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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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SC COURT OF APPEALS

Case tracking No. 2011201949

KRIST RIPLEY, LLC AND ASTLEY RIVER PROPERTIES II, LLC

Appellants

v.

EMERALD INVESTMENTS, LLC AND STUART LONGMAN

Respondents

BRIEF OF RESPONDENTS

Richard S. Rosen  
Daniel E. Blanchard, III  
James A. Braughton, IV  
ROSEN, ROSEN & HAGOOD, LLC  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402  
(843) 577-6726

ATTORNEYS FOR RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

I. Is the Circuit Court's Order denying Appellants' motion to foreclose upon a charging order lien, but which leaves the lien intact and does not dissolve the lien, appealable?

II. Did the Circuit Court abuse its discretion by refusing to allow Appellants to squeeze out Respondent's economic interest in a limited liability company through the foreclosure and forced sale of Respondent's interest in the company under the charging order provision of the South Carolina Limited Liability Company Act, S.C. CODE ANN. § 33-44-504, when the existing charging order sufficiently protects the Appellants' money judgment against Respondent, Appellants could satisfy their judgment through means other than a forced sale of Respondent's interest, and Appellants' mismanagement of the company and other inequitable conduct created the alleged basis for the foreclosure request?

III. Does Appellants' unclean hands and inequitable conduct towards Respondent justify denial of Appellants' request for the equitable relief of foreclosing upon and forcing the involuntary sale of Respondent's economic interest in the limited liability company?

IV. Is Respondent barred from obtaining judicial dissolution of the limited liability company in which it is a member pursuant to the dissolution provision of the South Carolina Limited Liability Company Act, S.C. CODE ANN. § 33-44-801(4), because of the unconfirmed findings of an arbitration award issued in New York when the Circuit Court previously entered an Order staying Respondent's action to dissolve the company pending the arbitration, the Circuit Court did not refer the dissolution claim to arbitration, the Circuit Court retained jurisdiction over the dissolution claim, and the arbitration panel was not asked to and did not make rulings on whether dissolution is warranted under the statute?

V. Did Appellants waive their appellate argument that the unconfirmed findings of an arbitration award issued in New York preclude Respondent from seeking an Order from the Circuit Court judicially dissolving the limited liability company in which Respondent is a member when the Circuit Court did not address this argument in its Order and Appellants did not move to alter or amend the Order to seek a ruling on the argument?

The Circuit Court did not abuse its discretion by refusing to allow Appellants Kriti Ripley, LLC (“Kriti”) and Ashley River Properties II, LLC (“ARP II”) to squeeze out Respondent Emerald Investments, LLC’s (“Emerald”) economic interest in ARP II through a foreclosure and forced sale of Emerald’s interest pursuant to the South Carolina Limited Liability Company Act because the existing charging order sufficiently protects Kriti’s judgment against Emerald, Kriti could satisfy the judgment through means other than a forced sale of Emerald’s interest, and Kriti’s mismanagement of ARP II and other inequitable conduct created the alleged basis for the foreclosure request.

## STATEMENT OF THE CASE AND FACTS

### ARP II Operating Agreement and Ripley Light Project

ARP II is a South Carolina member managed limited liability company governed by the South Carolina Limited Liability Company Act (“LLC Act), S.C. CODE ANN. §§ 33-44-101 *et seq.* (R. pp. 1357-1405). ARP II is supposed to be developing a marina and condominiums along a riverfront site on the Ashley River in Charleston known as Ripley Light Yacht Club Marina & Condominiums (the “Ripley Light Project”). (R. p. 1339 ¶ 2). Thus far only marina slips have been constructed. No condominium units have been built. *Id.* The most recent appraisals for the project give “as is” valuations for ARP II’s real estate holdings totaling \$17.25 million as of October 16, 2009. (R. pp. 1344-45 ¶ 18; pp. 1437-1630).<sup>1</sup>

At its inception, ARP II was wholly owned by Emerald. Emerald is managed by Stuart Longman. ARP II and a separate entity owned by Emerald—Ashley River Properties I (“ARP I”)—were initially jointly involved in developing the Ripley Light project. (R. p. 1339 ¶ 3). Emerald

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<sup>1</sup> A prior appraisal gave the project’s “as is” valuation (before marina slips were built) as being \$19.37 million as of July 11, 2005. (R. p. 358 ¶ 5; pp. 364-485). The appraisal also projected a completed value for the marina at \$11.73 million and a land value in addition to the marina slips of \$12.8 million. Therefore, the total valuation as of the completion of the marina was projected to be \$24.53 million.

initiated the project and was the project's developer. Id. At the project's inception, Emerald managed ARP II and ARP I. Id. However, in 2003, the project encountered financial difficulties and ARP II turned to an outside investor (Kriti) to provide financial assistance for the project. (R. p. 1340 ¶ 4). Kriti is managed by Davidson Williams. Id.

Emerald and Kriti subsequently entered into a written Operating Agreement dated December 29, 2003 (the "Operating Agreement") and Project Development Agreement dated December 20, 2003 ("Development Agreement"), in which they agreed to carry on the project through a joint venture. (R. p. 1340 ¶ 5; pp. 1357-1415). As a result of those agreements, which were drafted by Kriti's legal counsel, Emerald became a 70% financial and voting member in ARP II and Kriti became a 30% financial and voting member in ARP II. (R. p. 1340 ¶ 6). Kriti paid \$1.25 million for its interest in ARP II and Emerald's initial capital contribution to ARP II was \$2.5 million. Id.

#### **2005 New York Arbitration Award**

In 2004, a dispute arose between Emerald and Kriti involving the project and their respective rights under the ARP II Operating Agreement. (R. pp. 1340-41 ¶ 7). On January 14, 2005, Kriti terminated the Project Development Agreement, alleged default under the Operating Agreement, and seized exclusive management and operational control of ARP II from Emerald. Id. Kriti has had complete control over the management and operations of ARP II since January 14, 2005. Id. Emerald has been completely shut out of management of ARP II since that time. Id.

On March 23, 2005, Kriti and ARP II (controlled by Kriti) filed for arbitration in New York entitled Kriti Ripley, LLC & Ashley River Properties II, LLC v. Emerald Investments, LLC & Stuart Longman, Re: 13115Y0069805, seeking damages for alleged defaults under the Operating Agreement, an Order completely forfeiting Emerald's financial and voting interests in ARP II, and an

Order allowing Kriti to buy out Emerald's membership interest pursuant to § 13.02(c) of the Operating Agreement. (R. p. 1341 ¶ 8; pp. 104-13).

Emerald and Longman answered and counterclaimed in the arbitration seeking, *inter alia*, an order dissolving ARP II based on misconduct by Kriti. (R. pp. 114-30). Emerald sought dissolution of ARP II on the grounds that Kriti had engaged in oppressive conduct towards Emerald after taking control of ARP II including an improper and defective capital call in 2005 that was made to squeeze down Emerald's interest in ARP II; its frustration of a \$2.125 million loan extension from a lender (Marshall Bank) that would have obviated the need for the capital call; its encouragement of certain third party contract vendees to pursue litigation against ARP II; and its frustration of a \$14.5 million offer by Centex to acquire the ARP II property.

During the arbitration, a question was raised as to whether the panel had authority to order dissolution of ARP II. Kriti submitted a brief arguing that the panel lacked such authority:

There is a fundamental tension between arbitration by consent of the parties in the [ARP II] Operating Agreement and the provision for dissolution pursuant to judicial decree, which cannot be waived. The arbitrators are clearly empowered to decide those issues contemplated by the Operating Agreement (including dissolution provided for by the agreement), but can obtain the power for "judicial decree" dissolution only by ignoring the requirement that certain findings are made by "judicial decree," and because they are not otherwise waivable. **The parties, here, never consented to those remedies or rights at all, let alone being given to the arbitrators. Accordingly, the arbitrators should leave them for a court.** Indeed, it is not clear that whether or not the arbitrators order dissolution under [the LLC act], the disgruntled party would not be able to relitigate them anyway on the ground that the panel exceeded its powers.

(R. p. 143) (emphasis added). On July 11, 2005, the panel issued an Order stating that "[t]his Panel reserves decision on the question of its power, if appropriate, to order dissolution." (R. p. 4). The

panel never revisited this issue and did not address whether it had power to order dissolution of ARP II.

On October 31, 2005, the New York arbitrators rendered their award. (R. p. 1341 ¶ 8; pp. 1416-27). The panel found that Emerald had committed certain defaults under the Operating Agreement; however, it rejected Kriti's claim that Emerald forfeited its entire interest in ARP II. The panel also found that Kriti had engaged in oppressive conduct towards Emerald. Specifically, the panel found that Emerald had just cause to challenge a capital call which Kriti had made in 2005 in an improper attempt to "squeeze down" or dilute Emerald's 70% interest in ARP II:

[W]e believe that the Emerald Member had probable cause for such a challenge thereby obviating forfeiture pursuant to applicable South Carolina law. The portion of the claim seeking the forfeiture of the Respondent's Membership Shares is denied based on our finding that the Emerald Member had probable cause to challenge the capital call thereby obviating forfeiture pursuant to applicable South Carolina law and the inequity of such forfeiture. Probable cause existed because of [the] question about the proprietary (sic) of Kriti's capital call because (a) Kriti demanded that Emerald immediately fund a full 70% of a \$2 million capital call even though it knew that Emerald and/or Longman did not have the funds available to meet such a call; (b) Kriti demanded such a large capital call without an adequate explanation of the need for such an amount; (c) Kriti demanded that Emerald and/or Longman make a full deposit of 70% of the \$2 million capital call, even though its own deposits later proved that this was not necessary; and (d) funding might have been available from the lender, Marshall Bank, thereby obviating the need for all or part of the capital call. Kriti's insistence upon the capital call therefore provided probable cause for Emerald's challenge of Kriti's assertion of the above remedies.

