THE STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Case Tracking No.2011201949

Appeal From The Charleston County
Court of Common Pleas

The Honorable Kristi Lea Harrington
Civil Action No. 2008 –CP–10-2344

KRITI RIPLEY, LLC and ASHLEY RIVER PROPERTIES II, LLC, Appellants,

v.

EMERALD INVESTMENTS, LLC and STUART LONGMAN, Respondents.

APPELLANTS' FINAL REPLY BRIEF

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PRELIMINARY STATEMENT

This lawsuit is about Kriti and ARP II's efforts to collect on their judgment from Emerald's membership interest in ARP II. There is no evidence that Emerald or Longman have any other assets that can serve as a source of payment of Kriti and ARP II's judgment. The charging order that was issued by the court has been in place for four years and has not produced any payment towards Kriti and ARP II's judgment. Kriti and ARP II's right to enforce its judgment is clearly not protected. Kriti and ARP II's only remedy as judgment creditors is to proceed with foreclosure of their charging order lien.

The Trial Court erred in holding that Kriti and ARP II have any remedies other than the exclusive remedies provided under S.C. Code Ann. § 33-44-504. The Trial Court erred in holding the existing charging order protects Kriti and ARP II's interests as judgment creditors because the only evidence on that issue establishes that Kriti and ARP II's interests are not protected.

Kriti and ARP II have a judgment that remains unpaid since the New York Supreme Court confirmed the Award of Judgment on March 27, 2008. Kriti and ARP II are entitled to be paid. Emerald and Longman are the subject of other substantial judgments, including judgments for fraud. The only asset Kriti and ARP II have been able to identify as a source of payment of their judgment is Emerald's membership interest in ARP II. ARP II does not generate profits or distributions and Kriti and Emerald's Charging Order lien has not resulted in payment of the judgment within a reasonable period of time. The S.C. Code of Laws provide two, and only two, remedies for Kriti to enforce its judgment against Emerald's membership interest. They are the imposition of a charging order lien and, foreclosure of that charging order lien if the lien

does not result in the judgment's being paid within a reasonable time. Because the judgment has not been paid within a reasonable time and there are no prospects of its being paid, Kriti and ARP II are entitled to foreclose their lien.

Emerald and Longman wrongly attempt to characterize this lawsuit as a dispute among members of a limited liability company over management of the limited liability company. To be sure, these parties have fought over that issue. But, those fights have already been adjudicated in three separate and confirmed arbitration awards. In the first two awards, Emerald and Longman were stripped of their voting rights because of their misappropriation of company assets and adjudged liable to Kriti and ARP II's for their losses. (R. pp. 5-16 and R. pp. 755-762). In the most recent arbitration proceeding, Emerald and Longman's claims of mismanagement and other wrongful conduct were proven to be meritless. (R. pp. 755-762).

The Trial Court erred in holding that Kriti and ARP II must resort to other remedies to collect their judgment from Emerald's membership interest in ARP II, citing "forced dissolution" and "ordering the purchase of shares of any other shareholder, either by the corporation or by other shareholders." Neither of those purported remedies applies to a judgment creditor's seeking to enforce its judgment, as is the case here. The rights of a creditor are set forth in S.C. Code Ann. § 33-44-504. Those rights are "exclusive." S.C. Code Ann. § 33-44-504(e). Those rights are not subject to a member's right to seek judicial dissolution of the company. A judgment debtor member cannot oppose a judgment creditor's effort to enforce its judgment by insisting that the creditor wait for a judicial dissolution proceeding to take its course. What the judgment debtor can do is

redeem his interest and thereby protect his membership interest. S.C. Code Ann. § 33-44-504(c)(1).

Emerald and Longman's brief cites no authority for the proposition that a judgment creditor's rights to foreclose its charging order lien are in any way altered because the judgment creditor may be a member of the company in whom the debtor has a membership interest. Because the rights provided to Kriti and ARP II as judgment creditors are statutorily mandated to be exclusive, the Trial Court erred in holding that Kriti and APR II must resort to other remedies to enforce their judgment. Moreover, the primary "remedy" that Emerald and Longman argue protects Kriti and ARP II's judgment is dissolution, which Kriti and ARP II actively oppose and which Emerald and Longman cannot achieve because of the factual findings of the 2010 Arbitration Award. Therefore dissolution is not an alternate remedy that offers any protection whatsoever to Kriti and ARP II's right to enforce their judgment.

