Filing # 213068768 E-Filed 12/17/2024 11:15:24 PM

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ARC DIALYSIS, LLC, a Florida limited liability company and ARC DIALYSIS MIAMI LAKES, LLC, a Florida limited liability company,

Petitioners,

Case No.: 3D24-________

Lower Case No.: 2022-011215-CA-01

v.

L&C INVESTMENT CORP., a Florida corporation, derivatively on behalf of ARC DIALYSIS OF MIAMI LAKES, LLC, a Florida limited liability company,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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TABLE OF CONTENTS

Petition for Writ of Certiorari…………………………………………………..1
Conclusion……………………………………………………………………2

TABLE OF AUTHORITIES

Dobson v. U.S. Bank Nat'l Association, 217 So. 3d 1173 (Fla. 2017) ….1

YOSMANY PAEZ, N&R DIALYSIS, LLC, DIALYSIS CONSULTING, LLC, LA MINA MULTISERVICES, CORP., and GLOMACOR MEDICAL SERVICES, CORP. have filed a Petition for Writ of Certiorari with this Court, in which such parties assert the jurisdictional grounds for this Court's review of the Order and the grounds for reversing the Order. The Petitioners herein incorporate the table of authorities cited by such parties.

PETITION FOR WRIT OF CERTIORARI

ARC DIALYSIS, LLC and ARC DIALYSIS MIAMI LAKES, LLC (together, "Petitioners") petition this Court for a writ of certiorari and an order quashing certain portions of the lower tribunal's order titled "Order on Defendant ARC Dialysis LLC's Motion to Dismiss, or In the Alternative, Compel Arbitration (the "Order"), in which the trial court*, inter alia,* set aside an election to purchase Plaintiff L&C INVESTMENT CORP's membership interests in Nominal Defendant ARC DIALYSIS MIAMI LAKES, LLC pursuant to Florida Statute § 605.0706(2).

YOSMANY PAEZ, N&R DIALYSIS, LLC, DIALYSIS CONSULTING, LLC, LA MINA MULTISERVICES, CORP., and GLOMACOR MEDICAL SERVICES, CORP. have filed a Petition for Writ of Certiorari with this Court, in which such parties assert the jurisdictional grounds for this Court's review of the Order and the grounds for reversing the Order. *See* attached Exhibit A. Petitioners adopt and incorporate the matters and arguments set forth in the foregoing parties' Petition for Writ of Certiorari as if fully set forth herein.

In addition to the arguments set forth in the foregoing parties' Petition for Writ of Certiorari, ARC DIALYSIS MIAMI LAKES, LLC has suffered irreparable harm resulting from the Order. ARC DIALYSIS MIAMI LAKES, LLC was neither a movant nor a respondent to the motion at issue in the

Order, and did not receive notice and an opportunity to be heard on the issue of its statutory right to elect to purchase membership interests being eviscerated. To wit, ARC DIALYSIS MIAMI LAKES, LLC was not a movant or a respondent and no movant sought the affirmative relief of the elimination of ARC DIALYSIS MIAMI LAKES, LLC's right to purchase the membership interest of the Plaintiff, nor did ARC DIALYSIS MIAMI LAKES, LLC have an opportunity to respond to such a request, or be heard as to such a request. The Order violates ARC DIALYSIS MIAMI LAKES, LLC's due process rights, is a departure from the essential requirements of law, and imposes a harm which cannot be remedied by plenary appeal of final judgment. *See, Dobson v. U.S. Bank Nat'l Association*, 217 So. 3d 1173 (Fla. 2017) (due process requires that each litigant be given full and fair opportunity to be heard).

CONCLUSION

Petitioners request that this Court enter a Writ of Certiorari and quash the portions of the Order referenced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via Florida's E-Filing Portal to all counsel on the attached service list this 17th day of December, 2024.

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Pursuant to Fla. R. of App. P. 9.045(b) and Fla. R. of App. P. 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionally spaced Arial 14-point font and complies with the applicable font and word limit requirements.

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IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

YOSMANY PAEZ; DIALYSIS CONSULTING, LLC, a Florida limited liability company, N&R DIALYSIS LLC, a Florida limited liability company, LA MINA MULTISERVICES CORP., a Florida corporation and GLOMACOR MEDICAL SERVICES CORP., a Florida Corporation,

Petitioners,

v.

L&C INVESTMENT CORP., a Florida corporation, derivatively on behalf of ARC DIALYSIS MIAMI LAKES, LLC, a Florida liability company,

Respondent.

CASE NO. 3D24-____
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PETITION FOR WRIT OF CERTIORARI
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EXHIBIT A

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

BASIS FOR INVOKING JURISDICTION 2

FACTS UPON WHICH PETITIONERS RELY 3

NATURE OF RELIEF SOUGHT 7

ARGUMENT IN SUPPORT OF RELIEF REQUESTED 9

I. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING PETITIONERS' MOTION TO DISMISS 10

A. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY SETTING ASIDE THE ELECTION TO PURCHASE RESPONDENT'S MEMBERSHIP INTEREST 10

B. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY SHIFTING THE BURDEN OF PRE-SUIT DEMAND UNDER § 605.0802, FLA. STAT. to PETITIONERS 16

C. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY INVALIDATING THE PARTIES' JURY TRIAL WAIVER IN THE OPERATING AGREEMENT 17

II. THE ORDER ON MOTION TO DISMISS IN CONTRAVENTION OF § 605.0706, § 605.0802, AND WELL-ESTABLISHED CASELAW CAUSED A MATERIAL INJURY TO PETITIONERS THAT CANNOT BE REMEDIED ON APPEAL 27

A. IRREPARABLE HARM CAUSED BY THE TRIAL COURT'S FAILURE TO COMPLY WITH § 605.0706 27

B. IRREPARABLE HARM CAUSED BY THE TRIAL COURT'S FAILURE TO COMPLY WITH § 605.0802 29

C. IRREPARABLE HARM CAUSED BY THE COURT'S INVALIDATION OF PORTION'S OF THE PARTIES' OPERATING

AGREEMENT AND VIOLATIONS OF PETITIONERS' DUE PROCESS RIGHTS 31
CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Bergeron Environmental and Recycling, LLC v. LGL Recycling, LLC, 2024 WL 4446881 (Fla. 4th DCA Oct. 9, 2024) 19

Bishop v. Bishop, 47 So. 3d 326 (Fla. 2nd DCA 2018) 27

Brundage v. Evans, 295 So. 3d 300 (Fla. 2d DCA 2020) 29

C&C Wholesale, Inc. v. Fusco Management Corp., 564 So. 2d 1259 (Fla. 2d DCA 1990) 21