(R. p. 1417 § B(4)). The panel also expressly "question[ed] Kriti's conduct in encouraging some of [the] third [party vendees] to assert claims against ARP II and not accept partial reimbursement of their deposits." (R. p. 1418 § F). The panel further noted that "Longman initiated the development project and worked long and hard on it, including rendering significant services even after Kriti's" notice of default. (R. p. 1418 § B(4)).

Notwithstanding the above findings, the panel found that Emerald’s defaults caused the forfeiture of its “voting rights” in ARP II under the Operating Agreement, but not its financial interest in ARP II. (R. p. 1418 ¶ 1). As a result of the award, Emerald has no voting rights in ARP II, but remains a 70% financial owner. Id. The panel further awarded Kriti the option to buy out Emerald’s entire membership in ARP II in exchange for returning Emerald’s capital contribution of \$2.5 million, which if exercised would have given Kriti full ownership of ARP II. (R. p. 1418 ¶ 1; p. 1419 ¶ 3). The award mandated that Kriti must close on its buy out of Emerald’s membership interest “no later than 120 days after the date of th[e] Award,” which expired on February 28, 2006. (R. p. 1418 § C). Because the arbitration panel awarded Kriti the option to buy out Emerald’s membership interest—which would have divested Emerald of its entire interest in ARP II—the panel did not address whether dissolution of ARP II was warranted.

Despite the arbitration panel’s finding that probable cause existed to challenge the 2005 capital call, Kriti nevertheless continued to operate ARP II as though Emerald’s interest in ARP II had been diluted. (R. pp. 1341-42 ¶ 10). Kriti issued K-1 forms to Emerald and filed tax returns on behalf of ARP II after the arbitration award continuing to assert that Emerald’s shares were unilaterally diluted from 70% to approximately 21% by virtue of the defective capital call. (R. pp. 1341-42 ¶ 10; p. 1428).<sup>2</sup>

As a result of the 2005 arbitration, a money judgment totaling \$1,184,581.72 was entered against Emerald on April 2, 2008 comprising the following:

\$543,340.00	principal amount
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<sup>2</sup> Emerald notified Kriti that it objected to the incorrect K-1 forms and the alleged dilution of Emerald’s interest and demanded that it file corrected tax returns and K-1 forms for the relevant tax years. However, Emerald’s demands were ignored. (R. pp. 1341-42 ¶ 10; p. 1428). As discussed below, on October 28, 2010, following another arbitration hearing in New York, the arbitration panel overruled Kriti’s actions and held that Emerald continues to own a 70% interest in ARP II.

\$384,653.14	legal fees and litigation expenses assessed
\$60,856.00	arbitrator's fees and administrative expenses assessed
\$194,832.58	prejudgment interest assessed
<u>\$900.00</u>	costs taxed by court
\$1,184,581.72	total

(R. p. 1342 ¶ 11). The principal amount awarded by the arbitrators is less than half of the total judgment.

**2005 Action to Review New York Arbitration Award & Dissolve ARP II**

Because the arbitration clause in the ARP II Operating Agreement incorporated the South Carolina Uniform Arbitration Act, Emerald and Longman commenced an action in the Charleston County Circuit Court on November 9, 2005, entitled Ashley River Properties I, LLC; Emerald Investments, LLC; and Stuart L. Longman v. Ashley River Properties II, LLC and Kriti Ripley, LLC, Case No. 05-CP-10-4571. In their Amended Complaint in that case, Emerald and Longman sought (1) to vacate or modify the New York arbitration award involving ARP II pursuant to the judicial review provisions of the South Carolina Uniform Arbitration Act, S.C. CODE ANN. §§ 15-48-10 *et seq.*, and (2) to judicially dissolve ARP II pursuant to the provisions of the South Carolina LLC Act, S.C. CODE ANN. § 33-44-801, based on the New York arbitration panel's findings that Kriti had engaged in oppressive conduct towards Emerald. (R. pp. 145-234).

Emerald's grounds for judicial dissolution as stated in the 2005 lawsuit were essentially the same grounds for dissolution that it had asserted in the New York arbitration. Emerald's 2005 Lawsuit alleged that dissolution was appropriate because of Kriti's improper and defective capital call that was made in 2005 to squeeze down Emerald's interest in ARP II; its frustration of a \$2.125 million loan extension from a lender (Marshall Bank) that would have obviated the need for the

capital call; its encouragement of certain third party contract vendees to pursue litigation against ARP II; and its frustration of a \$14.5 million offer by Centex to acquire the ARP II property. Id.

On January 26, 2006, Kriti and ARP II moved to dismiss the Amended Complaint based on the argument that South Carolina's Courts lack subject matter jurisdiction to review the arbitration award rendered in New York. (R. pp. 972-74). Then Circuit Judge Daniel Pieper filed an Order on October 19, 2006, granting in part and denying in part the motion. (R. pp. 17-32). Judge Pieper dismissed the claims involving ARP II based on lack of subject matter jurisdiction, thus refusing to adjudicate the merits of the claims. Id.

Emerald appealed to this Court those portions of Judge Pieper's Order dismissing the claims involving ARP II. On June 21, 2007, this Court held that South Carolina's Courts lacked subject matter jurisdiction to review the award because the arbitration was held in New York. Ashley River Properties I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007). The Court held that the parties must "proceed in New York to modify, vacate, or confirm the arbitration award" issued in New York. (R p. 1785). As for the cause of action seeking to judicially dissolve ARP II based on Kriti's conduct towards Emerald, this Court stated in a footnote:

Additionally, Appellants argue Emerald's claims to judicially dissolve [ARP II] should not have been dismissed because a South Carolina court must entertain a lawsuit to judicially dissolve a South Carolina limited liability company. However, the arbitration award gave Kriti the right to acquire all of Emerald's interest in [ARP II]. Therefore, unless the arbitration award is overturned, Emerald has no standing to seek judicial dissolution of the business.

(R p. 1785 n.1). Thus, like the New York arbitration panel, this Court held that it was unnecessary to rule on dissolution because Kriti had been awarded an option to buy Emerald's interest in ARP II.

At the time when the lawsuit was commenced in 2005, Kriti's option to acquire Emerald's membership interest in ARP II had not yet expired. This Court apparently assumed that Kriti bought—or would buy—Emerald's membership interest in ARP II. However, Kriti did not exercise its option to purchase Emerald's membership interest in ARP II pursuant to the New York arbitration award and the option lapsed. (R. pp. 1416-27). Emerald still owns a 70% financial interest in ARP II. Id.

### **Issuance of Ex Parte Charging Order**

On October 17, 2008, Kriti made an *ex parte* application to Circuit Judge Roger Young and was granted a charging order against Emerald's distributional interest in ARP II pursuant to the provisions of S.C. CODE ANN. § 33-44-504. (R. p. 1342 ¶ 12; pp. 235-36; pp. 33-35). Following a hearing, the charging order was later continued in effect subject to modifications by Order of Circuit Judge Thomas Hughston, Jr. filed on February 6, 2009. (R. pp. 36-37).

The charging order requires ARP II (which is exclusively controlled by Kriti) to divert or pay over to Kriti any distributions from ARP II that would otherwise be payable to Emerald. (R. p. 1342 ¶ 12; pp. 33-37). The charging order allows Kriti to execute on its money judgment against Emerald by diverting or turning over Emerald's share of ARP II's distributions to itself.

### **2009 Action to Dissolve ARP II**

On January 30, 2009, because of Kriti's mismanagement of ARP II and continued misconduct towards Emerald, Emerald filed another action against Kriti and ARP II in the Charleston County Circuit Court entitled Emerald Investments, LLC v. Ashley River Properties II, LLC and Kriti Ripley, LLC, Case No. 09-CP-10-553 ("2009 Dissolution case"). (R. pp. 1343-44 ¶ 15; pp. 487-590). In that case, Emerald seeks judicial dissolution of ARP II pursuant to the LLC

Act, S.C. CODE ANN. § 33-44-801, based on Kriti's persistent mismanagement of ARP II resulting in the company's poor financial record and the frustration of the company's economic purpose, Kriti's misconduct making it impracticable for Emerald and Kriti to continue to conduct business together, Kriti's attempt to unilaterally dilute Emerald's membership interest in ARP II through improper capital calls, Kriti's repeated failures to timely provide Emerald with company records and information, Kriti's failure to conduct the affairs of ARP II in the best interest of ARP II and its members, Kriti's fraudulent and unfair acts, and Kriti's failure to follow the provisions of the ARP II Operating Agreement. Id.

The Complaint also seeks ancillary or incidental relief declaring that Emerald's ownership percentage in ARP II is still 70%. As an alternative to dissolution of ARP II, Emerald also seeks an Order in the 2009 Dissolution case permitting it to buyout Kriti's member interest in ARP II, or vice versa, pursuant to the procedures in the LLC Act. See S.C. CODE ANN. § 33-44-801(4) cmt.

On February 27, 2009, ARP II and Kriti moved to dismiss the Complaint in the 2009 Dissolution case. (R. pp. 991-93). The motion argued (1) that Emerald's claims should be dismissed under principles of *res judicata* or collateral estoppel because these same claims were purportedly ruled on by the 2005 New York arbitration award and this Court in its opinion in Ashley River Properties I, LLC v. Ashley River Properties II, LLC; (2) that the claims must be dismissed because the arbitration clause in the ARP II operating agreement requires that they be arbitrated in New York; and (3) that the claims must be dismissed pursuant to a forum selection provision in the ARP II operating agreement indicating that litigation will be held in New York.