The Trial Court also erred in holding that South Carolina's Limited Liability Act empowers a court to order the corporation or other shareholders to purchase the shares of "any shareholder" citing *Hendley v. Lee*, 676 F. Supp. 1317 (D.S.C. 1987). The entity discussed in *Hendley* was a corporation, not a limited liability company. There are no provisions in the South Carolina LLC Act similar to those applied in *Hendley*. Furthermore, the statute relied on by the Court in *Hendley* appears to have been repealed. S.C. Code Ann. § 33-21-150. Finally, neither the Trial Court's Order, nor Emerald and Longman's brief explain how such a statute, even if it were applicable, would operate so as to result in the enforcement of Kriti and ARP II's judgment.

I. RESPONDENTS' CLAIMS OF MISMANAGEMENT ARE BOTH IRRELEVANT AND PROVEN TO BE UNFOUNDED.

Emerald and Longman broadly claim that Kriti's mismanagement of ARP II both precludes its right to foreclose their charging order lien and gives rise to the specter of involuntary judicial dissolution. Although these factual assertions are addressed below, they are completely irrelevant for at least two reasons: First, the claims have been litigated and proven to be unfounded. (R. pp. 755-762). Second, as conceded by Emerald and Longman, the Trial Court did not base her order upon, or make any findings with respect to, Emerald and Longman's allegations of mismanagement. (R. pp. 85-86; Respondent's Brief p. 37, footnote 8).

Emerald and Longman argue that the 2010 findings of the New York arbitration panel do not preclude or otherwise affect their efforts to obtain an involuntary judicial dissolution of ARP II. Although the claim for judicial dissolution was not itself referred to arbitration, the April 19, 2009 order of reference expressly provides that the findings of the New York arbitration panel with respect to dissolution are "admissible and binding upon, the parties in any action including, but not limited to, this action seeking an order of judicial dissolution of ARP II." (R. pp. 78-80).

Emerald and Longman recite in their brief the same allegations of misconduct that they presented to the New York arbitration panel, which allegations were proven to be unfounded. The panel expressly found that all of Kriti's actions in managing ARP II complained of by Emerald were "well within reasonable business efforts to manage a complex piece of waterfront property." (R. pp. 755-762). Those findings are binding

upon the parties in the pending judicial dissolution lawsuit brought by Emerald against Kriti and ARP II. Those findings establish that Emerald is not entitled to dissolution.

Emerald and Longman argue that Kriti and ARP II have waived this argument by not presenting it by way of a Rule 59(e) motion. Kriti and ARP II presented this argument to the court at the April 7, 2011 motion hearing (R. p. 1763, lines 4-11; R. p. 1769, lines 19-25; R. p. 1771, lines 15-19). To the extent that the Trial Court's order holds that dissolution is one of the remedies available to Emerald and Longman, it constitutes a rejection of the argument presented to the court during oral argument and the argument does not need to be repeated again by way of a Rule 59(e) motion. Therefore, the argument has not been waived.

Kriti and Emerald argue that the findings of the New York arbitration panel are not binding because the award has not been confirmed. Emerald and Longman are incorrect. The New York arbitration was confirmed by the Supreme Court of the State of New York on December 29, 2011. Therefore, the findings of the New York arbitration panel are binding upon Emerald and Longman.

Emerald and Longman argue that the New York arbitration panel only considered what Emerald and Longman characterize as limited dissolution rights under the parties' operating agreement. The findings of the New York arbitration panel are not limited. They are broad in scope and dispose all of the factual assertions made by Emerald and Longman in their claim for dissolution. (R. pp. 755-762).

II. THE TRIAL COURT'S ORDERS ARE APPEALABLE.

Rule 72, SCRCP, provides that, "Appeal may be taken, as provided by law, from any final judgment or appealable order." Rule 201, SCACR, similarly provides that, "Appeal may be taken, as provided by law, from any final judgment, appealable order or

decision." S.C. Code Ann. § 18-9-10 provides, "[A]n appeal may be taken to the Supreme Court or the court of appeals in the cases mentioned in Sections 14-3-320 and 14-3-330."[1]

S.C. Code Ann. § 14-3-320, provides in pertinent part:

> The Supreme Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases when the facts are settled by a jury and the verdict not set aside.

