

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID R. DODD, DAVID E. DODD, and  
DIANN D. MARTIN,

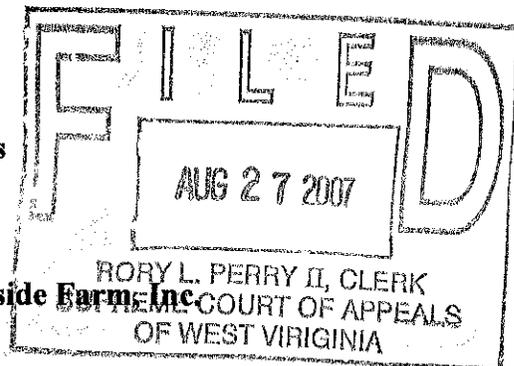
Plaintiffs/Petitioners,

vs.

Circuit Court of Berkeley County  
Civil Case No. 02-C-320  
Docket No. 071070

POTOMAC RIVERSIDE FARM, INC.,  
LOGAN D. WANNAMAKER, individually and as a  
Director of Potomac Riverside Farm, Inc.,  
MARJORIE LEE WANNAMAKER, individually and as  
a Director of Potomac Riverside Farm, Inc.,  
NATIONAL CITY BANK, a foreign  
corporation doing business in West Virginia,  
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.,  
Potomac Riverside Farm, Inc., and  
as Trustee of Edwin D. Dodd Trust; and  
SARAH D. KAUFFMAN, as President  
of Potomac Riverside Farm, Inc.

Defendants/Respondents.



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APPELLEE'S BRIEF ON BEHALF OF  
SARAH D. KAUFFMAN

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Appeal from the October 5, 2006 Order of the  
Circuit Court of Berkeley County, West Virginia  
Civil Action No. 02-C-320

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## I. SUMMARY OF ARGUMENT

West Virginia Code § 31-1-123(e) makes it clear that a Court has discretion to set a fair and equitable interest rate under "all the circumstances." The Berkeley County Circuit Court was correct in its adoption of the Special Commissioner's recommendation regarding fair value of Appellants' shares, and made a correct determination as to a fair and equitable rate of interest to be awarded given the facts and circumstances of this particular case. To allow any further interest to be awarded at a rate above the amount actually earned on the proceeds of the sale would unjustifiably reward the Appellants. Appellees were vindicated when the Commissioner and the Circuit Court found the value of the property to be very close to what the majority of the shareholders asserted at the very outset of this litigation and which Appellants could have collected years ago. Had Appellants acted appropriately and accepted the set value of the shares early on, significant sums could have been saved, not the least of which are the fees and expenses taken out of the proceeds of the sale.

The record below is replete with conduct that the Circuit Court was under obligation to consider in its determination of what interest, if any, Appellants should earn on the value of their shares. The proceeds from the sale were invested with a nominal amount of interest. At most, Appellants should have been granted only that interest which the other shareholders will have the benefit of receiving. Appellants should not be rewarded with any rate above what was actually earned, given the conduct noted so clearly on the record and the ultimate results as correctly determined by both the Commissioner and the Circuit Court.

## II. FACTS AND PROCEDURAL HISTORY

Appellants are three minority shareholders of Potomac Riverside Farms, Inc. ("PRF"). PRF is a closely-held corporation whose shareholders consisted of eleven family members. Appellees consist of PRF (the corporation), the Voting Trust Trustee, and three members of PRF's Board of Directors. Appellee Sarah D. Kauffman was President and the record owner of 344 shares of PRF stock which was held in the Voting Trust at all material times. PRF had minimal revenues and held two parcels of real property which were the corporation's primary asset. The real property consisted of two farms located in Berkeley County, West Virginia, which had been in the shareholders' family for seven generations.

At the August 4, 2001 meeting of the Board of Directors of PRF, the Board addressed a recommendation to PRF shareholders to sell substantially all of the assets of the corporation. A duly-noticed special meeting of the stockholders of PRF was then held on August 31, 2001. Prior to the meeting, each of the Appellants presented a written objection to the recommendation of the Board of Directors. Nonetheless, at the meeting a motion to accept the recommendation of the Board of Directors to sell substantially all of the assets of PRF passed by a majority vote, with the only votes against the measure being those cast by the Appellants.

In March of 2002, WV Hunter, LLC made an offer to purchase both the PRF property and the adjacent property owned by Edwin Dodd's estate for Five Million Dollars (\$5,000,000.00). On or about July 30, 2002, a special meeting of the Directors of PRF was held. The Directors' recommendation to the shareholders that substantially all

of the assets of the corporation be sold was affirmed and the Board of Directors approved and ratified a contract for the sale of PRF to WV Hunter, LLC.

The contract of sale entered into between PRF and WV Hunter, LLC provided for the sale of the PRF property alone for the purchase price of One Million Three Hundred Ninety-Nine Thousand Nine Hundred Dollars (\$1,399,900.00). Without notice to PRF, the Appellants then instituted this civil action on July 17, 2002, seeking to prevent the sale of the PRF property to WV Hunter LLC. In addition, Appellants also caused to be recorded upon the land books in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, a *lis pendens* for each of the parcels comprising the real property of PRF.