On May 4, 2009, Circuit Judge Roger Young entered an Order denying Kriti's motion to dismiss on all grounds. (R. pp. 38-64). On June 8, 2009, Judge Young also entered an Order denying

Kriti's motion to alter or amend. (R. pp. 65-75). Judge Young's Orders ruled that neither the 2005 New York arbitration award nor this Court's opinion in Ashley River Properties I, LLC v. Ashley River Properties II, LLC had adjudicated the merits of Emerald's claim for judicial dissolution of ARP II; therefore, the claim is not barred by *res judicata* or collateral estoppel. Judge Young further found that Emerald's claim for judicial dissolution of ARP II is not encompassed by the arbitration clause in the ARP II Operating Agreement; therefore, the claim is not subject to arbitration. (R. pp. 60-64). Judge Young also ruled that an action to judicially dissolve ARP II must be brought in the state which created the entity. Because ARP II is a South Carolina company, he ruled that South Carolina's Courts have *exclusive* jurisdiction over Emerald's claim for dissolution of ARP II. (R. pp. 60-64; p. 69).

Kriti attempted to appeal Judge Young's Orders to this Court, but the appeal was dismissed as being interlocutory and the case was remitted to the Circuit Court. (R. pp. 604-05; pp. 76-77). Despite Judge Young's prior Orders holding that Emerald's claims in the 2009 Dissolution case are not subject to the arbitration clause in the ARP II Operating Agreement, Kriti nevertheless filed a motion in the Circuit Court seeking to compel arbitration of those claims in New York. (R. pp. 1040-42).

### **2010 New York Arbitration**

On January 22, 2010, because of the continuing conflicts with Kriti regarding the scope of the arbitration clause and Kriti's repeated motions delaying Emerald's claims in the Circuit Court, Emerald filed a demand for another arbitration in New York. (R. pp. 636-51; pp. 1342-43 ¶ 13). Emerald's initial demand requested the arbitrators to declare that Emerald is a 70% owner of ARP II and to find that judicial dissolution of ARP II is warranted under the LLC Act. Id.

Emerald subsequently amended its initial arbitration demand in the 2010 New York arbitration because Kriti's New York counsel maintained that the arbitration panel lacked power to dissolve a South Carolina limited liability company (as Judge Young found in his Orders). In response to this position, which contradicted the position taken by Kriti's South Carolina counsel, Emerald amended its arbitration demand to remove the request for an Order judicially dissolving ARP II under the LLC Act, but continued to request a declaration that Emerald is a 70% owner of ARP II. (R. pp. 652-76; p. 756).

On April 19, 2010, in light of Emerald's demand for arbitration in New York, Circuit Judge Deadra Jefferson entered a Consent Order in the 2009 Dissolution case agreed to by Emerald, Kriti, and ARP II. (R. pp. 78-80). The Consent Order stipulates in pertinent part:

Plaintiff Emerald Investments, LLC's ("Emerald") Complaint in this action alleges claims seeking (I) an Order judicially dissolving Ashley River Properties II, LLC ("ARP II") and directing the winding up of its affairs pursuant to the South Carolina Uniform Limited Liability Company Act of 1996, S.C. CODE ANN. §§ 33-44-101 *et seq.* (hereinafter "judicial dissolution claim"), and (II) a declaratory judgment pursuant to S.C. CODE ANN. § 15-53-30 declaring that Emerald is a 70% member of ARP II (hereinafter "declaratory judgment claim").

By consent of the parties, the Plaintiff's declaratory judgment claim under Count II is hereby dismissed without prejudice pursuant to the provisions of S.C. R. CIV. PRO. 41(a)(2). The parties further agree that the claims or issues raised in Count II will be arbitrated before the American Arbitration Association in the arbitration proceeding currently pending between the parties in New York in accordance with the provisions of the Ashley River Properties II, LLC Operating Agreement.

Additionally, by consent of the parties, **the Plaintiffs' judicial dissolution claim under Count I is hereby stayed pending the above-referenced arbitration proceeding to be conducted in New York.** Notwithstanding the above, **nothing herein shall be construed as depriving this Court of jurisdiction** or barring this Court from issuing or enforcing compliance with properly issued subpoenas compelling the attendance of parties or witnesses at depositions and/or the production of documents or things in South Carolina in conjunction with the above-referenced arbitration proceeding in New York.

The parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in 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. 78-79) (emphasis added). Nothing in the Consent Order refers the dissolution claim (Count I) to arbitration. It simply stays that claim.

On October 28, 2010, the arbitrators issued their award (“2010 arbitration award”) confirming that Emerald still owns 70% of ARP II, finding that Kriti’s 2005 capital call was defective and did not dilute Emerald’s interest, and ordering Kriti to pay \$59,527.74 to Emerald. (R. pp. 755-62). The award also found that “dissolution may be in the best interests of all parties” and that “Kriti and Emerald cannot work together in any constructive manner.” (R. pp. 757-58). Williams (Kriti’s manager) had testified at the hearing: “I think it’s time we sever our interests somehow and end this nightmare.” (R. pp. 1715-16, ln 21-23).<sup>3</sup>

Despite these findings, the arbitration panel ruled that the facts did not satisfy the relatively narrow grounds for dissolution stated in *the provisions of the ARP II Operating Agreement*. (R. pp. 757-58). Paragraph 9.1 of the ARP II Operating Agreement lists the grounds for dissolution as follows:

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<sup>3</sup> Emerald and Longman had previously appealed the charging order to this Court on the grounds that the Circuit Court prematurely granted a charging order without first resolving the parties’ dispute as to what interest Emerald owns in ARP II (whether 70% or some other percentage) or in what manner Kriti will be allowed to charge Emerald’s distributional interest when distributions are made pursuant to the charging order. (R. pp. 591-603; pp. 606-35). However, after the 2010 arbitration panel found that Emerald still owns 70% of ARP II, Kriti and ARP II filed memoranda with this Court arguing that the appeal should be dismissed as moot. (R. pp. 764-65; p. 783). Kriti argued that the question involving Emerald’s membership interest in ARP II has now been “adjudicated,” “determined,” and is “moot” because of the findings in the 2010 Arbitration even though it acknowledged that those same findings have not yet been confirmed by a Court. (R. p. 765). On January 4, 2011, Kriti also filed a motion with this Court requesting it to “immediately dismiss [the] appeal” on the basis that it is “moot” because the recent New York arbitration award has “establish[ed] the percentage of Emerald’s membership interest in ARP II.” (R. pp. 787-91). On January 12, 2011, this Court granted the motion and dismissed the appeal as being moot. (R. pp. 81-82).

Except as otherwise provided herein, the Company shall dissolve, its affairs shall be wound up, and the company shall terminate only upon the happening of one or more of the following events:

- (a) The written consent of those Members who own the Required Interest of the Voting rights in the Company;
- (b) Any event occurs that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection;
- (c) The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to the Act, unless the Company is reinstated in accordance with the Act;
- (d) The expiration of the period fixed for the duration of the Company, as set forth in the Articles of Organization, unless those Members who own the Required Interest of the Voting rights in the Company extend the term of the Company.

(R. pp. 527-28 ¶ 9.1). The arbitrators found none of those grounds present.

The 2010 arbitration panel did not make rulings as to whether Kriti's improper conduct and mismanagement of ARP II and the fact that Kriti and Emerald cannot work together in any constructive manner warrant dissolution of ARP II *pursuant to § 33-44-801(4) of the LLC Act*. That section provides in pertinent part:

A limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

....

(4) on application by a member or a dissociated member, upon entry of a judicial decree that:

(a) the economic purpose of the company is likely to be unreasonably frustrated;

(b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;

(c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;

....

or (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner.

See S.C. CODE ANN. § 33-44-801(4)(a)-(c) and (e); see also S.C. CODE ANN. § 33-44-801(4) cmt. (“A court has discretion to dissolve a company . . . when the company has a very poor financial record that is not likely to improve.”). The grounds for dissolution listed in § 33-44-801(4) cannot be waived or varied by the parties in their operating agreement. See S.C. CODE ANN. § 33-44-103(b)(6) (“The operating agreement may not vary the requirement to wind up the limited liability company's business in a case specified in [§] 33-44-801(3) or (4).”).

The arbitrators restricted themselves to a consideration of the grounds for dissolution stated in the ARP II operating agreement because they had jurisdiction only over matters given to them in the parties' arbitration clause. That clause simply provides for arbitration of disputes arising under the terms of the operating agreement. (R. p. 542). Kriti itself argued in the 2010 arbitration that the question of whether ARP II should be judicially dissolved *pursuant to the LLC statute* was not before the panel and that the parties had stipulated that judicial dissolution of ARP II must be decided in a South Carolina court. (R. p. 691) (“Much of the decision deals with judicial dissolution, an issue not directly present here as the parties have acknowledged that under South Carolina law a claim for judicial dissolution is non-arbitrable”); (R. p. 721) (“Indeed expulsion under § 33-44-601(6) of the LLC Act, like § 33-44-801 of the LLC Act, which provides for judicial dissolution, requires a determination by the courts in South Carolina. In its Dismissal Order . . . , the South

Carolina court held that judicial dissolution of ARP-II can only be brought in a South Carolina Court. Indeed, Kriti and Emerald stipulated to this in the Consent Order [filed on April 19, 2010 in the 2009 Dissolution case.]; see also (R. p. 736) (“As the South Carolina court correctly noted, Kriti argued in the First Arbitration that the arbitrators lacked the authority to decide Emerald's judicial dissolution claim under South Carolina law.”). Indeed, Emerald had amended its original demand in the 2010 New York arbitration to remove the request for judicial dissolution of ARP II because Kriti’s New York counsel had argued the arbitrators lacked the power to award such relief. (R. pp. 636-76; p. 756).