S.C. Code Ann. § 14-3-330 provides in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; ...

[1] Although delineated "Appellate jurisdiction in law cases", the South Carolina Supreme Court has applied the bases for appeal of interlocutory orders, found in S.C. Code Ann. § 14-3-330, in equity cases. *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005); *Charleston County DSS v. Fortner, et al.*, 317 S.C. 283, 454 S.E.2d 307 (1995); *North Carolina Federal Savings and Loan Assn. v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986).

Kriti and ARP II initiated this case on April 29, 2008, by filing a Notice of Filing of Foreign Judgment. On October 17, 2008, Kriti and ARP II filed an Application for Issuance of Charging Order pursuant to S.C. Code Ann. § 33-44-504. That same day, Judge Roger M. Young issued a Charging Order and Rule to Show Cause, granting Kriti and ARP II' motion but setting a hearing date to give Defendants an opportunity to appear and show cause why the Charging Order should not continue in full force and effect. By Order dated February 6, 2009, Judge Hughston rejected Emerald and Longman's objections to the Charging Order and ordered that the Charging Order issued by Judge Young on October 17, 2008, "continue in full force and effect and constitute a lien on said distributional interest."

Having received no distributions or other payments on their judgment, on January 31, 2011, Kriti and ARP II filed a Motion to Foreclose Judgment Lien. Judge Kristi Lea Harrington denied the Motion by Order dated May 31, 2011, and judgment entered on June 10, 2011; and also denied Kriti and ARP II's Motion to Alter or Amend and Reconsider by Order dated, and Judgment entered on, September 26, 2011. The current appeal is from these Orders.

A. The Orders of the Trial Court are Final Judgments and are, therefore, Appealable.

"As a general rule, only final judgments are appealable." *Culbertson v. Clements*, 322 S.C. 20 at 23, 471 S.E.2d 163 at 164 (1996); *Wieters v. Bon-Secours-St. Francis*, 378 S.C. 160, 662 S.E.2d (Ct. App. 2008). "Generally an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits.... An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." *Canteen v. McLeod Regional*

Medical Center, 384 S.C. 617 at 622, 682 S.E.2d 504 at 506 (Ct. App. 2009), citing *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). Based upon these principles, the Orders appealed from in this case are final judgments and are, therefore appealable.

Once the foreign judgment was filed and the judgment lien based on that judgment granted, the only remaining issue in the case was Kriti and ARP II's claim for foreclosure of their lien. When the trial court denied Kriti and ARP II's motion, that ruling constituted an ultimate decision on the merits of Kriti and ARP II's claim since it "finally determine[d] some substantive matter forming the whole or part of some cause of action...in the case." The effect of the trial court's ruling was, therefore, to end the case, since there was nothing left for the trial court to do with regard to this issue. Consequently, the Orders in question clearly meet the requirements of a final judgment.

The Orders are appealable under S.C. Code Ann. § 14-3-330(3) because they are final orders affecting a substantial right made in a special proceeding and upon a summary application after judgment. Kriti and ARP II's Motion to Foreclose Judgment Lien was both made in a special proceeding and upon a summary application after judgment. Although the distinction between special proceedings and actions has now been eliminated in South Carolina's Rules of Civil Procedure, the note to South Carolina Rule of Civil Procedure 2 states: "A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc." Kriti and ARP II submit that the rights of a judgment creditor to obtain and foreclose a charging order lien that are set forth in S.C. Code Ann. § 33-44-504(b) involve a special proceeding within the meaning of S.C. Code Ann. § 14-3-330(3). Additionally, the

exercise of those same rights constitute a summary application after judgment has been entered. Because the trial court's Orders were final judgments, and pursuant to the express provisions of S.C. Code Ann. § 14-3-330(3), they are appealable.

B. Even if the Orders are not final judgments, they are still appealable.

S.C. Code Ann. § 14-3-330 allows appeals of intermediate orders (1) involving the merits, pursuant to § 14-3-330(1); and (2) affecting a substantial right, pursuant to § 14-3-330(2).