Upon motion of the Appellees, the Circuit Court, by order dated January 31, 2003, ruled that the *lis pendens* recorded by the Appellants were improper because the Appellants had no legal right to or interest in the real property of PRF. Accordingly, the Circuit Court ordered that the *lis pendens* be released, expunged and held unenforceable.

The closing proceeded on June 12, 2003, at which time PRF was transferred, by deed, to WV Hunter, LLC. An order referring the determination of the per share value to a special commissioner was entered on June 9, 2005, over the Appellants' objection.

The Appellees extended a statutorily-mandated offer to the Appellants in the amount of \$835.51 per share in June of 2003. Appellees also participated in three failed mediations.

The Appellees served an Offer of Judgment in the amount of \$367,500.00 on February 10, 2005 (an offer equal to a per share value of \$1,025.13), and served another

Offer of Judgment in the amount of \$414,500.00 on February 18, 2005 (an offer equal to a per share value of \$1,161.06). Both were rejected by the Appellants.

In October, 2005, Special Commissioner Oscar M. Bean, Esquire, held a two-day hearing, the result of which was the Commissioner's determination that the fair value of the shares was \$952.37 per share. This recommendation was adopted by the Circuit Court by order entered April 6, 2006. More than four months after entry of the April 6, 2006 Order, Appellants seek to appeal it.<sup>1</sup>

The fair value of \$952.37 per share, as determined by the Court and adopted by the Commissioner, exceeded the Appellee's statutory offer by \$116.86 per share. From the time of the sale of corporate assets on June 12, 2003, through March 1, 2006, the proceeds held in constructive trust earned 1.674% interest. In light of the facts and circumstances involved, the Court determined the following: 1) that Appellants should not receive interest on the \$835.51 per share for the time period of August 20, 2001, through June 12, 2003; 2) Appellants were granted 10% interest on \$116.86 per share for the time period of August 30, 2001 through the date of the Court's entry of its Order; 3) Appellants were to receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003, through the date of entry of Order, plus post-judgment interest at the statutory rate pursuant to W.Va. Code § 56-6-31 (2006).

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<sup>1</sup> In a subsequent decision on October 5, 2006, the Circuit Court disapproved of the Commissioner's findings regarding interest, costs, and attorney's fees as it went beyond the scope of the Court's reference order.

### III. TABLE OF AUTHORITIES

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#### IV. STANDARD OF REVIEW

This appeal involves a review of the Circuit Court's interest determination as well as the Circuit Court's adoption of the findings recommended by the Special Commissioner appointed to determine the fair value of PRF pursuant to West Virginia Code § 31-1-123. When a court adopts the findings of a Special Commissioner, the Special Commissioner's findings are treated as the findings of the court. *Napier v. Compton*, 210 W.Va. 594, 558 S.E.2d 593, 596 (2001).

In reviewing challenges to the findings and conclusions of a circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard; the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538, 543 (1996). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the firm and definite conviction that a mistake has been committed. *Id.* Under an abuse of discretion standard, the reviewing court will not disturb the circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances. *Hensley v. W.V. Dept. of Health and Human Resources*, 203 W.Va. 456, 508 S.E.2d 616, 622 (1998).

Accordingly, the Circuit Court's determination of the value of the property can be overturned only if clearly erroneous and the determination of the value of the Appellants' stock can be overturned only if the Circuit Court abused its discretion in making the

determination. Further, by allowing “for interest at a rate that the court may find to be fair and equitable in all the circumstances,” West Virginia § Code 31-1-123 makes it clear that the determination of the rate of interest in an appraisal action is in the circuit court’s discretion. *See also Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147, 159 (1995) (stating that awards of prejudgment interest are reviewed under an abuse of discretion standard).

## V. ARGUMENT

The recommended fair value of \$952.37 per share, adopted by the Circuit Court’s order of April 6, 2006, was consistent with the evidence and was not an abuse of discretion. Additionally, the Circuit Court’s determination of interest awarded was reasonable given the facts before it.

**A. Appellants’ Appeal from the Circuit Court’s April 6, 2006 Order Determining Value of Shares is Untimely. Alternatively, the Circuit Court was Correct to Adopt the Special Commissioner’s Determination of Fair Value for Corporate Shares.**

**1. Appellants’ Appeal from the Circuit Court’s April 6, 2006 Order is Untimely.**

As an initial matter, the Appellee’s pursuit of this appeal is untimely, irrespective of the merits. The Circuit Court’s order appraising the value of PRF shares was entered on April 6, 2006; separate from the October 5, 2006 *Order Determining Rate of Interest, Costs, Expert Witness’ Fees, and Attorney’s Fees*. As a matter of law, Appellants’ time to appeal the Circuit Court’s valuation of shares lapsed well before Appellants filed their petition.