#### **Motions to Dissolve Stay and to Amend Complaint in 2009 Dissolution Case**

On December 7, 2010, after the New York arbitrators issued their 2010 award and found that dissolution of ARP II may be in the parties’ best interests, Emerald filed a motion in the 2009 Dissolution case seeking to dissolve the stay previously entered in that case so that its dissolution claim can finally be adjudicated on the merits. (R. pp. 1043-52). Also on December 7, 2010, Emerald filed a motion to amend its Complaint in the 2009 Dissolution case to supplement the pleading based on the findings made in the 2010 arbitration award. (R. pp. 1053-1240).

#### **Motion to Foreclose on Charging Order Lien**

On February 1, 2011, Kriti and ARP II then filed a motion in the 2008 charging order case seeking to foreclose on the charging order lien that was originally entered on October 17, 2008, and later modified on February 6, 2009. (R. pp. 1241-44; p. 1341 ¶ 17). Kriti alleged in its motion that it should be allowed to foreclose on (*i.e.*, to involuntarily sell off) Emerald’s “distributional interest” in ARP II pursuant to S.C. CODE ANN. § 33-44-504 because the company, which Kriti has completely controlled, has not made any distributions under the charging order to satisfy the money judgment.

Id. Kriti further alleged that ARP II will not be able to make any distributions in the foreseeable future. Id.

### **Kriti's Mismanagement of ARP II and Unclean Hands**

To support its claim that ARP II is financially unable to make distributions, Kriti relied upon ARP II's purported financial statements for 2008 and 2009. (R. pp. 1344-45 ¶ 18). However, the financial statements drastically underreport the value of ARP II's assets. Id. The 2009 financial statement estimates the value of ARP II's real estate holdings as being approximately \$14 million; however, in October of 2009, on behalf of ARP II's lender, a professional appraisal firm (Fred H. Beck & Associates, LLC) appraised the value of ARP II's real estate holdings at \$17.25 million. (R. pp. 1344-45 ¶ 18; pp. 1437-1630). The 2009 financial statement underreports the value of ARP II's real estate holdings by approximately \$3.25 million. Id.

Moreover, to the extent that ARP II is in poor financial shape, it is a direct result of Kriti's mismanagement. (R. p. 1345 ¶ 19). Since taking over control of ARP II in 2005, Kriti has failed to act in the best interests of all of ARP II's members (including Emerald), has mismanaged the company to such an extent that it has financially crippled the company, and has squandered several opportunities for ARP II to realize on its assets by failing to consummate any of multiple offers that were made by third parties to purchase ARP II's assets. Id. Any of those potential sales would have netted ARP II in excess of \$10 million in profit and would have resulted in considerable distributions to ARP II's members. Id.

When Kriti assumed control of ARP II from Emerald in January of 2005, it took over a project in which Emerald had already acquired the property; obtained the necessary dredge permits and secured a disposal site at The Citadel; designed the marina and obtained the necessary permits; arranged for construction of the marina docks; developed the concept design and obtained zoning and regulatory approval for condominium

development; dredged the canal; secured initial financing and a subsequent modification to finance the marina construction; and secured an offer from a Fortune 250 company (Centex) interested in buying ARP II's assets. (R. pp. 1345-46 ¶ 20). Kriti inherited a shovel-ready marina, a condo project ready for pre-selling, and a property ready to sell. Id. Yet, from 2005 until 2011, Kriti squandered all of those opportunities leaving the company in financial distress. Id.

The Ripley Light Project was designed to be a condominium project, with a marina as a complementary asset. (R. p. 1346 ¶ 21). Kriti had every opportunity to develop the project as conceived. Id. Emerald received regulatory and zoning approval from the Board of Architectural Review in December of 2004, which allowed pre-sales of condos, and two real estate agents were on site attempting to sell the condos. Id. Kriti assumed control of ARP II in early 2005 at the apex of the housing market. Id. Nevertheless, Kriti failed to sell a *single* condominium unit. Id. In fact, ARP II has now effectively abandoned the condominium development portion of the project. Id.

Kriti also failed to tap the marina's value. (R. p. 1346 ¶ 22). As noted above, the Beck appraisals dated October 16, 2009, give "as is" valuations for ARP II's real estate holdings that total \$17.25 million. (R. p. 1346 ¶ 22; pp. 1437-1630). Those appraisals also make clear that the maximum value is in dockominiums—*i.e.*, selling the boat slips. The appraisals value "as is" rental slips at \$2.34 million and "as is" dockominium units at \$9.530 million. (R. p. 1346 ¶ 22). However, Kriti has not sold *any* boat slips and, indeed, has not been trying to sell boat slips separate from condominium units (none of which have been built). Id. Instead, under Kriti's management of the company, ARP II is merely renting boat slips, which does not generate even enough income to cover the interest expense or debt service currently owed by the project. Id.

As a result of Kriti's mismanagement of the project and inability to materially improve ARP II's property, the only means available for ARP II (and its members) to realize any value on the project is to sell it.

(R. p. 1346 ¶ 23). However, Kriti squandered every opportunity to sell the project that came ARP II's way. Id. For example, in April of 2005, at the very beginning of Kriti's control of the project, Kriti was presented with an offer from Centex to acquire ARP II's real estate for \$14.5 million on an "as is" basis, meaning that it would not have required any additional outlay of money by ARP II. (R. pp. 1346-47; pp. 1631-37). The offer from Centex was made before the project had incurred substantial debt to construct the marina slips on the property. Id. If the Centex offer had been accepted, ARP II would have made a profit in 2005 of nearly \$10.5 million. Id.

Instead of accepting the Centex offer to purchase ARP II's property, on May 9, 2006, Kriti caused ARP II to reject the offer and moved forward with the procurement of a multi-million dollar construction loan from Bank of America (hereinafter "BofA") for the purpose of constructing marina slips on the property. (R. p. 1347 ¶ 25). As part of the loan, ARP II executed a promissory note in favor of BofA for \$9 million and a related mortgage on the marina property and assets. (R. p. 1347 ¶ 25; pp. 1638-42). As a result of the BofA loan, the project is now overly burdened with enormous bank debt, is desperate for cash, and is unable to cover the tremendous interest or debt service payments without obtaining loans from Kriti, Williams, or their affiliated entities. (R. p. 1347 ¶ 26).

Since procuring the BofA construction loan, Kriti has had to cause ARP II to obtain loans of almost \$7 million from Kriti's affiliated companies (including KHI) in order for ARP II to remain current on the BofA loans. (R. pp. 1347-48 ¶ 26). Without substantial loans from Kriti or its affiliated entities, ARP II lacks sufficient cash or funds to repay the BofA loan or to satisfy the note and is in jeopardy of losing the Ripley Light marina, which is ARP II's sole asset. Id. If the BofA loan and note are allowed to go into default, the marina property and assets will be subject to foreclosure by the bank, ARP II will be at serious risk of losing its only asset, and Emerald will be at serious risk of losing its

\$2.5 million capital contribution to and investment in ARP II. Id.

After Kriti killed the Centex deal, ARP II received another opportunity to sell the property in 2007. (R. p. 1348 ¶ 27). On May 18, 2007, East Coast Horizon, LLC (“East Coast”) made an offer to ARP II and Kriti to purchase the Ripley Light marina (including land and assets) from ARP II in exchange for \$20 million. (R. p. 1348 ¶ 27; pp. 1643-45). Even though Emerald was a 70% financial owner of ARP II, Kriti failed to notify Emerald of the offer. Id. Before Emerald was even made aware of the offer from East Coast, Kriti had already caused the deal to be scuttled. Id. Had the transaction been consummated, it would have resulted in a net profit to ARP II of approximately \$10 million (after satisfying the outstanding bank debt owed on the project). Id. The transaction was not consummated because Kriti, through a very strict confidentiality agreement, prevented East Coast from being able to talk to anyone about the proposed purchase of the property, including funding sources. Id. Consequently, the deal did not happen, costing ARP II a profit of \$10 million. Id.

After Kriti had caused the Centex and East Coast deals to fail, ARP II had another chance to sell the property before the bottom fell completely out of the real estate market. (R. pp. 1348-49 ¶ 28). In January of 2008, Lucorp submitted a signed contract to Kriti offering the same pricing terms as the East Coast offer. (R. pp. 1348-49 ¶ 28; pp. 1646-57). As was the case with the offer from East Coast, Kriti had already caused the Lucorp deal to be scuttled before Emerald was even made aware of the offer. (R. pp. 1348-49 ¶ 28). Rather than selling the property to Lucorp for the offering price of \$20 million, Kriti increased the price for the property to \$27 million on August 14, 2008 (after the housing market had collapsed) causing the potential sale to fall through. Id. Had the transaction been consummated, it would have resulted in a net profit to ARP II of approximately \$10 million (after satisfying the outstanding bank debt owed on the project). Id.

Kriti has been in exclusive custody and control of ARP II's financial information and records that are needed to determine the true financial condition of the company and to project its prospects of future success. (R. p. 1355 ¶ 45). Emerald has tried unsuccessfully since 2005 to obtain complete and accurate business records and financial information from Kriti to ascertain ARP II's true financial condition and to monitor ARP II's business operations, but Kriti has continuously thwarted its efforts. (R. p. 1349 ¶ 29). Despite the fact that Emerald is a 70% member of ARP II and even though it has made numerous requests for the information, Kriti has persistently failed or refused to provide ARP II's financial information and records to Emerald. (R. pp. 1349-55 ¶¶ 31-44; pp. 1658-92). To the extent that Kriti has produced any information regarding ARP II's financial condition to Emerald, it has generally occurred only in response to litigation and the information that was produced is virtually useless and sometimes false. (R. p. 1354 ¶ 44). Because of Kriti's repeated refusals to grant Emerald complete access to all of ARP II's business records, computers, and information, the company's true financial condition is currently unknown. (R. p. 1355 ¶ 45).

