007 and 2010 revisions of that Act. He has served two terms as a member of the Committee on Corporate Laws of the American Bar Association's Section of Business Law, which has responsibility for the Revised Model Business Corporation Act." *Goolsby,* Introduction, at xvii.

phrase . . . 'unless otherwise provided in the articles of incorporation or bylaws.'" *Id.*

Such commentary lays bare Sarah's argument that corporations can only "opt out" of the safe harbor, and that they cannot modify the safe harbor to meet their own unique circumstances. The plain language of § 13.1-724(A) allows corporations to deviate from the default safe harbor and establish their own individual criteria for defining what is a significant continuing business activity.

4. <u>The Legislative History of § 13.1-724 Supports the Circuit Court's Interpretation and Rulings</u>.

Because the statute is unambiguous, there is no need to examine legislative history. *Newberry Station Homeowners Ass'n., Inc. v. Bd. of Sup'rs of Fairfax County*, 285 Va. 604, 614, 740 S.E.2d 5548, 553 (2013). However, Sarah's reliance upon legislative history to circumvent the statute's plain meaning is, in and of itself, incorrect.

The "significant continuing business activity" threshold is a relatively recent addition to the Act. In 2005, the General Assembly revised Va. Code § 13.1-724 to incorporate changes to the Revised Model Business Corporation Act ("Model Act"). The revisions included the substitution of the "significant continuing business activity" threshold for the previous test,

which required shareholder approval of a disposition of "all or substantially all" of the assets of the corporation.

The General Assembly revised § 13.1-724 in part because the "substantially all" threshold produced wide variation in court decisions and resulting uncertainty for corporations. Given the greater specificity and flexibility of the 2005 revisions, "[p]ractitioners should have less difficulty advising whether a sale of assets does or does not require shareholder approval." *Goolsby*, § 13.2 at 308. Thus, the purpose of the recent revisions to § 13.1-724(A) was not to protect minority shareholders, but to provide a more certain benchmark than the old "all or substantially all" test.

Sarah's arguments regarding legislative history rely primarily upon revisions to the Model Act. *Appellant's Brief, pp. 19-21*. Once again, her arguments are unavailing.

Notably, the safe harbor in the Model Act provides that a corporation will retain a significant continuing business activity if it retains 25% of its assets and 25% of its net income or revenue. The General Assembly lowered these benchmarks to 20%. Moreover, the relevant section of the Model Act does not include the "unless otherwise provided" language that allows corporations to alter the safe harbor and provide their own criteria

for what constitutes a significant continuing business activity. *Model Business Corporation Act, Section 12.02(a).*

While Sarah avers that the General Assembly set out to increase protections for minority shareholders, the reduced percentages in Virginia's version of the default safe harbor and the inclusion of the "unless otherwise provided" language indicates that the General Assembly was concerned less with protecting minority shareholders and more with preserving a corporation's flexibility to dispose of its assets and to alter the safe harbor to meet its particular circumstances.

Even the drafters of the Model Act recognized the need for this flexibility. The comments to the Model Act explain the rationale for allowing corporations to modify the safe harbor under the Act:

> In applying the 25% tests . . . an issue could arise if a corporation had more than one business activity, one or more of which might be traditional operating activities such as manufacturing or distribution, and another of which might be considered managing investments in other securities or enterprises. If the activity constituting the management of investments is to be a continuing business activity as a result of the active engagement of the management of the corporation in that process, and the 25% tests were met upon the disposition of the other businesses, shareholder approval would not be required . . . the board of directors may base a determination that a retained continuing business falls within the 25% bright-line tests of the safe harbor . . . either on accounting principles and practices that are reasonable in the circumstances or . . . on a fair valuation or other method that is reasonable in the circumstances.

Model Business Corporation Act, Section 12.02, Official Comment.[4]

Thus, both the Model Act and § 13.1-724 explicitly recognize and anticipate that a corporation may modify the safe harbor to fit the nature and scope of a corporation's business activities. That is exactly what the Company did here.

Sarah claims a "dearth of case law which could provide guidance in interpreting" the statute, but there are in fact several cases on point, none of which support Sarah's arguments. *Brief of Appellant, page 18.* Case law interpreting Va. Code § 13.1-724, its precursors, and analogous statutes in other jurisdictions supports the principles of corporate flexibility in the disposition of assets and of majority control.