Rule 3(a) of the West Virginia Rules of Appellate Procedure provides in pertinent part that “[n]o petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such a petition is filed in the office of the clerk of the circuit court where the judgment, decree, or order being appealed was entered. . .” W.Va. R. App. P. 3(a) (2007).

Appellants contend in their docketing statement that the Circuit Court’s April 6, 2006 Order is not a final decision on the merits as to all the issues and parties involved, and therefore is a judgment entered pursuant to W.Va. R. Civ. P. 54(b). Rule 54(b) provides that when multiple parties or claims are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. W.Va. R. Civ. P. 54(b) (2007).

Pursuant to *Durm v. Heck’s, Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991), it is indisputable that the determination as to valuation of corporate shares in this matter “approximates a final order in its nature and effect.” The *Durm* Court stated that “an order qualifies as a final order when it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” 401 S.E.2d at 912 *quoting Catlin v. United States*, 324 U.S. 429, 233 (1945). The April 6, 2006 Order is a completely separate matter from the October 2006 Order determining the appropriate rate of interest. Further, the April 6, 2006 Order determining the value of the property ended the litigation as to the property value and left nothing for the Circuit Court to do but execute the

judgment, which would implicitly encompass its interest determination. Therefore, the April 6, 2006 Order was a final order entered by the Circuit Court from which Appellants had four months to appeal. Accordingly, because Appellants' second assignment of error solely concerns the April 6, 2006 Order, it should be denied review.

**2. Alternatively, the Circuit Court's Valuation of Shares Was Not an Abuse of Discretion.**

Appellants contend that the Special Commissioner was dissatisfied with both parties' appraisals and that "the Special Commissioner, apparently reluctantly, chose the Defendants' appraiser." Appellants' Brief at p. 26. This argument is untrue and completely without merit.

The law is clear: "The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or any subsequent appointment." W.Va. Code § 31-1-123 (2001), repealed by Acts 2002, c. 25, 2<sup>nd</sup> Ex. Sess. Eff. Oct. 1, 2002.<sup>2</sup>

As the Circuit Court correctly noted in its April 6, 2006 Order adopting the Special Commissioner's findings as to fair value of shares, the Commissioner did not adopt one party's appraisal over another. *See* April 6, 2006 Order Adopting Special Commissioner's Findings, In Part at p. 7. The fact that the Special Commissioner did not simply adopt the Appellees' appraisal is made clear by the value he placed on the property. The Appellants' appraisal found the property to be worth \$2,082,000. The

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<sup>2</sup> Here, the appraisers' opinions were received by the Special Commissioner, acting on the Court's behalf pursuant to appointment.

Appellees' appraiser found the property to be worth \$1,250,000. The Special Commissioner weighed the evidence presented that led to these two values and determined that the property was worth \$1,400,000. Therefore, the Special Commissioner did not choose the Appellees' appraisal – he simply found it more persuasive in determining the value of the property.

In paragraph 30(e) of the April 6, 2006 Order, the Circuit Court explained the Special Commissioner's findings as to why the Appellants' appraisal was unpersuasive.

The Commissioner found the [Appellants'] appraisal unpersuasive because it did not satisfactorily account for the flood plain and Railroad Easement. (Comm'r Recommend. Find. At 11-12.) In addition, the listing [by the Appellants' appraiser] used was not comparable. (*See id.* at 12.) Moreover, it was obvious to the Commissioner that David Dodd [one of the Appellants], procured [the appraiser] for the purposes of litigation and had extensive contact with him throughout the appraisal process. (*Id.*)

Pursuant to the applicable statute, the Court elected to appoint the Commissioner to determine the fair value of PRF shares after hearing evidence. The Commissioner had the benefit of hearing evidence over a two-day period and received proposed findings of facts and conclusions of law from both parties. The Court adopted the Commissioner's determination of value over both parties' submission of facts to the Court disputing the Commissioner's findings. The Court was correct to adopt the Commissioner's recommendation which took both appraisers' views into account. As the Circuit Court also correctly pointed out, in making his determination the Commissioner was careful to follow Supreme Court precedent. *See id.*

Accordingly, the Circuit Court did not abuse its discretion in adopting the Special Commissioner's determination of the value of the property.

**B. The Circuit Court Awarded a Fair and Equitable Rate of Interest.**

West Virginia Code § 31-1-123(e) states, in pertinent part, that “[t]he judgment shall include an allowance of interest at such rate as the court may find fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment.” W.Va. Code § 31-1-123(e) (2007). This language makes it clear that the court has discretion to set a fair and equitable interest rate under “all the circumstances.” This is precisely what the Circuit Court did in its October 5, 2006 Order.<sup>3</sup>

There was no time from the date of the corporate action to the date of the Circuit Court's order that the Appellants were not earning interest. Appellants contend they were wrongly denied a “fair and equitable” rate of interest, while failing to acknowledge in their brief that the determination of interest must necessarily take into account the parties' behavior to date, including the wrongfully-filed *lis pendens* which delayed closing, the multiple offers of judgment, and the court's order requiring the monies be held in a constructive trust which limited interest and investment opportunities, all of which was occasioned and sought by the Appellants. Further, the circumstances surrounding the nature of PRF and what type of company it was supports the Circuit Court's interest

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<sup>3</sup> As the Supreme Court of Delaware stated in *Rapid-American Corp. v. Harris*, “[t]he court must only award interest to fairly compensate dissenting shareholders for their losses incurred during the pendency of an appraisal. There is no punitive aspect of an appraisal proceeding.” 603 A.2d 796, 808 (Del.1992).

award. Accordingly, the Circuit Court did not abuse its discretion in determining the interest owed to the Appellants.