#### **Motion to Consolidate Dissolution and Charging Order Cases**

On March 10, 2011, after Kriti moved to foreclose on Emerald's distributional interest, Emerald filed motions to consolidate the 2009 Dissolution case and the 2008 charging order case for a joint trial before a single judge of all matters pending in both cases. (R. pp. 1260-1283; pp. 1777-78).

#### **Circuit Judge Harrington's Orders**

On April 7, 2011, Circuit Judge Kristi Harrington conducted a hearing on all motions pending in the 2009 Dissolution and 2008 charging order cases. (R. pp. 1741-74). On April 19, 2011, Judge Harrington entered an Order granting Emerald's Motion to Amend Complaint in the

2009 Dissolution case. (R. p. 83). On April 26, 2011, Emerald filed and served its Amended Complaint upon Kriti and ARP II. (R. p. 1779; pp. 792-965).

On June 10, 2011, Judge Harrington entered three separate Orders (i) denying Kriti's and ARP II's Motion to Foreclose Charging Order Lien, (ii) denying Emerald's Motion to Dissolve Stay and its Motions to Consolidate the 2009 Dissolution and 2008 charging order cases, and (iii) *sua sponte* rescinding her prior Order filed on April 19, 2011 (which granted Emerald's Motion to Amend Complaint) and then reversing herself and denying the motion. (R. pp. 84-89).<sup>4</sup>

On June 24, 2011, Emerald timely filed a Motion to Alter, Amend, and/or Reconsider Judge Harrington's Orders denying Emerald's Motion to Dissolve Stay, Motions to Consolidate, and Motion to Amend Complaint. (R. pp. 1724-36). On June 28, 2011, Kriti filed a Motion to Alter, Amend, and/or Reconsider Judge Harrington's Order denying their Motion to Foreclose Charging Order Lien. (R. pp. 1737-40).

On July 19, 2011, Judge Harrington filed a form Order denying Emerald's Motion to Alter, Amend, and/or Reconsider. (R. p. 90). On September 26, 2011, Judge Harrington filed a form Order denying Kriti's Motion to Alter, Amend, and/or Reconsider. (R. p. 91).

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<sup>4</sup> Despite the fact that Kriti obtained the dismissal of Emerald's prior appeal to this Court involving the charging order on January 12, 2011 based on the argument that the 2010 arbitration award had "adjudicated" and "determined" Emerald's interest in ARP II—even though the award has not yet been confirmed by a Court—Kriti then opposed Emerald's motion to lift the stay entered in the 2009 Dissolution case based on the argument that the same arbitration award has not yet been confirmed by a Court. Despite Kriti's duplicitous positions to this Court and the Circuit Court, Judge Harrington accepted Kriti's argument and refused to dissolve the stay in the 2009 Dissolution case until the 2010 arbitration award is confirmed by a Court. (R. pp. 87-89).

## ARGUMENTS

### I. THE CIRCUIT COURT'S ORDER IS NOT APPEALABLE.

Appellants' brief does not address the issue of whether the Circuit Judge's Order denying their Motion to Foreclose Charging Order Lien is appealable.

In Kriti's action filed in the Circuit Court on October 17, 2008, the Circuit Judge entered an *ex parte* Order on October 17, 2008 (later modified on February 6, 2009) establishing a charging order lien upon Emerald's distributional interest in ARP II. Kriti now attempts to appeal from the Circuit Court's Order filed on June 10, 2011, which simply denied its motion to foreclose upon the lien. However, the June 10, 2011 Order leaves the lien intact, does not dissolve the lien, and does not impair Kriti's judgment.

Even if the Circuit Court's Order could be construed as dissolving the lien, it would not be appealable. In Cobb v. Maccaro, 310 S.C. 303, 423 S.E.2d 156 (Ct. App. 1992), this Court held that an Order refusing to vacate or dissolve a mechanic's lien filed against the appellant's property was not immediately appealable under S.C. CODE ANN. § 14-3-330(1)-(2). Numerous other Courts have held that Orders dissolving or refusing to dissolve a lien are not appealable. Lubetsky v. Dean, 142 A.2d 359, 359 (Pa. Super. Ct. 1958) (order discharging a rule to strike off a mechanic's lien not appealable); Uninsured Employers' Fund v. County of Hardin Planning & Dev. Comm'n, 2008 WL 1757222 (Ky. Ct. App. Apr. 18, 2008) (order dissolving lien on real property not appealable because it "simply determined the validity of the lien"); D.W. Flowe & Son, Inc. v. CDC, LLC, 654 S.E.2d 83 (N.C. Ct. App. 2007) (order canceling party's claim of a lien on funds deposited with the court, dismissing the party's claim for lien enforcement, and ordering return of deposited funds to opposing party was not appealable); Ackerson v. Stramaglia, 621 A.2d 1315 (Conn. 1993) (denial of motion to

dissolve judgment lien not appealable); Stoller Lumber Co. v. Cosmopolitan Nat. Bank, 243 N.E.2d 485, 485 (Ill. Ct. App. 1968) (order vacating decree to enforce a mechanic's lien not appealable).

This appeal should be dismissed because the Circuit Court's Order is not appealable.

## II. THE LAW APPLICABLE TO CHARGING ORDERS.

A charging order is a statutory provision rooted in equity. City of Arkansas City v. Anderson, 752 P.2d 673, 681-82 (Kan. 1988). Charging orders originated in response to cumbersome common-law collection procedures that allowed a debtor partner's judgment creditor to seize partnership assets and disrupt or close the partnership business. Id. (citing J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. 1, 1-2 (1953)); see Weddell v. H2O, Inc., 271 P.3d 743, 750 (Nev. 2012) ("Charging orders were formed by the English Partnership Act of 1890 as a result of an artificial and clumsy procedure whereby the town sheriff went down to the partnership's place of business, seized partnership assets, closed the partnership, infuriated the solvent partners, and caused the judgment creditor to bring an action for an injunction."); Keeler v. Academy of American Franciscan History, Inc., 943 A.2d 630, 633 (Md. Ct. Spec. App. 2008) ("The purpose of the charging order is 'to protect the partnership business and prevent the disruption that would result if creditors of a partner executed directly on partnership assets.'").

A charging order requires the partnership or company to divert or pay over to the judgment creditor any distributions that it otherwise would have made to the judgment debtor. The charging order statutes "proceed on the theory that the primary method for satisfying the creditor's judgment shall be by means of an order diverting the debtor partner's share of the profits to his creditor in a manner somewhat like that used in garnishment proceedings." City of Arkansas City, 752 P.2d at 682; see Madison Hills Limited Partnership II v. Madison Hills, Inc., 644 A.2d 363, 366 (Conn. App.

Ct. 1994) (“The charging order leaves the partnership intact but diverts to the judgment creditor the debtor partner’s share of the profits.”); Union Colony Bank v. United Bank of Greeley Nat’l Ass’n, 832 P.2d 1112, 1115 (Colo. Ct. App. 1992) (“[T]he charging order evolved as a way to divert the debtor partner’s share of the partnership profits and surplus to his creditor without disrupting the on-going partnership.”).

The South Carolina LLC Act contains a charging order provision stating as follows:

**§ 33-44-504. Rights of creditor.**

(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed:

- (1) by the judgment debtor;
- (2) with property other than the company's property, by one or more of the other members; or
- (3) with the company's property, but only if permitted by the operating agreement.

(d) This chapter does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.

S.C. CODE ANN. § 33-44-504. The act defines “distributional interest” to mean “all of a member’s interest in distributions in the limited liability company.” Id. § 33-44-101(6). “Distributions” are further defined as “mean[ing] a transfer of money, property, or other benefit from a limited liability company to a member in the member’s capacity as a member or to a transferee of the member’s distributional interest.” Id. § 33-44-101(5).

A charging order “constitute[s] a lien on” the judgment debtor’s distributional interest in the company. Id. § 33-44-504(b). Its effect is to charge only the “distributional interest of the judgment debtor to satisfy the judgment.” Id. § 33-44-504(a). The judgment creditor does not acquire the membership interests of the judgment debtor, but receives only the debtor’s rights to distributions or income for a period of time as necessary to satisfy the judgment. Green v. Bellerive Condominiums Limited Partnership, 763 A.2d 252, 257 (Md. Ct. Spec. App. 2000). The extent of the diversion of the debtor’s distributions is limited to the amounts due on the unsatisfied judgment and, therefore, the charging order terminates when the creditor’s judgment is satisfied. Nigri v. Lotz, 453 S.E.2d 780, 782 (Ga. Ct. App. 1995) (“The charging order remedy entitles the creditor to receive the profits and surplus of the limited partnership, which the limited partner would otherwise have been entitled to receive, up to the unsatisfied amount of the judgment debt, but gives no direct remedy against specific limited partnership property.”); City of Arkansas City, 752 P.2d at 684.

The LLC Act provides that a Court “*may* order a foreclosure of a lien on a distributional interest subject to the charging order at any time.” S.C. CODE ANN. § 33-44-504(b) (emphasis added). A Court may—but is not required—to order a judicial sale of the judgment debtor’s interest in the company subject to the right of redemption prior to foreclosure. 91<sup>st</sup> Street Joint Venture v. Goldstein, 691 A.2d 272, 276-80 (Md. Ct. Spec. App. 1997). “Ordinarily, the trial court should

consider whether the judgment can be satisfied out of the debtor partner's profits prior to resort to the more **drastic** method of sale of the debtor partner's interest." Id. at 283 (emphasis added); see Green, 763 A.2d at 257 (noting that foreclosure of charging order lien is "drastic course of action").