C.N. v. I.G.C., 316 So. 3d 287 (Fla. 2021) 23

Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49 (Fla. 2000) 11

Cent. Inv. Assocs., Inc. v. Leasing Serv. Corp., 362 So. 2d 702 (Fla. 3d DCA 1978) 19

Dobson v. U.S. Bank Nat'l Association, 217 So. 3d 1173 (Fla. 2017) 31

Dunmar Estates Homeowner's Ass'n., Inc. v. Rembert, 383 So. 3d 857 (Fla. 5th DCA 2024) 8, 9, 29

Dutch v. Gordon, 481 So. 2d 1235 (Fla. 3d DCA 1986) 17

Easley v. The Garden Sanctuary, Inc., 120 So. 2d 59 (Fla. 1960) 32

Fernandez v. Homestar at Miller Cove, Inc.,
935 So. 2d 547 (Fla. 3d DCA 2006) 21

Fierro v. Templeton,
857 So. 2d 931 (Fla. 4th DCA 2003) 14

First Am. Bank and Trust v. Frogel,
726 F. Supp. 1292 (S.D. Fla. 1989) 16

Fox v. Prof'l Wrecker Operators of Fla.,
801 So. 2d 175 (Fla. 5th DCA 2001) 14

Gelco Corp. v. Campanile Motor Serv., Inc.,
677 So. 2d 952 (Fla. 3d DCA 1996) 18, 19

Globe Newpaper Co. v. King,
658 So. 2d 518 (Fla. 1995) 28

Hill v. Deering Bay Marina Ass'n, Inc.,
985 So. 2d 1162 (Fla. 3d DCA 2008) 21

Hinners v. Hinners,
312 So. 3d 938 (Fla. 4th DCA 2021) 26, 32

In re Estate of Dahl,
125 So. 2d 332 (Fla. 2d DCA 1960) 32

King v. Farah & Farah, P.A.,
358 So. 3d 1271 (Fla. 5th DCA 2023) 23

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 20

Offutt v. United States,
348 U.S. 11 (1954) 20

Olson v. Olson,
260 So. 3d 367 (Fla. 4th DCA 2018) 15

Orlando Orane Groves Co. v. Hale,
107 Fla. 304 (Fla. 1932)... 16

Parkway Bank v. Fort Myers Armature Works, Inc.,
658 So. 2d 646 (Fla. 2d DCA 1995) 30

Perlow v. Berg Perlow,
875 So. 2d 383 (Fla. 2004) 20, 24, 26

Reeves v. Fleetwood Homes of Fla., Inc.,
889 So. 2d 812 (Fla. 2004) 10

Ross v. Botha,
867 So. 2d 567 (Fla. 4th DCA 2004) 23

Royal United Props., Inc. v. Royal,
370 So. 3d 1020 (Fla. 6th DCA 2023) .... passim

Santini v. Cleveland Clinic Florida,
65 So. 3d 22 (Fla. 4th DCA 2011) 23

State Farm Mut. Auto. Ins. Co. v. Menendez,
70 So. 3d 566 (Fla. 2011) 18

Tercier v. Univ. of Miami, Inc.,
383 So. 3d 847 (Fla. 3d DCA 2023) 20

Timko v. Triarsi,
898 So. 2d 89 (Fla. 5th DCA 2005) 14

Univ. of Fla. Bd. of Trs. v. Carmody,
372 So. 3d 246 (Fla. 2023) 10

Univ. of Miami v. Jones,
338 So. 3d 401 (Fla. 3d DCA 2022) 9, 30

Vista Centre Venture v. Unlike Anything, Inc.,
603 So. 2d 576 (Fla. 5th DCA 1992) 21

White v. Fort Myers Beach Fire Control District,
302 So. 3d 1075 (Fla. 2nd DCA 2020) 26

White v. White,
686 So. 2d 762 (Fla 5th DCA 1997) 24

Winslow v. Deck,
225 So. 3d 276 (Fla. 4th DCA 2017) 21

Statutes

§ 605.0702, Fla. Stat. (2022) 3

§ 605.0706(1), Fla. Stat. (2022) 12

§ 605.0706(2), Fla. Stat. (2022) .... passim

§ 605.0706(4), Fla. Stat. (2022) 3, 12

§ 605.0706(6), Fla. Stat. (2022) 7, 13

§ 605.0706, Fla. Stat. (2022) .... passim

§ 605.0802, Fla. Stat. (2021) .... passim

§ 607.1436(6), Fla. Stat. (2022) 27

§ 607.1436, Fla. Stat. (2020) 8, 14

§ 720.311(2)(a), Fla. Stat. (2021) 8, 9, 29

Art. V, § 4(b)(3), Fla. Const. 3

Rules

Fla. R. App. P. 9.020(h) 3

Fla. R. App. P. 9.030(b)(3) 2

Fla. R. App. P. 9.100 2

Fla. R. App. P. 9.100(c) 3

Fla. R. App. P. 9.220 2

Fla. R. Civ. P. 1.190 10

PETITION FOR WRIT OF CERTIORARI

YOSMANY PAEZ, N&R DIALYSIS, LLC, DIALYSIS CONSULTING, LLC, LA MINA MULTISERVICES, CORP., and GLOMACOR MEDICAL SERVICES, CORP ("Petitioners") petition this Court for a writ of certiorari quashing the lower tribunal's Order on Defendant ARC Dialysis LLC's Motion to Dismiss, or In the Alternative, Compel Arbitration and Response in Opposition to Defendants, Yosmany Paez, N&R Dialysis Consulting LLC, La Mina Multiservices Corp. and Glomacor Medical Services Corp. Motion to Dismiss Second[1] Amended Complaint ("Order on Motion to Dismiss"), in which the trial court*, inter alia,* set aside an election to purchase L&C INVESTMENT CORP's ("Respondent") membership interests in ARC DIALYSIS MIAMI LAKES, LLC ("ARC Dialysis Miami Lakes") under section 605.0706(2), Florida Statutes (2022). The lower tribunal's Order on Motion to Dismiss departs from the essential requirements of the law by (1) not following the procedural requirements mandated by section 605.0706, Florida Statutes (2022), after the elections to purchase were made, which would have afforded the Petitioners the opportunity to avoid this derivative action; (2) setting aside the jury trial waiver contained in ARC Dialysis Miami

[1] The Amended Complaint is inadvertently identified as the Second Amended Complaint.