The seminal Virginia decision is *Craddock-Terry Co. v. Powell*, 181 Va. 417 (1943). In *Craddock-Terry*, the Court considered a predecessor statute to Va. Code § 13.1-724 and noted that "where the corporation is solvent and prosperous, there are decisions authorizing such a sale in any case where the majority deem it expedient so to do, and the trend of the later decisions seems to be in favor of permitting such a sale by the

[4] The comment to the Model Act contemplated the precise situation before the Court. The Mill Business engages in "traditional operating activities" while the Timber Business "might be considered managing investments in other securities or enterprises." *Id.*

majority, against the dissent of minority stockholders, whenever deemed expedient." *Id.* at 432*; see also, Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.,* 258 Va. 140, 153 (1999) (affirming dismissal of minority shareholder's derivative claims regarding sale of corporate assets where majority shareholders and directors "used their business judgment by pursuing a course to achieve the result that they considered to be in the best interests of [the company]," notwithstanding the minority shareholder's objection); *Dan River, Inc. v. Icahn*, 701 F. 2d 278, 292 (1983) ("Virginia law indubitably permits those in control of a corporation to sell all or substantially all of the corporate assets….")

Even under the previous "substantially all" test, case law demonstrates that corporations are not beholden to minority shareholders as Sarah claims. For example, in *Hollinger v. Hollinger Int'l., Inc*., 858 A.2d 342 (Del. Ch. 2004), the issue before the court was whether the sale of a subsidiary business, which published a highly respected and well-known British newspaper, involved "substantially all" of the assets of the parent corporation such that shareholder approval of the sale was required. *Id.* The Court observed that the statute at issue (Delaware's version of Va. Code § 13.1-724) and its "substantially all" threshold was "designed as protection for rational owners of capital and its proper interpretation

requires this court to focus on the economic importance of assets and not their aesthetic worth." *Id*. at 349. Moreover, the majority of courts have "refused to find that a disposition involved substantially all the assets of a corporation when the assets that would remain after the sale were, in themselves, substantial and profitable." *Id.* at 385.

Thus, applying the plain meaning of the statutory language and in keeping with Virginia's flexible approach toward corporate governance and deference to majority control, the circuit court properly rejected Sarah's assertion that the Company could not alter the statutory safe harbor or define for itself what constitutes a significant continuing business activity.

B. The Bylaws Were Properly Amended.

Sarah also mounts an attack on the circuit court's ruling that the Company properly amended its bylaws. Sarah avers that, in the context of Virginia Code § 13.1-724, any amendment of a corporation's bylaws must be approved by more than two-thirds of the shareholders. This argument is both legally and factually baseless.

1. Section 13.1-724 Does Not Alter Virginia's General Law Governing Amendments of Bylaws.

Once again, Sarah's argument runs counter to the plain language of the statute. The default safe harbor is preceded by the clause: "[u]nless

the articles of incorporation **or a shareholder-approved bylaw** otherwise provide…" § 13.1-724(A) (*emphasis added*).

Had the General Assembly intended to require that bylaws altering the safe harbor of § 13.1-724(A) be approved by two-thirds of the shareholders, it would have written the statute to include such a requirement. For example, the General Assembly easily could have drafted the safe harbor to begin: "unless the articles of incorporation or a bylaw *approved by more than two-thirds of the shareholders* otherwise provide…*"* The General Assembly opted not to include such language in the statute, and it is not up to the judicial branch to read into the statute words the General Assembly did not use.

This is particularly true because this Court must presume "that the General Assembly acted with full knowledge of the law in the area in which it dealt." *Philip Morris USA Inc. v. Chesapeake Bay Found., Inc. 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007).* The General Assembly knew when it enacted § 13.1-724 that a simple majority of shareholders may amend a corporation's bylaws. Virginia's Stock Corporation Act allows for the amendment of bylaws by either the Board of Directors or by the shareholders of a company. Va. Code § 13.1-714. Like most other corporate actions, such amendment only requires a majority vote of either

the shareholders or the Board. Va. Code. §§ 13.1-666(C); 13.1-688(C). The General Assembly was aware when it revised § 13.1-724(A) that a simple majority of shareholders could amend a corporation's bylaws. Armed with that knowledge, the General Assembly opted not to require any heightened voting requirement to amend a bylaw that would alter the default safe harbor in the statute.