**1. The Circuit Court's Interest Award from August 30, 2001, through June 12, 2003, was Fair and Equitable under the Circumstances of this Case.**

The Circuit Court did not abuse its discretion in determining the fair and equitable interest rate for the period from August 30, 2001, to June 12, 2003. Appellants contend that the Circuit Court abused its discretion because it determined that no interest would be awarded on \$835.51 per share during this time period despite the language in the applicable statute that the "judgment shall include an allowance for interest." However, the Appellants *were* earning interest during this time period. The Circuit Court awarded them 10% interest on \$116.86 per share during this time. An award of 10% on \$116.86 per share is equivalent to an award of 1.227% on the total per share price of \$952.37.<sup>4</sup> Given the Appellants' actions during the time in question, and the nature of PRF, this award is "fair and equitable in all the circumstances."

There are additional circumstances that justify a finding that the Circuit Court's determination was well within its discretion. First, PRF was an unprofitable, illiquid company whose only real asset was real estate. From August 31, 2001 (the day of the vote to sell the property) to the closing of the sale of the real estate on June 12, 2003, the operation of the corporation changed very little. Expenses exceeded revenues, the shareholders received no cash distribution on their shares, and the Appellants made use of

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<sup>4</sup>  $116.86 \times .1 = 11.686$

$11.686 / 952.37 = .01227$  or 1.227%

Further, this interest rate is very close to the rate of return that was earned after the sale proceeds were deposited into constructive trust.

the corporate farm and farmhouse much in the same manner as they used it before August 31, 2001. Appellants kept personal tangible personal property on the corporate farm, visited the farm for recreation, and in the case of David R. Dodd, maintained a secondary (if not primary) residence at the farm. All three Appellees retained their corporate offices during this time. Because they held and did not tender one share each, Appellants retained the same status and benefits as all other shareholders after August 31, 2001.

Appellants repeatedly assert in their brief that, since they tendered their shares, they have not had the ability to use the money that represents the fair value of their shares. However, Appellants fail to recognize that *none* of PRF's shareholders have. During the time period before the property was sold, there were no funds to pay the Appellants for their shares, no funds to invest, and no way for any shareholder to earn any interest on the shares. All the shareholders were equally situated; yet, as a result of these proceedings, the Appellants have now been awarded interest on their shares, a benefit not realized by the Appellees. Under these circumstances, and in light of the unprofitable and illiquid nature of PRF during the subject period, the Appellants have received an appropriate return well within the Circuit Court's discretion.

Second, the Appellants' actions themselves are a "circumstance" that validates the Circuit Court's exercise of its discretion. After the August 31, 2001 vote, almost seven months passed before an offer to purchase the property was received. Subsequently, the Appellants filed the underlying action and improperly filed a notice of *lis pendens* in an attempt to block the sale. As a result, the sale could not be closed until June 12, 2003,

more than a year later. Had the Appellants not filed the *lis pendens*, PRF could have liquidated the property, the Appellants would have been paid, and they could have invested their money as they saw fit. The Appellants' actions prevented PRF from realizing on its only asset for over a year and forced PRF into a continued state of illiquidity. Yet, the Appellants contend that they should be rewarded for their actions with a substantial interest award applicable to this time frame. Such a conclusion is not fair and equitable given the Appellants' role in preventing the appropriately-sanctioned sale.

Accordingly, given PRF's unprofitable and illiquid nature and the Appellants' actions, the Circuit Court's award of 10% interest on the difference between the Court's price per share and the Appellees' offered price per share for the period from August 30, 2001, to June 12, 2003, is "fair and equitable in all the circumstances" and is not an abuse of discretion.

**2. The Circuit Court's Interest Award from June 13, 2001, through October 5, 2006, was Fair and Equitable under the Circumstances of this Case.**

The Circuit Court also did not abuse its discretion in determining the fair and equitable interest rate for the period from June 13, 2003, to the date of the Circuit Court's order. During this time period, the Appellants were awarded 1.674% interest on \$835.51 per share and 10% on \$116.86 per share. This award is equivalent to 2.696% on the total

per share price of \$952.37.<sup>5</sup> Again, "in all the circumstances," this is a fair and equitable rate of interest.