Even if the Orders in question are not final judgments, they are clearly appealable under the two subsections of S.C. Code Ann. § 14-3-330 referenced above. Under S.C. Code Ann. § 14-3-330(1) an otherwise interlocutory order involving the merits is immediately appealable. "To involve the merits, the order must 'finally determine some substantial matter forming the whole or part of some cause of action or defense'". *Peterkin v. Brigman*, 319 S.C. 367 at 368, 461 S.E.2d 809 at 810 (1995), citing *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993). As indicated above, when the lower court denied Kriti and ARP II's Motion to Foreclose Judgment Lien, it effectively denied Kriti and ARP II's sole remaining claim in the lawsuit in its entirety. Such a ruling clearly meets the test for appealability under S.C. Code Ann. § 14-3-330 (1), as it indisputably "finally determined" a "substantial matter" at the heart of Kriti and ARP II's claim.

The Orders are also appealable under S.C. Code Ann. § 14-3-330(2). Under that subsection, an otherwise interlocutory order is immediately appealable if it affects a substantial right and, in effect, determines the action and prevents a judgment from which an appeal may be taken or discontinues the action. Here, Kriti and ARP II have a "substantial" right to secure payment of their judgment lien. One of the two ways to

secure payment of their lien is by foreclosing on the lien. In its Orders, the trial court denied Kriti and ARP II that avenue of securing payment of their judgment. The Orders have, "in effect, determine(d) the action." If the Orders are not final judgments, which Kriti and ARP II believe they are, then, at the very least, they are Orders which either prevent a judgment from which an appeal may be taken or, even more clearly, which discontinue the case. Either way, they represent Orders that are appealable under S.C. Code Ann. § 14-3-330(2).

The cases relied upon by Emerald and Longman in their Brief are not on point. Those cases involved efforts by plaintiffs to vacate or dissolve liens. In contrast, here Kriti and ARP II brought an action to establish a lien and later to foreclose on it. The cases cited by Emerald and Longman are therefore, irrelevant to this case and do not support a finding that the Orders in question are not appealable.

In sum, the trial court's Orders are appealable as final judgments or, in any event, as appealable interlocutory orders under S.C. Code Ann. § 14-3-330. If that were not the case, Kriti and ARP II would have no way of ever obtaining appellate review of their effort to foreclose their judgment lien.

III. THE DOCTRINE OF UNCLEAN HANDS SHOULD NOT APPLY IN THIS CASE, NOR DOES IT JUSTIFY THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION TO FORECLOSE.

The Trial Court did not make a ruling relating to unclean hands. In apparent recognition of this fact, Emerald and Longman concede that the Circuit Judge's Order did not specifically address the unclean hands doctrine. (Respondent's Initial Brief at p. 37, fn 8). In light of the fact that the Trial Court did not rule on the issue, and Emerald and Longman never sought a specific ruling on the issue, Emerald and Longman "assert the issue on appeal as an additional sustaining ground" *Ibid.* In support of their position,

they rely on both Rule 220(c) SCRAP, which provides that an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal,"' and *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding that a respondent may raise additional reasons to affirm a lower court's ruling regardless of whether those reasons were presented or ruled on by the lower court, so long as the basis for the additional sustaining grounds appear in the Record on Appeal).

Regardless, the arguments advanced by Emerald and Longman in their Brief, at pages 37-39, do not support a finding of unclean hands in this case. In support of their position, Emerald and Longman list examples of alleged conduct they maintain are evidence of "unclean hands". A close examination of these examples reveals, however, that the alleged conduct does not support a finding of unclean hands in this case.

A. Respondents' contention that "Kriti failed to conduct the affairs of ARP II in the best interest of ARP II and its members by squandering several sale opportunities to potential buyers of ARP's property

Emerald and Longman's contention with regard to this point is simply an ex post facto challenge to Kriti and ARP II's exercise of business judgment with regard to various potential buyers. Significantly, this same argument was raised by Emerald and Longman in the arbitration commenced by Emerald in 2010 and was explicitly rejected by the arbitration panel in the Award of Arbitrators dated October 28, 2010. (R. pp. 755-762). As stated by the arbitrators:

> Nor did the Panel hear sufficient evidence to find corporate waste by Kriti or commission of any act which would justify enjoining Kriti from violating any provision of the Operating Agreement. The decisions to construct a bulkhead, dredge the canal and construct the out building were well within the business judgment of Kriti as managing member; and the application of funds by the

> Company was, also, well within reasonable business efforts to manage a complex piece of waterfront property. Kriti had envisioned a luxury development and these expenditures fell within that reasonable vision. Emerald's evidence was, at best, the observations of Stuart Longman who believed that he could develop the property better; but the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business...' Nor did Kriti's conduct constitute '...a material breach of [the Operating Agreement] or a duty owed to the Company or the other Members under Section 22-44-409 of the Act.' Operating Agreement, Article 10.5(b).

(R. p. 758).

Further, the arbitration panel specifically held that:

> Neither Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, dissolution or an award to Emerald of damages; and, thus, to the extent that the Panel is empowered to opine on the request for dissociation, dissolution or damages against Kriti, such request is denied.

(R. p. 759).

As held by the arbitration panel, Kriti's decisions with regard to managing ARP II were well within the business judgment rule. Emerald and Longman's argument to the contrary is without merit.

B. Respondents' contention that Kriti caused "ARP II to substantially and unnecessarily increase its debt burden"

Emerald and Longman's contention with regard to this point is, again, simply an ex post facto challenge to Kriti and ARP II's exercise of the business judgment with regard to securing a bank loan with Bank of America in 2006 for the purpose of constructing marina slips. In this regard, Emerald and Longman contend that the property should have been sold before the loan was taken out. However, in Longman's Affidavit, he details two other alleged potential sales subsequent to the loan, which

would, according to him, have resulted in comparable profits. Affidavit of Stuart Longman filed April 5, 2011, paragraphs 27-28. (R. pp. 1348-1349). Given Longman's own testimony, securing the loan in question is hardly evidence of unclean hands.

In addition, Longman admits that Kriti has loaned APP II significant funds to maintain the Bank of America loan. (R. pp. 1347-1348). Although Emerald attempted to have those funds characterized as equity contributions, rather than loans, in the 2010 arbitration, the arbitration panel rejected that contention and found they were valid loans (R. pp. 756-757). Kriti's conduct in loaning ARP II almost 7.5 million dollars in an attempt to sustain the project clearly belies any argument that it acted with unclean hands with regard to the loan.

C. Respondents' contention that "Kriti attempted to unilaterally dilute Emerald's membership interest in ARP II... from 70% to 21%."

Emerald and Longman's contention in this regard is moot. A bona fide dispute existed with regard to Emerald's membership interest subsequent to February 2005, which was addressed and determined in the arbitration initiated by Emerald in 2010. The Award of the Arbitrators dated October 28, 2010 recognized that Emerald's membership interest was not diluted as a result of a February 28, 2005 capital call and that, consequently, it remained at 70%. Significantly, the Award of Arbitrators was rendered prior to Appellants filing their Motion to Foreclose Judgment Lien.

Emerald and Longman's contention that the dispute over Emerald's membership interest is somehow evidence of unclean hands is thus without merit, since that issue had been determined conclusively prior to the trial court's decision to deny Kriti and ARP II's Motion to Foreclose Judgment Lien.

D. Respondent's contention that "Kriti has tried to circumvent Emerald's right to dissolution of ARP by squeezing out Emerald and taking its equity..."

This argument does not support Emerald and Longman's contention that Appellants acted with unclean hands. In the first place, it is not an accurate statement of Kriti's actions vis-à-vis Emerald. As noted previously, the dispute between the parties goes back to 2005 when, due to mismanagement of ARP II by Emerald and Longman, Kriti and ARP II were forced to initiate an arbitration against Emerald and Longman for violation of the Operating Agreement of Ashley River Properties II, LLC. The arbitrators agreed with Kriti and Emerald lost all of its voting rights, leaving Kriti as the sole voting member of ARP II. Pursuant to that award, Emerald and Longman were also ordered to pay Kriti and ARP II $706,225. Award of Arbitrators dated October 28, 2005. (R. pp. 5-16).

Thereafter, Kriti and ARP II initiated a second arbitration to recover monies due from Emerald arising from its diversion of funds and for legal fees. The arbitration in that case awarded Kriti and ARP II certain additional monies. Award of Arbitrators dated July 22, 2006.