### III. THE STANDARD OF REVIEW.

Because it is a drastic remedy, foreclosure on a member's distributional interest is discretionary—not mandatory—with the Court. See S.C. CODE ANN. § 33-44-504(b) ("The court *may* order a foreclosure of a lien on a distributional interest subject to the charging order . . . ." (emphasis added)). The trial court has "broad discretion" to decide "whether or not to order a foreclosure and judicial sale of charged interests." Nigri 453 S.E.2d at 783-84; cf. Stanley v. Reef Sec., Inc., 314 S.W.3d 659, 671 (Tex. Ct. App. 2010) (trial judge has discretion to appoint a receiver under charging order statute).

Under the abuse of discretion standard, the appellate court "cannot substitute its judgment for that of the trial judge and will not disturb the trial court's discretion absent a clear showing of abuse of discretion." Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535, 536 (Ct. App. 1987); Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816, 818 (Ct. App. 1986). "An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000); Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005). The Circuit Judge's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 384 S.C. 441, 682 S.E.2d 489, 492 (2009).

**IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING KRITI'S MOTION TO FORECLOSE ON AND FORCE THE INVOLUNTARY SALE OF EMERALD'S DISTRIBUTIONAL INTEREST IN ARP II WHEN THE EVIDENCE SHOWS THAT KRITI'S JUDGMENT IS SUFFICIENTLY PROTECTED BY THE CHARGING ORDER, KRITI CAN SATISFY ITS JUDGMENT THROUGH MEANS OTHER THAN FORECLOSURE, AND KRITI'S OWN MISMANAGEMENT OF ARP II AND ITS INEQUITABLE CONDUCT CREATED THE ALLEGED BASIS FOR ITS FORECLOSURE REQUEST.**

In the Circuit Judge's Order denying Kriti's Motion to Foreclose Judgment Lien, she ruled:

In the present case, foreclosure may not be the appropriate remedy. The previously issued charging order is sufficient to protect the judgment creditors' interests and the debtor has presented evidence that the debt could be satisfied without the necessity of a force sale of its distributional interest. The Plaintiff's Motion to Foreclose Judgment Lien is denied.

(R. p. 86).

Foreclosure on a member's distributional interest is a drastic remedy because it means that the member permanently loses all of the economic benefit of its membership interest, including the right to its share of the company's assets and properties at liquidation. ARP II and Kriti argue that foreclosure of Emerald's distributional interest in ARP II was *mandatory* because ARP II has not made any distributions pursuant to the charging order to satisfy the money judgment. However, Kriti has no absolute right to foreclose upon Emerald's interest in ARP II. See S.C. CODE ANN. § 33-44-504(b); cf. Stanley, 314 S.W.3d at 671 ("The [charging order] statute does not mandate that a court appoint a receiver. Instead, it gives the trial court discretion to appoint a receiver when it deems it is appropriate and to not appoint a receiver when it deems it is not appropriate."). In this case, the Circuit Judge properly exercised her discretion and ruled that foreclosure of the charging order lien

against Emerald's interest in ARP II is not warranted under the facts of this case. Her decision is amply supported by the evidence in the record. No abuse of discretion has been shown.<sup>5</sup>

This case is unique in that there is no true third-party judgment creditor. The judgment creditors in this case are the limited liability company subject to the charging order and its managing member. Kriti seeks to execute on its money judgment against Emerald by charging Emerald's right to distributions from ARP II, an entity which Kriti now wholly manages and controls. Because of the 2005 New York arbitration award, Emerald is still a member of ARP II, but it no longer has any voting rights. Kriti is the only voting member of ARP II. Since 2005, Kriti has unilaterally controlled Kriti's business operations, including when and in what manner ARP II makes distributions or transfers of funds. Kriti controls whether the monies paid out by ARP II are distributions, management fees, wages, salaries, bonuses, or other transfers. The charging order effectively allows Kriti to distribute to itself all of ARP II's funds, profits, property, and other assets, including any funds that are otherwise payable to Emerald, until the judgment has been satisfied.

A judgment creditor who obtains a charging order against the debtor's distributional interest in an LLC ordinarily has no right to control or participate in the management of the company. As such, creditors usually have no say as to when, or in what amount, distributions are to be made by the

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<sup>5</sup> Kriti relies upon Madison Hills, Nigri, Stewart v. Lanier Park Medical Office Building, Ltd., 578 S.E.2d 572 (Ga. Ct. App. 2003), Tupper v. Kroc, 494 P.2d 1275 (Nev. 1972), and FDIC v. Birchwood Builders, 573 A.2d 182 (N.J. Super. Ct. 1990), as support for its claim that the Circuit Judge was *required* to order foreclosure on Emerald's interest in ARP II. See Appellants Brief pp. 13-16. However, those cases do not hold that it is mandatory upon a Court to order foreclosure of the debtor's interest simply because no distributions have been made pursuant to the charging order. Moreover, unlike the present case, none of those cases involved evidence showing that the judgment creditor seeking to foreclose on the charging order had itself created the poor financial conditions allegedly supporting a forced sale of the debtor's interest by mismanaging the company to such an extent that it financially crippled the company, squandering opportunities to realize on the company's assets by failing to consummate offers from third parties that would have netted the company a substantial profit and satisfied the creditor's judgment without requiring a forced sale of the debtor's interest, and engaging in inequitable conduct. The cases cited by Kriti and ARP II

company pursuant to the charging order. Because creditors usually have no control over the timing and amount of distributions from the LLC, creditors usually cannot force an LLC to make any distributions to satisfy the money judgment. In such situations, the charging order may be insufficient (and foreclosure of the debtor's distributional interest may be appropriate). For example, when the company persistently reinvests its earnings instead of making distributions, foreclosure of the lien may be appropriate.

The present case is distinguishable. Here the judgment creditors are the LLC itself (ARP II) and the member with complete voting control of the LLC (Kriti). They have the ability to make distributions from the company when and in what amount they chose. In those cases where courts have observed that a forced sale of the judgment debtor's interest could be proper, the courts granted such relief *only when* they were convinced that the judgment creditor's claim could not be satisfied in a reasonably expedient manner other than by a forced sale—*i.e.*, it was necessary to sell the debtor's interest for the creditor to protect its judgment. See Birchwood Builders, 573 A.2d at 182; Nigri, 453 S.E.2d at 783; 91st St. Joint Venture, 691 A.2d at 282-83.<sup>6</sup>

In this case, foreclosure is unnecessary because Emerald presented evidence showing that the debt can be satisfied without forcing a sale of its distributional interest. Emerald showed that Kriti caused ARP II to reject purchase offers made by third-party suitors that would have resulted in a profit of at least \$10 million for ARP II's members. Kriti rejected these offers even though ARP II was not generating enough cash flow to cover its debt service payments. Kriti also significantly

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are distinguishable from this case.

<sup>6</sup> Kriti and ARP II assert in their brief that Birchwood Builders and Nigri involved a partner's charging order against the partnership interest of a fellow partner. See Appellants Brief pp.15-16. However, a review of those cases reveals that the judgment creditors seeking to foreclose upon the charging orders were not fellow partners of the judgment debtors. Instead, the creditors were third parties.

undervalued ARP II's assets by \$3.25 million in an attempt to bolster its argument that the only way to satisfy its money judgment is to sell off Emerald's interest. According to the most recent appraisals obtained by ARP II's lender, ARP II has real estate assets valued at \$17.25 million and there is still substantial equity in the company, if it will sell its assets. Kriti has repeatedly refused to sell the company's assets in the past and continues to refuse to do so now, even as it urges this Court for permission to sell off Emerald's interest in ARP II based on the bare assertion that "[t]here have not been any distributions from ARP II to its members and it does not appear that there will be any distributions by ARP II to its members in the foreseeable future." (R. p. 1246 ¶ 8). In short, the evidence supports the Circuit Judge's decision that foreclosure is not necessary in this case because the previously entered charging order is sufficient to protect Kriti's judgment.

Kriti ignores provisions in the ARP II Operating Agreement showing that a sale or transfer of the company's assets to satisfy a judgment creditor's judgment against a member of ARP II is preferred to an involuntarily foreclosure sale of a member's interest in the company under the charging order statute. (R. p. 1777; pp. 1357-1405). Paragraph 3.5 of the ARP II Operating Agreement states:

3.5 Redemption of Member's Financial Rights Subjected to Charging Order.

In the event a Member's Financial Rights are subjected to a charging order under the Act, the Company may redeem the Member's Financial Rights so charged, with Company Property, at any time prior to foreclosure of said Financial Rights in accordance with the Act. Nothing in this Section shall be construed as affecting or limiting the rights of the judgment debtor and the other Members to redeem any Financial Rights subjected to a charging order with their own property in accordance with the Act.

(R. p. 1364 ¶ 3.5). The Operating Agreement specifically contemplates that ARP II can sell its property to prevent a foreclosure upon a member's interest in the company under a charging order.

Kriti owes a fiduciary duty to Emerald to “discharge [its] duties and exercise any of [its] rights consistently with the obligation of good faith and fair dealing which [it] owes to” Emerald. (R. p. 1377 ¶ 6.3). Kriti violates this duty by placing its own economic interests above those of Emerald. Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15, 29 (Ct. App. 2000) (partner’s self-serving decision to cause a partnership to default on a loan guaranteed by a co-partner, allowing the property to be foreclosed and forcing co-partner to shoulder the burden of paying off the entire loan, breached fiduciary duty of fair dealing and loyalty).

Furthermore, Kriti’s own mismanagement of ARP II directly caused the lack of distributions from ARP II and the alleged likelihood that there will not be any distributions in the foreseeable future. Kriti seeks to be rewarded for its mismanagement of ARP II by causing Emerald’s distributional interest in ARP II to be involuntarily sold off at a fraction of its fair value because of ARP II’s poor financial performance, which Kriti is solely and directly responsible for. None of the cases cited in Kriti’s brief hold that a managing member of a LLC should be allowed to involuntarily sell off the non-managing member’s interest in the company because the managing member’s own actions have rendered the company financially insolvent.