Again, Appellants' actions during this time period are relevant to the determination of what amount of interest is fair and equitable. From June 13, 2003, to the entry of the October 5, 2006 Order, the Appellants rejected two offers of judgment. The first, in the amount of \$1,025.13 per share and the second, in the amount of \$1,161.06 per share, were both higher than the \$952.37 per share determination of the Circuit Court. Along with the initial offer of \$835.52 per share, the Appellants refused three opportunities to obtain possession of value for their shares and use it as they wished.

Further, upon the insistence and motion of the Appellants', the Circuit Court entered an order compelling the Appellees to hold the proceeds from the sale of the subject real estate in a constructive trust, which could be drawn upon without penalty, upon further ruling of the court. This grossly limited the investment opportunities available for these funds. All funds from closing were treated equally and were necessarily placed in a money market fund which made them readily available upon the court's order. While this constructive trust guaranteed no risk of investment for the Appellants, it likewise compelled a limited earning potential for all shareholders. After compelling this low-risk investment, Appellants' now seek to be awarded 10% interest on their money when, from the sale on June 12, 2003, through March 1, 2006, the proceeds

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<sup>5</sup>  $835.51 \times .01674 = 13.986$   
 $116.86 \times .1 = 11.686$   
 $13.986 + 11.686 = 25.672$   
 $25.672 / 952.37 = .02696$  or 2.696%

(less than payment of costs, taxes and fees from time-to-time as directed by the court's order) held in the constructive trust had actually earned only 1.674% interest.

In essence, Appellants are asking this Court to provide them a no-risk rate of return at 10% when such a high return could only have actually been achieved through risk-bearing investments. It is certainly not fair and equitable to permit the Appellants to recover a risk premium of 8.326% on their share of the sale proceeds when the sale proceeds were placed in a low-risk, low-return money market account at the Appellants' request.

Despite being responsible for the disposition of the sale proceeds, Appellants urge that the analysis should be based on the dissenters' loss of use of the money rather than what the corporation actually did with the money. *See* Appellants' Brief at p. 14. Appellants further assert that permitting the interest actually earned on the sale proceeds to aid in determining what is fair and equitable interest is an example of "the tail wagging the dog." *See* Appellants' Brief at p. 17. That is, the Appellants do not think that the end result stemming from the actual use of the sale proceeds should affect what is deemed to be a fair and equitable interest rate. However, the Appellants later assert that the subsequent increase in property values in the Eastern Panhandle should bear on this Court's determination of what interest is fair and equitable. *See* Appellants' Brief at p. 21. In other words, the Appellants do not want the *present value of the sale proceeds* to be relevant to what is deemed a fair and equitable interest rate, but do want the present value of the property to be relevant. Apparently, the Appellants are not worried about the tail wagging the dog so much as which tail does the wagging.

The subsequent increase in the property value has absolutely nothing to do with the Appellants' loss of the use of their money. The rise in property value could only potentially affect the value of the Appellants' shares. However, the statute makes clear that the shares are to be valued as of the day before the corporate action, i.e., August 30, 2001. Accordingly, only increases in property value prior to the vote to sell are relevant to this action. The Appellants have presented no evidence in this regard that could possibly bear on this Court's determination. Moreover, any such information would only be relevant as to the per share value of PRF, which the Appellants have already capitalized on. Thus, property value increases subsequent to the vote to sell the property are irrelevant to this appeal.

Accordingly, given the Appellants refusal to accept two more-than-reasonable offers of judgment and their insistence that the funds be placed in a low-risk, low-return constructive trust, the Circuit Court did not abuse its discretion in making its interest determination for the period from June 13, 2003, through October 5, 2006.

**3. Appellants have Earned Over 61% More on their Money than the Appellees from the Sale of the Property.**

It is important to note that the Appellants will realize significantly more return per share of PRF than the Appellees will. An extremely important aspect of the Circuit Court's October 5, 2006 Order is the award of 10% interest on \$116.86 per share from August 30, 2001, through October 5, 2006. Due to this award of interest, the Appellants were earning interest from August 30, 2001, through June 12, 2003, when no other shareholder was able to realize any value on their shares of PRF. Further, while the sale

proceeds sat in a constructive trust earning 1.674%, the Appellants were earning a total of 2.696%, over a whole point higher, for the same time period because they were earning 10% in addition to the amount that was held in the constructive trust. Thus, from June 13, 2003, through October 5, 2006, the Appellants earned over 61% more on their money than the Appellees did – in addition the interest the Appellants earned from August 30, 2001, through June 12, 2003, when the Appellees did not earn anything.<sup>6</sup> Given the circumstances, the Circuit Court has been more than fair and equitable to the Appellants.