On March 27, 2008, the Supreme Court of the State of New York, County of New York, issued an Order confirming the two awards and entering judgment in favor of Kriti and ARP II against Emerald and Longman in the amount of $1,184,581.72. (R. pp. 92-99). That judgment was later domesticated in South Carolina. Because no portion of this judgment had been paid, Kriti and ARP II filed the instant action in October 2008 to obtain a Charging Order on Emerald's interest in ARP II. By January 2011, the judgment had still not been paid and Kriti and ARP II moved to foreclose their judgment lien. That motion was denied and this appeal ensued.

Significantly, to this date, not one penny of the judgment has been paid.[2] To the contrary, Emerald and Longman have continually sought to delay payment while forcing Kriti and ARP II to spend time and money defending a variety of actions initiated by Emerald and Longman. Specifically, Emerald and Longman immediately challenged the 2005 award by filing a lawsuit in South Carolina, seeking to set it aside. After losing at the trial court level, Emerald and Longman appealed and this Court affirmed the trial court ruling dismissing the appeal. *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007).

Emerald and Longman also filed a second South Carolina matter, challenging the 2006 award. That action was ultimately dismissed. Emerald and Longman also filed a third lawsuit in South Carolina in 2009 and an arbitration action in 2010. In addition, Emerald and Longman vigorously contested Appellants' attempt to obtain the Charging Order and subsequently appealed the Order granting the lien. That appeal was essentially dismissed by this Court as moot in January 2011.

In contrast to Emerald and Longman's refusal to pay their debt and their deliberate delay tactics, Kriti has loaned ARP II over 7.5 million dollars in an attempt to build out the project. When Kriti and ARP II obtained their Charging Order in 2008 and subsequently sought to foreclose on their judgment, all they were doing was exercising their right, as provided for by South Carolina law, to obtain payment on their now over four year old judgment.

Moreover, Emerald and Longman do not have a "right" to dissolution of ARPII, so there is no way Kriti could circumvent that alleged "right". Initially, the 2010 award

[2] The 2010 arbitration award required the parties to split the administrative costs and expenses of the proceeding equally. Because Emerald and Longman had advanced costs, Kriti was required to reimburse Emerald $59,527.94, which it did by crediting the amount so as to reduce Kriti and ARP II's judgment.

specifically found that neither Kriti nor ARP II committed any acts which would justify a finding of dissolution under Operating Agreement. And, while SC Code Ann. § 33-44-801 certainly allows Emerald to petition for a dissolution under certain circumstances, Emerald certainly has no absolute "right" under that, or any other section, to dissolution of ARP II.

E. Respondents' contention that "Kriti undervalued ARP II's assets by 3.25 million in its financial statements that it submitted to the court in support of its motion to foreclose on its judgment lien."

Emerald and Longman's contention in this regard is found in paragraph 18 of Longman's Affidavit and is based solely on a difference of opinion between ARP II's accountants and an appraiser retained by Bank of America over the value of ARP II.

In support of its Motion to Foreclose, Davidson Williams, Managing Member of Kriti, submitted copies of ARP II's Accountants' Report and Financial Statements for the years 2008 and 2009, compiled by Streetman and Jones, PC, ARP II's independent, outside accountants. (R. pp. 1247–1251 and R. pp. 1252–1256). The 2008 Accountants' Report and Financial Statements valued ARP II's member's capital as of December 31, 2008 at $1,777,586. The 2009 Accountants' Report and Financial Statements valued members' capital at $1,219,570.00.

In opposition to Appellants' Motion to Foreclose Judgment Lien, Emerald and Longman introduced appraisals prepared by Fred H. Beck and Associates for Bank of America, which estimated a value of ARP II's assets as of September 25, 2009 at a higher figure, without taking into account APR II's liabilities. (R. pp. 1437-1505 and R. pp. 1506-1630).

In effect, Emerald and Longman argue that because an appraiser appraised the assets at a value higher than ARP II's independent, outside accountants valued the assets,

the appraiser's appraisal was indisputably correct and Kriti and ARP II had no right to rely on their accountants' valuation. However, while the differences between the figures may well represent a dispute among professionals as to the value of ARP II's assets, it does not support a finding that Appellants' choice to rely on their accountants was unwarranted. More importantly, Emerald's and Longman's references to the alleged value without taking into account the debt substantially distorts the prospects of Kriti and ARP II's being able to satisfy their judgment.