Notably, the General Assembly did place some limits upon a corporation's ability to alter the default safe harbor. The statute requires that such bylaws must be approved by the corporation's shareholders, and not by its Board of Directors. This precludes an unscrupulous Board from effectively eliminating the need for a shareholder vote under § 13.1-724 and ensures that shareholders will have a say in deciding what constitutes a significant continuing business activity in the context of a specific company's operations. However, the General Assembly did not go so far as to require that any bylaws altering the safe harbor be approved by a super-majority.

Finally, the General Assembly's approach in this regard is consistent with the language of § 13.1-724(E). Sarah avers that paragraph E of the statute requires that a two-thirds vote of the shareholders is required for any action, including amendment of bylaws, which could implicate the

definition of a significant continuing business activity. However, the two-thirds voting requirement itself is subject to change "so long as the vote provided for is not less than a majority of all the votes cast on the disposition." Va. Code § 13.1-724(E). This affirms that the overarching policy under both statutory and common law in Virginia law is for corporations to be governed by simple majority rule. *See, Craddock-Terry,* 181 Va. at 432; *Moneta Bldg. Supply, Inc.*, 258 Va. at 153; *Dan River, Inc.*, 701 F. 2d at 292.

For each of these reasons, Sarah's argument that § 13.1-724(A) requires two-thirds of the shareholders to amend a bylaw is legally untenable. Though Sarah claims that allowing a majority of shareholders to amend a company's bylaws would lead to "absurd results," it is in fact completely consistent with the statutory language and Virginia's historical adherence to principles of corporate flexibility and majority rule.

Sarah's argument is also factually flawed because **the amendment to the bylaws ultimately was approved by more than two-thirds of the shareholder votes**. Sarah conveniently glosses over the fact that five of the six shareholders, including her ex-husband, voted to approve the second bylaw amendment on March 25, 2016. *App. 56* (¶ 27); *362*. As a

result, roughly 70% of the eligible votes were cast in favor of adopting the second bylaw amendment. *App. 402-03* (¶ 17).

Sarah's attempt to invalidate the bylaw amendment on the grounds that it was not approved by more than two-thirds of the shareholders is based on a false factual premise. This point is dispositive of her entire appeal. Even if § 13.1-724(A) required a two-thirds majority to approve a bylaw amendment (it does not), that is exactly what happened in this case.

C. The Timber Business is a Significant Continuing Business Activity.

The Timber Business consists of more than 2,400 acres of property in Central Virginia. *App. 284* (¶ 13). The fair market value of that property is assessed for tax purposes at more than $7,600,000. *Id.* (¶16). By comparison, the sale price for the Mill Business, including realty, improvements, equipment, and other assets, is $10,000,000. *App. 287* (¶ 29).

Under the final amendment to Article XII of the Company's bylaws, the Timber Business constitutes a significant continuing business activity so long as it represents 25% of the fair market value of all assets held by the Company prior to a sale. *App. 286* (¶ 25). Absent a recent appraisal, the most recent gross land and improvement values determined by the local tax authority for local taxation of real property, irrespective of land use

deferral, is used as a proxy for such real estate's fair market value. *Id.*[5] The Timber Business easily surpasses the 25% threshold adopted by the Company in its bylaws. *App. 452-53*. Thus, the circuit court found that the Timber Business is a significant continuing business activity, and the sale of the Mill Business did not require shareholder approval. (*Id.*)

Even absent the bylaw amendment, however, the Timber Business is a "significant continuing business activity" under any reasonable interpretation. Not only does the Timber Business represent a substantial portion of the Company's total assets, but the circuit court acknowledged that in years when the Company harvests and sells timber, those revenues can be substantial. *App. 459*. In fact, at the time of the hearing, the Timber Business was preparing to sell roughly $750,000 worth of lumber. *App. 181*. The evidence also showed that the Mill Business is volatile. *App. 404* (¶21). Sarah conceded that there have been years when the Mill Business was not profitable and the Company relied upon the Timber Business to sustain the Mill's operations. *App. 135-36*. In any given year, the Timber Business would easily satisfy the default statutory safe harbor. This

[5] Although the Timber Business parcels receive tax deferrals for current forestry use, the tax deferral has no bearing on the land's value or commercial potential. Virginia's property tax statutes recognize that "land use value" does not reflect "fair market value" and require local taxing authorities to perform both assessments. *See* Va. Code § 58.1-3236(D).

demonstrates that the Company's amended bylaws were well-reasoned and historically justified in defining the Timber Business as a significant continuing business activity.