**4. Appellants' Asserted Interest Rate of 10% is Not Fair and Equitable and would Unjustly Enrich the Appellants.**

An award of 10% interest to the Appellants is not fair and equitable and would unjustly enrich the Appellants at the expense of the Appellees. The intent of Section 31-1-123(e) is to provide dissenting shareholders with fair value for their shares adjusted for the time value of money. Notably, a shareholder may permissibly be deprived of dividends upon making the demand for an appraisal without being entitled to compensating interest even if prolonged appraisal proceedings should ensue. *In re General Realty & Utilities Corp.*, 52 A.2d 6 (Del.Ch.1947); *In re Janssen Dairy Corp.*, 64 A.2d 652 (NJ Super. L. 1949); *Pittston Co. v. O'Hara*, 63 S.E.2d 34 (Va.1951). The applicable West Virginia statute, as well as case law from other jurisdictions, indicates that the rate of interest is largely a matter of judicial discretion, although a shareholder may attempt to show the appropriate rate of interest for the period in question. *See Lynch*

<sup>6</sup> .02696 - .01674 = .01022

.01022 / .01674 = .6105 or 61.1%

These values do not include the additional post-judgment interest.

*v. Vickers Energy Corp.*, 429 A.2d 497 (Del.1981) (in a case involving rescission of sale of stock by minority to majority shareholders, the appellate court overturned the chancellor's decision that 13.1% was the appropriate interest rate and found that 7% was a "fair rate of return"); *Swanton v. State Guaranty Corp.*, 215 A.2d 242 (Del. Ch. 1965); *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del. 1980) (award of interest at rate of 7% was within Circuit Court's discretion.).

W.Va. Code § 31-1-123(e) provides for the inclusion of "an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances from the date at which the vote was taken on the proposed corporate action to the date of payment." This provision for "fair and equitable" interest allows a court to adjust an award of fair value for the time value of money through an award of interest. In this case, the statute operates to compensate the Appellants for the return they would otherwise have received on their shares after August 31, 2001, by providing them a time value adjustment in the form of interest. The Circuit Court did, in fact, award interest in its October 5, 2006 Order, although making the correct determination that Appellants' actions and the circumstances of this case did not support the interest rate sought.

While acknowledging subsequent amendments and correctly noting that the 2001 statute was controlling in its decision, the Circuit Court acted in its discretion to achieve a fair and equitable interest rate considering all of the facts and circumstances. However, the Appellants assert that the analysis rather should be based on the dissenters' loss of use of their money, instead of being based on what the corporation actually did with the

money. See Appellants' Brief at p. 14. Appellants further contend that the statute, fairness, and legislative intent dictate a 10% interest rate, compounded annually.

As correctly noted in the *Respondents' Combined Motion and Memorandum for Recommended Interest Not to Exceed the Actual Interest Earned* filed with the Circuit Court on May 9, 2006, an award of 10% interest is, by all reasonable indicators, more than Appellants could have earned in the market and not a reasonable return on investment for the period in question. For example:

1. From August 31, 2001, to October 31, 2005, the Dow Jones Industrial Average Index (the most widely accepted equity investment index) moved from 9,949.75 to 10,440.07, a rise of 4.93% over fifty months, the equivalent of 1.18% per year.
2. From September 2001, to October 2005, the prime rate as reported by the Federal Reserve Board floated from a low of 4% to a high of 6.75%, with a monthly weighted average of 4.8%.
3. For the years from and including 2001 through 2006, the market interest rate for short term demand loans as determined by the Internal Revenue Service based on the average market yield of federal short term obligations fluctuated from a high blended annual rate of 4.98% to a low blended annual rate of 1.52%, with an average blended annual rate for the five-year period of 2.87%.

Because the intent of the statute is to provide dissenters with a fair value for their shares adjusted for the time value of money, an interest rate of 10% percent cannot reasonably be considered fair and equitable, when juxtaposed against the *actual* market conditions during the time in question.

It must again be noted that the Appellants initiated the underlying action in an attempt to stop the sale of the corporate farm for the sale price of \$1,399,900.00, just \$100.00 under the property's value as determined by the Circuit Court. The Appellants

have continually refused to accept their statutory remedy, as well as offers of \$835.51, \$1,025.13 and \$1,161.06 per share made by the Appellees in the form of shareholder offers and offers of judgment. Accordingly, 10% is not a fair and equitable rate of interest "in all the circumstances" of this case.

**C. Appellants' Receipt of Compound Interest for Unnecessary Delays Caused by Their Own Actions Would Result in a Grave Injustice.**

In addition to asking for an escalated rate of 10% interest, Appellants further argue that they are entitled compound interest. Such an argument is contrary to the law and the facts of this case. First, compound interest is disfavored under West Virginia law. Second, law from other jurisdictions relied on by the Appellants' is not persuasive. Finally, the facts of this case do not justify an award of compound interest. Accordingly, the Circuit Court's award of simple interest should be upheld.

**1. Compound Interest is Disfavored Under West Virginia Law.**

This Court has not had the occasion to determine whether compound interest is required or even permitted in a dissenting shareholder's appraisal action. However, this Court has expressly stated that, "[g]enerally speaking, compound interest is disfavored in the law [and] '[t]he rule generally recognized and followed in this state undoubtedly is that interest should not bear interest.'" *Hensley v. W.Va. Dep't of Health and Human Resources*, 203 W.Va. 456, 508 S.E.2d 616, 626 (1998) quoting *Hamilton v. Wheeling Pub. Serv. Co.*, 88 W.Va. 573, 107 S.E. 401, 403 (1921). Indeed, this Court went on to state that there are "very limited and specific instances in which compound interest is recoverable." *Hensley*, 508 S.E.2d at 626.