There is an inherent conflict of interest because Kriti (the beneficiary of the charging order) is able to manipulate the distributions from ARP II, which it exclusively controls. Kriti is also in exclusive custody and control of ARP II’s financial information and records that are needed to determine the company’s true financial condition and to project its prospects of future success. As

amply reflected in the record, Kriti has repeatedly refused to produce ARP II's records and information to Emerald despite numerous requests for this information.<sup>7</sup>

Foreclosure on Emerald's distributional interest is also inappropriate because ARP II and Kriti are attempting to permanently divest Emerald of its share of ARP II's assets at a significantly lower price than fair value. Despite Kriti's allegation that ARP II cannot make distributions, ARP II's assets and properties are very valuable and were most recently appraised as being worth \$17.25 million. Kriti is attempting to force a sale of Emerald's 70% distributional interest in ARP II through a foreclosure process which will ensure that Kriti is the only bidder. Any purchaser or transferee of Emerald's interest at a foreclosure sale receives only the "distributional interest" and cannot exercise any control over ARP II's management and business, unless Kriti consents. (R. pp. 1363-64 ¶ 3.2); S.C. CODE ANN. § 33-44-503(a) ("A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent."); *id.* § 33-44-504(b) ("A purchaser at the foreclosure sale has the rights of a transferee."); *Nigri*, 453 S.E.2d at 783 ("A transfer of the charged interest pursuant to a foreclosure by sale, though not technically a court-ordered assignment, is the equivalent of an assignment of the limited partner's interests. The status of a purchaser of the charged interest is similar to that of an assignee in that the purchaser, like an assignee, has the right to receive the distributions that the debtor partner would have been entitled to receive, but the foreclosure sale does not place the purchaser in the position of a limited partner. Accordingly, if the creditor under the charging order is

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<sup>7</sup> As a member of ARP II, Emerald has a statutory right to access, inspect, download, and copy ARP II's company records pursuant to the provisions of the LLC Act. *See* S.C. CODE ANN. § 33-44-408. Further, under Section 12.1 of the ARP II Operating Agreement, Emerald has a right to access, inspect, download, and copy ARP-II's books and records and has a right to be kept informed of ARP-II's business and affairs to the extent reasonably

the purchaser, the creditor does not by virtue of the purchase become a substituted limited partner, and is only entitled to receive the distributions to which the debtor limited partner would have been entitled.”); Weddell, 271 P.3d at 750 (“A judgment creditor, or assignee, is only entitled to the judgment debtor's share of the profit and distributions, takes no interest in the LLC's assets, and is not entitled to participate in the management or administration of the business.”).

Because a purchaser of Emerald’s distributional interest must obtain Kriti’s approval to have the ability to participate in the management of ARP II, there is obviously no incentive for anyone (except Kriti) to acquire such an interest through a foreclosure sale. There will be no market for such an interest. A foreclosure by judicial sale is not the most appropriate way to sell Emerald’s interest because it will effectively cause a forfeiture of Emerald’s interest in ARP II to Kriti. “A court of equity abhors forfeitures, and will not lend its aid to enforce them.” Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348, 356 (Ct. App. 2011) (citation omitted). “Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.” Lane v. N.Y. Life Ins. Co., 147 S.C. 333, 145 S.E. 196, 209 (1928). The court has the power in equity to deny or delay forfeiture when fairness demands. Lewis v. Premium Inv. Corp., 351 S.C. 167, 568 S.E.2d 361, 364 (2002); Regions Bank, 715 S.E.2d at 356.

Kriti is clearly attempting to use the foreclosure process to defeat or circumvent Emerald’s action to dissolve ARP II due to Kriti’s mismanagement of ARP II and its improper conduct towards Emerald. Kriti filed its motion to foreclose upon the charging order lien only after Emerald had moved to dissolve the stay in the 2009 Dissolution case following the 2010 arbitration award. In the 2009 Dissolution case, Emerald seeks to dissolve ARP II pursuant to § 33-44-801(4) of the LLC Act

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required for the proper exercise of its rights. (R. pp. 1393-94 ¶ 12.1).

based on Kriti's improper conduct towards Emerald, its mismanagement of ARP II, and the fact that Kriti and Emerald cannot work together in any constructive manner. Emerald's claim for judicial dissolution of ARP II and its request for a membership interest buyout will render moot the need to foreclose on the judgment lien against Emerald's distributional interest in ARP II. In lieu of a foreclosure sale of Emerald's distributional interest, Kriti would be able to enforce its money judgment as part of the sale of ARP II's property, the dissolution of ARP II, or the buyout of either member's interest. If any of these alternatives are followed, Kriti can obtain a full recovery of its money judgment and Emerald can obtain a fair return on its investment in the project. Instead, premised on ARP II's poor financial condition which Kriti directly caused, Kriti is trying to circumvent dissolution by squeezing out Emerald and taking its equity in the company on the cheap, thereby depriving Emerald of its investment in a project that still has considerable equity.

The LLC Act grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against other members, including an ordered buy-out of one member's interest in the LLC by another member at fair value. See Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009). In addition to allowing a forced dissolution, the statute empowers a Court to grant other relief, including ordering the purchase of the interest of any member, either by the company or by other members. See S.C. CODE ANN. § 33-44-801(4) cmt. (“[I]nvoluntary dissolution or some other remedy such as a buy-out might be appropriate where, for example, one or more members have (i) engaged in fraudulent or unconscionable conduct, (ii) improperly expelled a member seeking an unfair advantage of a provision in an operating agreement that provides for a significantly lower price on expulsion than would be payable in the event of voluntary dissociation, or (iii) engaged in serious misconduct and the applicant member is a member of a term company and

would not have the right to have the company purchase that member's distributional interest upon dissociation until the expiration of the company's specified term."); see also Kiriakides v. Atlas Food Systems & Serv., Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) (buy out in context of corporation); Hendley v. Lee, 676 F. Supp. 1317 (D.S.C. 1987) (same). In fashioning an appropriate remedy, the Court should consider the benefit or detriment to shareholders. Fox v. 7L Bar Ranch Co., 645 P.2d 929 (Mont. 1982). Under the circumstances of this case, an ordered buyout of the majority member by the minority member or vice versa would allow the business relationship between the parties to be wound up and satisfy any outstanding debt Emerald owes to Kriti and ARP II. An ordered buyout would provide fair valuation of the membership interest as opposed to a forced judicial sale of Emerald's interest at a liquidation price, which is what Kriti is asking this Court to authorize.

Kriti has been attempting to squeeze out Emerald from any involvement with ARP II since Kriti took control of the company's management and operations in 2005. The 2010 New York arbitration panel deemed the 2005 capital call that Kriti unsuccessfully tried to use to dilute Emerald's interest as a defective attempt to squeeze out Emerald's membership interest in ARP II. Kriti is now trying a different approach to squeeze out Emerald's membership interest through foreclosure of the charging order lien. Foreclosure would mean that Emerald permanently loses all of the economic benefit of its membership interest, including the right to its share of ARP II's assets and properties at liquidation. Kriti is attempting to use the foreclosure process to defeat Emerald's dissolution case that is based on Kriti's mismanagement of ARP II and its improper conduct toward Emerald. The Circuit Judge properly exercised her discretion and denied this attempt.

**V. KRITI'S UNCLEAN HANDS AND INEQUITABLE CONDUCT JUSTIFY DENIAL OF ITS MOTION TO FORECLOSE UPON EMERALD'S INTEREST IN ARP II.**

In the Circuit Court, Emerald argued that Kriti's motion to foreclose upon Emerald's interest in ARP II should be denied under the doctrine of unclean hands. (R. pp. 1711-14; see also id. pp. 1745-58, 1766-69, 1770-73).<sup>8</sup>

Kriti and ARP II seek equitable relief. A charging order is a statutory provision rooted in equity. City of Arkansas City, 752 P.2d at 681-82. An action to foreclose a lien is an action in equity. Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988) (action to foreclose mortgage); Dockside Association, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987) (action to foreclose lien for unpaid assessments). "The decision to grant equitable relief is in the discretion of the trial judge." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372, 379 (Ct. App. 1998). When the Court is "sitting in equity," it should "consider the equities of both sides, balancing the two to determine what, if any, relief to give." Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750, 755 (Ct. App. 2005); Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443, 457-58 (Ct. App. 2009).

South Carolina adheres to the maxim: "He who seeks equity must do equity." Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287, 291 (2000). "[O]ne who comes to the court seeking equity must come with clean hands." Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598, 605

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<sup>8</sup> Although the Circuit Judge's Order did not specifically address the clean hands doctrine, she clearly held that "foreclosure may not be the appropriate remedy." (R. p. 86). To the extent the Order did not rule on the clean hands doctrine, Respondents assert the issue on appeal as an additional sustaining ground. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000) (holding that respondent on appeal, as the prevailing party in the trial court, may raise on appeal any additional reasons that the appellate court should affirm the trial court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court, where the issue is raised as an additional sustaining ground); see also S.C. R. APP. P. 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

(Ct. App. 2004). Foreclosure is subject to the defense of unclean hands. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010); New Jersey Bank v. Azco Realty Co., Inc., 372 A.2d 356, 359 -60 (N.J. Super. 1977); Thompson v. Orcutt, 777 A.2d 670 (Conn. 2001).

The doctrine of “unclean hands” precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the opposing party. Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943)); Straight, 678 S.E.2d at 457-58. “The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue.” Thompson, 777 A.2d at 676.