By any reasonable metric, the Timber Business is a significant continuing business activity, and § 13.1-724(A) does not require shareholder approval for the Company to sell the Mill Business.

II. The Circuit Court Properly Granted the Company's Plea in Bar on The Ground That Sarah's Claims Are Barred by the Doctrine of Laches.

In its Plea in Bar, the Company asserted that Sarah's claim for injunctive relief was barred by the doctrine of laches. The circuit court agreed, and its ruling on laches is a factual finding that is amply supported by the evidence. It should not be disturbed by this Court.

Laches is "an equitable doctrine that precludes relief when a plaintiff has delayed bringing suit to the detriment of the defendant." *Perry v. Judd*, 840 F. Supp. 2d 945, 950 (E.D. Va. 2012)*, aff'd.,* 471 Fed. Appx. 219 (4th Cir. 2012). Laches requires proof of two elements: lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense. *Masterson v. Bd. of Zoning Appeals of City of Virginia Beach,* 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987). Laches is particularly pertinent where a plaintiff seeks an injunction, for "equity aids

the vigilant, not those who sleep on their rights." *Birchwood-Manassas Assocs., L.L.C. v. Birchwood at Oak Knoll Farm,* L.L.C., 290 Va. 5, 8, 773 S.E.2d 162, 164 (2015).

Importantly, "when a trial court considers the defense of laches, it does not apply an absolute rule such as a statute of limitations, but instead, the court examines each case in light of the particular circumstances. Therefore, whether under the circumstances of a given case a claim is barred by laches is primarily a decision resting within the discretion of the trial court." *Morris v. Mosby,* 227 Va. 517, 521, 317 S.E.2d 493, 496 (1984) *(citations omitted).*

Based on the evidence presented at the hearing on the Company's Plea in Bar, the circuit court's application of laches was a well-founded exercise of the circuit court's discretion. As a shareholder, director, and CFO of the Company, Sarah was aware of every step of the efforts to sell the Mill Business throughout 2015, 2016 and 2017. *App. 7* (¶ 34); *App. 404* (¶ 22). Sarah testified at the hearing that she believed the bylaw amendments in 2015 and 2016 were "a blatant attempt by [her] brothers to enable them to sell the lumber mill business without approval." *App. 144-45*. Her personal counsel even wrote a letter in January of 2016 objecting to the proposed amendment as contrary to Code § 13.1-724. *App. 410*.

However, rather than bringing a legal challenge to those amendments in a timely fashion, Sarah waited almost 20 months until the eve of the Company's sale of the Mill Business to file suit. At best, her delay demonstrates an unreasonable lack of diligence. *See, e.g., Perry*, 840 F. Supp. 2d 945, 954 (applying laches where plaintiff "waited almost half a year" to bring claims and therefore "displayed an unreasonable and inexcusable lack of diligence.") Moreover, the circuit court properly determined that Sarah's dilatory approach to asserting her claims did result in prejudice to the Company. *App. 457-58; App. 404* (¶ 21).

In truth, Sarah's conduct was not just dilatory, but deliberate. She hoped that, regardless of the merits of her claim, the threat of pending litigation would scare away the buyer. Her mindset in this regard is confirmed by her attempts to interfere with the transaction through unauthorized communications with the buyer of the Mill Business. *App. 408* (¶¶ 5-6). Moreover, the Company's counsel testified that even before the Company executed the letter of intent to sell the Mill Business, he proposed a mediation or arbitration with seasoned corporate lawyers to resolve Sarah's objections so that the dispute would not derail a potential transaction. *App. 212-213*. Sarah refused those invitations. *Id.* This lawsuit was Sarah's "ace in the hole", and she waited to play it until it was

most likely to interfere with the Company's sale of the Mill Business. Entertaining her request for relief under the circumstances would encourage similar strategic filings by shareholders acting to defeat legitimate corporate action.

Against that evidentiary backdrop, the circuit court properly exercised its discretion to apply the doctrine of laches. *App. 453* ("On the issue of laches, the Court also finds in favor of the defense.") Because the circuit court's ruling was well-founded on the evidentiary record, the Court should not disturb that ruling.