As noted by the Circuit Court in its order of October 5, 2006, in *Hensley* (which involved the propriety of compound prejudgment interest under W.Va. Code § 56-6-31), this Court ruled that “[w]here there exists no statute or express written agreement establishing the type of prejudgment interest as being compound, and in the absence of a recognized exception which would permit recovery of compound prejudgment interest, interest is simple in kind.” *Hensley*, 508 S.E.2d at Syl. Pt. 4; *see also Bruce v. Steele*, 215 W.Va. 460, 599 S.E.2d 883 (2004) (same); *Cherokee Nation v. United States*, 270 U.S. 476, 490 (1926) (“[t]he general rule, even as between private persons, is that, in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt”) (citations omitted). Because W.Va. Code § 31-1-123(e) does not articulate compound interest, the Circuit Court was correct in awarding simple interest to the Appellants. *See, e.g. Lucas v. Pembroke Water Co.*, 205 Va. 84, 135 S.E.2d 147 (1964) (under the plain language of the statute, the amount of the allowance of interest is left to the Circuit Court; an allowance of interest at the rate of 2% as ‘fair and equitable in all the circumstances’ was accordingly upheld).

Therefore, the award of simple interest should be upheld.

**2. Appellants’ Citations to Other Jurisdictions’ Case Law are not Persuasive.**

Appellants attempt to distinguish *Hensley* by contending that precedent against a compounded prejudgment interest does not preclude compound interest in this case. Appellants contend that prejudgment interest is different from interest awarded under the appraisal statute, while failing to cite any supporting authority in this jurisdiction. The

four cases cited by Appellants from other jurisdictions are distinguishable and not persuasive.

Appellants first rely on *Computer Task Group, Inc. v. Peierls*, 810 So.2d 977 (Fl.2002). In *Peierls*, a corporation failed to initiate a required action to determine value pursuant to Florida statutes, failed to negotiate with the dissenters in good faith, and engaged in actions before and after trial that deprived dissenters of their just compensation. See 810 So.2d at 978. The court determined that no Florida cases had been reported that interpreted the "fair and equitable" interest rate to be awarded under the statute, nor whether the terms would include compounded interest. See *id.* Thus, acting without any precedential guidance, the Florida Court of Appeals for the Fifth District held that the trial court's award of compound interest was not an abuse of discretion. See *id.* at 978-979. However, this case can only be interpreted as standing for the premise that under Florida law, an award of compound interest is discretionary where no prior precedent or contrary statutory provision states otherwise. Moreover, even if an abuse of discretion standard were applicable in West Virginia, *Peierls* is further distinguishable because unlike the corporation in *Peierls*, there was no misconduct on the part of the Appellees in the present case that could possibly justify such an award.

Likewise, in *Sarrouf v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1122, 1129 (Mass. 1986), the Supreme Judicial Court of Massachusetts held only that an award of compound interest was not an abuse of the trial court's discretion. Again, this case shows only that an award of compound interest in Massachusetts is discretionary.

Third, Appellants quote *Onti v. Integra Bank* to offer that court's reasoning as to why compound interest was appropriate. Notably, the court stated: "Certainly [the defendant] has earned compound interest on its investments during the pendency of this proceeding ...." *Onti*, 751 A.2d 904, 926 n.88 (Del. Ch. 1999). In the present case, Appellees did not and could not earn compound interest on their investments during the pendency of this proceeding. PRF had nothing to invest until the property was sold and was further compelled by court order to hold the sale proceeds in constructive trust after the sale. Therefore, the *Onti* court's justification for compound interest is not applicable to this case. Moreover, and most importantly, the applicable statute in that jurisdiction at that time explicitly stated that "[i]nterest may be simple or compound, as the Court may direct," far different from any applicable West Virginia statute.

Even if the cases cited by Appellees were persuasive, at best the cases provide only that the determination as to whether to award simple or compound interest is discretionary and to be determined based on the facts of each case. As set forth in the following section and throughout this brief, even if compound interest could be awarded in a court's discretion, the facts of this case do not warrant an award of compound interest.