The fact that Emerald and Longman disagree with the Appellants' valuation is not surprising or unusual since this situation is no different than most cases where valuation of property is an issue and both sides put in evidence of that they believe is the value of the property.

Appellant's submission of the 2008 and 2009 Accountants' Report and Financial Statements does not, therefore, constitute evidence of unclean hands.

F. **Respondents' contention that "Kriti caused ARP II to spend significant fees in its improper attempt to unilaterally dilute Emerald's financial interest from 70% to 21%, which was rejected by the New York arbitrators."**

Emerald and Longman's contention in this regard relates to the arbitration proceeding initiated by Emerald against Kriti in 2010, which resulted in the Award of Arbitrators dated October 28, 2010. In that Award, Kriti was ordered to pay one-half the costs and expenses of the arbitration. Presumably, it is that amount, in addition to attorneys' fees for defending that action, which Emerald and Longman are complaining about. Emerald and Longman's argument is not only disingenuous, it is brazenly hypocritical. In the first place, Emerald initiated the arbitration, not Kriti or ARP II. In addition, the arbitration decided a number of issues other than Emerald's membership

interest. Thus, Emerald is the party responsible for any costs incurred by Kriti or ARP II as a result of that arbitration.

More importantly, the costs incurred in defending the arbitration initiated by Emerald are not the only costs and expenses incurred by Kriti and ARP II in defending themselves in actions initiated by Emerald and Longman. As stated previously, in addition to the 2010 arbitration, Emerald and Longman have initiated three lawsuits against Emerald and Longman and filed two appeals, one which resulted in an opinion from this court, the other which was dismissed as moot after the 2010 Award. Thus, if anyone has caused ARP II to spend significant fees, it is the Emerald and Longman, not Kriti. Under the circumstances, to argue that incurring costs in defending the Emerald-initiated arbitration somehow constituted unclean hands is both baseless and hypocritical.

CONCLUSION

S.C. Code Ann. § 33-44-504 provides a judgment creditor with narrow rights to enforce its judgment against the membership interest of the judgment debtor. The two essential features of those rights are: (1) the creditor should be paid from distributions, if such distributions will pay the judgment within a reasonable period of time; and (2) if distribution will not pay the judgment within a reasonable period of time, then the charging order lien should be foreclosed.

The Trial Court erred in not applying these two principles to Kriti and ARP II's motion to foreclose their lien. The Trial Court compounded the error by holding that there were other "remedies" that would lead to the payment of Kriti and ARP II's judgment. This was error because S.C. Code Ann. § 33-44-504(e) is clear that the remedies provided therein are exclusive.

Moreover, one of the "remedies" cited by the Trial Court, dissolution, is opposed by Kriti and ARP II and is not achievable by Emerald and Longman.

The other "remedy", a forced buyout of one shareholder by another, does not exist as part of South Carolina's LLC statute.

For these reasons, Kriti and ARP II request that the orders appealed from be reversed and either judgment be entered granting Kriti and ARP II's motion to foreclose their charging order lien or the case be remanded to the Trial Court for further proceedings in accord with the applicable legal principles.

Respectfully submitted,

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Attorneys for the Appellants

Charleston, South Carolina
Dated: July 31, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Case Tracking No. 2011201949

KRITI RIPLEY, LLC AND ASHLEY RIVER PROPERTIES II, LLC,

Appellants,

v.

EMERALD INVESTMENTS, LLC AND STUART LONGMAN,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I do hereby certify that on the 31st day of July, 2012, I served a copy of the within **APPELLANTS' FINAL REPLY BRIEF** in the within entitled matter by sending a copy of the same via hand delivery to:

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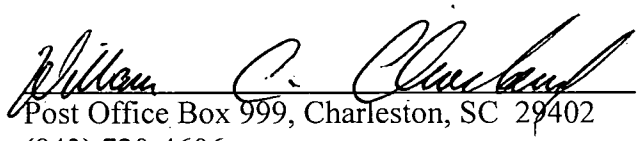

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