III. The Circuit Court Did Not Base its Ruling on Fiduciary Duties.

Sarah argues that the circuit court erred in "finding that the general fiduciary duty owed by corporate directors and officers . . . is a substitute for the protection of minority shareholders afforded by Va. Code § 13.1-724." *Brief of Appellant, pp. 29-31*.

However, the circuit court did not make this finding. The circuit court merely cited fiduciary duties in rejecting Sarah's argument that allowing a simple majority of shareholders to modify the safe harbor and "adopt a test that bears no reasonable relationship to the significant business activity is an absurd result." *Brief of Appellant, p. 25*. The circuit court recognized Sarah's concern but dismissed it by pointing out that "corporate officers and

directors have a fiduciary duty in dealing with shareholders which requires[s] exercising good faith." *App. 447*. Ultimately, the directors and officers who recommend a sale of assets to the shareholders are obligated to act in good faith and in the best interests of the corporation. *App. 446-448*. Thus, allowing amendment of bylaws in the normal course would not "suddenly permit[] majority shareholders and board of directors to obliterate [§ 13.1-724]." *App. 448*.

Sarah's argument regarding fiduciary duties is also a red herring because § 13.1-724(A) already requires that a bylaw which alters the statutory safe harbor be "shareholder-approved." Directors lack authority under the statute to define what is a significant continuing business activity without the approval of the shareholders. Thus, the shareholders need not rely upon fiduciary duties to protect their rights under the statute, and the circuit court did not base its rulings on such duties.

In any event, Sarah cites no evidence of unscrupulous conduct in this instance, and she has never claimed a breach of fiduciary duty by her brothers. The circuit court specifically found there is no evidence of such conduct, and that Dick and Dan "were very up front about what they were doing." *App. 460*. The Court should find no error in the circuit court's

rationale, and should affirm the circuit court's rejection of Sarah's argument that its holding leads to an "absurd result."

IV. The Circuit Court Correctly Denied Sarah's Emergency Motion for Temporary Injunctive Relief.

Sarah's Complaint only sought declaratory relief and a permanent injunction. Sarah was not entitled to injunctive relief because she could not show a likelihood of success on the merits and because the balance of equities do not weigh in her favor, particularly with respect to the doctrine of laches. Having determined that Sarah's claim for permanent injunctive relief could not stand, the circuit court also denied her request for temporary injunctive relief. *App. 462*.

A temporary injunction is an "extraordinary remedy" that should be granted only when "the nature and circumstances of a particular case" require it. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). The granting of injunctive relief "should be exercised sparingly and cautiously, with a full conviction of its urgent necessity," and "[n]o temporary injunction shall be awarded unless the court is satisfied of the plaintiff's equity." *NAACP v. Comm. on Offenses Against the Admin. of Justice*, 201 Va. 890, 903 (1960)*; Va. Code § 8.01-268*. To obtain this extraordinary remedy, a plaintiff must make a "clear showing" "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. NRDC, Inc.*, *555 U.S. 7 (2008). See Dean v. Virginia High Sch. League, Inc.,* 83 Va. Cir. 333 (2011).

For all the reasons discussed herein, Sarah could not show a likelihood of success on the merits. Moreover, Sarah sat on her rights, and the balance of equities thus cannot weigh in her favor. The circuit court correctly denied her request for an injunction and its decision should be affirmed.

Additionally, Sarah's failure to seek prompt review, pursuant to Va. Code § 8.01-626 and Va. Sup. Ct. R. 5:17A, of the circuit court's denial of her request for an injunction belies any argument that she requires immediate relief. Nothing prevented Sarah from pursuing immediate review of her request for an injunction and appealing the remainder of the circuit court's holdings with which she takes issue on the typical timeline. *See* Va. Sup. Ct. R. 5:17A(f). Instead, Sarah waited a full 90 days to appeal the circuit court's denial of her "emergency" motion. Her delay in appealing the circuit court's ruling demonstrates that her true aim is to prolong this litigation in hopes of scuttling the Company's sale of the Mill Business. Under the circumstances, such a delay constitutes a waiver of

her appeal as to the circuit court's denial of her "emergency" motion for a temporary injunction.

CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Court affirm the circuit court's ruling granting the Company's Plea in Bar and dismissing the Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 10th day of August, 2018, that the foregoing Brief of Appellee complies with Rule 5:26 and that on this same day I have caused three copies to be hand delivered to the Clerk's Office of the Supreme Court of Virginia, a copy electronically filed through VACES, and a copy emailed to opposing counsel listed below:

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