On the other hand, the only case cited by Appellants in which compound interest was mandatory is *In re: Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997 (Me. 1989). In *McLoon*, the Supreme Judicial Court of Maine expressed concern in dissenter's rights cases regarding situations in which corporations make unreasonably low offers that result in appraisal proceedings. *McLoon*, 565 A.2d at 1007 (citations

omitted). The court's concern was that dissenters could obtain more profit by taking the unreasonably low offer and investing the money rather than going through the appraisal proceeding. *See id.* The court went on to say that the purpose of appraisal statutes is to guarantee the dissenting shareholder *fair* value for his shares and to encourage the corporation to make a fair settlement offer. *See id.*

The present situation is completely opposed to the scenario that concerned the *McLoon* court. A comparison of the Appellees' three offers of \$835.51, \$1,025.13 and \$1,161.06 to the demand of \$1,536.25, as well as to the value of \$952.37 as determined by the Circuit Court, makes clear that this case does not involve an unreasonably low offer by PRF. If anything, the Appellees made an unreasonably high demand. Even if the purpose of the statute is to guarantee dissenter's fair value for their shares and to encourage the corporation to make a fair settlement offer, PRF satisfied that purpose. Both of PRF's offers of judgment exceeded the Circuit Court's determination of fair value and the statutory offer was significantly closer to the fair value assessed by the Circuit Court than was the Appellants' demand. The *McLoon* court also did not consider the possibility that a dissenter would be unreasonable in its demands, thus preventing all the parties from realizing anything on their investment in the corporation. Presumably, had the *McLoon* court been faced with a scenario comparable to the present case, it would not award compound interest to the dissenters.

Furthermore, PRF's status as a company whose sole asset of any value was real estate presents a unique situation that is simply not present in any of the cases cited by the Appellants. This fact is crucial to this Court's review. The cases cited by Appellants

involve companies with liquid assets such as cash flows, bank accounts, accounts receivables, investments, etc. To the contrary, PRF had *no* liquid assets of note; PRF simply held real property. PRF could not earn any interest prior to the sale of the property and was forced place the funds in a constructive trust after the sale. Regardless of the ultimate purpose of the provision for an interest award under dissenting shareholder statutes, it is clear that a corporation should not profit from the use of the dissenter's corporate investments while the dissenters are attempting to get a fair value for their shares. Given PRF's unique status and the Circuit Court's imposition of a constructive trust, this did not and could not have occurred in the present case. Accordingly, the present situation is distinguishable from the cases relied upon by the Appellants. Thus, the Circuit Court's award of simple interest should be upheld.

**3. The Circuit Court's Order Denying Compound Interest should be Upheld because the Facts of this Case do not Justify an Award of Compound Interest.**

As has been restated throughout this brief, § 31-1-123 grants a circuit court discretion to award interest at a rate that is "fair and equitable in all the circumstances." Again, the actions of the parties are a circumstance that is relevant to the determination of an appropriate rate of interest. There was no wrongdoing on the part of the Appellees in this case. Furthermore, none of the dissenting shareholders in the cases upon which Appellants rely made an improper filing of a *lis pendens* on the subject property, made unreasonable rejections of several offers of judgment, took unreasonable positions during several attempts at mediation, or requested a court-imposed trust that limited investment options during the pending litigation instituted by the Appellants.

To award the Appellants compound, escalated interest and profit from the unnecessary delays occasioned by their own actions would be a grave injustice. Not only would the Appellants benefit from obstruction on their part, but they would receive additional compensation to the detriment of the remaining shareholders who abided by the corporate decision and awaited the sale at \$1,399,900.00.

Appellants have been inflexible and unreasonable throughout the entire transaction yet now seek a "victim's remedy" on appeal. Presumably, after having rejected two offers in excess of the Court's award, the Appellants are now attempting to remedy their mistakes in judgment. However, these circumstances do not transform the Appellants' demands into an award that would be "fair and equitable in all the circumstances." Therefore, the Circuit Court's award of simple interest should be upheld.

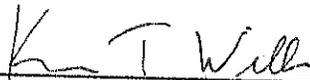
#### **VI. PRAYER FOR RELIEF**

For the reasons set forth herein, Appellee Sarah Kauffman respectfully submits that this Honorable Court should uphold the Circuit Court's decision.

Respectfully Submitted,

**SARAH D. KAUFMAN**

By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID R. DODD, DAVID E. DODD, and  
DIANN D. MARTIN,

Plaintiffs/Petitioners,

vs.

Circuit Court of Berkeley County  
Civil Case No. 02-C-320  
Docket No. 071070

POTOMAC RIVERSIDE FARM, INC.,  
LOGAN D. WANNAMAKER, individually and as a  
Director of Potomac Riverside Farm, Inc.,  
MARJORIE LEE WANNAMAKER, individually and as  
a Director of Potomac Riverside Farm, Inc.,  
NATIONAL CITY BANK, a foreign  
corporation doing business in West Virginia,  
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.  
Potomac Riverside Farm, Inc., and  
as Trustee of Edwin D. Dodd Trust; and  
SARAH D. KAUFFMAN, as President  
of Potomac Riverside Farm, Inc.

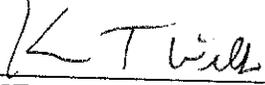
Defendants/Respondents.

CERTIFICATE OF SERVICE

I, Kevin T. Wills, counsel for the Appellee, Sarah Kaufman, do hereby certify that I have served the foregoing Appellee's Brief on Behalf of Sarah D. Kauffman, upon counsel of record, by mailing a true copy thereof by United States Mail, postage prepaid, this the 27<sup>th</sup> day of August, 2007, addressed as follows:

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