Emerald demonstrated inequitable conduct by Kriti justifying the denial of its request for equitable relief. Kriti has repeatedly refused to sell ARP II’s assets when doing so would have created huge profits for the members (including Emerald), even as it urges the Court to sell off Emerald’s interest in ARP II at a fraction of its fair value because of ARP II’s poor financial performance, which Kriti is solely and directly responsible for. 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 II’s property (any one of which would have netted ARP II in excess of \$10 million in profit and would have resulted in considerable distributions to ARP II’s members) and causing ARP II to substantially and unnecessarily increase its debt burden. (R. pp. 1345-49 ¶¶ 19-28). Kriti attempted to unilaterally dilute Emerald’s membership interest in ARP II by issuing a defective capital call and filing false financial statements and tax documents indicating Emerald’s interest in ARP II had been diluted from 70% to 21%. (R. pp. 1341-43, 1353-54 ¶¶ 10, 13, 40-42; pp. 1416-27; pp. 1429-36).

Kriti has tried to circumvent Emerald's right to dissolution of ARP II by squeezing out Emerald and taking its equity in the company on the cheap, thereby depriving Emerald of its investment in a project that still has considerable equity. Kriti has repeatedly refused to disclose ARP II's financial records to Emerald despite numerous demands for same from Emerald, which has allowed Kriti to conceal ARP II's true financial condition. (R. pp. 1349-55 ¶¶ 29-46). Kriti undervalued ARP II's assets by \$3.25 million in the financial statements that it submitted to the Court in support of its motion to foreclose on its judgment lien. (R. pp. 1344-45 ¶ 18). Kriti caused ARP II to spend significant legal fees in its improper attempt to unilaterally dilute Emerald's financial interest from 70% to 21%, which was rejected by the New York arbitrators.

Kriti's unclean hands directly relate to the reason Kriti now seeks foreclosure. Since Kriti took over control of ARP II in 2005, it has spent the majority of its time trying to squeeze out Emerald from membership in ARP II instead of focusing on the company's financial well-being. Kriti alleges that the charging order is insufficient to protect its interests because ARP II has made no distributions since the order was issued and distributions are not expected in the near future. However, the lack of distributions from ARP II (controlled by Kriti) and the alleged likelihood that no distributions will be made in the foreseeable future are the direct result of Kriti's own mismanagement of ARP II. Kriti's inequitable conduct towards Emerald and unclean hands put ARP II in its current financial position, which Kriti now seeks to take advantage of to the detriment of ARP II's majority financial member (Emerald). It would be inequitable and unfairly prejudicial to Emerald to reward Kriti for its mismanagement and misconduct.

**VI. THE 2010 ARBITRATION AWARD DOES NOT PRECLUDE EMERALD'S CLAIM FOR JUDICIAL DISSOLUTION OF ARP II.**

Appellants argue in their brief that that the 2010 arbitration ruling “preclude[s] Emerald and Longman from obtaining a judicial dissolution of ARP II.” See Appellants’ Brief p. 18.

The Circuit Judge did not rule on this argument in her Order and Appellants’ motion to alter, amend, or reconsider did not request the Court to make a ruling on the argument. (R. pp. 85-86; pp. 1737-40). As such, Appellants waived the argument. South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870, 875 (Ct. App. 2001); !On, L.L.C., 526 S.E.2d at 724 (2000).

Appellants’ argument also fails on the merits. First, the Consent Order entered in the 2009 Dissolution case makes clear that the claim for judicial dissolution of ARP II was *not* referred to arbitration. (R. pp. 78-79). It stipulates that “the claims or issues raised in Count II [the declaratory judgment claim] will be arbitrated” in New York. Id. However, the Order also stipulates “that the Plaintiffs’ judicial dissolution claim under Count I is hereby stayed pending the above-referenced arbitration proceeding to be conducted in New York.” Id. Nothing in the Order refers the dissolution claim (Count I) to arbitration. It merely stays that claim. The Order also clearly states that “nothing herein shall be construed as depriving this Court of jurisdiction.” Id.

Second, the Consent Order provides that the findings in the 2010 New York arbitration become binding upon the parties *when confirmed by a Court*. It states in pertinent part:

The parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in 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. p. 79) (emphasis added). The 2010 New York arbitration award has not been confirmed by a Court and, therefore, the findings are not yet binding per the terms of the Consent Order.<sup>9</sup>

Third, Kriti misstates the scope of the 2010 arbitration award. The arbitration panel was not asked to and did not make rulings on whether ARP II should be judicially dissolved *pursuant to the LLC statute*. The arbitrators addressed only whether Emerald demonstrated grounds for dissolution of ARP II *under the provisions of the ARP II Operating Agreement*. The arbitrators restricted themselves to a consideration of the grounds for dissolution stated in the operating agreement because they had jurisdiction only over matters given to them in the parties' arbitration clause. That clause simply provides for arbitration of disputes arising under the terms of the operating agreement.

Kriti itself argued in the 2010 arbitration that the question of whether ARP II should be judicially dissolved *pursuant to the LLC statute* was not before the panel. (R. p. 691) (“Much of the decision deals with judicial dissolution, an issue not directly present here as the parties have acknowledged that under South Carolina law a claim for judicial dissolution is non-arbitrable”); (R. p. 721) (“Indeed expulsion under § 33-44-601(6) of the LLC Act, like § 33-44-801 of the LLC Act, which provides for judicial dissolution, requires a determination by the courts in South Carolina. In its Dismissal Order . . . , the South Carolina court held that judicial dissolution of ARP-II can only be brought in a South Carolina Court. Indeed, Kriti and Emerald stipulated to this in the Consent Order [filed on April 19, 2010 in the 2009 Dissolution case.]”); see also (R. p. 736) (“As the South Carolina court correctly noted, Kriti argued in the First Arbitration that the arbitrators lacked the authority to decide Emerald's judicial dissolution claim under South Carolina law.”). Indeed,

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<sup>9</sup> As noted above, Kriti convinced Judge Harrington to refuse to lift the stay entered in the 2009 Dissolution case by arguing that the 2010 arbitration award has not yet been confirmed by a Court even though Kriti simultaneously obtained the dismissal of Emerald's prior appeal to this Court involving the

Emerald amended its original demand in the 2010 New York arbitration to remove the request for judicial dissolution of ARP II because Kriti's New York counsel had argued the arbitrators lacked the power to award such relief. (R. pp. 636-76; p. 756).

Although the 2010 arbitration panel explicitly found that "dissolution may be in the best interests of all parties" and further observed "Kriti and Emerald cannot work together in any constructive manner," the panel nevertheless ruled that the facts did not satisfy the relatively narrow grounds for dissolution stated in the ARP II Operating Agreement. (R. pp. 757-58); see also (R. pp. 527-28 ¶ 9.1) (listing grounds for dissolution under the operating agreement). However, the arbitration panel did *not* address or determine whether judicial dissolution of ARP II is warranted pursuant to the statutory grounds set forth in the LLC Act. The panel's award does not even mention § 33-44-801(4). Those statutory grounds are substantially different from and broader than the very limited grounds for dissolution set forth in the operating agreement. See S.C. CODE ANN. § 33-44-801(4) (dissolution appropriate when the economic purpose of the company is likely to be unreasonably frustrated, another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member, it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement, or the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner); see also S.C. CODE ANN. § 33-44-801(4) cmt. ("A court has discretion to dissolve a company . . . when the company has a very poor financial record that is not

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charging order by arguing that the same arbitration award had finally adjudicated and determined Emerald's interest in ARP II.

likely to improve.”). The operating agreement cannot waive those grounds for dissolution. See S.C. CODE ANN. § 33-44-103(b)(6).

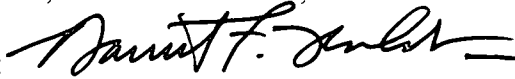
The 2010 arbitration panel’s ruling was carefully restricted to a consideration of the grounds for dissolution set forth in the ARP II Operating Agreement. The award did not rule on the grounds for judicial dissolution set forth in the LLC statute. Appellants are wrong in their assertion that Emerald’s claim to judicially dissolve ARP II has been adjudicated or is barred. Emerald has been attempting since 2005 to obtain a decision on the merits of its claim for dissolution of ARP II pursuant to the provisions of the LLC Act. The merits of that claim have still not been adjudicated to this date and remain to be litigated in the 2009 Dissolution case.

**CONCLUSION**

For the reasons stated, this Court should affirm the Circuit Court’s Order denying the Respondents’ Motion to Foreclose Charging Order Lien against Emerald’s interest in ARP II.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: 

Richard S. Rosen  
Daniel F. Blanchard, III  
James A. Bruorton, IV  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 577-6726

August 6, 2012.

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

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

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Case Tracking No. 2011201949

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

Appellants,

v.

EMERALD INVESTMENTS, LLC AND STUART LONGMAN,

Respondents.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned hereby certifies that the Brief of Respondents complies with Rule 211(b), SCACR.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 577-6726

August 6, 2012.

ATTORNEYS FOR RESPONDENTS

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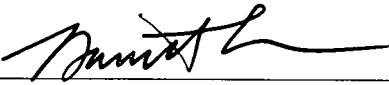
**PROOF OF SERVICE**

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I certify that I have served the final Brief of Respondents and the Respondents' Certification of Compliance with SCACR 211(b) on the Appellants by causing copies of same to be hand-delivered to their attorneys of record on the date indicated herein-below as follows:

William C. Cleveland, Esquire  
Womble Carlyle Sandridge & Rice, LLP  
Five Exchange Street  
Charleston, South Carolina 29402

ROSEN, ROSEN & HAGOOD, LLC

By: 

Daniel F. Blanchard, III  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 577-6726

August 6, 2012.

ATTORNEYS FOR RESPONDENTS