Lake's operating agreement based on a finding (without hearing any evidence) that the Respondent lacked negotiating power and experience necessary to justify a knowing waiver of a right to trial by jury; (3) not enforcing the pre-suit demand requirement set forth in section 605.0802, Florida Statutes (2021), which action would improperly allow Respondent to maintain the underlying derivative action in violation of Florida's Revised Limited Liability Company Act; and (4) violating the Petitioners' due process rights (App. at 006-013.)[2] Petitioners attempted to remedy this matter before in the lower tribunal, but Petitioners were unable to obtain a ruling or hearing on their Motion for Rehearing, which was joined by ARC Dialysis LLC and ARC Dialysis Miami Lakes, prior to the appellate deadline to seek certiorari. (App. at 504.) Additionally, Petitioners do not have an adequate remedy on appeal because the trial court violated statutory safeguards that bar this litigation in its entirety. Thus, this Court should grant certiorari and quash the Order on Motion to Dismiss.

BASIS FOR INVOKING JURISDICTION

This Court maintains jurisdiction for this certiorari review pursuant to Florida Rules of Appellate Procedure 9.030(b)(3) and 9.100 and pursuant to

[2] Pursuant to Florida Rules of Appellate Procedure 9.100 and 9.220, this Petition is accompanied by an Appendix, and references to the appendix shall be as (App. at ___), with the appropriate page number indicated.

Article V, Section 4 (b)(3) of the Florida Constitution. The petition is timely filed as the Order on Motion to Dismiss was rendered on November 17, 2024. *See* Fla. R. App. P. 9.020(h) and 9.100(c).

FACTS UPON WHICH PETITIONERS RELY

This matter arises from a five-count derivative action filed by Respondent on June 17, 2022 ("Complaint"). (App. at 014-079.) Count IV of the Complaint sought judicial dissolution of ARC Dialysis Miami Lakes pursuant to section 605.0702, Florida Statutes (2022) (App. at 029-031.) As an alternative to the derivative action, ARC Dialysis Miami Lakes and Glomacor Medical Services Corp. ("Glomacor") timely elected to purchase (each, an "Election to Purchase") Respondent's membership interest in ARC Dialysis Miami Lakes pursuant to section 605.0706, Florida Statutes (2022). (App. at 082-085.)

ARC Dialysis Miami Lakes, Glomacor and Respondent were unable to reach an agreement as to the fair value and terms of purchase of Respondent's membership interest. Therefore, pursuant to section 605.0706(4), Florida Statutes (2022), ARC Dialysis Miami Lakes requested an evidentiary hearing to determine the fair value and terms of sale of Respondent's membership interest. (App. at 153-158.) In an attempt to set aside the Election to Purchase, and without meeting the standard set forth in

section 605.0706(2), Florida Statutes (2022), Respondent filed an Amended Complaint wherein it removed the judicial dissolution count. (App. at 086-152.) On June 6, 2023, the trial court entered a Notice of Special Set Hearing for August 25, 2023, specially setting a final hearing to determine the fair market value of Respondent's membership interest ("Valuation Hearing"). (App. at 156-158.) The Valuation Hearing was cancelled due to a scheduling conflict.

Before the Valuation Hearing could be reset, Respondent retained new counsel, who refused to cooperate in re-setting the Valuation Hearing or to engage in discovery related to the valuation of Respondent's membership interest. (App. at 162-188.) Instead, two years after filing its Amended Complaint and pursuing a path to sell its membership interest under section 605.0706, Respondent moved for entry of judicial defaults—and actually obtained a judicial default against N&R Dialysis that was set aside—against Petitioners. (App. at 205-211; 291-292.) Based on the procedural posture of the case, on July 26, 2024, ARC Dialysis LLC filed a Motion to Dismiss Amended Complaint or, in the alternative, Compel Arbitration. (App.at 189-204). On July 31, 2024, Yosmany Paez, Dialysis Consulting LLC, LA Mina Multiservices Corp, and Glomacor Medical Services filed a Motion to Dismiss; and on August 8, 2024, N&R Dialysis LLC filed its Motion to

Dismiss. The forgoing motions are collectively referred to herein as "Motion to Compel Arbitration and Motions to Dismiss"). (App. at 212-218; 219-225.)

At the hearing on the foregoing motions, the trial court decided to bifurcate the Motion to Compel Arbitration and Motions to Dismiss and said the trial court would not rule on the Motions to Dismiss at that time. (App. at 312-313, Tr. 20:1–18 and 21:7–19). Additionally, the trial court requested proposed orders from the parties solely as to the issue of arbitration in the following exchange:

MR. DUMENIGO: Just for the sake of clarity with the Court's ruling, so again, our motion is to compel arbitration or to dismiss. So not getting into the dismissal arguments, now we're just dealing with the arbitration, so I just want to make sure that we reserve the right to be able to continue these arguments should the Court not rule for arbitration for whatever reason. So right now, we're just dealing with arbitration, correct?

THE COURT: I'm going to take this one step at a time. So let's right now focus on the arbitration, okay? And then I don't know if your argument is going to be, "Well, if the Court finds that this is arbitrable and sends it to arbitration, then the motion should go with the arbitrator," that will be for another day. But right now, my focus is going to be whether or not this should go to arbitration….

MR. DORTA:	If Your Honor finds that arbitration is not proper and remains within Your Honor's court, will we have to then reset the motion to dismiss for argument? Is there –
THE COURT:	No.
MR. DORTA:	So Your Honor, then we'd submit – we'll cross that bridge when we get to it.
THE COURT:	Yes. I'm not going to need to hear all the arguments again, but I do want to take them one step at a time. Right now, I think we're just going to go with the competing orders on arbitration, and then depending on how I rule with that, we'll go to the next phase.

(App. at 312-313, Tr. 20:1–18 and 21:7–19).

Notwithstanding, Respondent disregarded the trial court's instructions and knowingly submitted a proposed order with the following misrepresentation:

> At the hearing, this Court requested the parties file supplemental authority as to the issue of arbitration to [sic] submit competing orders on the issues of arbitration ***<u>and dismissal</u>*****.**

(App. at 327.) Petitioners objected to the unilateral submission of a proposed order on the Motions to Dismiss by Respondent. (App. at 466.) In a departure from the essential requirements of law, the trial court adopted Respondent's proposed order verbatim without exercising independent judgment. (App. at 006-013.)

NATURE OF RELIEF SOUGHT

Petitioners request that this Court issue a writ of certiorari, quashing the lower court's Order on Motion to Dismiss and remanding with instructions to hold a valuation hearing under section 605.0706(2) or otherwise to comply with the statutory mandates and safeguards set forth in Florida's Revised Limited Liability Company Act. By operation of section 605.0706(6), Florida Statutes (2022), Respondent will no longer have rights or status as a member of ARC Dialysis Miami Lakes upon entry of an order by the trial court determining the fair value of Respondent's interest. *See* § 605.0706(6). Fla. Stat. The purpose of the election to purchase statute is to allow the company and its members to avoid Respondent's derivative action, and allow the company to continue on without the cloud of an owner initiated derivative litigation. *See id.; see also Royal United Props., Inc. v. Royal,* 370 So. 3d 1020, 1022–1023 (Fla. 6th DCA 2023).

The lower tribunal disregarded the statutory framework governing elections to purchase when it denied Petitioners' motion to dismiss, set aside the Election to Purchase Respondent's membership interest, and allowed Respondent's derivative action to continue. (App. at 009-010.) Allowing the derivative action to proceed in derivation of the requirements of section 605.0706 deprives Petitioners of their statutory rights and increases the

damage to ARC Dialysis Miami Lakes by furthering a dispute as to ownership of the company, and the concomitant impact on management of the company, which the statute is designed to prevent. *See Royal United Props.,* 370 So. 3d at 1022–1023 (granting certiorari and quashing a trial court order that failed to follow a nearly identical corporate election to purchase statute set forth in section 607.1436, Florida Statutes).

Similarly, the lower tribunal disregarded section 605.0802 when it shifted the burden of pre-suit demand to the Petitioners. (App. at 010.) Before filing the underlying derivative action, Respondent was required to first make demand upon ARC Dialysis Miami Lakes, providing the company with a fair and due opportunity to act or to refuse to act in their discretion. § 605.0802, Fla. Stat. (2021). The trial court departed from the essential requirements of the law when it failed to require the Respondent to comply with the statutorily mandated condition precedent to filing its derivative action. *See Dunmar Estates Homeowner's Ass'n., Inc. v. Rembert*, 383 So. 3d 857, 857 (Fla. 5th 2024) (granting certiorari and quashing a trial court order denying a motion to dismiss where the plaintiff failed to serve a pre-suit demand for mediation to her homeowner's association pursuant to section 720.311(2)(a), Florida Statutes (2021)). Petitioners have been irreparably harmed by the trial court's failure to recognize and enforce the

statutory condition precedent to Respondent's derivative action. *See id.* (quashing trial court order which failed to require pre-suit demand for mediation under section 720.311(2)(a))*; see also Univ. of Miami v. Jones*, 338 So. 3d 401 (Fla. 3d DCA 2022) (granting certiorari and quashing a trial court order denying a motion to dismiss where the trial court failed "to make the requisite findings as to respondent's compliance with presuit requirements" for filing a medical malpractice action).

Certiorari relief is necessary to correct the irreparable harm caused by the lower court's failure to apply the plain language of sections 605.0706 and 605.0802. Additionally, certiorari relief is necessary to correct the material harm that permeates this cause by virtue of the trial court's ruling that Respondent did not knowingly and voluntarily enter into the operating agreement governing ARC Dialysis Miami Lakes. Moreover, certiorari relief is necessary to remedy the trial court's violation of Petitioner's due process rights.

ARGUMENT IN SUPPORT OF RELIEF REQUESTED

To demonstrate an entitlement to certiorari relief, the Petitioners must show that the Order on Motion to Dismiss is "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal."

Univ. of Fla. Bd. of Trs. v. Carmody, 372 So. 3d 246, 252 (Fla. 2023) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)).

I. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING PETITIONERS' MOTION TO DISMISS

The trial court departed from the essential requirements of law by setting aside the Election to Purchase Respondent's membership interest in violation of section 605.0706; by failing to make any findings that Respondent complied with the pre-suit demand requirements set forth in section 605.0802; by invalidating a portion of ARC Dialysis Miami Lakes' operating agreement without any evidentiary basis for such ruling; and by violating the Petitioners' due process rights.

A. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY SETTING ASIDE THE ELECTION TO PURCHASE RESPONDENT'S MEMBERSHIP INTEREST

Respondent conflated its procedural right to amend a complaint under Florida Rule of Civil Procedure 1.190 with the Legislature's statutory prohibition against the unilateral discontinuance of the election to purchase process. *See* § 607.0706, Fla. Stat. Where a statute, such as section 607.0706, creates a substantive right in an area of legitimate legislative concern, the statute is constitutional and enforceable even where in conflict with a procedural rule adopted by the Florida Supreme Court. *See Caple v.*

Tuttle's Design-Build, Inc., 753 So. 2d 49, 53-54 (Fla. 2000); *Royal United Props.*, 370 So. 3d 1020 (finding that statutory procedures under corporate election to purchase statutes constitute substantive rights).

Here, the trial court departed from the essential requirements of law by setting aside ARC Dialysis Miami Lakes' and Glomacor's Election to Purchase, resulting in irreparable harm to the Petitioners seeking to purchase Respondent's membership interest. *See Royal United Props.*, 370 So. 3d at 1021–22. Section 605.0706 provides, in pertinent part:

> (1) In a proceeding initiated by a member of a limited liability company under s. 605.0702(1)(b), the company may elect, or, if it fails to elect, one or more other members may elect, to purchase the entire interest of the petitioner in the company at the fair value of the interest. An election pursuant to this section is irrevocable unless the court determines that it is equitable to set aside or modify the election.
>
> (2) An election to purchase pursuant to this section may be filed with the court within 90 days after the filing of the petition by the petitioning member under s. 605.0702(1)(b) or at such later time as the court may allow. If the election to purchase is filed, the company shall within 10 days thereafter give written notice to all members, other than the petitioning member. The notice must describe the interest in the company owned by each petitioning member and must advise the recipients of their right to join in the election to purchase the petitioning member's interest in accordance with this section. Members who wish to participate must file notice of their intention to join in the purchase within 30 days after the effective date of the notice. A member who has filed an election or notice of the intent to participate in the election to purchase thereby becomes a party to the proceeding and shall participate in the purchase in proportion to the ownership interest as of the date the first election was filed unless the members

> otherwise agree or the court otherwise directs. After an election to purchase has been filed by the limited liability company or one or more members, the proceeding under s. 605.0702(1)(b) may not be discontinued or settled, and the petitioning member may not sell or otherwise dispose of the interest of the petitioner in the company unless the court determines that it would be equitable to the company and the members, other than the petitioner, to authorize such discontinuance, settlement, sale, or other disposition or the sale is pursuant to a deadlock sale provision described in s. 605.0702(1)(b).

ARC Dialysis Miami Lakes and Glomacor timely filed their Election to Purchase under section 605.0706. Because the parties were unable to reach an agreement as to the fair market value and terms of purchase of Respondent's membership interest, the trial court "shall… determine the fair value of petitioner's interest." § 605.0706(4), Fla. Stat. (2022).

An election to purchase is "irrevocable unless the court determines that it is equitable to set aside or to modify the election." § 605.0706(1), Fla. Stat. (2022). And, the trial court does not have discretion to set aside an election to purchase at the request of Respondent and its discretion to set aside the Election to Purchase is limited to only circumstances in which it would be equitable to ARC Dialysis Miami Lakes and the other Petitioners. Section 605.0706(2) states, in pertinent part:

> After an election to purchase has been filed by the limited liability company or one or more members, the proceeding under s. 605.0702(1)(b) may not be discontinued or settled, and the petitioning member may not sell or otherwise dispose of the interest of the petitioner in the company unless the court

> determines that it would be equitable to the company and the members, ***other than the petitioner,*** to authorize such discontinuance, settlement, sale, or other disposition or the sale is pursuant to a deadlock sale provision described in s. 605.0702(1)(b).

(emphasis added).

Here, no member of ARC Dialysis Miami Lakes, apart from the Respondent, has asked the trial court to deem it equitable to permit the discontinuance of Respondent's count for judicial dissolution. As such, the trial court did not have grounds to set aside the Election to Purchase and departed from the essential requirements of law by setting aside the Election to Purchase based on a perceived inequity that would befall Respondent in "the true and actual valuation of ARC Dialysis Miami Lakes." (App. at 009-010.) Based thereon, this Petition for Writ of Certiorari should be granted and the Order on Motion to Dismiss should be quashed.

Florida law provides that upon entry of a trial court order setting for the fair value and terms of condition of sale, Respondent "shall no longer have any rights or status as a member of the limited liability company except the right to receive the amounts awarded by the order of the court, which shall be enforceable in the same manner as any other judgment." § 605.0706(6). Therefore, the mandated repurchase order should trigger dismissal of the derivative action. *See id.*; *Timko v. Triarsi,* 898 So. 2d 89 (Fla. 5th DCA

2005) (holding that "a plaintiff in a derivative suit, in addition to meeting the requirements of the statute, must meet the common law requirement of continuous ownership throughout the pendency of the suit."); *Fox v. Prof'l Wrecker Operators of Fla.,* 801 So. 2d 175, 178 (Fla. 5th DCA 2001) ("When standing is raised as an issue, the court must determine whether the plaintiff 'has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation.").

Rather than direct the sale as mandated by statute as the trial court previously indicated it would do in June of 2023, the trial court permitted Respondent to set aside the Election to Purchase on the unsupported proposition that the sale would be inequitable to Respondent:

> The Court has discretion to equitably set aside the Defendants' Election to Purchase under Fla. Stat. § 605.0706(2). *See also Fierro v. Templeton,* 857 So. 2d 931 (Fla. 4th DCA 2003) ("section 607.1436…gives the court discretion to set aside or modify an election to purchase for equitable reasons."). This Court finds that to continue with the election to purchase and final hearing would be inequitable, as the remaining counts in the Amended Complaint ultimately affect the true and actual valuation of ARC Dialysis Miami Lakes.

(App. at 009-010.) *Cf.* § 605.0706(2), Fla. Stat. (An election to purchase may only be set aside upon a finding that "it would be equitable to the company and the members, other than petitioner."). Contrary to the essential

requirements of the law, the trial court only considered the impact a valuation would have on Respondent's financial gain.

Again, there is no record evidence to support a finding that it would be *equitable to ARC Dialysis Miami Lakes or its other members* to allow Respondent to set aside the Election to Purchase and, instead, proceed with lengthy and costly litigation. Additionally, there is nothing in the record to suggest the trial court cannot determine the value of Respondent's membership interest at an evidentiary hearing under the election to purchase statute. And, the trial court cannot consider purported inequities to Respondent in determining whether to set aside the Elections to Purchase. Further, the trial court certainly cannot, as it did here, accept Respondent's counsel's statements as evidence on this issue. *See Olson v. Olson*, 260 So. 3d 367, 369 (Fla. 4th DCA 2018) (an attorneys' unsworn statements do not establish facts).

Based thereon, the Order on Motion to Dismiss should be quashed as it departs from the essential requirements of the law.

B. <u>THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY SHIFTING THE BURDEN OF PRE-SUIT DEMAND UNDER § 605.0802, FLA. STAT. to PETITIONERS</u>

The Order on Motion to Dismiss also departs from the essential requirements of law related to the statutorily required pre-suit demand because the trial court inexplicably found:

> Defendants have not violated Section 605.0802, Florida Statutes, as demand on the other members or managers would have been futile. *Orlando Orane Groves Co. v. Hale*, 107 Fla. 304 (Fla. 1932); *First Am. Bank and Trust v. Frogel*, 726 F. Supp. 1292, 1298 (S.D. Fla. 1989) (demand excused as futile when directors are alleged to have "participated in the wrongs complained of and could not be expected to institute a lawsuit."). The Amended Complaint alleges ARC Dialysis engaged in self-dealing behavior and other behavior to the detriment of ARC Dialysis of Miami Lakes.

(App. at 010.)

The foregoing ruling is a departure from the essential requirements of the law because Respondent, not Petitioners, must plead with particularity that it complied with the pre-suit demand requirements set forth in section 605.0802, which states:

> A member may maintain a derivative action to enforce a right of a limited liability company if:
>
> (1) The member first makes a demand on the other members in a member-managed limited liability company or the managers of a manager-managed limited liability company requesting that the managers or other members cause the company to take suitable action to enforce the right, and the managers or other members

> do not take the action within a reasonable time, not to exceed 90 days; or
>
> (2) A demand under subsection (1) would be futile, or irreparable injury would result to the company by waiting for the other members or the managers to take action to enforce the right in accordance with subsection (1).

The alleged self-dealing by one member, ARC Dialysis, does not meet the threshold for a finding of utility that would excuse Respondent's non-compliance with the statutory condition precedent of making a pre-suit demand on the company or its other members. *See* § 605.0802. Pre-suit demand is a statutory requirement, and Respondent's failure to satisfy this condition precedent required dismissal of Respondent's derivative action. *See Dutch v. Gordon,* 481 So. 2d 1235 (Fla. 3d DCA 1986).

Thus, the Order on Motion to Dismiss departed from the essential requirements of the law. Based thereon, this Court should grant certiorari and vacate the Order on Motion to Dismiss.

C. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY INVALIDATING THE PARTIES' JURY TRIAL WAIVER IN THE OPERATING AGREEMENT

The trial court invalidated the parties' jury trial waiver, without any record evidence of unconscionability or other evidentiary showing that the jury trial waiver should not be enforced.

If the text of a contract's language is plain and unambiguous, a court must interpret the contract "in accordance with the plain meaning of the language used" so as to give effect to the contract as written. *E.g., State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569–70 (Fla. 2011). Article XVII, Section 13 of ARC Dialysis Miami Lakes' Operating Agreement, of which Respondent is a party, states:

> SECTION 13. WAIVER OF JURY TRIAL. EACH PARTY TO THIS AGREEMENT HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION (A) ARISING UNDER THIS AGREEMENT OR (B) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO IN RESPECT OF THIS AGREEMENT OR ANY OF THE TRANSACTIONS RELATED HERETO, IN EACH CASE, WHETHER NOW OR EXISTING OR HEREAFTER ARISING, AND WHETHER IN CONTRACT, TORT, EQUITY OR OTHERWISE.

(App. at 051.)

The broad language of the parties' jury trial waiver encompasses all the claims raised by Respondent; and contractual waivers of the right to a jury trial must be upheld. *See Gelco Corp. v. Campanile Motor Serv., Inc.*, 677 So. 2d 952, 952 (Fla. 3d DCA 1996) (A trial court commits error when it chooses to ignore the parties' contractual waiver of a jury trial…). Thus, Respondent is not entitled to a jury trial in this matter. *See Bergeron Environmental and Recycling, LLC v. LGL Recycling, LLC*, 2024 WL

4446881, *1–2 (Fla. 4th DCA Oct. 9, 2024); *Gelco Corp.*, 677 So. 2d at 952 (Fla. 3d DCA 1996) (enforcing plain and clear contractual jury trial waiver stating that "Both parties to this agreement hereby waive any and all right to any trial by jury in any action or proceeding arising directly or indirectly hereunder."); *Cent. Inv. Assocs., Inc. v. Leasing Serv. Corp.*, 362 So. 2d 702, 704 (Fla. 3d DCA 1978) (enforcing "clear, unambiguous" jury trial waiver which read: "Lessee and Lessor hereby waive any and all right to a trial by jury in action based hereon or arising hereunder.").

Despite the clear and unambiguous language of the jury trial waiver, the trial court found—without any record evidence or evidentiary hearing—that Respondent did not knowingly and voluntarily waive its right to a trial by jury:

> Plaintiff had little to no ability to negotiate the Operating Agreement or jury trial waiver, was not represented by counsel, and as a corporation with experience in the construction industry, had little familiarity in the dialysis arena.[3] The majority of the other Defendants, at best, have had a longer standing business relationship and joint ventures in other companies.[4]

(App. at 011.)

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[3] Having experience in a particular industry is irrelevant to the enforceability of a jury trial waiver.

[4] Past business relationships between the other members are wholly irrelevant to the enforceability of a jury trial waiver.

There is no evidence to support the trial court's findings of fact. Rather, the purported findings embedded in Respondent's proposed order, which were wholesale adopted by the Court, are purely a regurgitation of Respondents' arguments from its response in opposition to the Motions to Dismiss that were cut and pasted into the proposed order. (*See* App. at 006-013; 326-333); *See also Tercier v. Univ. of Miami, Inc.*, 383 So. 3d 847, 854 (Fla. 3d DCA 2023).

A party's proposed order "cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." *Perlow v. Berg Perlow*, 875 So. 2d 383, 390 (Fla. 2004). As cautioned by this Court in *Tercier*:

> We must be ever-mindful that "justice must satisfy the appearance of justice," Offutt v. United States, 348 U.S. 11, 13, 75 S.Ct. 11, 99 L.Ed. 11 (1954), and that the requirement of a neutral arbiter "preserves both the appearance and reality of fairness ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

383 So. 3d at 854.

Further, trial court's ruling related to the enforceability of the jury trial waiver is in direct conflict with the parties' Operating Agreement attached as Exhibit 1 to the Amended Complaint. (App. at 011); *See Winslow v. Deck,*

225 So. 3d 276, 278 (Fla. 4th DCA 2017) (exhibits attached to the complaint must be considered on a motion to dismiss). Article XVII, Section 14 of the Operating Agreement states:

> SECTION 14. LEGAL REPRESENTATION. Each Member acknowledges that it has read and understood this Agreement and any accompanying exhibits, and has had ample time and opportunity to consult with advisors and legal counsel of its own choosing about the potential benefits and risks of entering into this Agreement. Each Member acknowledges that it has had an opportunity to negotiate, and has fully negotiated, the essential stipulations of this Agreement and that such stipulations were not unilaterally imposed on it by any other Member. No Member shall be considered to be the drafting party nor shall any rule of construction resolving ambiguities against the drafting party be applied in the interpretation of this Agreement.

(*See* App. at 051, Complaint, Ex. 1.)

The trial court cannot rewrite the terms of the parties' Operating Agreement to eliminate the jury trial waiver provision. *See, e.g.*, *Vista Centre Venture v. Unlike Anything, Inc.,* 603 So. 2d 576, 578 (Fla. 5th DCA 1992); *C&C Wholesale, Inc. v. Fusco Management Corp*., 564 So. 2d 1259, 1261 (Fla. 2d DCA 1990) (because the jury trial waiver was included in the contract giving rise to the claims and there are no allegations that the contract as a whole was unenforceable, then jury trial waiver provision was enforceable); *Hill v. Deering Bay Marina Ass'n, Inc.,* 985 So. 2d 1162, 1167 (Fla. 3d DCA 2008) (citing *Fernandez v. Homestar at Miller Cove, Inc.,* 935 So. 2d 547, 551 (Fla. 3d DCA 2006)) (observing "a court is powerless to rewrite the

contract to make it more reasonable or advantageous for one of the contracting parties"). In essence, Respondent convinced the trial court to strike the jury trial waiver contained in Article XVII, Section 13, of the Operating Agreement and the arbitration provision in Article XVII, Section 12, of the Operating Agreement; but yet, Respondent relies upon the enforceability of the remaining provisions of the Operating Agreement in its Breach of the Operating Agreement claim against Petitioners.

Based thereon, the Order on Motion to Dismiss departed from the essential requirements of the law and must be quashed.

D. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY ADOPTING RESPONDENT'S ORDER WITHOUT EXERCISING INDEPENDENT JUDGMENT AND WITHOUT ALLOWING PETITIONERS THE RIGHT TO PRESENT A COMPETING ORDER

The trial court only requested the parties present competing orders on the issue of arbitrability. Yet, over objection, the trial court adopted Respondent's proposed order that denied Petitioners' motions to dismiss and contained findings of fact that are unsupported by any evidence. Petitioners were not afforded the opportunity to submit competing orders on the motions to dismiss or to be heard. "A court should never direct only one side to prepare an order without assuring that the opposing party has had the opportunity to comment or object to its contents, or to prepare its own

submission." *Ross v. Botha*, 867 So. 2d 567, 572 (Fla. 4th DCA 2004) (*abrogated on other grounds by C.N. v. I.G.C.*, 316 So. 3d 287 (Fla. 2021)). This is a departure from the essential requirements of law, and the Respondent must concede error. *See Santini v. Cleveland Clinic Florida*, 65 So. 3d 22, 39–40 (Fla. 4th DCA 2011) (finding the most egregious of all the trial court's error to be adopting an order without first giving the opposing party an opportunity to review the order and sua sponte imposing sanctions against appellee for failure to concede error on appeal where the adopted order contained a "good number" of "patently erroneous" errors). Thus, the Order on Motion to Dismiss should be quashed as the trial court departed from the essential requirements of the law. *See King v. Farah & Farah, P.A.*, 358 So. 3d 1271, 1273 (Fla. 5th DCA 2023) (reversing where trial judge adopted a party's proposed order word for word, without allowing objection by opposing counsel).

Not only were the Petitioners not afforded the opportunity to present a competing order on the motions to dismiss, but the trial court also departed from the essential requirements of the law by adopting, verbatim, the Respondent's proposed order that contained numerous legal deficiencies, clerical errors and unsupported findings of fact. *See Perlow*, 875 So. 2d at 390 (the Court may not adopt a parties' judgment verbatim, blindly, or without

making in-court findings); *see also White v. White*, 686 So. 2d 762 (Fla 5th DCA 1997) (holding "It is the court's unique responsibility to make the decisions on the various issues of the case based on the pleadings before it and its view of the evidence presented. The court does not fulfill this responsibility by merely choosing the better option contained in competing proposed judgments presented by the attorneys.").

The *first* paragraph numbered 7(c)[5] (on page five) of the Order on Motion to Dismiss adopted the following exact nonsensical language from Respondent's proposed order:

> ***Defendants*** have not violated Section 605.0802, Florida Statutes, as demand on the other members would have been futile…

(App. at 010 (emphasis added).) Respondent–not the Petitioners–is obligated to comply with the statutory presuit demand requirements. *See* § 605.0802. There are also internal inconsistencies in the Order on Motion to Dismiss. For example, in paragraph 6, the trial court found it would be prejudicial to Respondent to "change course mid-journey" away from moving forward with a valuation hearing under section 605.0706(2) and proceeding to arbitration, stating:

[5] The Order on Motion to Dismiss also contains errors in the numbering of the paragraphs. There are three (3) paragraphs identified as 7(a); two paragraphs identified as 7(b); and two paragraphs identified as 7(c).

> 6. Plaintiff filed its initial Complaint on June 17, 2022 [DE 2. Pursuant to Defendants' respective representations within the procedural process of this case, it is clear that within the twenty-five (25) months of this case, Defendant' goal is to have a Final Hearing on Business Valuation pursuant to Florida Statute § 605.0706(2). To compel arbitration and change course mid-journey is inconsistent with one's arbitration right and would prejudice Plaintiff.[6]

(App. at 009.)

Yet, in Paragraph 7(b) beginning on page 4 of the Order on Motion to Dismiss, the trial court found "that to continue with the election to purchase and final hearing would be inequitable . . . ." How can it be prejudicial to "change course mid-journey" at the same time it is "inequitable" to stay the course? Clearly, it cannot. Moreover, the trial court does not have authority under Florida law to set aside the Election to Purchase based on the purported inequities to Respondent. § 605.0706(2), Fla. Stat.

Further, the trial court found–without any evidence *and* without holding an evidentiary hearing–that "Plaintiff did not knowingly, voluntarily, and intelligently waive its right to a jury trial." (App. at 011.) The hearing on this matter focused primarily on the issue of arbitration. It was <u>not</u> an evidentiary hearing, and there was <u>no</u> evidence presented to support this finding. The wholesale adoption of the Order serves as an injunction that was not properly

[6] This further evidences that the Petitioners did not waive arbitration as they were not seeking to litigate Respondent's claims.

pled, preventing Petitioners from seeking the-relief in the Operating Agreement as agreed upon by the Parties.

This type of ruling requires a writ of certiorari because the entry of a de facto injunction here without an evidentiary hearing is clear error. *See Hinners v. Hinners*, 312 So. 3d 938, 942 (Fla. 4th DCA 2021) (entering a temporary injunction without a proper pleading and without an evidentiary hearing is a violation of due process). The Order on Motion to Dismiss is merely a rubberstamp of Respondent's proposed order, which, in turn, was a cut and paste from Respondent's responses in opposition to the Motions to Dismiss. (App. at 006-013; 226-289; 326-333.) As the Florida Supreme Court has warned, party's proposed order "cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." *Perlow*, 875 So. 2d at 390.

Based on the legal errors, internal inconsistences and unsupported factual findings in the Order on Motion to Dismiss, it is clear that the trial court failed to exercise independent judgment in entry of the order and violated the Petitioners' due process rights to be heard, and thereby departed from the essential requirements of the law. *See White v. Fort Myers Beach Fire Control District,* 302 So. 3d 1075 (Fla. 2nd DCA 2020) (setting forth the factors to determine whether the trial court exercised independent

judgment); *see also Bishop v. Bishop*, 47 So. 3d 326, 828 (Fla. 2nd DCA 2018).

II. THE ORDER ON MOTION TO DISMISS IN CONTRAVENTION OF § 605.0706, § 605.0802, AND WELL-ESTABLISHED CASELAW CAUSED A MATERIAL INJURY TO PETITIONERS THAT CANNOT BE REMEDIED ON APPEAL

The trial court's substantial departures from the requirements of law resulted in material harm to the Petitioners that cannot be remedied on appeal.

A. IRREPARABLE HARM CAUSED BY THE TRIAL COURT'S FAILURE TO COMPLY WITH § 605.0706

In a similar case, the Sixth District Court of Appeal found that a trial courts' failure to apply the plain language of the election to purchase provisions under Florida's nearly identical corporate statutes resulted in irreparable harm to the shareholders' rights to purchase shares in lieu of the derivative action. *See Royal United Props.*, 370 So. 3d at 1021–1022. Like Florida Statute § 605.0706, the election to purchase statute under Florida's Business Corporation Act provides an option for a corporation or its shareholders to purchase all the shares owned by a shareholder who has petitioned for judicial dissolution. *See* § 607.1436(6), Fla. Stat. (2022)[7]. In

[7] While the *Royal United Props.* Court analyzed the 2020 version of section 607.1436, the statute has remained unchanged since that time.

Royal United Props., the parties timely filed their elections to purchase; but rather than follow the statutory framework, the trial court set aside the elections to purchase. *Royal United Props.*, 370 So. 3d at 1021. In granting a writ of certiorari under those circumstances, the Sixth District Court of Appeal noted: "[T]he Florida Supreme Court has recognized that in rare instances irreparable injury may exist where statutory procedures are not followed, and it affects a party's substantive legal right." *Id.* at 1022–1023 (*citing Globe Newpaper Co. v. King,* 658 So. 2d 518, 520 (Fla. 1995)). The *Royal United Props.* Court further explained:

> The streamlined statutory scheme outlined in section 607.1436 cannot be meaningfully enforced post judgment because one of its purposes, which is evident from the text, is to provide Petitioners with a process, within strict time constraints, to quickly end corporate deadlock and take control.
>
> . . .
>
> The path the trial court has chosen begins the ringing of a bell which cannot be unrung.

Id. at 1023.

Similarly, here, the trial court's actions in allowing the derivative action to proceed despite the Election to Purchase made by ARC Dialysis Miami Lakes and Glomacor has resulted in irreparable harm to Petitioners that cannot be remedied on appeal.

B. <u>IRREPARABLE HARM CAUSED BY THE TRIAL COURT'S FAILURE TO COMPLY WITH § 605.0802</u>

Certiorari is appropriate where a trial court fails to uphold pre-suit procedural requirements set forth by statute. In *Dunmar Estates*, 383 so. 3d at 858, the Fifth District Court of Appeal granted certiorari and quashed an order denying a motion to dismiss where the trial court erroneously determined section 720.311(2)(a), Florida Statutes (2021), did not require a demand for pre-suit mediation before filing suit against a homeowner's association. The *Dunmar* Court held:

> In establishing that their motion to dismiss was denied based on the erroneous determination that section 720.311(2)(a) did not require demand for presuit mediation, Petitioners have sufficiently shown irreparable harm.

Id.

Relevant to this case, the trial court failed to make any findings that Respondent complied with the statutory presuit demand requirements that were enacted to safeguard limited liability companies and its members from derivative actions. *See* § 605.0802 (pre-suit demand requirements for commencement of a derivative action); *see also Brundage v. Evans*, 295 So. 3d 300 (Fla. 2d DCA 2020) (granting certiorari and quashing an order denying motion to dismiss where medical provider was irreparably harmed by plaintiff's failure to comply with the statutorily mandated presuit

requirements set forth in Florida's medical malpractice statute). Indeed, in the case at hand, an evidentiary hearing did not occur.

In *Univ. of Miami v. Jones*, this Court granted certiorari and quashed an order denying motion to dismiss for failure to comply with the presuit statutory requirements in a medical malpractice case. 338 So. 3d 401 (Fla. 3d DCA 2022). In support of its holding, the *Jones* Court noted that "[b]y failing to make the requisite findings as to respondent's compliance with the presuit requirements, the trial court effected a denial of the procedural safeguards of chapter 766 for with certiorari is appropriate." *Id.* at 402. (internal citations omitted). In *Parkway Bank v. Fort Myers Armature Works*, Inc., 658 So. 2d 646, 649-50 (Fla. 2d DCA 1995), the Second District Court of Appeal noted that where the issues to be resolved address procedures designed to avoid litigation, those issues can be reviewed by certiorari.

The trial court below failed to address or make any findings that the Respondent complied with its presuit demand requirements set forth in section 605.0802. Notwithstanding, the trial court denied the Petitioner's motion to dismiss on this issue and allowed Respondent's derivative action to proceed even though Respondent failed to comply with the statutory condition precedent to filing this action. Thus, Petitioners have been

irreparably harmed by the trial court's departure from the essential requirements of law; and this Court has jurisdiction to grant certiorari.

C. IRREPARABLE HARM CAUSED BY THE COURT'S INVALIDATION OF PORTION'S OF THE PARTIES' OPERATING AGREEMENT AND VIOLATIONS OF PETITIONERS' DUE PROCESS RIGHTS

The trial court's unsupported findings of fact striking certain portions of the parties' operating agreement and the trial court's violation of Petitioners' due process rights in relation to the issuance of the Order on Motion to Dismiss resulted in a miscarriage of justice that cannot be remedied on appeal. The trial court's ruling related to striking the parties' jury trial waiver calls into question the entirety of the parties' operating agreement at issue in Respondent's Amended Complaint. Additionally, the trial court made factual rulings related to Respondent's waiver of a jury trial without notice or an opportunity to be heard by Petitioners. *See Dobson v. U.S. Bank Nat'l* Association, 217 So. 3d 1173 (Fla. 2017) (due process requires that each litigant be given full and fair opportunity to be heard). The Order on Motion to Dismiss creates uncertainty related to the enforceability of the parties' operating agreement that permeates Respondent's entire derivative action. "[W]here an interlocutory order does not conform to essential requirements of law and may reasonably cause material injury throughout subsequent proceedings for which the remedy of appeal will be inadequate, an appellate

court may exercise discretionary power to issue such writ." *In re Estate of Dahl*, 125 So. 2d 332, 336 (Fla. 2d DCA 1960) (citing, e.g., *Easley v. The Garden Sanctuary, Inc.*, 120 So. 2d 59 (Fla. 1960).

Additionally, Petitioners are entitled to the presentation of evidence, the opportunity to be heard, and the exercise of independent judicial judgment. The trial court violated all off these procedural due process rights of the Petitioners. This creates irreparable harm that cannot be remedied on appeal. The fact the Court deprived Petitioners from their statutory election to purchase pursuant to section 605.0706(2) serves as a de facto injunction enjoining Petitioners without an evidentiary hearing from having access to the remedies and rights afforded under section 605.0706(2). *See Hinners*, 312 So. 3d at 942. Therefore, this Court should grant certiorari and quash the Order on Motion to Dismiss.

CONCLUSION

Petitioners request that this Court grant the petition for writ of certiorari and quash the order denying dismissal. The trial court departed from the essential requirements of the law in its verbatim adoption of Defendant's proposed order, which caused irreparable injury to Petitioners. Thus, this Court should grant certiorari and quash the Order on Defendant ARC Dialysis LLC's Motion to Dismiss, or In the Alternative, Compel Arbitration

and Response in Opposition to Defendants, Yosmany Paez, N&R Dialysis Consulting LLC, La Mina Multiservices Corp. and Glomacor Medical Services Corp. Motion to Dismiss Second[8] Amended Complaint as set forth herein.

Respectfully submitted,

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[8] The Amended Complaint is inadvertently identified as the Second Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via Florida's E-Filing Portal to all counsel on the attached service list this 17th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. of App. P. 9.045(b) and Fla. R. of App. P. 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionally spaced Arial 14-point font and complies with the applicable font and word limit requirements.

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